

IN THE SUPREME COURT OF OHIO

06-2289

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

DANIEL J. FUGATE,

Defendant-Appellant.

On Appeal from the
Franklin County Court
of Appeals, Tenth Appellate
District.

Court of Appeals
Case No. 06AP-298

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT DANIEL J. FUGATE**

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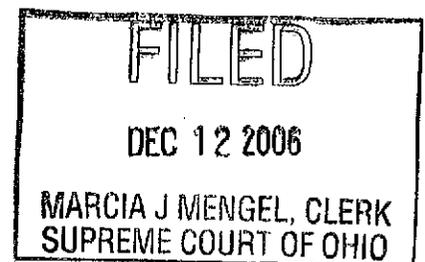


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I. EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND MATTERS OF PUBLIC AND GREAT GENERAL INTEREST

The appellate decision in this case permits trial courts to unlawfully deny jail credit on all cases involving concurrent terms. A criminal defendant should be entitled to credit for the number of days actually incarcerated against one charge if the sentences run consecutively and against both charges if two sentences run concurrently. It is the aggregate sentence that should be reduced by jail credit. Instead, the Tenth District confused precedent and incorrectly applied the justification for not awarding jail credit on multiple consecutive terms to cases involving multiple concurrent terms.

This case presents a narrow, easily decided issue that directly impacts thousands of criminal sentences and addresses a conflict between appellate districts on a fundamental constitutional issue – equal protection under the law. Additionally, the decision of the Tenth District creates great confusion for the Department of Rehabilitation and Corrections in its handling of sentences and the manner in which it awards jail credit. Further review is essential to address this error.

Appellant was held on two cases while awaiting trial: the case on appeal and a probation revocation motion. The court sentenced Appellant to concurrent terms of 12 months on the probation case and 24 months on the new charges. The court applied 213 days of jail credit to the probation case only, which was the shorter term. This had the effect of rendering the jail time credit meaningless as it left the greater sentence undiminished.

The Tenth District Court of Appeals upheld the sentence, finding that to award credit against multiple concurrent terms would discriminate in favor of the defendant charged with more than one offense over the defendant charged with only one offense. In reality, the court's decision improperly discriminates in favor of the defendant who is free on bond and who receives multiple concurrent terms over the defendant who is held in lieu of posting bond and who receives multiple concurrent terms. The decision violates the express language of R.C. 2967.191 and constitutes a denial of equal protection under the United States Constitution. A defendant who is incarcerated while awaiting trial because of an inability to post bond will serve a longer term of incarceration over a similarly situated defendant who has the means to post bond. The Tenth District's decision upholds this disparate treatment, thereby, violating concepts of equal protection and fundamental fairness.

In addition, the Tenth District's holding is in direct conflict with the holdings of the First, Fifth, and Twelfth Appellate Districts on the following issue:

Whether a defendant who is sentenced on multiple charges is entitled to credit for days actually incarcerated against all sentences that are to run concurrently.

The Tenth District refused to certify a conflict even though its holding expressly conflicted with the principle set forth by the three other districts. The Tenth District argued that the facts in the present case differed from the circumstances in the three other decisions, while not addressing the rule of law applied in those cases. It is the underlying rule of law that was applied by the First, Fifth, and Twelfth Districts that is in direct conflict with the holding of the Tenth District.

Finally, the decision below creates a substantial conflict for the Department of Rehabilitation and Corrections in the manner in which it credits jail time. The Tenth District has held that a criminal defendant is not entitled as a matter of law to jail credit against more than one concurrent term. Three other appellate districts have held that criminal defendants are entitled as a matter of law to jail credit against each concurrent term. Review by this case is warranted to resolve this disparate treatment of prisoners and to clarify policy and procedure for the Department of Corrections.

II. STATEMENT OF THE CASE

On June 30, 2005, the Franklin County Grand Jury indicted Daniel J. Fugate, defendant-appellant (hereinafter, Appellant), on one count of burglary, a violation of R.C. 2911.12 and a felony of the second degree, and on one count of theft, a violation of R.C. 2913.02 and a felony of the fifth degree.

On February 2, 2006, a jury trial commenced in the Franklin County Common Pleas Court. On February 9, 2006, the jury found Appellant not guilty of burglary as a felony of the second degree. The jury found Appellant guilty of the lesser offense of burglary as a felony of the third degree and guilty of the offense of theft, as indicted. The court sentenced Appellant to a term of Two (2) years incarceration with respect to these charges and to a concurrent term of One (1) year in case 05CR-1414¹. The court recognized that Appellant had been held 213 days in jail while awaiting trial. The court credited all the time against the shorter term that was imposed in the revocation case (05CR-1414) and recognized 0 days in the present case. In effect, the court did not give jail time credit against the aggregate sentence. Because the court did not give jail credit against *each* concurrent term, the jail credit did not diminish Appellant's sentence.

¹ In Case 05CR-1414, the court revoked Appellant's probation because of his conviction in this case.

Daniel Fugate appealed the judgment to the Franklin County Court of Appeals. In a decision rendered on November 2, 2006, the Court affirmed the conviction and sentence. On December 7, 2006, the Court of Appeals denied Appellant's motion to certify the case to the Supreme Court because of a conflict between appellate districts. Appellant is now before this Court seeking leave to appeal in a felony case that involves a substantial constitutional question and matters of public and great general interest.

III. STATEMENT OF FACTS

Stephanie Hannah had resided in Hilliard, Ohio with her boyfriend, Scott Williams, until Scott assaulted her, moved out, and was incarcerated. While she was awaiting Scott's release from jail, Stephanie called Appellant and asked him to move into the recently vacated apartment. Appellant, who was a former boyfriend, stayed there for several days, moving his clothing with him. The two began an intimate relationship that ended by mutual agreement (and the release of Scott from jail). Within days of this separation, Stephanie's house was burglarized. A neighbor testified that she observed a person she identified as Appellant removing items from the apartment. Appellant, who argued that the witness mistook the incident for an earlier move, maintained his innocence. The main issue at trial was the identity of the burglar.

According to Stephanie, she went to stay with her mother for a couple of nights at the end of the 3-4 day fling with Appellant. Stephanie testified that she returned to her apartment with Scott Williams on the morning of June 16, which she described as being on a Saturday or Sunday, right after Scott returned from jail.² They discovered that the

² Stephanie indicated that Scott, who is now her fiancé, would have been angry if he discovered that she had been having sex with Appellant while he was incarcerated. Stephanie also indicated that on an earlier separation from Scott, she had a short romantic relationship with Antonio Stewart, who was coincidentally taken to jail on charges that Stephanie insisted were unrelated to her.

front and bedroom doors had been kicked in. Several items of property were taken, including a 27-inch television, a surround-sound system with a DVD player, a 2-1/2 karat diamond ring, a pair of diamond earrings, about 200 DVDs and 400 CDs, and a bottle of Crown Royal alcohol. Stephanie called the police and later spoke to several of her neighbors. One of her neighbors, Amy Hannah, described a person resembling Appellant as having recently moved some property from the apartment to a white van.

Stephanie testified that "the next day or the day after," she went to her mother's home.³ She saw Appellant pull up with a teenager, Dolly Marcum, and Marcum's young son. Stephanie approached Appellant and asked him why he broke into her house and took her things. According to Stephanie, Appellant said that he did but that she couldn't prove it. Stephanie testified that no one else would have heard the exchange because they were too far away. Stephanie's mother, Sue Hannah, testified that she came running up just in time to hear Appellant confess. The confession was apparently the only part of the exchange that Sue Hannah claimed to have heard.

Sue Hannah called 911 and told the police that there was a confrontation on the street with a lot of people, that there could be violence, and that someone was being assaulted. Hannah admitted that the police report was false, but she made the statement to get the police to come sooner. The police, responding to what they believed was a dire situation, appeared quickly and arrested Appellant.

Stephanie testified that she saw the bottle of Crown Royal alcohol that had been taken from her house sitting between the front seats of the car. The police never

³ Stephanie's description of days and events was confused and inconsistent with ascertainable facts. June 16, 2005 was a Thursday and not a Saturday or Sunday. Moreover, the testimony of the witnesses, including the police, was that the incident in front of her mother's home took place on June 16, which was the day the burglary was reported, as opposed to "the next day or the day after."

received a report from Stephanie or her mother about the “confession” or the discovery of the bottle of Crown Royal. This “evidence” was news to the investigating detectives and officers involved in the case. No bottle was recovered on Appellant’s arrest.

Stephanie estimated that the burglary took place between June 13 and June 16. Contrary to the testimony of numerous other witnesses, Stephanie insisted that Appellant did not have a key to her apartment. Stephanie also noted that she had various prior convictions on theft charges, including of two misdemeanor theft charges in 2002, of unauthorized use of property in 2002, and of misdemeanor theft in 2004.

Amy Hannah, Stephanie’s neighbor at 5380 Bridlecreek Way in Hilliard, testified that she was at home on the weekend of June 12 through 16.⁴ Between June 12 and June 16, there was a lot of activity at the house. On one of the days, while she was sitting outside her apartment smoking, she observed a man and a woman move some things out of Stephanie’s apartment and put them in a white van. This activity was not unusual, however. Two weeks earlier, Amy saw Stephanie move her things out of the apartment. A man (likely Scott Williams) moved out as well. According to Amy, there were many occasions when Stephanie moved things in and out of her apartment.

Amy was not certain which day between June 12 and 16 that she saw the white van. On June 16, she was interviewed by a Columbus Police Officer about the burglary. She described the man she observed as being about 5’10”, between 160 and 170 pounds, and having dark hair. He had a tattoo on one bicep, but she was unsure which arm. The female that accompanied him was between 5’3” and 5’4”, weighed about 110 to 115 pounds, and had blond hair in a ponytail and a tattoo on her lower back. From a color photograph given to her by Stephanie, she identified the man as being Appellant.

⁴ Amy Hannah was unrelated to Stephanie Hannah and did not know her or any members of her family.

Amy did not believe that the woman was Stephanie. Numerous witnesses, however, testified that Appellant did not drive and did not own a vehicle. The only white van known to any of the witnesses was owned by Stephanie's mother, Sue Hannah. Stephanie used the vehicle to move property to and from the apartment shortly after Appellant moved in with her. In addition, of all the people Appellant had contact with during the week preceding his arrest, almost all of whom testified, only Stephanie had a tattoo on her lower back.

The defense presented testimony from each person it was able to identify as having contact with Appellant during the affidavit period. Holly Gardner, Appellant's oldest sister and a home health aid person, testified that she knew that Appellant was staying with Stephanie because he moved all his clothes from his mother's house. Holly believed from the discussions that her brother had a key to the apartment.

Sarah Moore, Appellant's cousin, picked up Appellant at a 7-11 near Stephanie's apartment in early June of 2005. As they were driving away, Stephanie called her cellphone to make sure that Appellant had a house key so that he could get back into the apartment. When Sarah turned to ask Appellant about the key, he responded by dangling a key and said that he had it. Sue Ann Thompson was also in the van with Sarah Moore and Appellant. She was sitting next to them and could hear the exchange about the key.

Mary Fugate, Appellant's mother, testified that Appellant, who did not have a license or access to a white van, moved his clothing from her home to Stephanie's apartment. Mrs. Fugate never saw her son with a new television, stereo equipment, CDs, or DVDs, even after he returned to her home.

Dolly Marcum, Appellant's current girlfriend, testified that neither she nor Appellant had access to a white van. Appellant never appeared with new property like a television, stereo equipment, DVDs, or CDs, and he never had a windfall of cash.

Several days after they started dating, Dolly drove Appellant to her mother's home on Moler Street, across from Stephanie's mother's home. According to Dolly, Stephanie and her mother came out of their house and accused Appellant of taking things from Stephanie's apartment. Appellant denied taking anything.

This exchange was also witnessed by John Kohler, Dolly's brother-in-law and an employee of the Ohio State Fire Marshall. Kohler saw Stephanie strike Appellant in the face and accused him of burglarizing her apartment. Appellant seemed shocked by the accusation and told Stephanie that he did not have her things.

Bobbie Jo Marcum, Dolly's sister and fiancée of John Kohler, was also a witness to the exchange. Ms. Marcum saw Stephanie approach Dolly and Appellant and accuse Appellant of breaking into her apartment. Stephanie used foul language and struck Appellant. Appellant denied breaking into her home and walked away. Ms. Marcum further noted that Stephanie was messed up on "pills and things" at the time.

Appellant maintained that Amy Hannah had been mistaken about the time she saw Appellant with the white van. The only person among the circle of friends and relatives who owned a white van was Stephanie's mom. Stephanie's brother David had used the van to help Appellant and Stephanie move some things in and out of the apartment on June 8 or 9. They returned the television to the apartment and moved some of Stephanie's clothing. They removed a box of pictures of her father from the

apartment because they did not want Scott to tear them up. Moreover, Stephanie is the only petite blonde that he knows who has a tattoo on her lower back.

According to Appellant, Stephanie gave him a key to the apartment when he moved in. She claimed that she wanted to get married and have children. They were together for about a week and separated around June 13, 2005.

Appellant vehemently denied taking anything from Stephanie's apartment, except for his clothing. Like Stephanie, Appellant had a long record of theft offenses. He pled guilty to receiving stolen property charges in 2000 and 2004. In 2005, after getting out of prison, he pled guilty to receiving a stolen vehicle motor.

IV. ARGUMENT

FIRST PROPOSITION OF LAW

A defendant who is sentenced on multiple charges is entitled to credit for days actually incarcerated against all concurrent terms. The failure to award jail credit against all concurrent terms violates R.C. 2967.191 and the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution.

The trial court imposed concurrent terms of twenty-four months for the offenses in the present case and twelve months following the termination of probation on an older conviction. Appellant had been held on both charges. The trial court recognized 213 days of jail credit against the sentence in the probation case but no time on the newer charges. This action was incorrect. In order for Appellant to benefit from any jail time credit, the trial court was required to award it against the *aggregate term*. In other words, jail time credit is awarded against *each* concurrent term or once against consecutive terms. To do less renders the jail time credit meaningless. Moreover, the failure to fully award jail time credit denies equal protection to a defendant who is

incarcerated in lieu of posting bond by treating him differently from a defendant who has the means to secure his freedom while awaiting trial.

Section 2967.191 of the Revised Code states in pertinent part, that an imposed prison term shall be reduced 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." Three appellate districts have interpreted this provision as requiring jail credit against all concurrent terms, even when imposed for unrelated charges. In *State v. Gregory* (1995), 108 Ohio App. 3d 264, the First Appellate District reversed a judgment in which the trial court awarded full jail time credit against a dismissed count but no jail time credit against the offense for which the defendant was sentenced. The Court held that the defendant was entitled to jail time credit against his prison term. Moreover, the Court emphasized that if the defendant had been convicted of both counts, he would have been entitled to jail credit against all concurrent terms.

Here, while Gregory was held pursuant to both charges, one of those charges arose "out of the offense for which [Gregory] was convicted and sentenced." R.C. 2967.191 does not give the trial court discretion to select the trafficking charge instead of the probation violation charge for the allocation of credit for the jail time, thereby preventing Gregory from receiving credit for the time in jail. This is not a matter of double counting. Gregory is merely entitled to one-for-one credit for each day he spent in jail under the probation-violation charge. *Had he been convicted of the trafficking charge, he would then be entitled only to credit for the same one-for-one number of days actually incarcerated against one charge if the sentences were to run consecutively, and **against both charges if the sentences were to run concurrently.*** See *State v. Callender*, 1992 Ohio App. LEXIS 485, (Feb. 4, 1992), Franklin App. No. 91AP-713, unreported. (Emphasis added)

Similarly, in *State v. Carroll*, Fairfield App. No. 01 CA 48, 2002-Ohio-764, the Fifth District reversed a judgment that failed to award credit against concurrent terms from different counties. At the time of commission of felony offenses in Fairfield County,

Carroll was on community control in both Ross County and Franklin County. The Fairfield County Common Pleas Court sentenced Carroll to consecutive ten-month sentences. Ross County credited Carroll with 170 days of jail credit. Fairfield County then denied Carroll's motion for jail time credit, stating that she had already received credit on the case in Ross County. The Fifth District disagreed and held accordingly,

Appellant is entitled to credit for the same one for one number of days actually incarcerated against one charge if the sentences were to run consecutively, and against both charges if the sentences were to run concurrently. *State v. Gregory* (1995), 108 Ohio App.3d 264, 670 N.E.2d 547. Therefore, Appellant's time spent at CBCF time should be credited against both the Ross County and Fairfield County cases because she was concurrently serving the sentences on both cases.

Finally, in *State v. Kent* (June 14, 1999), Warren App. Nos. CA98-08-094, CA98-10-140, CA98-12-152, the Twelfth District adopted the holding in *Gregory* in determining jail credit.

The jail credit awarded in the present case was rendered meaningless because it was not also applied to the longer, undiminished prison term, as the following graphic demonstrates. The term on the probation case was reduced to 152 days. Appellant would serve that reduced term while serving the full sentence in the present case.

----- [Jail credit of 213 days applied to probation case]
----- [Sentence of 12 months – probation case]
----- [Sentence of 24 months – present case]

In addition, the sentence imposed below violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The United States Supreme Court has long been sensitive to the treatment of indigents in the criminal justice system. In *Griffin v. Illinois* (1956), 351 U.S. 12, 19, Justice Black wrote that "[t]here can be no equal justice where the kind of trial a man gets depends on the

amount of money he has." In *Griffin* the Court struck down a practice of granting appellate review only to persons able to afford a trial transcript. Since then, the Supreme Court has held that a state cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine, *Williams v. Illinois* (1970), 399 U.S. 235, and that a State cannot convert a fine imposed under a fine-only statute into a jail term were the defendant is indigent and cannot immediately pay the fine in full, *Tate v. Short* (1971), 401 U.S. 395. In *Tate*, the Supreme Court held that incarcerating an indigent for nonpayment of a fine violates the Equal Protection Clause.

Other courts have extended the principle set forth in *Williams* and *Tate* to recognize that a criminal defendant who is held in jail for failure to post a bond is entitled to receive credit for the days of incarceration against her sentence. "Where, for whatever reason, a defendant remains in jail prior to his trial[,] he must be given credit on the statutorily fixed sentence ultimately imposed for all periods of actual confinement." *White v. Gilligan* (1972), 351 F. Supp. 1012, 1014. This requirement enforces the Fourteenth Amendment right to equal protection of the law. *Workman v. Cardwell* (1972), 338 F. Supp. 893. The holding in *Workman* is based upon the following reasoning:

The net effect of not crediting this petitioner with the time he spent in jail prior to trial results in the serving of a longer term in prison than he would have served had he been released on bail prior to trial* * *. Since indigency is the sole reason why the petitioner was in jail, fundamental fairness seems to require this Court's intervention.

Workman, at 899.

The Second District Court of Appeals adopted the *Workman* standard in *State v. Rawlings* (1973), 34 Ohio App.2d 63, and reached the "unavoidable conclusion" that credit must be given for jail time when a criminal defendant is held on high bond while awaiting trial. The Fourth District applied Equal Protection analysis in *State v. Whitaker*, 2003-Ohio-3231, in holding that,

Regardless of whether bond is set, made, or denied, the principle of equal protection requires that in the imposition of sentence all accused persons be treated equally. If after trial, a defendant is found guilty and sentenced, the sentence he serves must be equal to, and no more than, any other defendant in similar circumstances. Whether the defendant had the resources to make pretrial bond is irrelevant to sentencing. Simply put, there ought not to be one standard for people with money and [one for] people without money.

The principle contained in *Whitaker* applies to the present case, while the facts are distinguishable. The Court in *Whitaker* ultimately denied the defendant's request for jail time credit against all terms in a *consecutive* sentence. This would, as indicated above, advantage a defendant improperly over those who are not held while awaiting trial. On the other hand, defendants who are held on multiple charges and who receive jail credit against only one of a series of concurrent terms, are disadvantaged in comparison with those who can post bond. There would be an Equal Protection violation. Further review is warranted.

SECOND PROPOSITION OF LAW

A jury verdict that is not supported by sufficient credible evidence violates the due process clauses under the state and federal Constitutions.

The state's case rested almost exclusively on the testimony of a witness who said that she saw Appellant and a young woman with a tattoo on her lower back move property from Stephanie's apartment into a white van. The witnesses at trial conceded

that the only woman known to the parties who had such a tattoo was Stephanie and the only white van known to the wide circle of friends, relatives, and neighbors was owned by Stephanie's mother. The state's critical eyewitness, who was uncertain as to the exact date and time of her observations, was very likely describing an event that took place well before the burglary. The neighbor testified that the events happened over a weekend – a period before Appellant and Stephanie separated and well before the actual burglary.

In the absence of reliable testimony from Amy Hannah, there was no credible evidence that Appellant was involved in the theft of property from Stephanie Hannah's apartment. As a result, the verdict of the trial court was defective .

Due process under the Fifth and Fourteenth Amendments requires not just that conviction be based upon some evidence, but that there be sufficient evidence to justify a rational trier of fact finding the accused's guilt to have been proven beyond a reasonable doubt. *In re Winship* (1970), 397 U.S. 358; *Jackson v. Virginia* (1978), 443 U.S. 307. The guarantee of "due course of law" contained in Article I, Section 16 of the Ohio Constitution, when read together with Sections 1 and 19 of Article I, is substantially equivalent to the due process guarantees of the federal constitution. *Peebles v. Clement* (1980), 63 Ohio St. 2d 314; *State ex rel. Heller v. Miller* (1980), 61 Ohio St. 2d 6.

There was insufficient evidence to support a finding that Appellant committed the charged offenses. Further review is warranted.

V. CONCLUSION

The holding of the Tenth District improperly denies jail credit for concurrent sentences in violation of R.C. 2967.191. By awarding credit against only one of multiple concurrent terms, the Court effectively denied any credit for the 213 days Appellant was incarcerated. This decision violates the Equal Protection Clauses under the state and federal Constitutions as it treats similarly situated defendants differently based on their ability to secure their release by posting bond. The holding potentially impacts thousands of criminal defendants every year. Moreover, the conflicting appellate decisions will create confusion for the Department of Rehabilitation and Corrections and result in disparate treatment of prisoners. The present case involves a substantial constitutional issue and matters of public and great general interest. Further review is warranted.

Respectfully submitted,

Franklin County Public Defender



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memo was hand delivered to the office of Kimberly Bond, Assistant Prosecuting Attorney, 373 South High St., 13th Floor, Columbus, Ohio 43215 on this the 12th day of December, 2006.



Paul Skendelas
Counsel for Defendant-Appellant

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

DANIEL J. FUGATE,

Defendant-Appellant.

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APPENDIX

Judgment Entry, November 7, 2006..... A-1
Opinion, November 2, 2006 A-2

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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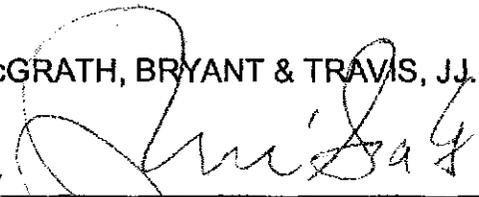
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State of Ohio,	:	
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Plaintiff-Appellee,	:	No. 06AP-298
	:	(C.P.C. No. 05CR-4367)
v.	:	
	:	(REGULAR CALENDAR)
Daniel J. Fugate,	:	
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on November 2, 2006, appellant's two assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

McGRATH, BRYANT & TRAVIS, JJ.

By  _____

Judge Patrick M. McGrath

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Council
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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, : No. 06AP-298
 : (C.P.C. No. 05CR-4367)
 v. :
 : (REGULAR CALENDAR)
 Daniel J. Fugate, :
 :
 Defendant-Appellant. : PAUL SKENDELAS
 : F.C. PUBLIC DEFENDER
 : 373 SOUTH HIGH STREET
 : 12TH FLOOR
 : COLUMBUS, OH 43215

O P I N I O N

Rendered on November 2, 2006

Ronald J. O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Daniel J. Fugate ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas convicting him of one count of burglary in violation of R.C. 2911.12(A)(3), and one count of theft in violation of R.C. 2913.02, entered upon a jury verdict. Appellant was sentenced to serve a two-year period of incarceration.¹

¹ The trial court's judgment entry reflects that appellant's two-year sentence was to be served concurrent to the sentence imposed in case No. 05CR-1414. A-2

{¶2} The facts underlying the charges in this case are as follows. In 2005, Stephanie Hannah lived at 5366 Bridlecreek Way in Hilliard, Ohio, with her boyfriend Scott Williams. In the beginning of June 2005, Scott went to jail on a domestic violence charge. While Scott was in jail, Stephanie began dating appellant. Stephanie and appellant had known each other for several years as they grew up in the same neighborhood on the southside of Columbus. Upon Scott's release from jail in mid-June, the relationship between Stephanie and appellant ended. Stephanie went to stay with her mother for a few days, and did so from approximately June 12 to June 16, 2005. When Stephanie returned to her apartment on June 16, she noticed that the apartment door had been kicked in, and several items had been taken, such as a television, a DVD player, a stereo, diamond earrings and a diamond ring, both of which were gifts from Scott, a number of CD's and DVD's, and a bottle of Crown Royal alcohol. Stephanie called the police and reported the burglary.

{¶3} The police arrived at Stephanie's apartment, talked to some neighbors, and took a report. Stephanie's neighbor, Amy Hannah² told police that at some point between June 12 and June 16, 2005, she was outside smoking when she saw two people taking items from Stephanie's apartment and put them into a van. Amy gave a description of the persons she saw to the police, and the police relayed the information to Stephanie. Later that day, Stephanie showed Amy a picture of appellant, and Amy recognized him as one of the persons involved. However, a few weeks later Amy was unable to pick appellant out of a photo line-up that was presented to her by the police.

² Although sharing the same last name, Stephanie and Amy are not related, and did not know each other prior to this incident.

Although at trial, Amy did identify appellant as the man she saw taking things from Stephanie's apartment between June 12 and June 16, 2005.

{¶4} After finding the items missing from her apartment, Stephanie went back to her mother's house and ran into appellant and his girlfriend Dolly Marcum. Dolly and appellant began dating on or about June 12 or June 13, 2005. Dolly's mother lives near Stephanie's mother, and when Dolly and appellant drove up, Stephanie approached their car and noticed a bottle of Crown Royal in the vehicle. By this time, appellant had exited the car and Stephanie proceeded to confront him about the burglary. According to Stephanie, appellant said that he had her property, and told Stephanie, "you can't prove it." (Tr. at 59.) Stephanie's mother, Sue Ellen, testified that she was present and heard appellant's statements. Thereafter, Sue Ellen called the police, and said "there was a confrontation in the street with a lot of people, and there could be trouble or violence." (Id. at 229.) At trial, Sue Ellen admitted that she lied to the dispatcher, but explained that she did so to get the police to respond quickly. The police did respond, and arrested appellant a short distance away.

{¶5} On June 30, 2005, the Franklin County Grand Jury indicted appellant on one count of burglary, a felony of the second degree, in violation of R.C. 2911.12, and one count of theft, a felony of the fifth degree, in violation of R.C. 2913.02. A jury trial commenced on February 2, 2006. On February 9, 2006, the jury returned a verdict of not guilty of burglary as a second-degree felony, but guilty of the lesser-included offense of burglary as a third degree felony, and guilty of theft as indicted. The trial court sentenced appellant to two years incarceration to be served concurrent to the 12-month sentence imposed in case No. 05CR-1414. The trial court awarded zero days of jail time credit on

the instant case and 216 days of jail time credit in case No. 05CR-1414. Appellant timely appealed to this court.

{¶6} On appeal, appellant brings the following two assignments of error:

Assignment of Error No. 1:

There was insufficient evidence to support Appellant's conviction and the verdicts were against the manifest weight of the evidence. This denied Appellant due process under the state and federal Constitutions.

Assignment of Error No.2:

The trial court erred in failing to give Appellant jail time credit against each of the concurrent terms in violation R.C. 2967.191. The court's action deprived Appellant of equal protection under the Fourteenth Amendment to the United States Constitution.

{¶7} In his first assignment of error, appellant challenges both the sufficiency and the weight of the evidence. The Supreme Court of Ohio described the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, followed.)

{¶8} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact

fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, at ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Thus, a jury verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks*, supra.

{¶9} A manifest weight argument is evaluated under a different standard. "The weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Brindley*, Franklin App. No. 01AP-926, 2002-Ohio-2425, at ¶35, citation omitted. In order for a court of appeals to reverse the judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court must disagree with the fact finder's resolution of the conflicting testimony. *Thompkins*, supra, at 387. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶10} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, Franklin App. No. 02AP-35, 2002-Ohio-4503, at ¶58; *State v. Clarke* (Sept. 25, 2001), Franklin App. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), Franklin App. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), Hamilton App. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, Franklin App. No. 02AP-245, 2002-Ohio-7037, at ¶22; *State v. Hairston*, Franklin App. No. 01AP-1393, 2002-Ohio-4491, at ¶17.

{¶11} In the case before us, appellant submits the evidence to convict him of burglary and theft was insufficient and against the manifest weight of the evidence. Specifically, appellant claims that there is no credible evidence that appellant was involved in the alleged theft and burglary of Stephanie's apartment. Appellant attacks the credibility of Stephanie and Sue Ellen's testimony, referring to it as "convenient" and "unlikely to the point of being contrived." (Appellant's brief at 17.) Although appellant attacks most of the witnesses' credibility, an appellate court does not weigh credibility when considering an insufficiency of the evidence argument. *State v. Coit*, Franklin App.

No. 02AP-475, 2002-Ohio-7356, citing *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68-69. We find the testimony and the evidence, when viewed in a light most favorable to the prosecution, as we are required to do, could convince the average mind of appellant's guilt beyond a reasonable doubt.

{¶12} Amy Hannah, who knew none of the involved parties prior to this incident, testified that she saw appellant and a young woman with a tattoo on her back removing items from Stephanie's apartment. Although Stephanie is the only witness said to have such a tattoo, Amy indicated that the woman she saw with appellant was not Stephanie. Amy stated she observed these persons during the relevant time frame, to wit: between June 12 and June 16, 2005. Amy recalled seeing the persons carry out some small boxes and what appeared to be stereo equipment and things of that nature.

{¶13} Columbus Police Officer Michael Votaw, the officer who responded to the burglary report, testified that he responded to Stephanie's residence at approximately noon on June 16, 2005. Officer Votaw described that the doorjamb was damaged, and "one side was splintered pretty good." (Tr. at 178.) Officer Votaw indicated that the door would have been "forced open with a kick, or shoulder, or some type of force," and that, in his opinion, the door had obviously been forced open. (Id.) According to Officer Votaw, the apartment was somewhat ransacked and appeared as if it had been burglarized because the described items were missing from the apartment. Officer Votaw explained that he went to talk to the neighbors, and Amy Hannah provided him with a physical description of the persons she observed removing things from Stephanie's apartment. Thereafter, Officer Votaw asked Stephanie if she knew anyone matching the description, which included height, weight, age, and tattoos. Stephanie indicated that the description

sounded familiar and Officer Votaw listed the man described as the suspect. After her conversation with Officer Votaw, Stephanie testified that she went to Amy with a photograph of appellant, and Amy indicated that he was the man she saw.

{¶14} Columbus Police Officer Jerome Collins, who was a detective with the burglary squad during the time frame at issue, received Officer Votaw's report and prepared a photo line-up consisting of six photographs to take to Amy Hannah. Officer Collins explained that Amy was unable to pick anyone out of the line-up because she "could not be sure." (Id. at 197.) Amy testified that she was unable to choose between three of the six photographs in the line-up. Officer Collins explained that appellant's photograph was one of the three that Amy had selected. After Amy was unable to pick someone out of the photo line-up, Officer Collins returned with the color photograph of appellant that Stephanie had shown Amy a few weeks prior, and Amy again identified the man in the color photograph as the one she saw removing things from Stephanie's apartment.

{¶15} Stephanie and her mother, Sue Ellen, testified that appellant admitted he had Stephanie's things and that he stated Stephanie would not be able to prove it. The majority of the witnesses testifying on behalf of appellant testified that appellant had no need to force the door on Stephanie's apartment because he was living with Stephanie and had a key to her residence. Stephanie, however, testified to the contrary, and explained that appellant had just been staying with her for a few days and that he did not possess a key to her apartment.

{¶16} Appellant testified on his own behalf and stated that he did not burglarize Stephanie's apartment. Appellant also advanced the theory, through his and other

witness testimony, that he was being set-up by Stephanie. However, based on the evidence and the testimony of all the witnesses viewed in a light favorable to the state, a rational trier of fact could have found beyond a reasonable doubt that appellant was indeed guilty of the offenses of which he was convicted. Thus, we find the record contains sufficient evidence to support appellant's convictions.

{¶17} Similarly, we cannot say that the jury's verdict was against the manifest weight of the evidence. The basis for appellant's manifest weight argument is the witnesses' conflicting testimony, and the credibility of the witnesses. A conviction, however, is "not against the manifest weight of the evidence simply because the jury believed the prosecution testimony." *State v. Moore*, Montgomery App. No. 20005, 2004-Ohio-3398, quoting *State v. Gilliam* (Aug. 12, 1998), Lorain App. No. 97CA006757. The weight to be given to the evidence, and the credibility of the witnesses are issues primarily for the trier of fact. *DeHass*, supra. Further, the jury is free to believe *all*, or *any* of the testimony. *Jackson*, supra. Thus, the fact that the jury may or may not have found all of a particular witness' testimony to be credible is not a basis for reversal on manifest weight grounds. After carefully reviewing the trial court's record in its entirety, we conclude that the trier of fact did not lose its way in resolving credibility determinations, nor did the convictions create a manifest miscarriage of justice. While appellant denies that he burglarized Stephanie's apartment, the trier of fact was in the best position to determine the credibility of the testimony presented and we decline to substitute our judgment for that of the trier of fact. Consequently, we cannot say that appellant's convictions are against the manifest weight of the evidence.

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{¶18} Accordingly, appellant's first assignment of error is overruled.

{¶19} In his second assignment of error, appellant asserts the trial court erred in failing to award jail time credit against each of the concurrent sentences to which he was sentenced. At sentencing, the trial judge indicated that he was awarding 216 days of jail time credit to the 12-month sentence imposed on case No. 05CR-1414, and zero days of jail time credit to the two-year sentence imposed in the instant case. No objections were raised at the sentencing hearing; therefore, appellant has waived all but plain error. *State v. Keenan* (1998), 81 Ohio St.3d 133; *State v. Santiago*, Franklin App. No. 02AP-1094, 2003-Ohio-2877.

{¶20} Appellant maintains that he was entitled to have 216 days of jail time credit awarded to each sentence, and that the trial court's failure to do so constitutes an equal protection violation. This very issue has previously been considered and rejected by this court in *State v. Eble*, Franklin App. No. 04AP-334, 2004-Ohio-6721, discretionary appeal not allowed, 105 Ohio St.3d 1544, 2005-Ohio-2188. In *Eble*, the defendant was sentenced simultaneously on two separate cases. In case No. 00CR-10-6188, the trial court imposed a four-year prison sentence and credited the defendant with 354 days of jail time credit. In case No. 00CR-11-6803, the trial court imposed a four-year sentence and credited the defendant with zero days of jail time credit. Further, the trial court ordered both sentences to be served concurrently. On appeal, the defendant alleged that he was confined for 354 days pre-sentence on both cases. Therefore, the defendant argued that because the trial court imposed a concurrent sentence, the trial court's failure to apply 354 days of jail time credit on both cases constituted error under R.C. 2967.191. In response, this court applied prior precedent, and stated:

Applying standard rules of statutory construction, it is our interpretation of Crim.R. 32.2(D), when read in conjunction with R.C. 2967.191, that a trial court is not required to recognize duplicate or multiple pretrial detention credit. We do not believe that the legislature intended to entitle a defendant held and later sentenced on multiple offenses the right to multiply his single period of pretrial confinement by the No. of convictions entered against him. To do so would, in effect, discriminate in favor of the defendant charged with more than one offense over the defendant charged with only one offense.

Id. at ¶10, quoting *State v. Fincher* (Mar. 31, 1998), Franklin App. No. 97AP-1084, quoting *State v. Callender* (Feb. 4, 1992), Franklin App. No. 91AP-713.

{¶21} We find no reason to depart from this court's prior precedent. Thus, pursuant to *Eble*, and the cases upon which it relied, we find that the trial court did not err in failing to credit appellant with duplicate pretrial detention credit for any of the time he was held simultaneously on the two cases.

{¶22} In *Eble*, the defendant also argued, as appellant does here, that the failure to award jail time credit in each sentence violates his equal protection rights because it discriminates against defendants who have received concurrent prison sentences. In *Eble*, we stated that "[w]hen a party argues that a law that is impartial on its face is applied in a manner that improperly discriminates between similarly situated persons, 'there is no denial of equal protection unless an element of intentional or purposeful discrimination is shown.'" Id. at ¶16, quoting *Stratford Chase Apartments v. City of Columbus* (2000), 137 Ohio App.3d 29, 32. Because the record contained no evidence or allegations of intentional or purposeful discrimination, this court concluded that the defendant's constitutional claims failed. Like the defendant in *Eble*, appellant has not presented any evidence, nor even alleged, any intentional or purposeful discrimination in

the application of R.C. 2967.191. We reiterate, as we did in *Eble*, "that to award [a] defendant multiple pretrial detention credit when he is held and sentenced on more than one offense would discriminate in his favor, over the defendant charged with only one offense." *Id.* at ¶17.

{¶23} Accordingly, we overrule appellant's second assignment of error.

{¶24} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and TRAVIS, JJ., concur.
