[Cite as *State v. Brigner*, 2025-Ohio-1753.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
	:	Case No. 23CA14
Plaintiff-Appellee,	:	Case No. 23CA23
	:	
v.	:	
	:	DECISION AND JUDGMENT
ALAN D. BRIGNER,	:	ENTRY
	:	
Defendant-Appellant.	:	**RELEASED: 05/05/2025**
	:	

APPEARANCES:

Alan D. Brigner, Chillicothe, Ohio, pro se.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

Wilkin, J.

{¶1} This is a consolidated appeal from Athens County Court of Common Pleas judgment entries denying Appellant, Alan D. Brigner's (hereinafter "Brigner"), postconviction motions to correct his sentence. In Case No. 23CA14, Brigner challenges the trial court's imposition of restitution as part of his July 8, 2016 nunc pro tunc sentence entry. In Case No. 23CA23, Brigner seeks review of the jail-time credit previously granted by the trial court in that same July 8, 2016 entry.

{¶2} As to his appeal in Case No. 23CA14, we reject Brigner's assertions because res judicata bars his appeal regarding the trial court's order of restitution. That issue had to have been raised and addressed initially in the trial court at the appropriate time and on direct appeal or it was subject to being barred.

{¶3} As to his appeal in Case No. 23CA23, we find that the trial court properly calculated and applied Brigner's jail-time credit and therefore we find no abuse of discretion.

{¶4} As a result, we overrule all of Brigner's assignments of error and affirm the trial court's decisions in both Case No. 23CA14 and Case No. 23CA23.

PROCEDURAL BACKGROUND

{¶5} An Athens County Grand Jury returned an indictment charging Brigner with six counts of rape. The parties entered into a plea agreement, which the trial court accepted, whereby Brigner pled guilty to three counts of rape, first-degree felonies, in violation of R.C. 2907.02(A)(2) (Counts 4, 5, and 6) in return for the dismissal of the remaining three counts (Counts 1, 2, and 3). After the trial court sentenced Brigner to an aggregate 20-year prison term, he appealed. We reversed and remanded the case for further proceedings because the trial court failed to substantially comply with Crim.R. 11(C)(2)(a), which invalidated his guilty plea.

{¶6} On remand, Brigner again pled guilty to three counts of rape (Counts 4, 5, and 6) in exchange for the dismissal of the remaining three counts of rape; the trial court accepted his guilty plea. That same day, June 29, 2016, the trial court sentenced Brigner to 8 years on Count 4, 8 years on Count 5, with Counts 4 and 5 running concurrently with each other, and consecutively to the 4-year prison term imposed in Count 6, for an aggregate prison term of 12 years. In addition, the trial court assessed no fine but required Brigner to pay the costs of the proceeding and restitution to the Ohio Crime Victims Reparations Fund in the amount of $6,545.62 within five years.

Brigner acknowledged the amount of restitution the State requested by signing a plea agreement on the same date of the combined plea and sentencing hearing.

{¶7} The trial court gave Brigner jail-time credit in the amount of 433 days. Then on July 8, 2016, the trial court filed a corrected nunc pro tunc entry which set forth the same exact provisions, except it remedied the clerical error in the amount of jail-time credit days from 433 days to 443 days. Brigner did not contest the amount or application of the jail-time credit to his sentence at that time. While Brigner filed a motion to correct his sentence on a different basis in December 2016 – almost six months after the judgment entry – he did not raise the issue of restitution or jail-time credit.

{¶8} On November 10, 2021, over five years after the nunc pro tunc judgment entry of sentence, Brigner filed a motion for restitution hearing in the trial court. The trial court entered a decision denying defendant's motion on restitution on January 10, 2022. The trial court ruled that Brigner had filed prior direct appeals and a postconviction petition but failed at various times to argue error in the court's imposition of restitution. The trial court further found that once it had ordered a final judgment of conviction regarding restitution, it could not modify the restitution amount.

{¶9} On July 7, 2023, Brigner filed a motion requesting a correction in the way the trial court applied his jail-time credit to the sentence in the July 8, 2016 nunc pro tunc entry. He requested that an additional 443 days of jail-time credit be applied to the aggregate sentence. On September 20, 2023, the trial court denied Brigner's motion. The trial court held that the way Brigner requested the jail-time credit be applied would result in him receiving a total of 886 days which is double the amount of days he

actually spent in confinement. Because the trial court found that the jail-time credit of 443 days granted in the July 8, 2016 nunc pro tunc entry was correct, the trial court denied the motion.

Case No. 23CA14 – Restitution Appeal

I. Assignment of Error I – The lower court committed prejudicial error in ignoring the constitutional protections of due process.

II. Assignment of Error II – The lower court committed prejudicial error in imposing a financial sanction without jurisdiction.

{¶10} In both assignments of error in Case No. 23CA14, Brigner challenges the court's sentencing entry ordering him to pay restitution. First, he argues that because he entered into a sentencing agreement with the State that did not include an agreement regarding restitution, the trial court did not have the authority to order him to pay restitution. He further argues that the trial court imposed a financial sanction that is not supported by competent, credible evidence in the record. Brigner claims that the court not only did not have a hearing, but also imposed a restitution amount that did not bear a reasonable relationship to the actual loss suffered by the victim. In his second assignment of error, Brigner claims that the trial court did not have subject matter jurisdiction to impose restitution.

{¶11} In response, the State contends that when Brigner entered a plea after the case had been remanded, he signed the plea agreement document on each page, which includes the payment of $6,545.62 in restitution. Therefore, the State contends Brigner did not contest the amount. In addition, the State points out that Brigner did not request a hearing on restitution at the time of sentencing. Further, the State contends

Brigner's claims are barred by the doctrine of res judicata. The State also counters that the trial court no longer has jurisdiction to modify the restitution order.

I. Standard of Review

{¶12} " 'Prior to increasing, reducing, or otherwise modifying a sentence that is appealed, or vacating the sentence and remanding the matter for resentencing, we will seek to determine whether the trial court's restitution order is clearly and convincingly contrary to law.' " *State v. Martin,* 2024-Ohio-2334, ¶ 97 (4th Dist.), quoting *State v. Patton*, 2019-Ohio-2769, ¶23 (4th Dist.), quoting *State v. Anderson*, 2016-Ohio-7252, ¶ 33 (4th Dist.). However, because Brigner did not object to the restitution order nor request a hearing on restitution at the time of sentencing, the proper standard of review is plain error. *See State v. White,* 2019-Ohio-4288, ¶ 22 (4th Dist.) (applying plain error review to a challenge of a restitution order); *see also*, *State v. Coleman*, 2018-Ohio-1709, ¶ 12-14 (4th Dist.).

{¶13} We determine plain error by assessing whether (1) there is error, i.e., "a deviation from a legal rule"; (2) the error is plain, i.e., "an 'obvious' defect in the trial proceedings"; and (3) the error affected "substantial rights," i.e., it must have affected the outcome of the proceedings. *Coleman* at ¶ 13, citing *State v. Barnes,* 94 Ohio St.3d 21, 27 (2002). "We reverse a sentence for plain error only under exceptional circumstances to prevent a manifest miscarriage of justice." *State v. Little*, 2019-Ohio-4488, ¶ 8 (1st Dist.), citing *State v. Rogers*, 2015-Ohio-2459 ¶ 23. *Brigner* bears the burden to demonstrate plain error in the record. *See Little* at ¶ 8 and *Rogers* at ¶ 22.

II. Analysis

{¶14} As to Case No. 23CA14, we will address Brigner's assignments of error together. The version of R.C. 2929.18(A)(1) in effect at the time of Brigner's sentencing provides that a court imposing a sentence upon a felony offender may impose restitution to be "made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court." Further, "the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense." Thus, an order of restitution must bear a " 'reasonable relationship to the actual loss suffered as a result of the defendant's offense.' " *Martin,* 2024-Ohio-2334, ¶ 100 (4th Dist.), quoting *State v. Alexander*, 2012-Ohio-2041, ¶ 12 (4th Dist.), quoting *State v. Johnson*, 2004-Ohio-2236, ¶ 11 (4th Dist.).

{¶15} Ordinarily, we would turn to the record to see whether competent, credible evidence exists to discern the amount of restitution with a reasonable degree of certainty and ascertain that the order represents an actual loss caused by the defendant's criminal conduct for which he was convicted. *Id.,* citing *State v. Jones,* 2014-Ohio-3740, ¶ 21 (10th Dist.). However, in the case sub judice, we observe that Brigner did not supply us with a transcript of the plea and sentencing hearing. It is well-settled that "[t]he duty to provide a transcript for appellate review falls upon the appellant." *State v. Freeman*, 2023-Ohio-3835, ¶ 8 (4th Dist.), quoting *Knapp v. Edwards Laboratories,* 61 Ohio St.2d 197, 199 (1980). "This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record."

Id. quoting *Knapp*, 61 Ohio St.2d at 199. In the absence of such transcript, we presume regularity of the record and the trial court's decision. *Id.* citing *State v. Bear,* 2021-Ohio-1539, ¶ 32, *State v. Green*, 2025-Ohio-611, ¶ 17 (4th Dist.) (" '[w]hen portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the Court has no choice but to presume the validity of the lower court's proceedings, and affirm." "), quoting *State v. Goff,* 2023-Ohio-4823, ¶ 15 (4th Dist.), quoting *Knapp,* 61 Ohio St.2d at 199.

{¶16} The State contends, and we observe, that the written plea agreement contained the exact amount of restitution and each page of the agreement was signed by Brigner, such that Brigner consented to the payment of restitution and its amount. Brigner does not acknowledge the plea agreement but directs us to a sentencing agreement signed the same day in which he states, and we observe, the restitution was not mentioned. However, a review of the record shows that the plea agreement includes specific language that the trial court was not bound by that agreement. Further, by implication, the sentencing agreement makes clear that the trial court was not bound by the sentencing agreement when rendering its ultimate sentence. Courts have held that the terms of a plea or sentencing agreement are not binding on a trial court. *See State v. Jenkins,* 2020-Ohio-1480, ¶ 15 (4th Dist.) ("the terms of a plea agreement are not binding on a trial court."), citing *State v. Russell,* 2016-Ohio-5290, ¶ 10 (4th Dist.); *see also*, *State v. Collins,* 2019-Ohio-249, ¶ 14 (8th Dist.) ("[A] joint sentencing recommendation is not binding upon a trial court.") And, while the sentencing agreement did not specifically include the restitution, it was signed on the

same day as the plea agreement which did set forth the specific amount and agency to which the restitution would be paid. Once again, because Brigner did not provide the transcripts of the proceedings, we must assume their regularity.

{¶17} Further, Brigner's argument that the trial court did not conduct a hearing specifically on restitution must fail. "A trial court is required to conduct a hearing on restitution only if the offender, victim, or survivor disputes the amount of restitution ordered." *State v. White*, 2019-Ohio-4288, ¶ 20 (4th Dist.), quoting *State v. Lalain,* 2013-Ohio-3093, paragraph two of the syllabus. The record below shows that the appellant did not timely request a hearing on restitution prior to the trial court entering its final judgment. Under these circumstances, Brigner has not demonstrated plain error.

{¶18} Finally, " ' [u]nder the doctrine of res judicata, a final judgment of conviction bars a defendant from raising and litigating in any proceeding except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at trial * * * or on appeal from that judgment.' " *State v. Brigner*, 2017-Ohio-5538 (4th Dist.), quoting *State v. Szefcyk,* 77 Ohio St. 3d 93, 95 (1996), quoting *State v. Perry,* 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. As the Supreme Court of Ohio has observed, "[a]n order of restitution imposed by the sentencing court on an offender for a felony is part of the sentence." *State v. Brasher,* 2022-Ohio-4703, ¶15, quoting *State v. Danison*, 2005-Ohio-781, syllabus. Therefore, "If no one appeals a criminal judgment, it becomes final and res judicata attaches." *Id.*, citing *State v. Henderson*, 2020-Ohio-4784, ¶ 16-40; *State v. Harper*, 2020-Ohio-2913, ¶ 20-41. Here, Brigner neither raised the issue in the trial court during the plea or sentencing hearings, nor did he raise the issue in a timely

appeal from his conviction and sentence. Thus, because the trial court correctly overruled Brigner's motion for a restitution hearing, we overrule both assignments of error in Case No. 23CA14.

Case No. 23CA23 – Jail-Time Credit Appeal

I. Assignment of Error. The lower court abused its discretion in ignoring the legislature and Constitution.

{¶19} In Case No. 23CA23, Brigner's sole assignment of error is that the trial court improperly applied his jail-time credit. Brigner argues that R.C. 2929.19(B)(2)(g)(iii) provides the trial court with continuing jurisdiction to correct any error not previously raised at sentencing regarding jail-time credit. The State contends the trial court complied with the law in applying the credit.

I. Standard of Review

{¶20} It should be mentioned at the outset that although filing a direct appeal and several postconviction motions, Brigner had not raised an issue with the July 8, 2016 nunc pro tunc entry's application of jail-time credit before July 7, 2023, either in a motion with the trial court or in his various appeals. Typically, res judicata would bar any claim arising out of the transaction or occurrence that was the subject matter of the previous action, as explained above. However, in the case of granting or correcting errors in jail-time credit, trial courts have continuing jurisdiction. *State v. Crisp,* 2022-Ohio-1221, ¶ 15 (4th Dist.), citing *State v. Butcher,* 2017-Ohio-1544, ¶ 108 (4th Dist.). As set forth by R.C. 2929.19(B)(2)(g)(iii), "[t]he sentencing court retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination [of the appropriate jail-time credit]," and this motion may be filed "at any time after sentencing." *Butcher* at ¶ 108.

{¶21} It is important to note that the standard of review we apply in the instance of jail-time credit depends on the circumstance in which it was raised. If the issue of jail-time credit is raised on direct appeal, we review the trial court's calculation of jail-time credit to see if it is supported by competent, credible evidence. *State v. Price,* 2020-Ohio-6702, ¶ 22 (4th Dist.). Further, on direct appeal, if the calculation of the jail-time credit is not supported by competent, credible evidence, we will find plain error. *Id* In contrast, if a jail-time credit challenge is not raised on direct appeal, it can still be raised by motion; however, the grant or denial of a motion for jail-time credit is reviewed for an abuse of discretion. *Id., State v. Miller,* 2024-Ohio-913, ¶ 6 (4th Dist.), citing *Crisp* ¶ 13. " 'An "abuse of discretion" means that the court acted in an "unreasonable, arbitrary, or unconscionable" manner or employed "a view or action that no conscientious judge could honestly have taken." ' " *Miller at ¶ 6,* quoting *Jones v. Jones,* 2021-Ohio-1498, ¶ 15 (4th Dist.) quoting *State v. Kirkland,* 2014-Ohio-1966, ¶ 67, quoting *State v. Brady,* 2008-Ohio-4493, ¶ 23; *see also, Price* at ¶ 21-22 (Because R.C. 2929.19(B)(2)(g)(iii) indicates that the trial court "may in its discretion grant or deny" a motion for jail-time credit, the review is an "abuse of discretion"). Thus, in this instance, because Brigner did not raise the issue of jail-time credit on direct appeal, we apply an abuse of discretion standard.

II. Analysis

{¶22} In the instant case, Brigner does not challenge the court's calculation of the number of days of jail-time credit to which he is entitled. Rather, he challenges the way the trial court applied the jail-time credit. He contends that the 443 days of credit

should be applied to each concurrent sentence, such that he would have a total of 886 days total credit subtracted from the aggregate sentence amount.

{¶23} " 'The practice of awarding jail-time credit, although now covered by state statute, has its roots in the Equal Protection Clauses of the Ohio and United States Constitutions. ' " *State v. Hodge,* 2022-Ohio-2748, ¶ 37 (4th Dist.), quoting *State v. Fugate*, 2008-Ohio-856, ¶ 7. As the Supreme Court of Ohio has observed,

> Recognizing that the Equal Protection Clause does not tolerate disparate treatment of defendants based solely on their economic status, the United States Supreme Court has repeatedly struck down rules and practices that discriminate against defendants based solely on their inability to pay fines and fees. * * * Relying on the principle set forth in such cases, courts have held that defendants who are unable to afford bail must be credited for the time they are confined while awaiting trial. The Equal Protection Clause requires that *all* time spent in any jail prior to trial and commitment by [a prisoner who is] unable to make bail because of indigency *must* be credited to his sentence.

Fugate at ¶ 7 (Citations and eternal quotation marks omitted.) This principle is codified in R.C. 2967.191. The version of R.C. 2967.191, applicable at the time Brigner was sentenced, states, 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[.]" The Ohio Administrative Code also spells out rules for the courts to comply with the requirements of equal protection. *State v. Smith,* 2021-Ohio-4091, ¶ 17 (10th Dist.), citing *Fugate* at ¶ 11.

{¶24} In the instant case, the trial court ran the eight-year sentence of Count 4 and the eight-year sentence of Count 5 concurrent to each other, but consecutive to the four-year sentence of Count 6. Brigner's aggregate sentence is 12 years. The trial

court granted Brigner 443 days of jail-time credit in its July 6, 2016 nunc pro tunc entry and applied it to the aggregate sentence. Further, ODRC has credited Brigner with this amount.

{¶25} In Brigner's July 7, 2023 motion and on appeal, citing *Fugate,* he argues that because Counts 4 and 5 were to run concurrently to one another the trial court should have applied 443 days to each of those counts such that an additional 443 days of jail-time credit should be added to his sentence. In its September 20, 2023 decision denying Brigner's motion, the trial court disagreed with Brigner's argument, underscoring that the part of the *Fugate* case cited by Brigner was factually inapposite because it dealt with concurrent sentences only. The trial court correctly discerned that *Fugate* does not contemplate that offenders receive doubled, trebled, multiplied, or otherwise stacked sentences. This is because Brigner's ultimate sentence results in a consecutive jail sentence.

{¶26} We turn to the version of the statutes in effect at the time Bringer was sentenced. At that time, the applicable version of R.C. 2929.19(B)(2)(g)(i) states that:

> (B)(2) * * * [I]f the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:
>
> * * *
>
> (g)(i) Determine, notify the offender of, and include in the sentencing entry the number of days that the offender has been confined for any reason arising out of the offense for which the offender is being sentenced and by which the department of rehabilitation and correction must reduce the stated prison term under section 2967.191 of the Revised Code.

Further the version of R.C. 2967.191 applicable at the time of Brigner's sentencing, governs jail-time credit and provides in pertinent part as follows:

> 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, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, and confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term, as determined by the sentencing court under division (B)(2)(g)(i) of section 2929.19 of the Revised Code, and confinement in a juvenile facility. The department of rehabilitation and correction also shall reduce the stated prison term of a prisoner * * * by the total number of days, if any, that the prisoner previously served in the custody of the department of rehabilitation and correction arising out of the offense for which the prisoner was convicted and sentenced.

{¶27} Brigner relies on the Supreme Court of Ohio's case of *State v. Fugate* in support of his position, acknowledging that he has been sentenced to concurrent terms, but ignoring that those terms run consecutively to one of the terms. *Fugate* states that

> [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, 2008-Ohio-856, ¶ 12; *see also, State v. Miller,* 2024-Ohio-913, ¶ 8 (4th Dist.) and *State v. Travis*, 2023-Ohio-33, ¶ 12 (5th Dist.). However, *Fugate* goes on to state:

> When 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.

Fugate at ¶ 22.

{¶28} *Fugate* discusses the distinctions in jail-time credit for concurrent sentences versus jail-time credit for consecutive sentences in the directives of the Adm.Code 5120-2-04(F) [now E] and 5120-2-04(G) [now F]. *Fugate* further explains "[t]hese two directives make clear that although concurrent and consecutive terms are to be treated differently when jail-time credit is applied, the overall objective is the same: to comply with the requirements of equal protection *by reducing the total time that offenders spend in prison after sentencing by an amount equal to the time that they were previously held*." (Emphasis added.) *Fugate* at ¶ 11. In addition, as *Fugate* points out, with consecutive prison sentences, because prison terms are served one after another, credit applied to one term of imprisonment gives full credit by reducing the entire length of the sentence. *Fugate* at ¶ 26. (Lundberg Stratton, J. concurring.) The trial court properly observed that applying the jail-time credit to Brigner's sentence in the way he suggests would result in multiplying, or "stacking," the period of confinement by the number of offenses. Applying jail-time credit to each concurrent offense in a case like this, where there is a consecutive sentence also, results in Brigner receiving more jail-time credit than the time he has actually been confined related to the offenses. *See Fugate* at ¶ 21; *State ex rel. McPherson v. Bureau of Sentence Computation*, 2020-Ohio-580, ¶ 5 (8th Dist.). Put simply, Brigner should not receive more jail-time credit than days he actually served in jail or prison pending sentencing. Therefore, we find that the trial court did not abuse its discretion in computing and properly applying Brigner's jail-time credit.

CONCLUSION

{¶29} As to Case No. 23CA14, we must assume regularity in the proceeding because Brigner did not provide this court with a transcript. Further, Brigner was well-aware of the State's requested restitution amount when he signed the plea agreement, and he did not object, nor raise the issue at any time during a direct appeal. Therefore, his claims regarding the restitution order are barred by res judicata and outside of the scope of this court's jurisdiction. Even if res judicata did not apply, Brigner has not demonstrated plain error as to restitution.

{¶30} As to Case No. 23CA23, the trial court properly computed jail-time credit for Brigner as it is impermissible and contrary to law and equal protection principles to "stack" jail-time credit as he suggests. We therefore find no error in these consolidated appeals and affirm the trial court as to Case No. 23CA14 and Case No. 23CA23.

JUDGMENTS AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENTS ARE AFFIRMED and appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the ATHENS 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.

Abele, J. and Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.