

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-13-025

Appellee

Trial Court No. 1989-CR-0118

v.

Mark S. Verdi

DECISION AND JUDGMENT

Appellant

Decided: December 20, 2013

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann Barylski and Frank Romeo Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

Barry W. Wilford and Sarah M. Schregardus, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Mark Verdi, appeals the judgment of the Erie County Court of Common Pleas, denying his motion for custody credit. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} The relevant facts are undisputed. On March 3, 1989, appellant was indicted in the U.S. District Court for the Northern District of Ohio on two counts of possession of a firearm, and one count of conspiracy, stemming from appellant's use of a firearm during the commission of various crimes including aggravated murder. He was arrested four days later and placed in federal custody at the Lucas County Jail.

{¶ 3} One week after being indicted on the federal charges, appellant was indicted by the Erie County Grand Jury on one count of aggravated murder in violation of R.C. 2903.01(A), one count of aggravated murder in violation of R.C. 2903.01(B), one count of aggravated murder in violation of R.C. 2903.02(A), one count of murder in violation of R.C. 2903.02, one count of kidnapping in violation of R.C. 2905.01(A)(1), and one count of aggravated robbery in violation of R.C. 2911.01(A)(1). Additionally, a firearm specification was attached to each count in the indictment. Pursuant to the indictment, a warrant was issued for appellant's arrest.

{¶ 4} On March 20, 1989, the Erie County prosecuting attorney certified that appellant was notified by the United States Marshal of the pending detainer and untried indictment. The arrest warrant issued pursuant to the Erie County indictment was subsequently executed on May 12, 1989.

{¶ 5} A jury trial commenced with regard to the federal charges on January 28, 1991. Ultimately, appellant was found guilty on all counts in the federal indictment and ordered to serve 180 months in federal prison.

{¶ 6} Appellant was subsequently transferred into state custody on October 11, 1994, and was finally arraigned on the state charges three days later. On August 11, 1995, following successful plea negotiations, appellant pleaded guilty to one count of aggravated murder with a firearm specification. Pursuant to the plea agreement, the state dismissed the remaining counts in the indictment. The trial court proceeded to sentence appellant to a term of life in prison with the possibility of parole after 20 years, to be served consecutive to the three-year prison term attributable to the firearm specification. The trial court ordered the sentence to be served concurrently to the federal sentence appellant was serving at the time. Additionally, the court granted appellant 315 days of jail-time credit for the time he had served while in state custody as of the date of sentencing.

{¶ 7} On February 11, 2013, appellant filed a motion for custody credit with the trial court, arguing that he was entitled to 2,346 days of jail-time credit under R.C. 2967.191. On April 5, 2013, without first conducting a hearing, the trial court issued its judgment denying appellant's motion for custody credit. This timely appeal followed.

B. Assignments of Error

{¶ 8} On appeal, appellant asserts the following assignments of error:

Assignment of Error I: THE JUDGMENT OF THE COURT
BELOW DENYING CUSTODY CREDIT IS CONTRARY TO LAW
AND SHOULD BE REVERSED AND REMANDED.

Assignment of Error II: THE COURT BELOW ERRED BY DENYING A HEARING UPON THE MOTION FOR CUSTODY CREDIT, AND THE JUDGMENT OF THE COURT SHOULD BE REVERSED AND REMANDED FOR HEARING.

II. Analysis

{¶ 9} In his first assignment of error, appellant argues that the trial court erred in denying his motion for custody credit. Appellant contends that he was entitled to receive credit for 2,346 days he served while he was “physically in the Lucas County jail in the legal custody of the U.S. Marshall attendant to related criminal proceedings in federal district court, and thereafter in the legal custody of the U.S. Department of Justice’s Bureau of Prisons pursuant to the sentence imposed by the federal district court in those related proceedings.” While he recognizes that his confinement was directly attributable to his conviction for the federal charges, appellant argues that he was entitled to receive jail-time credit under R.C. 2929.19(B)(2)(g)(i) and 2967.191 because he was simultaneously subject to a certified detainer filed by the Erie County prosecuting attorney. Further, appellant asserts that the Ohio Supreme Court’s holding in *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, requires the trial court to credit him for such time because the court imposed his sentence concurrently with the remainder of the federal sentence.

{¶ 10} Appellee argues that *Fugate* is inapplicable in this case and, further, that appellant’s motion, which was filed more than a decade after the underlying sentence was

imposed, was barred by res judicata. We agree with appellee’s second argument and conclude that it is dispositive of appellant’s first assignment of error.

{¶ 11} This court has previously determined that a motion to correct jail-time credit is an alternative to raising the issue on direct appeal or in postconviction relief. *State v. McLain*, 6th Dist. Lucas No. L-07-1164, 2008-Ohio-481, ¶ 11, citing *Heddleston v. Mack*, 84 Ohio St.3d 213, 702 N.E.2d 1198 (1998). However, this remedy is limited to cases in which the trial court’s alleged error involves a clerical mistake rather than a substantive claim. *State v. Newman*, 6th Dist. Wood No. WD-07-083, 2009-Ohio-2935, ¶ 10. Indeed, we have held that “[f]ailure to timely raise substantive jail time credit claims results in the issue being barred from further consideration by the doctrine of res judicata.” *Id.* at ¶ 11.

{¶ 12} Here, appellant’s motion is premised upon his contention that he was entitled to additional credit for time served while he was held in custody under the federal charges. This was not a clerical mistake. Instead, appellant’s claim is a substantive claim, “which must be brought to the trial court’s attention *before sentencing or raised on direct appeal.*” (Emphasis added.) *McLain* at ¶ 12. Since appellant’s claim is substantive, his appeal is barred by res judicata. *Id.*

{¶ 13} Nonetheless, appellant argues that his appeal is not barred by res judicata in light of a recent amendment to R.C. 2929.19(B)(2)(g)(iii), which now provides:

The sentencing court retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination under

division (B)(2)(g)(i) of this section. The offender may, at any time after sentencing, file a motion in the sentencing court to correct any error made in making a determination under division (B)(2)(g)(i) of this section, and the court may in its discretion grant or deny that motion. If the court changes the number of days in its determination or redetermination, the court shall cause the entry granting that change to be delivered to the department of rehabilitation and correction without delay. Sections 2931.15 and 2953.21 of the Revised Code do not apply to a motion made under this section.

{¶ 14} Referencing R.C. 2929.19(B)(2)(g)(iii), appellant contends that the General Assembly intended to create a “statutory exception to the doctrine of res judicata as applied to custody credit determinations.” However, appellant’s argument overlooks several cases decided by appellate courts in this state since the effective date of the amendment, all of which maintain that “[a] post-sentencing motion for jail-time credit may only be used to address a purported mathematical mistake by the trial court, rather than * * * an erroneous legal determination.” *State v. Doyle*, 10th Dist. Franklin Nos. 12AP-567, 12AP-794, 12AP-568, 12AP-793, 2013-Ohio-3262, ¶ 10, citing *State v. Roberts*, 10th Dist. Franklin No. 10AP-729, 2011-Ohio-1760, ¶ 6; *see also State v. Summerall*, 10th Dist. Franklin No. 12AP-445, 2012-Ohio-6234, ¶ 11 (applying res judicata to bar appellant’s motion where appellant “failed to challenge the trial court’s award of jail-time credit at sentencing or on a direct appeal from his conviction” and “did

not allege that the trial court committed any mathematical error in the calculation of jail-time credit so as to avoid the res judicata bar”); *State v. McKinney*, 7th Dist. Mahoning No. 12 MA 163, 2013-Ohio-4357 (stating that appellant’s failure to raise his “purely legal argument” concerning jail-time credit on a direct appeal precluded him from raising it in a subsequent appeal under the doctrine of res judicata); *State v. Perry*, 7th Dist. Mahoning No. 12 MA 177, 2013-Ohio-4370, ¶ 12 (finding that appellant’s substantive claim for jail-time credit was barred by res judicata where he failed to raise it on a direct appeal, noting that “[t]his is the view across the state”); *State v. Britton*, 3d Dist. Defiance Nos. 4-12-13, 4-12-14, 4-12-15, 2013-Ohio-1008, ¶ 14 (limiting the use of a motion for correction of jail-time credit to situations where the trial court made a mathematical mistake).

{¶ 15} In light of the foregoing, we conclude that principles of res judicata bar appellant’s claim for additional jail-time credit. Accordingly, appellant’s first assignment of error is not well-taken.

{¶ 16} In his second assignment of error, appellant argues that the trial court erred in denying his motion without first holding a hearing on the matter. Citing R.C. 2929.19(B)(2)(g)(ii), appellant contends that the court was required to conduct a hearing on his motion before issuing its decision, especially in light of appellant’s request for such hearing contained within the motion. Appellee responds by arguing that R.C. 2929.19(B)(2)(g)(ii) does not apply to motions, such as the one at issue here, that seek to correct a trial court’s allegedly erroneous calculation of jail-time credit.

{¶ 17} R.C. 2929.19(B)(2)(g)(ii) provides, “In making a determination under division (B)(2)(g)(i) of this section [concerning the amount of jail-time credit a defendant should receive], the court shall consider the arguments of the parties and conduct a hearing if one is requested.” Under a plain reading of the statute, this provision is limited in its application to the trial court’s *initial* calculation of jail-time credit under R.C. 2929.19(B)(2)(g)(i). Here, appellant’s motion to correct the trial court’s initial determination of jail-time credit was not made under R.C. 2929.19(B)(2)(g)(i), but rather was made under R.C. 2929.19(B)(2)(g)(iii). Thus, R.C. 2929.19(B)(2)(g)(ii) does not apply to require the trial court to hold a hearing. Further, appellant does not argue that he was denied a hearing when he was originally sentenced. On the contrary, the record clearly reveals that a sentencing hearing was held on August 11, 1995, at which time the court calculated that appellant was entitled to 315 days of jail-time credit. Thus, the hearing requirement contained in R.C. 2929.19(B)(2)(g)(ii) was satisfied in this case.

{¶ 18} Accordingly, appellant’s second assignment of error is not well-taken.

III. Conclusion

{¶ 19} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.

CONCUR.

JUDGE

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