

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-6
JOHN G. MARINI	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Tuscarawas County Court of Common Pleas Case No. 2008-CR-166

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 1, 2009

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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*Delaney, J.*

{¶1} Defendant-Appellant, John Marini, appeals from the judgment of the Tuscarawas County Court of Common Pleas, denying his Motion to Modify/Correct Sentence. The State of Ohio is Plaintiff-Appellee.

{¶2} On July 28, 2008, Appellant was indicted in case number 2008-CR-166 on two counts of breaking and entering, in violation of R.C. 2911.13 and one count of possession of criminal tools, in violation of R.C. 2923.24. Appellant was originally arrested in case number 08-CR-166 on June 1, 2008. At that time, Appellant had an unrelated, pending case (case number 08-CR-55) in front of Judge O'Farrell based on an indictment issued in January, 2008, for one count of breaking and entering, one count of felony theft, and once count of possession of criminal tools.

{¶3} On July 30, 2008, Appellant was arraigned in case number 08-CR-166. He pled not guilty to the charges and was issued a \$5,000.00 bond and his request for recognizance bond was denied based on his prior criminal record.

{¶4} Throughout the pendency of case number 08-CR-166, Appellant remained incarcerated and held on bond in this case.

{¶5} On August 25, 2008, Appellant pled guilty to one count of breaking and entering in case number 08-CR-166. The trial court set a sentencing date of October 8, 2008.

{¶6} On September 23, 2008, Appellant appeared before Judge O'Farrell in case number 08-CR-55 and pled no contest to and was found guilty of all three counts of the indictment in that case. The defendant was sentenced to four months

incarceration in the Tuscarawas County Jail, which was retroactive to June 1, 2008, and concluded on October 1, 2008.

{¶7} On October 9, 2008, Appellant appeared for sentencing on case number 08-CR-166 in front of Judge Thomakos, who sentenced Appellant to ten months in prison and gave Appellant credit for seven days served in jail, from October 2, 2008, to October 8, 2008. The record is devoid of any evidence that Appellant objected to this sentence after it was imposed.

{¶8} On November 3, 2008, Appellant filed a pro se Motion for Jail Time Credit. Said motion was denied on November 25, 2008. On December 8, 2008, Appellant filed a Motion to Correct/Modify Sentence, which was denied on January 6, 2009. It is from that judgment that Appellant now appeals.

{¶9} Appellant raises one Assignment of Error:

{¶10} “I. THE TRIAL COURT ERRED IN THE JAIL TIME COMPUTATION WHEN IT GAVE THE APPELLANT ONLY SEVEN DAYS OF JAIL TIME CREDIT.”

I.

{¶11} In his sole assignment of error, Appellant argues that he is entitled to jail time credit in case number 08-CR-166 for the time period running from June 1, 2008, to October 1, 2008. He argues that because he was originally incarcerated under case number 08-CR-166 on June 1, 2008, that he is entitled to credit for any time he served in jail leading up to his sentencing in this case.

{¶12} We would initially note that the issue of crediting a sentence with jail time served is one which is properly raised on direct appeal. *State v. Hunter*, 10th Dist. No. 08AP-183, 2008-Ohio-6962, citing *State v. Thorpe* (June 30, 2000), 10th Dist. No.

99AP-1180. However, in the present case, Appellant did not object to the jail credit at the time of sentencing and did not appeal from the sentencing. Because Appellant failed to raise this issue in the trial court when it could have corrected any error, he has forfeited all but plain error for the purposes of appeal. *Id.*, citing *State v. Goings*, 10th Dist. No. 07AP-644, 2008-Ohio-949, at ¶ 7 (no objections were raised at the sentencing hearing regarding defendant's jail time credit; therefore, Appellant has waived all but plain error), citing *State v. Fugate*, 10th Dist. No. 06AP-298, 2006-Ohio-5748, at ¶ 19, reversed on other grounds, *State v. Fugate*, 117 Ohio St.3d 261, 883 N.E.2d 440, 2008-Ohio-856; *State v. Fife*, 2nd Dist. No.2006-CA-33, 2007-Ohio-6588, at ¶ 12 (failure to raise error with regard to jail time credit requires plain error for reversal); *State v. Miller*, 4th Dist. No. 07CA2, 2007-Ohio-5931, at ¶ 14 (defendant did not raise his jail time credit argument in the trial court, thus, he has forfeited all but plain error).

{¶13} R.C. 2967.191 provides in pertinent part, as follows:

{¶14} “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.”

{¶15} The case law confirms that the felony offense of conviction must be a legal cause for the defendant’s prior confinement in order for that confinement to be creditable. As the Tenth District Court of Appeals stated in *State v. Smith* (1992), 71

Ohio App.3d 302, 304, 593 N.E.2d 402, “R.C. 2967.191 requires that jail credit be given only for the time the prisoner was confined for any reason arising out of the offense for which he was convicted and sentenced. It does not entitle a defendant to jail-time credit for any period of incarceration which arose from facts which are separate and apart from those on which his current sentence is based.”

{¶16} Ohio courts have repeatedly recognized that time spent serving a jail sentence in another case will not be credited toward another felony case, even if the felony was pending at the time of the service of the jail sentence. In *Smith*, supra, the court rejected a claim for credit for serving a misdemeanor sentence while the felony charge was pending. As the court in *Smith*, supra, stated: “[A]ppellant was incarcerated on a prior misdemeanor criminal conviction which was completely unrelated to the offense for which he was later sentenced by the trial court. Because the sentence in the municipal court case did not arise out of the offense for which appellant was convicted in this case, appellant is not entitled to additional jail-time credit.” *Smith*, 71 Ohio App.3d at 304.

{¶17} Similarly, the court rejected a claim for credit in *State v. Logan* (1991), 71 Ohio App.3d 292, 301, 593 N.E.2d 395, stating that, “Since defendant was incarcerated on a prior unrelated conviction during the pendency of the present case, he is not entitled to jail time credit.”

{¶18} In *State v. Goehring*, 6th Dist. No. OT-03-035, 2004-Ohio-5240, the defendant sought credit for time he spent incarcerated after conviction in Municipal Court. The appellate court affirmed the trial court’s ruling that the defendant “cannot under any stretch of the imagination receive credit against his felony time for those days

he spent incarcerated in Municipal Court after sentence on separate and distinct matters.” Id. at ¶ 5 (quoting trial court’s ruling). The Sixth District concluded that defendant “was not entitled to jail-time credit after November 4, 2002, when he was convicted and sentenced on the unrelated charges.” Id. at ¶ 11.

{¶19} In *State v. Brown* (2001), 2nd Dist. No. 18427, the appellate court rejected the defendant’s claim for credit for a period of time during which the defendant was serving a misdemeanor sentence imposed in Municipal Court on an unrelated case. Because the incarceration was due to a separate misdemeanor offense, the appellate court concluded that the trial court properly refused to give credit for that period.

{¶20} In *State v. Tuck* (1996), 2nd Dist. No. 95-CA-23, the defendant admitted that he was seeking credit for a time period when “he was also serving misdemeanor sentences at the same time he was in pre-trial confinement awaiting trial on the felony charges.” The appellate court rejected the claim for credit, citing the general principle that “a defendant is not entitled to jail time credit for any period of incarceration which arose from charges apart from those for which the present sentence is based.”

{¶21} In *State v. Struble*, 11th Dist. No. 2005-L-115, 2006-Ohio-3417, the defendant had remained in the Lake County jail after having been sentenced to nine months in prison in that county. When he was later convicted in Ashtabula County and sought credit in that latter county for the post-sentence jail time completed in Lake County, the appellate court rejected the claim, concluding that “R.C. 2967.191 is inapplicable when the offender is imprisoned as a result of another unrelated offense.” Id. at ¶ 11. “[T]here is no jail-time credit for time served on unrelated offenses, even if

*that time served runs concurrently during the pre-detention phase of another matter.”*  
Id. at ¶ 11 (emphasis added).

{¶22} Under the foregoing analysis, Appellant cannot receive double jail time credit for confinement while serving the sentence imposed on case number 08-CR-55. Such sentences arose out of unrelated cases. The language of R.C. 2967.191 does not allow the convicted person to turn his confinement for various convictions into a “bank” of jail time that he “withdraw” as needed for pending felony offenses.

{¶23} When different courts impose sentences at separate times, the sentences at best are only partly concurrent, and there is no requirement that courts arrange their cases in such a way as to maximize concurrency. *State v. Carter*, 2nd Dist. No. 1580, 2002-Ohio-6387, ¶¶ 8-10. It is one thing to hold, such as the Supreme Court did in *State v. Fugate*, 117 Ohio St.3d 261, 883 N.E.2d 440, 2008-Ohio-856 that jail time credit earned in two cases must be applied to both cases when the sentences are imposed concurrently by the same court. It would be quite another to hold in the present case that confinement while serving non-concurrent jail time must be awarded as “jail time” to reduce a later-imposed felony sentence.



For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. SHEILA G. FARMER

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HON. JULIE A. EDWARDS