

IN THE SUPREME COURT OF OHIO
2006

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

DANIEL FUGATE,

Defendant-Appellant.

Case No. 06-2289

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

Court of Appeals
Case No. 06AP-298

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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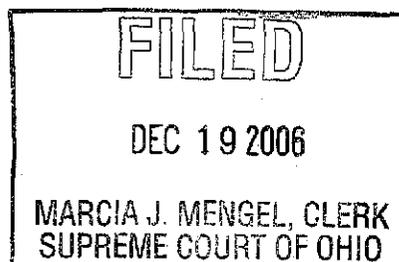


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. Defendant's primary issue concerns the allocation of jail time credit. The Tenth District Court of Appeals found no plain error in the allocation of jail time credit in this case. It is well settled that, for an error to be plain, it must not only be plain in the sense of being obvious, it must also be so serious as to indicate that, but for the error, the outcome clearly would have been different. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. A claimed error will be "plain error" only if it was "'plain' at the time that the trial court committed it." *Id.* at 28. As case law states that trial courts are not required to recognize duplicate jail time credit, the appellate court properly concluded that the trial court did not commit plain error in calculating jail time credit.

Furthermore, contrary to defendant's argument, the Tenth District properly denied defendant's motion to certify a conflict on this issue. None of the cases cited by defendant in his motion dealt with the issue resolved by the Tenth District; specifically, whether the trial court committed plain error in its allocation of jail time credit. *State v. Fugate*, Franklin App. No. 06AP-298, 2006-Ohio-5748 at ¶ 19. Because defendant's cases did not address "the same question," there could be no conflict. See, *Whitlock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596. As defendant failed to satisfy the *Whitlock* criteria, the Tenth District properly denied his motion to certify a conflict.

It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND THE FACTS

Stephanie Hannah lived in an apartment at 6355 Bridlecreek Way in Hilliard. She leased the apartment with her fiancé Scott Williams. Early in June of 2005, Williams went to jail on domestic violence charges. Williams did not move out of the apartment when he was sent to jail. While Williams was in jail, Stephanie began seeing defendant. Stephanie had known defendant since she was a teen and they grew up in the same neighborhood on the Southside of Columbus.

Defendant stayed in Stephanie's apartment for several days. However, defendant was not a "room-mate" and never had a key to her apartment. Although she engaged in this brief affair with defendant, Stephanie had decided to reunite with Williams. Stephanie told defendant her decision. Stephanie subsequently left her apartment to stay with her mother for several days. Stephanie stayed with her mother from June 12th through June 16th.

When Stephanie returned to her apartment on June 16th, she noticed that the door to the apartment had been kicked in as well as an interior door. Several items were taken from Stephanie's apartment including: a television; a \$600 DVD/CD stereo; a diamond ring and diamond earrings Williams had given her; numerous CD's and DVD's; and a bottle of Crown Royal. Stephanie reported the burglary and theft to the police.

Amy Hannah, no relation to Stephanie, lived next door to Stephanie in the Bridlecreek apartments. Between June 12th and June 16th, Amy, who was a stay-at-home mother, was out smoking when she saw what she thought was a white van backed up to the apartment. Amy had an unobstructed view and watched as two people, a man and a woman, took items from Stephanie's apartment and put them in the van. Amy knew that

this man and woman were not her neighbors. These people carried out various things including stereo equipment, some small boxes, and some bigger items.

Interviewed by a police officer on June 16th, Amy told the officer what she had seen and provided detailed descriptions of the man and the woman. The female was blond and, because she was wearing a tank top, Amy saw the tattoo on her lower back. Amy also described the age, height and weight of the man and recalled that the man had a tattoo on one and possibly both of each arm.

Stephanie heard the description Amy provided and subsequently went to talk to Amy. Stephanie was still very upset and asked Amy if she would recognize the man she has seen. When Stephanie showed Amy a picture of defendant, Amy immediately recognized him as the man involved. Several days later, when the police officer presented her with a photo-line up, Amy was unable to make an identification from the photographs. However, Amy had been able to select defendant's photo as well as another individual who bore a strong resemblance to defendant. Amy did not make an identification from the photo array because she was not "completely certain" and she did not want to be wrong. During her testimony at trial, Amy identified defendant as the same man she saw moving things out of Stephanie's apartment between June 12th and 16th.

A day or so later Stephanie went back to her mother's house and ran into defendant with his girlfriend Dolly Marcum. Dolly's mother lived across the street from Sue Ellen Hannah, Stephanie's mother, on Moler Street. Defendant and Dolly were pulling up in a car when Stephanie saw them. Stephanie approached defendant and Stephanie saw a bottle of Crown Royal in the vehicle that she thought had been taken

from her apartment. Stephanie confronted defendant about the burglary and whether he had her property. Defendant affirmed that he had Stephanie's property. Defendant also told Stephanie "you can't prove it." Stephanie's mother, Sue Ellen Hannah, was also present and heard defendant's statements.

Sue Ellen called 911 after hearing defendant's admission. Sue Ellen admitted at trial that she told the police that there was a confrontation in the street with a lot of people and there could be trouble or violence. Sue Ellen also reported that someone was actually getting hurt. Sue Ellen stated that she lied to the 911 operator because it had been her experience that the police would not respond unless the situation was volatile or violent. In fact, the police did respond right away.

At trial, the defense presented three theories to the jury. First, the predominant theory was that because defendant had a key to Stephanie's apartment, he would not have broken down the door to enter the apartment. Although one witness (Sarah Moore) claimed defendant dangled the key in front of her while she gave him a ride away from Stephanie's apartment, the key was never produced at trial. Second, through the testimony of Bobbie Jo Marcum (Dolly's sister), the defense presented the theory that Stephanie set defendant up on the burglary. Finally, through defendant's testimony, the defense tried to explain that what Amy Hannah "really" saw between June 12th and 16th was defendant moving in. Defendant stated that Stephanie (who defendant claimed has a tattoo on her back) and her brother helped him move into Stephanie's apartment and they used a white van. When defendant moved in, he took a TV into her house and took a box of pictures out of the house because Stephanie did not want Williams to destroy those

pictures. This third theory was contradicted by defendant's testimony that he moved out on June 12th or 13th.

At trial, defendant acknowledged his prior convictions. Defendant admitted that he stayed with Stephanie for about a week, that he actually moved into Stephanie's apartment, and that Stephanie gave him a key to her apartment. Defendant stated that the key was either with his property or at his mother's house.

Despite the fact that Stephanie had been living with Williams, defendant stated that he and Stephanie were in love and, during their brief affair, they had talked about marriage. Defendant stated that he decided to end the relationship with Stephanie because she was doing drugs and he didn't want to relapse and violate probation. Defendant also thought Stephanie wanted to get back together with Williams. According to defendant, when they broke-up, Stephanie did not ask for her key back. Contrary to other defense witnesses, defendant stated that Stephanie was not angry about the breakup, and she did not claim she was going to "get him."

Defendant described Stephanie's apartment during the time he stayed there as looking like it had been ransacked. Defendant's understanding was that Williams had been really upset and wrecked the apartment. Defendant stated that even though the apartment smelled due to the rotten food in the sink, he stayed there and helped SH clean it up. Defendant then explained that the apartment was not "all they way clean" and there were holes in the wall as well as clothes, pictures and broken glass everywhere.

Defendant denied that he committed the burglary and theft. Defendant claimed he did not have access to a white van but later admitted that he worked for a moving company. Defendant reluctantly stated that there was a white van at the moving

company, but then described it as more of a box-type truck. Defendant also denied that he confessed to Stephanie.

The jury found defendant guilty of the lesser charge of burglary, without someone present, in Count One, and guilty of theft of property over \$500 in Count Two. At the sentencing hearing, two cases were before the court. In 05CR-1414, defendant admitted to and was sentenced for a probation violation. In 05CR-4367, defendant was sentenced on the burglary and theft. According to the probation officer, defendant had 216 days of jail time credit. The prosecutor stated that defendant was held on both cases and that defendant should get credit on probation case only. Defense counsel did not dispute the allocation of jail time credit.

The court imposed a sentence of 12 months imprisonment with 216 days jail time credit for 05CR-1414 to run concurrent with the sentence in 05CR-4367. The court imposed two years of incarceration in 05CR-4367. The court awarded restitution of \$4,750.

ARGUMENT

RESPONSE TO PROPOSITION OF LAW NO. ONE:

PLAIN ERROR DOES NOT OCCUR IN AWARDING JAIL TIME CREDIT AGAINST ONE OF TWO CONCURRENT SENTENCES AS THE COURT IS NOT REQUIRED TO RECOGNIZE DUPLICATE OR MULTIPLE PRETRIAL DETENTION.

It is well settled that “[w]hen calculating jail-time credit, ‘a trial court is not required to recognize duplicate or multiple pretrial detention credit.’” *State v. Peck*, Franklin App. Nos. 01AP-1379, 02AP-146, 2002-Ohio-3889, ¶ 10, quoting *State v. Callender* (Feb. 4, 1992), Franklin App. No. 91AP-713; see also, *State v. Fincher* (Mar.

31, 1998), Franklin App. No. 97AP-1084; *State v. Whitaker*, Ross App. No. 02CA2691, 2003-Ohio-3231. A defendant, who was sentenced on the same day to concurrent sentences of three years under separate case numbers, with jail time credited in one case, but not in the other, is *not* entitled to have his release accelerated by the application of the jail time credit granted in the one case. *Rankin v. Adult Parole Authority* (November 7, 2002), Cuyahoga App. No. 81709, 2002 Ohio 6062. Similarly, in *Eble*, the Tenth District rejected the argument that jail time credit must be awarded against each concurrent sentence. *State v. Eble*, Franklin App. Nos. 04AP-334/335, 2004-Ohio-6721. The *Eble* Court held that no error occurred and that defendant was not entitled to “duplicate” jail time credit. *Id.* Like these cases, defendant was not entitled to jail time credit against each sentence.

Defendant also challenges the court’s imposition of jail time credit as an equal protection violation. Defendant’s argument lacks merit. Allowing defendant to receive jail-time credit on both offenses would discriminate against those who make bail as well as those who are held on only one offense. *Eble, supra.* In *Eble*, the court rejected the argument that failure to award duplicate jail time credit violates equal protection.

Here, appellant has not alleged any intentional or purposeful discrimination in the application of R.C. 2967.191 or Ohio Adm.Code 5120-2-04(F), nor is there any evidence in the record. Because there is no evidence as to the vital element of intentional or purposeful discrimination, appellant's equal protection challenge to R.C. 2967.191 and Ohio Adm.Code 5120-2-04(F) is without merit. We reiterate our statement in *Callender* that to award the 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.

Eble, supra at ¶ 17. The *Whitaker* Court held that awarding multiple jail-time credit contravenes principles of equal protection. *Whitaker, supra* at ¶5. The *Whitaker* Court continued, stating “Under Whitaker’s multiple jail-time credit argument, R.C. 2967.191 becomes a vehicle for discriminating against those defendants who do make bail.” *Id.* at ¶8.

The Tenth District Court of Appeals properly found that no plain error occurred. Defendant’s First Proposition of Law should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. TWO:

THE FINDER OF FACT IS IN THE BEST POSITION TO RESOLVE ISSUES OF WITNESS CREDIBILITY. IT IS NOT THE FUNCTION OF AN APPELLATE COURT TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE FACTFINDER WHEN REVIEWING THE SUFFICIENCY OR MANIFEST WEIGHT OF THE EVIDENCE.

In determining whether a verdict is against the manifest weight of the evidence, this Court acts as a “thirteenth juror.” This role allows the Court to weigh the evidence in order to determine whether the trier of fact “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. However, the power to reverse on “manifest weight” grounds should only be used in exceptional circumstances, *i.e.*, when “the evidence weighs heavily against the conviction.” *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175.

This Court does not act as a “thirteenth juror” in determining the sufficiency of the evidence. The issue of sufficiency of the evidence presents a purely legal question for the Court regarding the adequacy of the evidence. *Thompkins*, 78 Ohio St.3d at 386. “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.” *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

“This familiar standard gives 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. When there is conflicting evidence, “it [is] the function of the jury to weigh the evidence and assess the credibility of the witnesses in arriving at its verdict.” *Jenks*, 61 Ohio St.3d at 279. “It is not the function of an appellate court to substitute its judgment for that of the factfinder.” *Id.* “[I]t is the minds of the jurors rather than a reviewing court which must be convinced.” *State v. Thomas* (1982), 70 Ohio St.2d 79, 80.

Defendant’s argument against his convictions turns on an assessment of the credibility of the witnesses. Amy Hannah was a credible witness with no ties to any of the parties and no stake in the outcome of the trial. Amy testified that she saw defendant taking things from Stephanie’s apartment. Amy identified defendant as the man she saw moving stereo equipment and other things from Stephanie’s apartment. She testified that she only saw defendant and this woman moving things out of Stephanie’s apartment between June 12th and June 16th. Amy watched defendant and the blonde woman for about thirty minutes the day they were taking things out of the apartment. Based on this

testimony, the jury could properly find defendant was the individual who broke into Stephanie's apartment and appropriated her property.

As to the time frame of the burglary, Amy's testimony referred to events that occurred between Sunday June 12th and Thursday June 16th. Stephanie testified that she went to her mother's house on Sunday June 12th whereas defendant testified that he moved out on June 13th. Amy reported the burglary on June 16th. Because Amy testified that the items were taken one or two days prior to the 16th, the jury could reasonably conclude that the burglary occurred within the indicted time frame. Given the unassailable testimony of Amy Hannah, the jury properly convicted defendant of the charges.

The credibility of each witness was tested on cross-examination. It was in the province of the jury to find the State's witnesses more believable than the defense witnesses. Indeed, defendant admitted that Amy's testimony was more credible because she had no relationship with any of the other witnesses. To try to explain Amy's testimony, defendant asserted that she could have seen him move into Stephanie's apartment using a white van. The jury could properly reject this explanation as Amy testified that she only saw defendant taking property from Stephanie's apartment and Amy testified that Stephanie was not the blonde who was helping defendant. Furthermore, Amy corroborated the fact that stereo equipment and larger items were taken from Stephanie's apartment.

Jury could properly reject defendant's theory that he did not break in because he had a key to the apartment. The key was not produced. Even if defendant had a key, he could have broken down the door to make the scene look like a break-in. Therefore,

whether or not defendant had a key was not relevant to the ultimate finding of guilt. Furthermore, the jury could find, based on Stephanie's testimony, that defendant did not have a key.

The jury also could properly find the credibility of defense witnesses was lacking given their close association with defendant and the inconsistencies in their testimony. For example, the sister of defendant's girlfriend tried to portray Stephanie as a drug addict and accused Stephanie of saying she was going to set defendant up so that defendant would not "mess things up" with Stephanie's fiancé Williams. Stephanie denied this accusation and even defendant stated that Stephanie was not trying to "get him." The set-up theory was implausible since Stephanie would never have accused defendant of the burglary if she wanted to keep her affair with defendant secret from Williams.

Finally, defendant's credibility was also at issue and before the jury. Indeed, when defendant denied that he committed the multiple crimes, the jury could have concluded that the truth was the opposite of his denial. Evidence of a witness' demeanor on the witness stand "may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance, or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer v. MacDougall* (C.A. 2, 1952), 201 F.2d 265, 269; see, also, *NLRB v. Walton Mfr. Co.* (1962), 369 U.S. 404, 408 (quoting *Dyer*); *Wright v. West* (1992), 505 U.S. 277, 296 (plurality – citing *Dyer*).

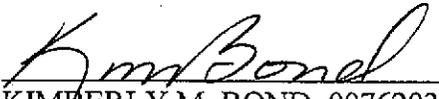
Defendant's Second Proposition of Law should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand-delivered this day, December 19, 2006, to PAUL SKENDELAS, 373 South High Street-12th Fl., Columbus, Ohio 43215; Counsel for Defendant-Appellant.


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