[Cite as *State v. Hughley*, 2009-Ohio-5824.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92588 and 93070

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KEVIN HUGHLEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-462014

BEFORE: Cooney, A.J., Stewart, J., and Dyke, J.

RELEASED: November 5, 2009

JOURNALIZED:

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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BY: Thorin O. Freeman
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COLLEEN CONWAY COONEY, A.J.:

{¶ 1} In these consolidated appeals, defendant-appellant, Kevin Hughley ("Hughley"), pro se, appeals his misdemeanor sentence and the trial court's application of jail-time credit. Finding no merit to the appeal, we affirm.[1]

{¶ 2} The facts of this case were previously set forth by this court in *State v. Hughley*, Cuyahoga App. No. 90323, 2008-Ohio-6146, ("*Hughley I*") in which we stated:

> "**CR-462014**-Summer 2004
>
> "According to the facts, James Altman is a special agent for the Inspector General's Office, Social Security Administration. Altman was contacted by the Ohio Bureau of Motor Vehicles ("BMV") to verify appellant's social security number. Altman found that Kevin Hughley, a.k.a. Hakeem Sultaana, had two social security numbers. Appellant had two social security numbers because he had requested a duplicate. Altman confirmed that appellant was not issued a new social security number as Sultaana.
>
> "Barry Solomon, an investigator for the BMV, began an investigation into the conflict. Solomon discovered that appellant had used the name Hakeem Sultaana and applied for a state identification card. Further investigation revealed that appellant fraudulently indicated in his BMV [form] 2026 application that his social security number ended in 9870. The investigation also revealed that appellant indicated to a BMV worker that he did not have a current driver's license or identification card, that his driving privileges were not revoked, and that he did not have any citations for violations of any motor vehicle

[1]In Case No. 92588, Hughley appeals his sentence. In Case No. 93070, he appeals the trial court's application of his jail-time credit.

law. These answers were fraudulent, as appellant knew that he had a driver's license, a noncompliance suspension, and three warrant blocks at the time.[2]

"In *State v. Hughley*, CR-462014, appellant was indicted on eight counts of forgery, eight counts of uttering, and eight counts of tampering with records. These offenses occurred on June 17, 2004. On February 20, 2005, appellant pleaded not guilty to all counts. Trial commenced on July 16, 2007. The state presented four witnesses and the defense did not present any witnesses. At the close of the state's case, the defense moved for acquittal on counts 15, 16, 21, and 24, pursuant to Crim.R. 29, and the court denied the defense's motion for acquittal. The prosecution noted that counts 11, 12, and 22 had been nolled prior to trial. On July 18, 2007, the jury rendered guilty verdicts on all counts submitted.

"June 17, 2004

"More specifically, in CR-462014 appellant was indicted for three counts of forgery under R.C. 2913.31 in relation to a state ID application, Bureau of Motor Vehicles form 2026, and a state of Ohio ID (counts 1, 3, and 5). Appellant was also indicted for three counts of uttering under R.C. 2913.31 (counts 2, 4, and 6) and tampering with records under R.C. 2913.42 (counts 17, 18, and 19) for each of the above listed items. Appellant was convicted of all crimes committed on this day.

"**July 13, 2004**

"In addition to appellant's criminal activity on June 17, 2004, he also engaged in criminal activity on July 13, 2004. For appellant's criminal activity on July 13, 2004, he was indicted for three counts of forgery under R.C. 2913.31 in relation to a state driver's license application, BMV form 2026, and a HP form 20C (counts 7, 9, and 11). Appellant was also indicted for three counts of uttering under R.C. 2913.31

[2]The jury rendered guilty verdicts on the following charges: forgery (Counts 1, 3, 5, 7, 9, and 13); uttering (Counts 2, 4, 6, 8, 10, and 14); and tampering with records (Counts 17, 18, 19, 20, 23, and 24).

(counts 8, 10, and 12) and tampering with records under R.C. 2913.42 (counts 20, 21, and 22) for each of the above items.

"Appellant was convicted of forgery and uttering in relation to the state of Ohio driver's license application (counts 7 and 8), forgery and uttering in relations to the BMV form 2026 (counts 9 and 10), and tampering with records in relation to the state of Ohio driver's license application.

"**July 20, 2004**

"For his criminal activity on this day, appellant was indicted for one count of forgery (count 13), uttering (count 14), and tampering with records (count 23) in relation to a state of Ohio driver's license. Appellant was convicted of all these counts.

"**August 14, 2004**

"For his criminal activity on this day, appellant was indicted for one count of forgery (count 15), uttering (count 16), and tampering with records (count 24) in relation to a vehicle registration application. Appellant was convicted of tampering with records.

"The court imposed nine months on the forgery charges (merged) and nine months on the uttering charges (merged), to be served concurrently. A term of two years was imposed on the tampering counts, to be served concurrently. The tampering counts and forgery counts were merged. The two-year term is to be served consecutively to the nine-month term for the uttering charges. Accordingly, appellant was sentenced to a total of two years and nine months incarceration." (Emphasis in original.) Id. at ¶4-17.

{¶ 3} Hughley appealed his convictions, arguing that under R.C. 2945.75(A), he should have been found guilty of only a misdemeanor offense as opposed to a felony for the tampering with records charges.[3] We agreed,

[3]The State conceded this argument in *Hughley I*.

finding that because "tampering with records is considered a misdemeanor of the first degree and due to the lack of specificity in the verdict forms, [Hughley] could only be found guilty of tampering with records, a misdemeanor of the first degree." Id. at ¶39. Thus, we reversed his felony tampering with records convictions and remanded the matter for resentencing.[4]

{¶ 4} On remand, the trial court sentenced Hughley to a total of 18 months on the misdemeanor tampering with records charges, to be served consecutively to the nine months for the forgery charges and the nine months for the uttering charges, for an aggregate of 27 months.[5]

{¶ 5} Hughley appeals again, raising a total of six assignments of error for our review, which shall be discussed together where appropriate.

Case No. 92588

{¶ 6} In the first, second, fourth, and fifth assignments of error, Hughley challenges his misdemeanor sentence. He argues that the trial court erred when it: (1) imposed his misdemeanor sentence to be served consecutively to his felony sentence; (2) imposed a maximum consecutive

[4]In December 2008, Hughley applied to reopen *Hughley I* under App.R. 26(B), which this court recently denied in *State v. Hughley*, Cuyahoga App. No. 90323, 2009-Ohio-3274.

[5]The trial court also ordered that Hughley's sentence in CR-462014 be served consecutive to each of his nine-month sentences in CR-473878 and CR-481899.

misdemeanor sentence, (3) displayed vindictiveness by running the sentences consecutively on remand; and (4) imposed a void sentence.

Standard of Review

{¶ 7} The trial court enjoys broad discretion in imposing a misdemeanor sentence. *Cleveland v. Jurco*, Cuyahoga App. No. 88702, 2007-Ohio-4305, ¶18. Therefore, a misdemeanor sentence will not be disturbed on appeal unless the trial court abused its discretion. *State v. Frazier*, 158 Ohio App.3d 407, 2004-Ohio-4506, 815 N.E.2d 1155, ¶15. "'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

Consecutive Sentence

{¶ 8} Hughley first argues that the trial court erred by ordering his misdemeanor sentence to be served consecutively to his felony sentence. He argues that, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, does not apply to misdemeanor sentencing and that R.C. 2929.41(A) requires that a misdemeanor sentence must be served concurrently to any felony sentence. Prior to *Foster*, R.C. 2929.41(A) provided:

> "Except as provided in division (B) of this section, division (E) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution."

{¶ 9} In support of his argument, he relies on *State v. Butts* (1991) 58 Ohio St.3d 250, 569 N.E.2d 885. In *Butts*, the Ohio Supreme Court held that: "R.C. 2929.41(A) requires that a sentence imposed for a misdemeanor conviction must be served concurrently with any felony sentence." Id. at syllabus. However, *Butts* is inapplicable to the instant case because it is based on a prior version of R.C. 2929.41(A), which specifically provided that: "* * * [i]n any case, a sentence of imprisonment for misdemeanor shall be served concurrently with a sentence of imprisonment for felony served in a state or federal penal or reformatory institution." In 2000, the General Assembly amended R.C. 2929.41(A) by removing the "in any case" language.

{¶ 10} Moreover, the *Foster* Court in reviewing Ohio's felony sentencing scheme, declared that R.C. 2929.41(A) is unconstitutional and severed it from the remainder of the statute. Id. at paragraphs three and four of the syllabus.[6] Thus, we are left with R.C. 2929.41(B), which provides that:

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[6]We note that *Foster's* syllabus holds that R.C. 2929.41(A) is unconstitutional

> "(1) A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment **when the trial court specifies that it is to be served consecutively** or when it is imposed for a misdemeanor violation of section 2907.322, 2921.34, or 2923.131 of the Revised Code.
>
> "When consecutive sentences are imposed for misdemeanor under this division, the term to be served is the aggregate of the consecutive terms imposed, except that the aggregate term to be served shall not exceed eighteen months." (Emphasis added.)

{¶ 11} Hughley also relies on *State v. Owens*, Cuyahoga App. No. 89948, 2008-Ohio-3555, and *State v. McCauley*, Cuyahoga App. No. 86946, 2006-Ohio-4587, for the proposition that post-*Foster* a misdemeanor sentence must run concurrently with a felony sentence. However, the *Owens* court relied on *Butts*, which as discussed above, is based on the prior version of R.C. 2929.41(A) and, in reaching its conclusion that misdemeanor and felony sentences could not be ordered to be served consecutively, the *McCauley* court cited *State v. Elchert*, Seneca App. No. 13-04-42, 2005-Ohio-2250, which relied on the now unconstitutional and excised portion of R.C. 2929.41. *McCauley* is further distinguishable from the instant case in that McCauley's entire

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and excised, while the opinion text states that R.C. 2929.41 is excised in its entirety. See *Foster* at paragraphs three and four of the syllabus, with *Foster* at ¶97. Thereafter, the text states that R.C. 2929.41(A) is excised. Id. at ¶99. Because the syllabus controls, the Twelfth and Second District Court of Appeals have found that R.C. 2929.41(A) "is unconstitutional and no longer exists after *Foster* [.]" *State v. Terry*, 171 Ohio App.3d 473, 475, 2007-Ohio-1096, 871 N.E.2d 634,¶9; *State v. Trainer*, Champaign App. No. 08-CA-04, 2009-Ohio-906. According to *Trainer*, the other portion of the statute, R.C. 2929.41(B), remains constitutional and has not been excised. We agree with this conclusion.

sentence was vacated and the matter was remanded because the trial court failed to advise McCauley of postrelease control and to comply with *Foster*.[7] Thus, Hughley's argument is misplaced and the decisions he cites in support are predicated upon a statutory provision that no longer exists.

{¶ 12} Additionally, we note that three other appellate districts have held, post-*Foster*, that R.C. 2929.41(B)(1) authorizes a trial court to order a misdemeanor sentence to be served consecutively to a felony sentence. See *Trainer*; *Terry*; *State v. Elkins*, Morrow App. No. 05 CA 0008, 2006-Ohio-3997. R.C. 2929.41(B)(1) expressly states that: "[a] jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, * * * when the trial court specifies that it is to be served consecutively." Accordingly, we find that under R.C. 2929.41(B)(1) the trial court was permitted to order Hughley to serve his misdemeanor tampering sentence consecutive to his felony sentences.

Maximum Sentence

{¶ 13} In the second assignment of error, Hughley argues that the trial court erred when it imposed the maximum consecutive sentence for his misdemeanor tampering with records charges because the trial court failed to

[7]We also note that the State conceded the issues McCauley raised and made no argument that R.C. 2929.41(A) was unconstitutional and severed from the statute under *Foster*.

discuss the factors set forth in R.C. 2929.22.

{¶ 14} R.C. 2929.22 lists factors that the trial court must consider when it imposes a sentence. The factors include the nature and circumstances of the offense, the offender's history of criminal conduct, and the likelihood that the offender will commit crimes in the future. We note that, "when determining a misdemeanor sentence, R.C. 2929.22 does not mandate that the record reveal the trial court's consideration of the statutory sentencing factors. Rather, appellate courts will presume that the trial court considered the factors set forth in R.C. 2929.22 when the sentence is within the statutory limits, absent an affirmative showing to the contrary." *State v. Nelson*, 172 Ohio App.3d 419, 2007-Ohio-3459, 875 N.E.2d 137, citing *State v. Kelly*, Greene App. No. 2004CA122, 2005-Ohio-3058; see, also, *Jurco*.

{¶ 15} In the instant case, Hughley was convicted of six counts of tampering with records under R.C. 2913.42, involving four separate events. The trial court sentenced him to six months on each of Counts 17, 18, and 19 to be served concurrently to each other. He was also sentenced to six months on each of Counts 20, 23, and 24, to be served consecutively to each other and Counts 17, 18 and 19 for a total of 24 months. However, because these offenses were first degree misdemeanors, the trial court sentenced him to a total of 18 months. See R.C. 2929.41(B)(1).

{¶ 16} "While it is preferable that the trial court state on the record that it has considered the statutory criteria, the statute imposes no requirement that it do so. Instead, in the case of a silent record, the presumption exists that the trial court has considered the statutory criteria absent an affirmative showing by Defendant that it did not." *State v. Raby*, Wayne App. No. 05CA0034, 2006-Ohio-1314, ¶9.

{¶ 17} In the instant case, there is no affirmative indication in the record that the trial court failed to consider the applicable factors set forth in R.C. 2929.22. The misdemeanor sentence imposed on Hughley is within the statutory limit, and the sentencing entry reveals that the trial court considered all required factors of the law. In addition, the trial judge was familiar with the facts of this case because the same judge handled the resentencing on remand. The trial court also acknowledged reviewing a copy of Hughley's sentencing memorandum, in which Hughley argued that his misdemeanor sentence should run concurrently with his felony sentence.

{¶ 18} Thus, we find Hughley has failed to bring forth any evidence to rebut the presumption that the trial court considered all the factors in R.C. 2929.22. Given these considerations, we conclude that the trial court did not abuse its discretion by imposing the maximum sentence.

Vindictive Sentence

{¶ 19} In the fourth assignment of error, he argues that the trial court displayed vindictiveness because the tampering with records counts were originally ordered to be served concurrently, but at resentencing the trial court ordered the counts to be served consecutively. He claims that the trial court punished him for being successful on appeal. He further claims that the Fourteenth Amendment requires the trial court to make "affirmative findings on the record regarding conduct or events that were discussed after the original sentencing hearing to overcome the presumption of vindictiveness."

{¶ 20} We note that: "'[a] trial court violates the Due Process Clause of the Fourteenth Amendment when it resentences a defendant to a harsher sentence when motivated by vindictive retaliation. *North Carolina v. Pearce* (1969), 395 U.S. 711, 724. A presumption of vindictiveness arises when the same judge resentences a defendant to a harsher sentence following a successful appeal. Id.'" *State v. Glover*, Cuyahoga App. No. 88317, 2007-Ohio-2122, ¶109, quoting *State v. Chandler*, Cuyahoga App. No. 83629, 2004-Ohio-2988.

{¶ 21} In the instant case, Hughley was originally sentenced to a total of two years on the tampering with records counts (two years on each count to

be served concurrently), but on remand he was sentenced to a total of 18 months. Because Hughley's sentence after remand is less than the original sentence imposed by the trial court, he fails to demonstrate that his sentence is the product of vindictiveness. See *State v. Sanders*, Cuyahoga App. No. 83630, 2004-Ohio–2345, ¶29, (where this court found no presumption of vindictiveness by the trial judge because he imposed a lesser sentence than the original on the first resentencing and imposed the same sentence since that time).

Void Sentence

{¶ 22} In the fifth assignment of error, Hughley argues that the trial court erred by imposing a void sentence. He claims that his sentence is void because the trial court sentenced him to "prison" on the tampering with records convictions. However, a review of the record reveals that the trial court did not order Hughley to serve his misdemeanor sentence in prison. Rather, the trial court ordered that Hughley serve his felony sentences in prison and then be returned to the Cuyahoga County Jail to serve his misdemeanor sentence. Thus, we find that this argument lacks merit.

{¶ 23} Accordingly, the first, second, fourth, and fifth assignments of error are overruled.

Waiver of Counsel

{¶ 24} In the third assignment of error, Hughley argues that the trial court erred by failing to properly waive his right to counsel as provided in Crim.R. 44(C).[8] He claims that retained counsel was not properly withdrawn and that the trial court did not advise him of "the possible nature of sentencing possibilities."

{¶ 25} "The Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so." *State v. Gibson* (1976), 45 Ohio St.2d 366, 345 N.E.2d 399, paragraph one of the syllabus, citing *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562.

{¶ 26} However, "courts are to indulge in every reasonable presumption against the waiver of a fundamental constitutional right, including the right to be represented by counsel." *State v. Dyer* (1996), 117 Ohio App.3d 92, 95, 689 N.E.2d 1034. As a result, "a valid waiver affirmatively must appear in the record, and the State bears the burden of overcoming the presumption against a valid waiver." *State v. Martin*, Cuyahoga App. No. 80198,

[8]Crim.R. 44(C) provides in pertinent part: "[w]aiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22."

2003-Ohio-1499. "In order to establish an effective waiver of right to counsel, the trial court must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right." *Gibson*, paragraph two of the syllabus.

{¶ 27} Although there is no prescribed colloquy in which the trial court and a pro se defendant must engage before a defendant may waive his right to counsel, the court must ensure that the defendant is voluntarily electing to proceed pro se and that the defendant is knowingly, intelligently, and voluntarily waiving the right to counsel. *Martin*, citing *State v. Jackson* (2001), 145 Ohio App.3d 223, 227, 762 N.E.2d 438.

{¶ 28} In the instant case, a review of the resentencing hearing reveals that Hughley acknowledged that retained counsel no longer represented him.[9] The court noted that Hughley went through five attorneys before trial commenced, proceeded to trial pro se, and during trial, he had standby counsel assigned to assist him. The trial court then advised Hughley that he has a right to counsel. The trial court further explained that if Hughley wanted counsel, the court would appoint counsel for him. The trial court also advised Hughley that it was only resentencing him on the tampering

[9]Hughley has represented himself since the initial charges were filed in 2005. He has filed numerous motions, letters, and other correspondence throughout the entire lower court proceedings and on appeal.

with records counts as mandated by this court in *Hughley I*. Hughley then stated that he understood his rights and wanted to proceed pro se. Hughley spoke on his own behalf, referencing the sentencing memorandum and arguing that the misdemeanor counts should only run concurrently under R.C. 2929.41(A). The court then advised Hughley that the maximum sentence it could impose is 18 months, and the court discussed the validity of R.C. 2929.41(A) post-*Foster*. The trial court correctly concluded that under R.C. 2929.41(B), it could order Hughley's misdemeanor sentence be served consecutive to his felony sentence.

{¶ 29} Based on the foregoing, we find that Hughley voluntarily elected to proceed pro se and that he knowingly, intelligently, and voluntarily waived his right to counsel at the resentencing hearing.

{¶ 30} Accordingly, the third assignment of error is overruled.

Case No. 93070

{¶ 31} In this appeal, Hughley contests the trial court's application of jail-time credit. He claims that the trial court had no authority to use a nunc pro tunc entry to apply his jail-time credit to the misdemeanor portion of his sentence. He further claims that under R.C. 2967.191, his jail-time credit should apply to the felony portion of his sentence.

{¶ 32} R.C. 2967.191 provides in pertinent part that: "[t]he department of rehabilitation and correction shall reduce the stated prison term of a prisoner * * * by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial."

{¶ 33} In the instant case, the trial court sentenced Hughley to a total of 27 months, including nine months on the felony forgery charge, consecutive to the 18 months on the misdemeanor tampering with records charges. This sentence was to be served consecutive to his sentences in Cases CR-473878 and CR-481899. In March 2009, the court ordered that Hughley's jail-time credit of 304 days shall be applied first to this case because it is the oldest case he had pending for sentencing. The trial court then ordered that the jail-time credit be applied to Hughley's misdemeanor sentence and, upon completion of his felony sentence in this case and CR-473878 and CR-481899, Hughley shall be returned to the Cuyahoga County Jail to serve the remaining 243 days on the misdemeanor charges.

{¶ 34} We note that under R.C. 2967.191, the department of rehabilitation and correction credits jail time served; however, it is "the trial court that is to make the factual determination as to the number of days that can constitute jail-time credit." *State v. Frazier*, Cuyahoga App. No. 86984,

2006-Ohio-3023, ¶9, citing *State v. Morgan* (Mar. 27, 1996), Wayne County App. No. 95CA0055. Moreover, in *State v. Fugate*, 117 Ohio St.3d. 261, 2008-Ohio-856, 883 N.E.3d 440, the Ohio Supreme Court noted that: "[w]hen a defendant is sentenced to consecutive terms, the terms of imprisonment are served one after another. Jail-time credit applied to one prison term gives full credit that is due, because the credit reduces the entire length of the prison sentence."[10]

{¶ 35} A review of the record reveals that Hughley has repeatedly asked the trial court to clarify his jail-time credit. Because the trial court could run the misdemeanor sentence consecutive to the felony sentence, and the trial court must specify the number of days that constitute jail-time credit, we find that it was within the trial court's discretion to direct that the jail-time credit be applied to the misdemeanor sentence in the instant case. This is especially true when his sentences are consecutive and the jail-time credit reduces the entire length of his sentence.

{¶ 36} Thus, the sole assignment of error is overruled.

{¶ 37} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

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[10]We note that in *Fugate* the question before the Supreme Court was "whether a defendant who is sentenced concurrently on multiple charges is entitled to have 'jail-time credit' applied toward all terms."

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE OPINION);

ANN DYKE, J., CONCURS IN JUDGMENT ONLY.

MELODY J. STEWART, J., CONCURRING IN JUDGMENT ONLY:

{¶ 38} By law, a defendant who is imprisoned is entitled to have credited to his sentence of incarceration the number of days that he was confined prior to conviction and sentence. R.C. 2949.08; R.C. 2949.12; R.C. 2967.191. When a prisoner is remanded to a state prison for execution of sentence, as appellant was, the department of rehabilitation and correction is charged with reducing the stated prison term by the total number of days of jail time credit. R.C. 2967.191. The trial court determined appellant was entitled to 304 days of jail time credit.

{¶ 39} This case, however, presents an unusual situation because upon resentencing following appeal, appellant was sentenced to a felony prison term followed by a misdemeanor jail term in one case, to be served consecutive to prison terms imposed in two other cases. This resulted in an aggregate sentence of imprisonment of 27 months in prison followed by 18 months in jail. Under these facts, I agree with appellant's contention that the jail time credit should have been applied first to the stated prison term. But, due to the length of time spent during appeals and resentencing, appellant has served almost the entire prison term prior to our reaching this issue on appeal.[11] As a result, ordering the 304 days of jail time credit be applied to appellant's felony sentence at this time would provide no beneficial effect to appellant. Under these narrow facts, I concur in the decision that the jail time credit should be applied to appellant's misdemeanor jail sentence.

[11] The Ohio Department of Rehabilitation and Correction's website shows that Hughley's prison term expires on November 19, 2009.