

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2014-T-0001
MICHAEL ANTHONY KARPENKO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 12 CR 73.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Michael Anthony Karpenko, pro se, PID: A640399, Marion Correctional Institution, P.O. Box 57, Marion, OH 43302 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the Trumbull County Court of Common Pleas. Appellant, Michael Anthony Karpenko, appeals from the trial court's December 16, 2013 judgment entry, denying his pro se motion for jail time credit. For the reasons that follow, we affirm.

{¶2} On January 16, 2012, an officer with the Niles Police Department arrested appellant for making terroristic threats and placed him in jail. Appellant posted bond

three days later. Thereafter, appellant appeared before the Niles Municipal Court with appointed counsel and waived his right to a preliminary hearing. Appellant's case was bound over to the Trumbull County Grand Jury and his bond was continued.

{¶3} Slightly more than a one month later, appellant was indicted by the Trumbull County Grand Jury on one count of making terroristic threats, a felony of the third degree, in violation of R.C. 2909.23(A)(1)(a) and (2) and (C).

{¶4} Ultimately, appellant plead not guilty by reason of insanity and filed a motion to determine his competency to stand trial. The trial court granted appellant's motion. The Forensic Psychiatric Center of Northeast Ohio, Inc. determined his competency. Two reports were later filed finding appellant competent and the trial court determined appellant was competent to stand trial.

{¶5} On February 27, 2013, appellant withdrew his former plea and pleaded guilty to the sole count as charged in the indictment. Appellant agreed to a jointly recommended nine-month sentence to be served consecutively to his sentence in Trumbull County Case No. 10-CR-599. On March 1, 2013, the trial court sentenced appellant accordingly, indicated that he may be eligible to earn credit, and notified him that post release control is optional for up to three years. The court further found that appellant "has been incarcerated in the Trumbull County Jail from February 27, 2013 to date."

{¶6} Appellant did not appeal his conviction and sentence. Instead, approximately eight months later, appellant filed a pro se motion for jail time credit. The trial court denied the motion and appellant timely appealed asserting the following:

{¶7} "Trial Court erred for failing to determine the number of days of confinement owed before sentence was imposed."

{¶8} Appellant argues the trial court failed to determine and calculate the amount of jail time credit in its sentencing entry. Appellant alleges he is owed a total of 40 days. The state, on the other hand, maintains appellant's appeal is barred under the doctrine of res judicata. The state further claims that if appellant is in fact owed any days, the amount he asserts is "overstated." We agree that the matter is barred by res judicata.

{¶9} This court stated in *State v. Caldwell*, 11th Dist. Lake No. 2004-L-173, 2005-Ohio-6149, ¶9-10, quoting *State v. Szefcyk*, 77 Ohio St.3d 93 (1996) that the failure to raise jail time credit issues on direct appeal precludes a post-conviction relief motion for jail time credit:

{¶10} "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment."

{¶11} Here, Karpenko had an opportunity to raise the jail time credit issue on direct appeal and failed to do so. He therefore cannot raise the issue now.

{¶12} The sole assignment of error is without merit.

{¶13} The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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{¶14} I respectfully dissent.

{¶15} The majority holds that appellant is precluded from raising the issue of jail time credit. For the following reasons, I disagree.

{¶16} In his sole assignment of error, appellant asserts the trial court erred in failing to determine the number of days of confinement owed before sentence was imposed. Specifically, appellant argues the trial court failed to determine and calculate the amount of jail time credit in its sentencing entry. Appellant alleges he is owed a total of 40 days.

{¶17} The state, on the other hand, maintains appellant's appeal is barred under the doctrine of res judicata. The majority agrees with the state's position that res judicata applies. The state further claims that if appellant is in fact owed any days, the amount he asserts is "overstated."

{¶18} This writer notes that res judicata would apply if the total amount of jail time credit was specified in the trial court's sentencing entry. *See State v. Caldwell*, 11th Dist. Lake No. 2004-L-173, 2005-Ohio-6149, ¶8-10. However, such is not the case in this appeal. I believe the trial court should have granted appellant's motion for jail time credit.

{¶19} This court stated in *State v. Williamson*, 11th Dist. Portage Nos. 2012-P-0011 and 2012-P-0012, 2012-Ohio-5227, ¶19-20:

{¶20} "When the trial court imposes its sentence, the court must give the defendant credit for all time served, pursuant to R.C. 2967.191. That section provides:

‘The 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 (* * *).’

{¶21} “It is the duty of the trial judge to determine the amount of credit to which a prisoner is entitled. *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-Ohio-2061, ¶7 * * *. This information must be included in appellant’s sentencing entry. See R.C. 2949.12; Ohio Adm.Code 5120-2-04(B). Further, since the provisions of R.C. 2967.191 are mandatory, the trial court’s failure to properly calculate jail-time credit and to include it in the body of the sentencing order is plain error. *State v. Miller*, 8th Dist. Nos. 84540 and 84916, 2005-Ohio-1300, ¶10.” (Parallel citation omitted.)

{¶22} In *State v. Ott*, 11th Dist. Portage No. 2012-P-0010, 2012-Ohio-4471, this court reversed and remanded the judgment of the trial court because the trial court’s entry did not detail the amount of jail time credit owed in “specific terms.” *Id.* at ¶25. This court held that “* * * the trial court’s intentions regarding its order must be made clear: it must make a factual finding and journalize the amount of time owed to appellant. A remand to the trial court is the appropriate procedural mechanism for this determination.” *Id.* at ¶28.

{¶23} The record before this court does not clearly reveal the exact amount of days owed to appellant. Again, appellant claims the total number is 40 whereas the state asserts that number is “overstated.” Thus, the total amount is in dispute.

{¶24} In its March 1, 2013 sentencing entry, the trial court sentenced appellant to nine months in prison to be served consecutively to time imposed in Trumbull

County Case No. 10-CR-599.¹ The court notified appellant that he may be eligible to earn credit if he would productively participate in an education program, vocational training, employment in prison industries, treatment for substance abuse, or any other constructive program developed by the Ohio Department of Corrections. The court stated that those credits are not automatically awarded but rather must be earned. The court further notified appellant that post release control is optional for up to three years. Lastly, the court noted that appellant “has been incarcerated in the Trumbull County Jail from February 27, 2013 to date.” However, the court did not determine a specific amount of jail time credit in its entry and failed to go back to January 2012 when appellant was first incarcerated following his arrest in this matter. Thus, although the trial court provided a “window of dates,” i.e., “from February 27, 2013 to date,” it did not go back to appellant’s January 2012 arrest, when he was first incarcerated. Therefore, as it stands, the proper amount of days does not appear to be credited. See *Ott, supra*, at ¶25, 29.

{¶25} Therefore, by failing to properly calculate appellant’s jail time credit in its sentencing entry, the trial court erred in not complying with the mandatory provisions of R.C. 2967.191. Thus, this matter should be remanded and the trial court should re-sentence appellant. The court should calculate the correct amount of jail time credit to which appellant is entitled and include this specific amount of credit in a corrected sentencing entry. See *Williamson, supra*, at ¶25; *Ott, supra*, at ¶28.

{¶26} Because I believe this case should be reversed and remanded, I respectfully dissent.

1. An online offender search of the Ohio Department of Rehabilitation and Correction, www.drc.ohio.gov, shows that appellant is currently incarcerated and is not scheduled to be released from prison until October 27, 2016.