IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellee,

vs.

Daniel J. Fugate,

Defendant-Appellant.

Supreme Court No. 06-2289

On Appeal from the Franklin County Court, Tenth Appellate District. Court of Appeals Case No. 06AP-298.

BRIEF OF DEFENDANT-APPELLANT DANIEL J. FUGATE

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I. 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-1414[1]. 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.

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 sought leave to appeal to this Court, and this Court accepted Jurisdiction. Daniel Fugate is now before the Ohio Supreme Court to ask that the

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

holdings of the lower courts be reversed and that he receive jail credit against concurrent terms imposed by the trial court.

II. 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 that 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] (Tr. 70) They discovered that the front and bedroom doors had been kicked in. (Tr. 53) 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. (Tr. 50-52, 60, 87) Stephanie called the police and later spoke to several of her neighbors. One of her neighbors, Amy Hannah,

[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.

described a person resembling Appellant as having recently moved some property from the apartment to a white van. (Tr. 55)

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. (Tr. 93) 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. (Tr. 59) 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. (Tr. 229, 234) The confession was apparently the only part of the exchange that Sue Hannah claimed to have heard. (Tr. 248)

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. (Tr. 229) Hannah admitted that the police report was false, but she made the statement to get the police to come sooner. (Tr. 230) 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. (Tr. 60) The police never received a report from Stephanie or her mother about the "confession" or the discovery of the bottle of Crown Royal. (Tr. 203, 209, 288) This "evidence" was news

[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."

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 witnesses, Stephanie insisted that Appellant did not have a key to her apartment. (Tr. 79-80) Stephanie also noted that she had various prior convictions on theft charges, including two misdemeanor theft charges in 2002, unauthorized use of property in 2002, and misdemeanor theft in 2004. (Tr. 49)

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. (Tr. 116) 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. (Tr. 116-117) This activity was not unusual, however. Two weeks earlier, Amy saw Stephanie move her things out of the apartment. (Tr. 119) 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. (Tr. 120, 130)

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. (Tr. 133) 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. (Tr. 132) From a color photograph given to her by Stephanie (State's Ex. #1),

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

she identified the man as being Appellant. (Tr. 136) Amy did not believe that the woman was Stephanie. (Tr. 121) 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. (Tr. 240) 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. (Tr. 382, 427)

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. (Tr. 307) Holly believed from the discussions that her brother had a key to the apartment. (Tr. 302)

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 cell phone to make sure that Appellant had a house key so that he could get back into the apartment. (Tr. 312) When Sarah turned to ask Appellant about the key, he responded by dangling a key and said that he had it. (Tr. 318, 321) 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. (Tr. 327)

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. (Tr. 352, 354) Mrs. Fugate never saw her son with a new television, stereo equipment, CDs, or DVDs, even after he returned to her home. (Tr. 350)

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. (Tr. 359) 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. (Tr. 362) Appellant denied taking anything. (Tr. 362)

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. (Tr. 381, 384) Appellant seemed shocked by the accusation and told Stephanie that he did not have her things. (Tr. 387)

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. (Tr. 392) Ms. Marcum further noted that Stephanie was messed up on "pills and things" at the time. (Tr. 395)

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 mother. (Tr. 419) 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. (Tr. 420, 441) They removed a box of pictures of her father from the apartment because they feared that Scott would tear them up. (Tr. 441) Moreover, Stephanie is the only petite blonde that Appellant knew who had a tattoo on her lower back. (Tr. 427, 441)

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. (Tr. 434) They were together for about a week and separated around June 13, 2005. (Tr. 438)

Appellant vehemently denied taking anything from Stephanie's apartment, except for his clothing. (Tr. 441) Like Stephanie, Appellant had a long record of theft offenses. He pled guilty to receiving stolen property charges in 2000 and 2004. (Tr. 414-415) In 2005, after getting out of prison, he pled guilty to receiving a stolen vehicle motor. (Tr. 432)

III. ARGUMENT

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 Clauses under the Fourteenth Amendment to the United States Constitution and Section 2, Article I, of the Ohio Constitution.

A. Overview.

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 all charges if 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.

Appellant was held on two cases while awaiting trial: the case on appeal and a probation revocation motion that was triggered by the new criminal filing. 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. As the following graphic demonstrates, Appellant would complete the term imposed on the revocation motion while serving the full sentence on the new charges.

□□□□□□□□□□ [Jail credit of 213 days applied to probation case]
■■■■■■■■■■■■■■■■■ [Sentence of 12 months – probation case]
◙◙◙

words, jail time credit is awarded against *each* concurrent term or once against consecutive terms. To do less renders the jail time credit meaningless.

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, 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 term." The language of the statute has been broadly applied – "R.C. 2967.191 is not an inclusive statute, meaning the statute lists situations where credit for time served is applicable, but it does not limit the situations where it is applicable to only those listed in the statute." *State v. Nunez,* Montgomery App. No. 21495, 2007-Ohio-1054.

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.

This interpretation is consistent with the Ohio Administrative Code, which directs that jail credit must be awarded against *each concurrent term.* Ohio Adm.Code 5120-2-03 and 5120-2-04 govern the application of jail time credit to a prisoner's sentence. The regulations provide, in pertinent part, as follows:

> **5120-2-03 Determination of minimum, maximum and definite sentences when multiple sentences are imposed**
>
> (D) When multiple indefinite sentences are imposed to run concurrently, the prisoner shall be deemed to be serving an indefinite term, the minimum of which is the longest of such minimum terms and the maximum of which is the longest of such maximum terms. If, however, the various sentences are subject to different amounts of reduction for jail-time credit and/or are subject to different rates of diminution for time off for good behavior, the prisoner becomes eligible for parole consideration after serving the longest diminished sentence.
>
> (E) Subject to the maximums provided in this rule:
> (1) When consecutive indefinite sentences of imprisonment are imposed for felony, the minimum term to be served is the aggregate of the consecutive minimum terms imposed and the maximum term to be served is the aggregate of the consecutive maximum terms imposed.
>
> **5120-2-04 Reduction of minimum and maximum or definite sentence for jail time credit**
>
> (F) If a prisoner is serving *two or more sentences concurrently,* the adult parole authority shall independently *reduce each sentence* for the number of days confined for that offense. Release of the prisoner shall be based upon the longest definite, minimum and/or maximum sentence after reduction for jail time credit.
>
> (G) If a prisoner is serving two or more sentences consecutively, the record officer shall aggregate the sentences pursuant to Rule 5120-2-03 of the Administrative Code. The adult parole authority shall reduce the aggregate definite sentence or aggregate minimum and aggregate maximum sentences, as determined by Rule 5120-02-03 of

> the Administrative Code, by the total number of days the person was confined for all of the offenses for which the consecutive sentences were imposed. ***

The Administrative Code applies jail credit to the aggregate sentence, as opposed to a single offense. In doing so, the Code insures that prison terms are diminished by the actual period of pre-trial incarceration.

Ohio courts have broadly interpreted and applied R.C. 2967.191. The statute, which liberally awards jail credit, states in unambiguous terms 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." If there is any ambiguity as to the meaning of this language, Ohio law requires that "sections of the Revised Code defining *offenses or penalties* shall be strictly construed against the state, and liberally construed in favor of the accused." R.C. 2901.04. Moreover, rules of statutory construction apply equally to rules enacted by administrative bodies pursuant to statutory authority. R.C. 1.41. Contrary to the holding of the Tenth District, the Ohio Administrative Code requires that jail credit be applied once against consecutive terms but against *each concurrent term.* The Tenth District simply erred in interpreting R.C. 2967.191. Its holding should be reversed.

C. The sentence of the trial court violates the Equal Protection Clauses under the state and federal Constitutions.

The Fourteenth Amendment to the United States Constitution provides that, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Ohio's Constitution provides in similar manner under

Section 2, Article I, Ohio Constitution, that "all political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly." Both Equal Protection Clauses require that individuals be treated in a manner similar to others in like circumstances. *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (1999), 87 Ohio St. 3d 55, 60, 1999 Ohio 248. Ohio's Equal Protection Clause provides the same protection as its federal counterpart. *McCrone v. Bank One Corp.,* 107 Ohio St. 3d 272; 2005-Ohio-6505, ¶7; *Porter v. Oberlin* (1965), 1 Ohio St.2d 143, 151-152.

The holding below violates 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 who was held pending trial improperly over a defendant who was released while awaiting trial. Similarly, according to the Fourth District, 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. As Judge Grey poignantly wrote in dissent in *State v. Thorpe* (June 30, 2000), Franklin App. Nos. Nos. 99AP-1180, 1181, 1182, 1183, 1184, 1185, 1186, and 1187[5],

> The rationale for this rule is quite simple. A person with money will make bail while a person without money will not. If both persons are given identical sentences, the reality is that unless the person who did not make bail is given credit for his pretrial time, the poorer person will have served more time than the other. Unequal treatment based on personal wealth is anathema to the Constitution as a denial of equal protection.

---

[5] In *Thorpe,* the majority denied the appeal because the defendant, who was indigent and proceeding pro se, failed to provide a transcript of the lower court proceedings. Accordingly, the dissent noted that,

> The majority opinion recognizes the importance of equal treatment, but, and this is where I disagree, puts the burden of equal protection on the poorer defendant. The majority notes that appellant failed to file a transcript of the sentencing hearing, and as a result, this court is unsure as to whether Thorpe was properly credited with his pretrial time. To me, this merely repeats the problem. People who cannot make bail, the only ones to whom R.C. 2967.191 might apply, probably cannot pay for a transcript either.

To 'consider' the pre-sentence custody but leave the sentence unchanged is tantamount to increasing the sentence in violation of the defendant's equal-protection rights. See, *Johnson v. Prast* (7th Cir. 1977), 548 F.2d 699, 703.

The Tenth District Court of Appeals upheld the sentence in the present case, 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 and the Ohio 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 permits this disparate treatment, thereby, violating concepts of equal protection and fundamental fairness.

IV. 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 credit for any of the 213 days Appellant was incarcerated. This decision violates the Equal Protection Clauses under the Fourteenth Amendment to the United States Constitution as it treats similarly situated defendants differently based on their ability to secure their release by posting bond. Contrary to the holding by the Court of Appeals below, individuals who receive jail credit against all concurrent terms do not receive an advantage over persons who have the resources to post bond. They are placed on the same footing. The present case should be remanded to the trial court to determine the exact amount of jail credit to which the Appellant is entitled.

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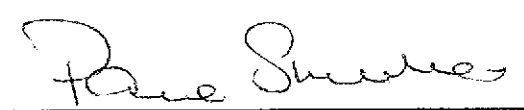
V. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memo was hand delivered to the office of Kimberly M. Bond, Assistant Prosecuting Attorney, 373 South High Street, 13th Floor, Columbus, Ohio 43215 on this the 23rd day of April, 2007.



Paul Skendelas (0014896)
Counsel for Defendant-Appellant
Daniel J. Fugate

IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellee,

vs.

Daniel J. Fugate,

Defendant-Appellant.

Supreme Court No. 06-2289

On Appeal from the Franklin County Court, Tenth Appellate District. Court of Appeals Case No. 06AP-298.

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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

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NOTICE OF APPEAL OF APPELLANT DANIEL J. FUGATE

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SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT DANIEL J. FUGATE

Appellant Daniel J. Fugate gives notice of appeal to the Supreme Court of Ohio from judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 06AP-298 on November 7, 2006.

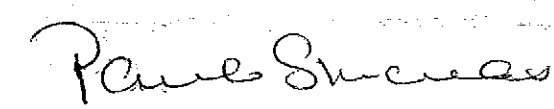
This case raises a substantial constitutional question, involves a felony, and is one of public or great general interest.

Respectfully submitted,

Paul Skendelas (0014896)
Counsel for Appellant
Daniel J. Fugate

PROOF OF SERVICE

I hereby certify that a copy of this notice of appeal was hand-delivered to the Office of the Franklin County Prosecuting Attorney, Counsel for Appellee, 373 South High Street, Thirteenth Floor, Columbus, Ohio 43215, on this the 12th day of December, 2006.



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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.	:	

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

PAUL SKENDELAS
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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.

{¶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 Hannah[2] 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.

{¶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.

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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

MEMORANDUM DECISION

Rendered on December 7, 2006

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

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

ON MOTION TO CERTIFY.

McGRATH, J.

{¶1} Defendant-appellant, Daniel J. Fugate, has filed a motion requesting this court to certify the record in this case to the Supreme Court of Ohio pursuant to App.R. 25(A) and Section 3(B)(4), Article IV, of the Ohio Constitution. Plaintiff-appellee, the State of Ohio, has filed a memorandum in opposition.

{¶2} Section 3(B)(4), Article IV, of the Ohio Constitution, gives the court of appeals of this state the power to certify the record of a case to the Supreme Court of Ohio "[w]henever * * * a judgment upon which they have agreed is in conflict with a

judgment pronounced upon the same question by any other court of appeals of the state." We have previously held that certification under the constitution will be granted only where the judgments conflict upon the same question. *Johnson v. Indus. Comm.* (1939), 61 Ohio App. 535, 537. Such questions must be over a question that is material to both judgments as to be dispositive of the cases. *Lyons v. Lyons* (Oct. 4, 1983), Franklin App. No. 82AP-949.

{¶3} App.R. 25 provides, in part, that a motion to certify a conflict "shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed."

{¶4} Appellant's motion to certify asserts our decision finding that the trial court did not commit plain error when it did not award jail time credit against each of appellant's concurrent sentences rendered in *State v. Fugate*, Franklin App. No. 06AP-298, 2006-Ohio-5748, is in conflict with decisions from other Ohio districts, namely, *State v. Gregory* (1995), 108 Ohio App.3d 264; *State v. Carroll*, Fairfield App. No. 01 CA 48, 2002-Ohio-764; and *State v. Kent* (June 14, 1999), Warren App. No. CA98-08-094. There is a commonality among these cases in that they all concern an issue relating to jail time credit. This, however, is insufficient to justify the certification of a conflict where important factual distinctions exist between the cases.

{¶5} The Supreme Court of Ohio has instructed that there are conditions that must be met before and during the certification of a case to the Supreme Court of Ohio pursuant to Section 3(B)(4), Article IV, of the Ohio Constitution. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594. "[T]he alleged conflict must be on a rule of law – not

facts." Id. at 596. "*Factual* distinctions between cases do not serve as a basis for conflict certification." (Emphasis sic.) Id. at 599.

{¶6} In *Gregory*, the court addressed whether or not a trial court had the discretion to allocate the time of incarceration to the charge for which the defendant was acquitted, causing the defendant to lose the jail time credit. Id. at 268. The court held that "under these unique facts where Gregory was incarcerated under two unrelated charges, one resulting in acquittal and the other in conviction, Gregory was entitled to have this time credited to his conviction sentence * * *." Id. at 269. Because the *Gregory* court addressed a different issue, the judgment is not on the same rule of law.

{¶7} In *Carroll*, the defendant had cases in both Ross and Fairfield Counties. The issue before the Fairfield County Appellate Court was whether time spent in a community based correctional facility ("CBCF") that was credited in the defendant's Ross County case should be credited in the Fairfield County case as well. The court, noting that this would not be recognition of duplicate or multiple pretrial detention credit, answered in the affirmative.

{¶8} In *Kent*, the court had to "determine not whether [the defendant] was entitled to 'double counting,' but whether [the defendant] was somehow entitled to concurrent sentences." The court answered in the negative.

{¶9} As has been demonstrated, none of the above-referenced cases concerned whether or not the trial court committed plain error in its allocation of jail time credit. We fail to see a conflict between our decision in *Fugate* and the cases cited by appellant. Thus, in conclusion, we find that appellant has not demonstrated a conflict between this court's decision in *Fugate* and that of *Gregory*, *Carroll*, or *Kent*.

{¶10} For the foregoing reasons, appellant's motion to certify a conflict is denied.

Motion to certify denied.

KLATT, P.J., and BRYANT, J., concur.

---

§ 1.41. Applicability of sections 1.41 to 1.59

Sections 1.41 to 1.59, inclusive, of the Revised Code apply to all statutes, subject to the conditions stated in section 1.51 of the Revised Code, and to rules adopted under them.

HISTORY: 134 v H 607. Eff 1-3-72.

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§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense.

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

HISTORY: 134 v H 511 (Eff 1-1-74); 148 v S 107. Eff 3-23-2000; 150 v S 146, § 1, eff. 9-23-04.

Not analogous to former RC § 2901.04 (GC § 12402-1; 109 v 545; 111 v 77; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

Effect of Amendments

150 v S 146, effective September 23, 2004, added (D) and corrected internal references.

19xx Committee Report or Comment.

1974 Committee Comment to H 511

This section codifies the rule that penal statutes must be strictly construed against the state and liberally construed in favor of the accused. See, Harrison v. Ohio, 112 Ohio St. 429, 147 N.E. 650 (1925) aff'd 270 U.S. 632; State ex rel. Moore Oil Co. v. Dauben, 99 Ohio St. 406, 124 N.E. 232 (1919). In

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addition, the section provides a rule for the construction of procedural measures, based on the premise that the prime object of procedural statutes and rules is to promote justice both to the accused and to the state. Thus, procedural measures are not to be construed in terms of strictness or liberality, but rather to effect the fair, impartial, speedy, and sure administration of justice.

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[§ 2967.19.1] § 2967.191. Reduction of prison term for related days of confinement.

The department of rehabilitation and correction shall reduce the stated prison term of a prisoner or, if the prisoner is serving a term for which there is parole eligibility, the minimum and maximum term or the parole eligibility date of the 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.

HISTORY: 131 v 688 (Eff 10-20-65); 134 v H 511 (Eff 3-23-73); 137 v H 565 (Eff 11-1-78); 138 v H 1000 (Eff 4-9-81); 139 v S 199 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 111. Eff 3-17-98.

See provisions, § 5 of SB 2 (146 v -) as amended by § 3 of SB 269 (146 v -) following RC § 2929.03.

19xx Committee Report or Comment.

1974 Committee to Comment to H 511

This section mandates reduction of both the minimum and maximum terms of imprisonment imposed for felony by the number of days during which the prisoner was confined awaiting trial, sentence, transportation to the penitentiary or reformatory, or for any other reason arising out of the case for which he was sentenced, including confinement during an examination to determine his sanity. As a practical matter, the chief effect of the section is to advance the date on which the prisoner first becomes eligible for parole consideration. If a prisoner is never paroled, however, the date on which he is entitled to his final discharge must be advanced under this section by the number of days "dead time" spent prior to his commitment. Similarly, if a person is placed on probation or parole, the date of his final discharge must be advanced by the "dead time" to which he is entitled, if the advanced discharge date would occur sooner than the expiration of his period of probation or parole.

Under the former statute, an offender was not entitled to a "dead time" credit unless the sentencing court recommended that he be given such credit and the Parole Board chose to follow the court's recommendation. The credit was made mandatory under decisions of the U.S. District Courts for both the Northern and Southern Districts of Ohio, on the theory that the law would otherwise unconstitutionally discriminate against poor offenders who languish in jail awaiting trial because they are unable to make bail. Workman v. Cardwell, 60 Ohio Op.2d 187, 31 OMisc. 99, 338 F. Supp. 893 (USDC, ND Ohio, 1972); Mallory v. State, 59 Ohio Op.2d 218, 31 OMisc 113, 281 N.E.2d 860 (USDC, SD Ohio, 1972). Since the mandatory credit for dead time was included in H.B. 511 as introduced in March, 1971, the bill anticipated these decisions. (Effective March 23, 1973).

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5120-2-03 Determination of minimum, maximum and definite sentences when multiple sentences are imposed.

(A) Any sentence of imprisonment to the department of rehabilitation and correction shall be served consecutively to any other sentence of imprisonment in the following cases:

(1) The trial court specifies that it is to be served consecutively to another sentence;

(2) It is imposed for a new felony committed by a probationer, parolee, or escapee;

(3) It is a three-year term of actual incarceration imposed pursuant to section 2929.71 of the Revised Code, for using a firearm in commission of an offense;

(4) It is imposed for a violation of section 2921.34 of the Revised Code (escape), division (B) of section 2917.02 of the Revised Code (aggravated riot committed by an inmate in a detention facility), or division (B) of section 2921.35 of the Revised Code (aiding escape or resistance to authority committed by a person confined in a detention facility).

(B) Any sentence of imprisonment to the department of rehabilitation and correction shall be served concurrently, not aggregated, with any other sentence of imprisonment imposed by a court of this state, another state, or of the United States, except as provided in paragraph A of this rule.

(C) When multiple definite sentences are imposed to run concurrently, the prisoner shall be deemed to be serving the longest of the sentences so imposed. If, however, the various sentences are subject to different amounts of reduction for jail-time credit and/or are subject to different rates of diminution for time off for good behavior, the prisoner shall be released after serving the longest diminished sentence.

(D) When multiple indefinite sentences are imposed to run concurrently, the prisoner shall be deemed to be serving an indefinite term, the minimum of which is the longest of such minimum terms and the maximum of which is the longest of such maximum terms. If, however, the various sentences are subject to different amounts of reduction for jail-time credit and/or are subject to different rates of diminution for time off for good behavior, the prisoner becomes eligible for parole consideration after serving the longest diminished sentence.

(E) Subject to the maximums provided in this rule:

(1) When consecutive indefinite sentences of imprisonment are imposed for felony, the minimum term to be served is the aggregate of the consecutive minimum terms imposed and the maximum term to be served is the aggregate of the consecutive maximum terms imposed.

(2) When consecutive definite sentences of imprisonment are imposed, the term to be served is the aggregate of the consecutive definite terms imposed.

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(3) When a three-year term of actual incarceration is imposed pursuant to section 2929.71 of the Revised Code for using a firearm in the commission of an offense, it shall be served consecutively with, and prior to, the life sentence or indefinite term of imprisonment imposed for the offense.

(4) When multiple three-year terms of actual incarceration are imposed pursuant to section 2929.71 of the Revised Code for using firearms in the commission of multiple offenses, the aggregate of all of such terms of actual incarceration shall be served first and then the aggregate indefinite term and/or life sentence(s) imposed for the offenses shall be served.

(5) When a person is serving any definite terms of imprisonment consecutively to any indefinite or life terms of imprisonment or to any three-year terms of actual incarceration imposed pursuant to section 2929.71 of the Revised Code or to both, the aggregate of all such three-year terms of actual incarceration shall be served first, then the aggregate of the definite terms of imprisonment shall be served, and then the indefinite or life terms of imprisonment shall be served.

(F) Consecutive terms of imprisonment imposed shall not exceed:

(1) An aggregate minimum term of fifteen years, when the consecutive terms imposed are for felonies other than aggravated murder or murder and do not include any three-year terms of actual incarceration imposed pursuant to section 2929.71 of the Revised Code for using a firearm in the commission of an offense.

(2) An aggregate minimum term of fifteen years plus the sum of all three-year terms of actual incarceration imposed pursuant to section 2929.71 of the Revised Code for using a firearm in the commission of an offense, when the consecutive terms imposed are for felonies other than aggravated murder or murder.

(3) An aggregate minimum term of twenty years, plus the sum of any three-year terms of actual incarceration imposed pursuant to section 2929.71 of the Revised Code, when the consecutive terms imposed include a term of imprisonment for murder and do not include a term of imprisonment for aggravated murder.

(4) An aggregate term of eighteen months, when the consecutive terms imposed are for misdemeanors. When consecutive terms aggregating more than one year are imposed for misdemeanors under the Revised Code, and at least one such consecutive term is for a misdemeanor of the first degree that is an offense of violence, the trial court may order the aggregate term imposed to be served in a state penal or reformatory institution.

(G) There shall be no limit to the aggregate minimum sentence when at least one sentence is imposed for aggravated murder committed on or after October 19, 1981.

(H) There shall be no limit to the aggregate of definite sentences imposed for felonies.

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HISTORY: Replaces part of rule 5120:1-1-05; Eff 11-12-75; 1-20-80; 8-1-80; 1-16-84; 11-30-87 (Emer.); 2-29-88

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5120-2-04 Reduction of minimum and maximum or definite sentence or stated prison term for jail time credit.

(A) The department of rehabilitation and correction shall reduce the minimum and maximum sentence, where applicable, the definite sentence or the stated prison term of an offender by the total number of days that the offender was confined for any reason arising out of the offense for which he was convicted and sentenced, including confinement in lieu of bail while awaiting trial, confinement for examination to determine his competence to stand trial or sanity, confinement in a community-based correctional facility and program or district community-based correctional facility and program, where applicable, and confinement while awaiting transportation to the place where he is to serve his sentence.

(B) The sentencing court determines the amount of time the offender served before being sentenced. The court must make a factual determination of the number of days credit to which the offender is entitled by law and, if the offender is committed to a state correctional institution, forward a statement of the number of days of confinement which he is entitled by law to have credited. This information is required to be included within the journal entry imposing the sentence or stated prison term.

(C) When the sheriff delivers the offender to the department of rehabilitation and correction's reception center, he shall present the managing officer with a copy of the offender's sentence, stated prison term or combination thereof that specifies the total number of days, if any, the offender was confined for any reason prior to conviction and sentence and a record of the days he was confined for the offense between the date of sentencing and the date committed to the reception center.

(D) The number of days, if any, specified in the court's journal entry committing the offender to the department is the court's finding of the number of days the offender is entitled to by law, up to and including the date of the journal entry. The record office shall reduce the offender's minimum and maximum, definite sentence or stated prison term by the number of days specified in the entry, plus the number of days the offender was confined as a result of the offense, between the date of the entry and the date committed to the department, as reflected in the sheriff's record.

(E) If the court's journal entry of sentence or stated prison term fails to specify that the offender is entitled to any credit up to the date of sentencing, the record office shall reduce the sentence or stated prison term only by the number of days the sheriff reports the offender was confined between the date of the sentencing entry and the date the offender was committed to the department.

(F) If an offender is serving two or more sentences, stated prison terms or combination thereof concurrently, the adult parole authority shall independently reduce each sentence or stated

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prison term for the number of days confined for that offense. Release of the offender shall be based upon the longest definite, minimum and/or maximum sentence or stated prison term after reduction for jail time credit.

(G) If an offender is serving two or more sentences, stated prison terms or combination thereof consecutively, the record office shall aggregate the sentences, stated prison terms or combination thereof pursuant to rule 5120-2-03, 5120-2-03.1, or 5120-2-03 of the Administrative Code. The department of rehabilitation and correction shall reduce the aggregate definite sentence, aggregate stated prison term or aggregate minimum and aggregate maximum sentences or combination thereof, as determined by rule 5120-02-03, 5120-2-03.1 or 5120-2-03.2 of the Administrative Code, by the total number of days the offender was confined for all of the offenses for which the consecutive sentences, stated prison term or combination thereof were imposed. Generally, when consecutive sentences, stated prison terms or combination thereof are imposed by multiple journal entries, the record office shall reduce the aggregate sentence, stated prison terms or combination thereof by the sum of the days specified in each of the journal entries plus the number of days the offender was confined between the date of the last journal entry and the date committed to the institution. However, if any of the journal entries received on or after January 1, 1992, indicates that any particular day of confinement has been reported on more than one journal entry, the aggregate sentence, stated prison terms or combination thereof shall be reduced by one day for each day the offender was confined. If any of the journal entries received on or after January 1, 1992, indicates that any particular day of confinement has been reported more than once, the rules set forth hereinafter should be followed in determining whether any particular day of confinement has been reported more than once.

(1) When an offender receives consecutive sentences, stated prison terms or combination thereof from different counties, both the sentences, and/or prison terms and the jail time credit in each journal entry should be aggregated, unless other wise indicated. However, the transport time shall not be aggregated for each sentence and/or prison term, but rather shall only be credited one time.

(2) When an offender receives consecutive sentences, stated prison terms or combination thereof from the same county, the sentences and/or stated prison term shall be aggregated, the transport time shall not be aggregated, and jail time credit shall be determined in the following manner:

(a) If the number of days of jail time credit given for each sentence and/or stated prison term is identical, do not aggregate the jail time credit, but rather, only give the credit one time, unless otherwise ordered or indicated in the journal entry. The sheriff's letter may be used to confirm duplicate dates of confinement.

(b) If the number of days of jail time credit for each sentence and/or stated prison term is not identical, aggregate the credit in the following situations:

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(i) The journal entry orders or indicates that the jail time credit shall be aggregated.

(ii) The dates of confinement are not indicated in the journal entry or the sheriff's letter and there is no indication whether any of the dates of confinement are reported more than once.

(c) If the number of days of jail time credit for each sentence and/or stated prison term is not identical and the journal entry does not provide otherwise, do not aggregate the credit in the following situations:

(i) The dates of confinement are indicated in the journal entry or the sheriff's letter and some or all of the dates are reported more than once. In such situations, the aggregate sentence, stated prison term or combination thereof shall be reduced by only one day for each day the offender was confined as indicated by the dates.

(ii) The journal entry orders or indicates that the jail time credit shall not be aggregated. In such situations, the aggregate sentence, stated prison term or combination thereof shall be reduced by the longest single amount of jail time credit ordered.

(3) When an offender goes out to court and receives an additional sentence, and/or stated prison term to run consecutive to his current sentence, stated prison terms or combination thereof, the sentences and/or stated prison terms shall be aggregated, but the offender shall not be given jail time credit for the period of time he was absent with leave (AWL) on the additional charges.

(H) The record office shall not reduce a sentence, stated prison term or combination thereof for jail time credit except in accordance with this rule. A party questioning either the number of days contained in the journal entry or the record of the sheriff shall be instructed to address his concerns to the court or sheriff. Unless the court issues an entry modifying the amount of jail time credit or the sheriff sends the institution corrected information about time confined awaiting transport, no change will be made.

(I) If an offender receives a sentence, or stated prison term to this department consecutive to or concurrent with a sentence in an institution in another state or a federal institution, no action will be taken towards considering him for parole or otherwise terminating his sentence, or stated prison term until the offender is physically committed to the custody of this department. At that time, the offender's minimum and maximum, definite sentence or stated prison term shall be reduced pursuant to this rule by the total number of days confined for the crime as certified by the court and the sheriff.

HISTORY: Eff 11-12-75; 1-20-80; 8-1-80; 1-16-84; 11-30-87 (Emer.); 2-29-88; 7-1-93; 3-13-98; 4-10-03

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