Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105524

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRIAN LUMBUS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-556112-A

BEFORE: E.A. Gallagher, P.J., E.T. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: December 7, 2017

FOR APPELLANT

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant Brian Lumbus appeals the denial of his motion for additional jail-time credit in the Cuyahoga County Court of Common Pleas. For the following reasons, we affirm.

Facts and Procedural Background

{¶2} The procedural history of this case is set forth in great detail in this court's opinion *State v. Lumbus*, 8th Dist. Cuyahoga No. 102273, 2016-Ohio-380 ("*Lumbus I*"). In 2014, Lumbus was convicted of engaging in a pattern of corrupt activity (Count 1), theft (Count 4), aggravated theft (Count 5), two counts of grand theft (Counts 7 and 66), 12 counts of identity fraud (Counts 26, 27, 28, 29, 32, 34, 54, 55, 56, 57, 58, 59), obstructing justice (Count 106) and possessing criminal tools (Count 222).

{¶3} We explained Lumbus' sentence in *Lumbus I* as follows:

> The trial court imposed the following sentence: (1) ten years of imprisonment on Count 1; (2) nine months of imprisonment on Count 4, concurrent to Count 1; (3) nine months of imprisonment on Count 5, concurrent to Count 1; (4) nine months of imprisonment on Count 7, concurrent to Count 1; (5) nine months of imprisonment on Count 66, concurrent to Count 1; (6) nine months of imprisonment each on Counts 26, 27, 28, 29, 32, and 34, consecutive to each other and concurrent to Count 1; (7) six months of imprisonment each on Counts 54, 55, 56, 57, 58, and 59, with 55 concurrent to 56 and the remaining counts consecutive to each other and concurrent to Count 1; and (8) nine months of imprisonment on Count 222, concurrent to Count 1.[1]

Id. at ¶ 9.

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[1] Although omitted from *Lumbus I*, the trial court also imposed a nine-month sentence on Count 106 to be served concurrently with Count 1.

{¶4} The trial court further ordered that all of Lumbus' sentences in the present case, CR-11-556112, be served concurrently with a three- year prison term previously imposed in CR-11-556136.   The court addressed the matter of jail-time credit and stated:

> As of 11-3-2014, Defendant was in jail on this case 271 days based on Sheriff's records for this case plus all days after 11-3-2014 until transferred to prison.   This time in jail does not include any jail time credit in the concurrent case, number 556136.   Defendant's prison time in this case starts on the first day of confinement in the concurrent case, 556136, including any presentence jail time credit for that case.   Defendant was serving prison time for that case while he physically was in the Cuyahoga County Jail awaiting trial and thereafter sentencing in this case.   These cases are to run concurrent because of the RICO conviction in this case, Count 1, covered the time period in case 556136, and the crime in that concurrent case was similar to the underlying crimes of this RICO case.

{¶5} This court affirmed Lumbus' convictions in *Lumbus I*.   On January 26, 2017, Lumbus filed a pro se motion for additional jail-time credit arguing that the trial court had failed to properly credit him with the appropriate jail-time credit on all concurrent counts pursuant to *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440.   By Lumbus' calculations he was entitled to 751 days of jail-time credit. Lumbus further argued that in applying jail-time credit to the counts for which he received six-and nine-month sentences, the trial court should accumulate excess jail-time credit for each count and apply the accumulated excess days to his ten-year prison sentence in Count 1.

{¶6} The trial court denied Lumbus' motion but clarified that Lumbus was entitled to 751 total days of jail-time credit on each count in the present case after crediting Lumbus for (1) all the time he spent in jail awaiting either trial or sentencing in both the present case and CR-11-556136 and (2) the time he spent serving his prison term in

CR-11-556136. The trial court rejected Lumbus' argument that he was entitled to an accumulation of the excess jail-time credited to each of his six-and nine-month sentences to be applied against his sentence in Count 1. Finally, in addressing the mandates of *Fugate* the trial court noted that even if Lumbus had not previously been credited with the full 751 days of jail-time credit on the six-and nine-month sentences, those sentences had already been served in full as of the date of the court's ruling on Lumbus' motion and he appropriately remained in prison serving the balance of his ten-year prison term.

Law and Analysis

{¶7} In his sole assignment of error, Lumbus argues that the trial court failed to comply with the mandates of *Fugate*. In *Fugate*, the Ohio Supreme Court held:

> [W]hen concurrent prison terms are imposed, courts do not have the discretion to select only one term from those that are run concurrently against which to apply jail-time credit. R.C. 2967.191 requires that jail-time credit be applied to all prison terms imposed for charges on which the offender has been held. If courts were permitted to apply jail-time credit to only one of the concurrent terms, the practical result would be * * * to deny credit for time that an offender was confined while being held on pending charges. So long as an offender is held on a charge while awaiting trial or sentencing, the offender is entitled to jail-time credit for that sentence; a court cannot choose one of several concurrent terms against which to apply the credit.

Fugate, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, ¶ 12.

{¶8} Lumbus first argues that the trial court failed to comply with *Fugate* by completely failing to apply jail-time credit to any of his concurrent sentences other than Count 1. We find no merit to this argument. The trial court's sentencing entries credited Lumbus with jail-time credit without limiting such credit to only Count 1. Therefore, the trial court's discussion of *Fugate* compliance in its denial of Lumbus'

motion for additional jail-time credit was largely unnecessary.   However, to the extent that the trial court's discussion of *Fugate* muddied the waters on whether or not its earlier sentencing entries had applied jail-time credit to all of Lumbus' convictions, any potential error would be harmless in light of the fact that the trial court concluded that Lumbus had completed his sentence on those counts and remained in prison solely on Count 1.

{¶9} Lumbus next argues the trial court should have applied 751 days of jail-time credit to each of the counts for which he received a six-or nine-month sentence, accumulated the surplusage of credit for each count and applied the accumulated excess credit to his ten-year sentence on Count 1.   The trial court correctly pointed out that there exists no statutory or case law support for this position.   In fact, Lumbus' position directly contradicts the holding in *Fugate* where the Ohio Supreme Court explained the appropriate manner in which to apply jail-time credit under Ohio Adm.Code 5120-2-04(F):

> If an offender is serving two or more sentences, stated prison terms or combination thereof concurrently, the department shall independently reduce each sentence or stated prison term for the number of days confined for that offense. Release of the offender shall be based upon the longest definite, minimum and/or maximum sentence or stated prison term after reduction for jail time credit.

Fugate at ¶ 9.

{¶10} *Fugate* further clarified that the application of jail-time credit to all concurrent prison terms does not have the effect of multiplying a defendant's single period of pretrial confinement by the number of convictions entered against him. *Fugate* at ¶ 21. "Instead, applying the credit toward all concurrent terms simply ensures

that the offender actually receives credit for that *single* period of confinement."
(Emphasis added.) *Id.*

{¶11} Lumbus' argument directly contradicts Fugate in that it would result in an inappropriate multiplication of his jail-time credit against his longest sentence. If we were to accept Lumbus' contention, the state would be penalized for pursuing lesser charges in an indictment where jail-time credit exceeded the sentences on the lesser charges and the accumulation of the credit was used to reduce the offender's longer sentences on greater offenses. We find no merit to Lumbus' argument.

{¶12} Finally, we note that in its appellee brief, the state opines that by its calculations Lumbus is entitled to a further seven days of jail-time credit for the period of November 7, 2011 through November 14, 2011. The state reaches this conclusion based on materials outside of our record, namely, the docket in Lumbus' separate case CR-11-556136. Because Lumbus has only appealed from the judgment in CR-11-556112, we lack the appropriate record before us to take action on the state's contention.

{¶13} Lumbus' sole assignment of error is overruled.

{¶14} The judgment of the trial court is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.

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EILEEN A. GALLAGHER, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR