

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : Case No.  
 :  
 vs. : On appeal from the Lawrence  
 : County Court of Appeals  
 CARL V. CARPENTER, : Fourth Appellate District  
 : Case No. 14CA13  
 Defendant-Appellant. :

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**EMERGENCY MOTION TO STAY THE OPINION OF THE COURT OF APPEALS**

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OFFICE OF THE OHIO PUBLIC DEFENDER

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COUNSEL FOR CARL V. CARPENTER

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On January 30, 2015, the Fourth District Court of Appeals denied Mr. Carpenter's motion to certify a conflict and to stay the court's opinion. Currently, Mr. Carpenter is not incarcerated, as the trial court granted his request for an appellate bond. The appellate bond is set to expire on February 22, 2015. As explained in the attached Memorandum in Support, if this stay is not granted, Mr. Carpenter may serve time in prison beyond his lawful sentence, and the issue in this case will likely be moot before relief can be granted.<sup>1</sup> Accordingly, Defendant-Appellant, Carl Carpenter, respectfully requests that this Court stay his sentence pending this Court's consideration of his jurisdictional appeal. And if jurisdiction is accepted, he asks that the stay continue until his case—and the issues in which it presents—is resolved. A memorandum in support is attached.

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<sup>1</sup> Mr. Carpenter is filing a notice of appeal and memorandum in support of jurisdiction in tandem with this Emergency Motion to Stay.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

BY: s/ ALLEN VENDER

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COUNSEL FOR CARL V. CARPENTER

### MEMORANDUM IN SUPPORT

The court of appeals below granted Mr. Carpenter a stay of the execution of his sentence, and has continued it for a period not to exceed sixty days upon the bail previously posted. *See State v. Carpenter*, 4th Dist. Lawrence No. 14CA13, 2014-Ohio-5698. The court of appeals decided Mr. Carpenter's case on December 24, 2014, so his appellate bond has been extended until Sunday, February 22, 2015. Further, the stay granted in the court of appeals will expire if this Court dismisses the appeal before the expiration of the sixty days. Mr. Carpenter respectfully requests a ruling on this motion at the earliest practicality so he can notify his employer if he will need to return to prison.

Mr. Carpenter requests that this court stay his sentence for the duration of this Court's consideration of his jurisdictional appeal. A memorandum in support of jurisdiction is being filed contemporaneously with this motion. Mr. Carpenter is asking this Court to accept jurisdiction in this case regarding the denial of his motion for jail-time credit. Mr. Carpenter has requested that this Court accept jurisdiction as to the following propositions of law:

- I. Post-sentencing motions regarding the determination of jail-time credit filed pursuant to R.C. 2929.19(B)(2)(g)(iii) may not be denied on the grounds that

res judicata bars the consideration of the issue because it could have been raised on direct appeal. Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Sections 1 and 10, Article I of the Ohio Constitution; R.C. 2929.19(B)(2)(g)(iii).;

II. Post-sentencing motions regarding the determination of jail-time credit filed pursuant to R.C. 2929.19(B)(2)(g)(iii) may not be denied on the grounds that res judicata bars consideration of all mistakes except mathematical mistakes. Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Sections 1 and 10, Article I of the Ohio Constitution, R.C. 2929.19(B)(2)(g)(iii).; and

III. Post-sentencing motions for jail-time credit are not barred by res judicata when the error can only be established with documentation which is not included in the record on appeal. Sixth and Fourteenth Amendments to the United States Constitution; Sections 1 and 10, Article I of the Ohio Constitution. *State v. Szefercyk*, 77 Ohio St.3d 93, 95, 671 N.E. 233 (1996).

As argued in Mr. Carpenter's Memorandum in Support of Jurisdiction, a recently amended statute is being ignored by some Ohio courts, and as a consequence, defendants are remaining incarcerated beyond their lawful sentences. In 2012, the Generally Assembly passed a law instructing trial courts to fix "any error" regarding determinations of jail time credit (hereafter JTC) at "any time." R.C. 2929.19(B)(2)(g)(iii). Unfortunately, some Ohio appellate courts have disregard the recently amended statute by continuing to apply precedent which has been superseded by the unambiguous text of R.C. 2929.19. That is what happened in Mr. Carpenter's case. The legislature has stated that trial courts may correct "any error" regarding JTC, but the Fourth District Court of Appeals held that a "postsentencing motion for jail-time credit may only be used to address a purported mathematical mistake by the trial court, rather than \* \* \* an erroneous legal determination." *State v. Carpenter*, 4th Dist. Lawrence No. 14CA13, 2014-Ohio-5698, ¶ 16. Similarly, the legislature has stated that determinations of JTC may be remedied "at any time" by the trial court, but the court of appeals held that such claims

may only be raised in a timely direct appeal, and are barred by res judicata at any time thereafter.

*Id.* at ¶ 2.

Currently, a conflict exists among appellate districts regarding the application of R.C. 2929.19(B)(2)(g)(iii).<sup>2</sup> Moreover, given that the denial of a defendant's jail-time credit violates that individual's Fifth, Sixth and Fourteenth Amendment rights as guaranteed by the United States Constitution, and Sections 1 and 10, Article I of the Ohio Constitution, along with ignoring the plain and unambiguous text of R.C. 2929.19(B)(2)(g)(iii), Mr. Carpenter is unlikely to succeed on the merits of his argument. If this stay is not granted, Mr. Carpenter may serve time in prison beyond his lawful sentence, and the issue in this case will likely be moot before relief can be granted.

For these reasons, Mr. Carpenter respectfully requests that this Court stay the decision of the Court of appeals pending the resolution of this jurisdictional appeal.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

BY: s/ ALLEN VENDER

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COUNSEL FOR CARL V. CARPENTER

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<sup>2</sup> Despite recognizing that the decision in Mr. Carpenter's case was "inconsistent" with the Eighth District's decision in *State v. Quarterman*, 8th Dist. Cuyahoga No. 101064, 2014-Ohio-4928, and the Tenth District Court of Appeals' decision in *State v. Inboden*, 10th Dist. Franklin Nos. 14AP-312 & 14AP-317, 2014-Ohio-5762, the Fourth District Court of Appeals declined to certify a conflict. Further, this case is in direct conflict with *State v. Bennett*, 2nd Dist. Greene No. 2014-CA-17, 2014-Ohio-4102.

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **EMERGENCY MOTION TO STAY THE OPINION OF THE COURT OF APPEALS** has been served upon W. Mack Anderson, Assistant Prosecuting Attorney, Lawrence County Prosecutor's Office, 111 South 4th Street, Ironton, Ohio 45638, on this 9th day of February, 2015.

BY: s/ ALLEN VENDER

Allen Vender #0087040

Assistant State Public Defender

COUNSEL FOR CARL V. CARPENTER

IN THE COURT OF COMMON PLEAS  
LAWRENCE COUNTY, OHIO

FILED  
COMMON PLEAS COURT  
09CR216  
2014 FEB 28 AM 11:39

STATE OF OHIO, :  
PLAINTIFF, :  
:  
VS. :  
:  
CARL V. CARPENTER, :  
DEFENDANT . :

CASE NO. 09-CR-216  
MIKE PATTERSON  
LAWRENCE COUNTY  
CLERK OF COURTS

ENTRY

48709.973  
D

On February 27, 2014, the defendant filed a Motion for Jail Time Credit Pursuant to O.R. C. 2949.08(C)(D), 2967.191 and Criminal Rule 36. This issue has previously been addressed by the Court and the appropriate days have been credited making this motion moot.

It is so ORDERED.

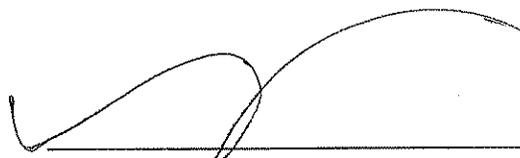
  
D. SCOTT BOWLING  
JUDGE

PROOF OF SERVICE

A copy of the foregoing has been mailed via U.S. mail to the following on February 28, 2014:

Brigham Anderson, Prosecuting Attorney (Interoffice Mail)  
111 South 4<sup>th</sup> Street  
Ironton, OH 45638

Eric M. Hedrick  
Assistant State Public Defender  
250 East Broad Street, Suite 1400  
Columbus, OH 43215

  
D. SCOTT BOWLING  
JUDGE

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

27 DEC 24 AM 9:51

STATE OF OHIO, : Case No. 14CA13  
 Plaintiff-Appellee, :  
 v. : DECISION AND  
 CARL V. CARPENTER, : JUDGMENT ENTRY  
 Defendant-Appellant. :

W. PATTERSON  
 CLERK OF COURTS  
 LAWRENCE COUNTY

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APPEARANCES:

Timothy Young, Ohio Public Defender, and Eric M. Hedrick, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and W. Mack Anderson, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

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Harsha, J.

{¶1} The Lawrence County Court of Common Pleas revoked Carl V. Carpenter's community control and sentenced him to serve 12 months in prison. The trial court granted Carpenter jail-time credit for 54 days plus additional days in custody awaiting transportation to prison. Instead of timely appealing his sentence to contest the trial court's jail-time credit order, Carpenter filed two pro se motions for jail-time credit and one pro se motion to clarify jail-time credit. Ultimately, over a year after the trial court's judgment, counsel for Carpenter filed a motion for recalculation of jail-time credit. The trial court denied the motion, finding it had previously addressed the issue and given Carpenter the appropriate days of credit.

{¶2} On appeal Carpenter contends that the trial court committed reversible error by denying his motion to recalculate his jail-time credit. We reject his contention. Res judicata bars his request for additional jail-time credit because he could have raised

his claims in a direct appeal from his sentence. Therefore, we overrule his assignment of error and affirm the judgment of the trial court.

### I. FACTS

{13} In C.P. Case No. 09-CR-16, Lawrence County officials charged Carpenter with one count of receiving stolen property for his possession of a chainsaw and weed eater belonging to another person. After Carpenter pleaded guilty to the charge, the trial court sentenced him to four years of community control sanctions under intensive supervised probation, which included successful completion of six months of intensive residential treatment at the STAR Community Justice Center or other similar community-based correctional facility. The trial court reserved jurisdiction to sentence him to a term of 11 months in prison should he violate the terms of his community control in the future and granted him 12 days of credit for time served. Carpenter was already serving a term of community control sanctions in Lawrence County C.P. Case No. 05-CR-027, in which he was convicted of two counts of complicity to burglary and one count of breaking and entering. On November 5, 2009, the trial court ordered Carpenter to report to the county jail on November 7, 2009, to be transported to the STAR Community Justice Center on November 10.

{14} In April 2010, the STAR Community Justice Center discharged Carpenter without successfully completing the program based on his negative behavior, disrespect, and failure to progress in the program. The state filed a motion to revoke his community control, and Carpenter admitted his violation. The trial court ordered him to serve a sentence of 30 days in jail and again reserved a term of incarceration of 11 months, subject to the 30-day credit. The court also gave him eight days of credit for

time served. The trial court ordered the continuation of his community control sanctions upon the completion of his 30-day jail sentence.

{15} In March 2011, Carpenter tested positive for drugs and he admitted violating his community control in both underlying criminal cases. In Case No. 09-CR-216, the trial court sentenced Carpenter to an additional year of community control sanctions and intensive supervised probation, and readvised him that it was reserving jurisdiction to sentence him to serve a prison term of 11 months should he violate the terms of his community control in the future. He was also given eight days credit for time served. The court ordered sanctions to be served concurrently with the sentence imposed against him in Case No. 05-CR-27.

{16} In August 2012, Carpenter violated his community control a third time by failing to report to the Bureau of Community Corrections as directed. He also violated his community control by being found guilty of obstructing official business and receiving stolen property, and being indicted for breaking and entering. The state filed a motion to revoke his community control in both previous criminal cases.

{17} Once again Carpenter, pleaded guilty to violating his community control in both cases. In an entry dated January 9, 2013, the court noted that it had reserved jurisdiction to impose a prison sentence of eleven months in Case No. 09-CR-216 and two years, seven months, and nine days in Case No. 05-CR-027. The court revoked Carpenter's community control and sentenced him to serve a prison term of twelve months to run consecutively with his sentence in Case No. 12-CR-334. In the same entry, the trial court specified that Carpenter would be given credit for 54 days served, plus future days spent in custody while awaiting transportation to prison.

{¶18} Instead of timely appealing the judgment, Carpenter filed pro se motions for jail-time credit and clarification of jail-time credit in October, November, and December 2013. Then in late February 2014, Carpenter's counsel filed a motion for recalculation of jail-time credit. In this motion Carpenter challenged the propriety of the trial court's January 9, 2013 sentencing entry's calculation of jail-time credit. He claimed that the entry credited him with only 74 days of jail-time credit (54 days from 11/2/12-12/16/12 plus 20 additional days spent in custody awaiting transportation to prison), when he should have received an additional 168 days of jail-time credit, including 113 days spent at the STAR Community Justice Center from 11/10/09-3/3/10 and time spent in jail. The trial court denied the motion, stating that "[t]his issue had previously been addressed by the Court and the appropriate days have been credited making this motion moot." This appeal resulted from our granting of Carpenter's motion for leave to file a delayed appeal from the denial of his February 2014 motion.

## II. ASSIGNMENT OF ERROR

{¶19} Carpenter assigns the following error for our review:

The trial court committed reversible error when it declined to correct Mr. Carpenter's jail-time credit to reflect the number of days of confinement that Mr. Carpenter is entitled to have credited towards his sentence, denying him a substantial right under Ohio law and equal protection of the law under the Fifth and Fourteenth Amendments to the U.S. Constitution, and Section 2, Article I of the Ohio Constitution.

## III. STANDARD OF REVIEW

{¶10} " 'A trial court must make a factual determination of the number of days credit to which a prisoner is entitled by law. See Ohio Adm.Code 5120-2-04(B). Therefore, we must uphold the trial court[']s findings of fact if the record contains competent, credible evidence to support them.' " *State v. Primack*, 4th Dist. Wash. No.

13CA23, 2014-Ohio-1771, ¶ 5, quoting *State v. Elkins*, 4th Dist. Hocking No. 07CA1, 2008-Ohio-674, ¶ 20. To determine whether the trial court correctly relied on res judicata to resolve the jail-time credit issue, we apply a de novo standard of review to this question of law. *State v. Tolliver*, 4th Dist. Athens No. 12CA36, 2013-Ohio-3861, ¶ 12.

## II. LAW AND ANALYSIS

{¶11} In his sole assignment of error Carpenter asserts that the trial court erred in denying his motion for recalculation of jail-time credit. He claimed to have filed his motion pursuant to R.C. 2929.19(B)(2)(g)(i), which requires the sentencing court to “[d]etermine, notify the offender of, and include in the sentencing entry the number of days that the offender has been confined for any reason arising out of the offense for which the offender is being sentenced and by which the department of rehabilitation and correction must reduce the stated prison term under section 2967.191 of the Revised Code.”

{¶12} The trial court denied the motion because it had already determined the amount of jail-time credit that Carpenter was entitled to in its January 9, 2013 sentencing entry. “If a party fails to timely appeal a final order, matters that could have been reviewed on appeal become res judicata and cannot be reviewed in related or subsequent proceedings or appeals.” *State v. Swayne*, 4th Dist. Adams Nos. 12CA952, 12CA953, and 12CA954, 2013-Ohio-3747, ¶ 24. See also *State v. Bradshaw*, 4th Dist. Lawrence No. 14CA8, 2014-Ohio-3148, ¶ 10; *State v. Quinnie*, 8th Dist. Cuyahoga No. 100317, 2014-Ohio-1435, ¶ 16 (res judicata barred appellant from raising jail-time credit claim in postconviction motion because he could have but did not raise the issue in his

direct appeal); *State v. Spillan*, 10th Dist. Franklin Nos. 06AP-50, 06AP-51, 06AP-52, and 06AP-750, 2006-Ohio-4788, ¶ 12 (“res judicata bars appellant from raising the jail-time credit issue through the jail-time credit motions and subsequent appeal of such motions, given that appellant, represented by counsel, could have raised the issue on direct appeal”); *State v. Williams*, 3d Dist. Allen No. 1-03-02, 2003-Ohio-2576, ¶ 10 (res judicata barred appellant from raising claim for additional jail-time credit in postconviction motion when he could have raised it in an appeal from his original sentence).

{¶13} Carpenter could have raised his claims for additional jail-time credit in a timely appeal from the trial court’s January 9, 2013 sentencing entry. At that time he was represented by counsel. He also could have raised many of his claims for additional jail-time credit, including his claim for 113 additional days of credit for the time he spent in the STAR Community Justice Center from November 10, 2009 to March 3, 2010, in a timely appeal from the trial court’s April 2010 and April 2011 sentencing entries on his prior violations of community control. But he did not despite being represented by counsel during both proceedings.

{¶14} Moreover, Carpenter does not suggest that the trial court committed a mere mathematical mistake or clerical error, which would not be barred by res judicata; rather he seeks a legal determination of his entitlement to periods of time he claims he was confined on the pertinent charges. The trial court’s entry also indicates that its decision that Carpenter was only entitled to the specified amount of jail-time credit was the product of its legal determination and not a mere mathematical or clerical mistake. See *Bradshaw*, 4th Dist. No. 14CA8, 2014-Ohio-3148, ¶ 11; *State v. Smiley*, 10th Dist.

Franklin No. 11AP-266, 2012-Ohio-4126, ¶ 12 (“Appellant did not challenge the issue of jail-time credit by way of direct appeal, and because his motion for jail-time credit involves a substantive claim, and not merely clerical error, we agree with the state that his motion is barred under the doctrine of res judicata”); *State v. Roberts*, 10th Dist. Franklin No. 10AP-729, 2011-Ohio-1760, ¶ 11 (res judicata barred motion for jail-time credit because appellant’s claim “requires a legal determination, rather than the correction of a mathematical error” when he “is claiming jail-time credit is due for a category of time, not simply the correction of the number of days within that category”).

{¶15} Carpenter points to the seemingly expansive language in R.C. 2929.19(B)(2)(g)(iii) to argue it precludes courts from applying res judicata to bar postsentence motions for jail-time credit even when these claims could have been raised by timely appeal from the sentencing judgment. R.C. 2929.19(B)(2)(g)(iii) states “[t]he sentencing court retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination under division (B)(2)(g)(i) of this section. The offender may, at any time after sentencing, file a motion in the sentencing court to correct any error made in making a determination under division (B)(2)(g)(i) of this section, and the court may in its discretion grant or deny that motion.”

{¶16} However, in *State v. Verdi*, 6th Dist. Erie No. E-13-025, 2013-Ohio-5630, ¶ 14-15, the Sixth District Court of Appeals recently rejected a similar claim:

Referencing R.C. 2929.19(B)(2)(g)(iii), appellant contends that the General Assembly intended to create a “statutory exception to the doctrine of res judicata as applied to custody credit determinations.” However, appellant’s argument overlooks several cases decided by appellate courts in this state since the effective date of the amendment, all of which maintain that “[a] post-sentencing motion for jail-time credit may only be used to address a purported mathematical mistake by the trial court, rather than \* \* \* an erroneous legal determination.” *State v. Doyle*, 10th

Dist. Franklin Nos. 12AP-567, 12AP-794, 12AP-568, 12AP-793, 2013-Ohio-3262, ¶ 10, citing *State v. Roberts*, 10th Dist. Franklin No. 10AP-729, 2011-Ohio-1760, ¶ 6; see also *State v. Summerall*, 10th Dist. Franklin No. 12AP-445, 2012-Ohio-6234, ¶ 11 (applying res judicata to bar appellant's motion where appellant "failed to challenge the trial court's award of jail-time credit at sentencing or on a direct appeal from his conviction" and "did not allege that the trial court committed any mathematical error in the calculation of jail-time credit so as to avoid the res judicata bar"); *State v. McKinney*, 7th Dist. Mahoning No. 12 MA 163, 2013-Ohio-4357 (stating that appellant's failure to raise his "purely legal argument" concerning jail-time credit on a direct appeal precluded him from raising it in a subsequent appeal under the doctrine of res judicata); *State v. Perry*, 7th Dist. Mahoning No. 12 MA 177, 2013-Ohio-4370, ¶ 12 (finding that appellant's substantive claim for jail-time credit was barred by res judicata where he failed to raise it on a direct appeal, noting that "[t]his is the view across the state"); *State v. Britton*, 3d Dist. Defiance Nos. 4-12-13, 4-12-14, 4-12-15, 2013-Ohio-1008, ¶ 14 (limiting the use of a motion for correction of jail-time credit to situations where the trial court made a mathematical mistake).

In light of the foregoing, we conclude that principles of res judicata bar appellant's claim for additional jail-time credit. Accordingly, appellant's first assignment of error is not well-taken.

{¶17} We agree with the holding in *Verdi*. Notably, the Supreme Court of Ohio did not accept jurisdiction for a review of the appellate court's decision in *Verdi*. *State v. Verdi*, 138 Ohio St.3d 1495, 2014-Ohio-2021, 8 N.E.3d 964.

{¶18} Carpenter also points to a recent procedural decision from this court in which we held that an entry denying a postsentence motion for jail-time credit is a final appealable order because it is made in a special proceeding and affects a substantial right. *State v. Earles*, 4th Dist. Ross No. 13CA3415 (Mar. 27, 2014). In so holding, we relied in part on the 2012 amendment to R.C. 2929.19(B)(2)(g)(iii) conferring continuing jurisdiction on sentencing courts to "correct any error not previously raised at sentencing" in imposing jail-time credit. *Earles* is distinguishable because that case did not involve the issue raised here, i.e. whether res judicata precludes a substantive-as

opposed to a mathematical-claim of error in the calculation of jail-time credit. And the only court to have directly considered this issue - the court of appeals in *Verdi* - answered this question in the affirmative. Notably, the Supreme Court declined to review that holding. Therefore, *Earles* does not require a contrary result.

#### V. CONCLUSION

{¶19} The trial court did not err in denying Carpenter's motion to recalculate his jail-time credit based on the rationale that it had already decided the matter in its sentencing entry. *Res judicata* barred him from raising claims in his postsentence motions that he could have raised in timely appeals from his sentencing entries. In so holding, we need not address the state's argument that the jail-time credit imposed was part of a plea agreement, which the court had approved. We overrule Carpenter's assignment of error.

JUDGMENT AFFIRMED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY:   
William H. Harsha, Judge

**NOTICE TO COUNSEL**

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

COURT OF APPEALS

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

2015 JAN 30 PM 2:46

STATE OF OHIO,	:	Case No. 14CA13
Plaintiff-Appellee,	:	
v.	:	<u>ENTRY DENYING</u>
CARL V. CARPENTER,	:	<u>APPELLANT'S MOTION</u>
Defendant-Appellant.	:	<u>TO CERTIFY A CONFLICT</u>
	:	<u>AND STAY</u>

W. MACK ANDERSON  
CLERK OF COURTS  
LAWRENCE COUNTY

APPEARANCES:

Timothy Young, Ohio Public Defender, and Allen Vender, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and W. Mack Anderson, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

Harsha, J.

{¶1} The Lawrence County Court of Common Pleas revoked Carl V.

Carpenter's community control and sentenced him to serve 12 months in prison. The trial court granted Carpenter jail-time credit for 54 days plus additional days in custody awaiting transportation to prison. Instead of timely appealing his sentence to contest the trial court's jail-time credit order, Carpenter filed two pro se motions for jail-time credit and one pro se motion to clarify jail-time credit. Ultimately, over a year after the trial court's judgment, counsel for Carpenter filed a motion for recalculation of jail-time credit. The trial court denied the motion, finding it had previously addressed the issue and given Carpenter the appropriate days of credit.

{¶2} On appeal we rejected Carpenter's claim that the trial court committed reversible error by denying his motion to recalculate his jail-time credit. *State v. Carpenter*, 4th Dist. Lawrence No. 14CA13, 2014-Ohio-5698. We held that the trial

court did not err in denying his motion because “[r]es judicata barred him from raising claims in his postsentence motions that he could have raised in timely appeals from his sentencing entries.” *Id.* at ¶ 19.

{¶13} Carpenter now seeks to certify a conflict between our judgment and the judgments of the Eighth District Court of Appeals in *State v. Quarterman*, 8th Dist. Cuyahoga No. 101064, 2014-Ohio-5796, and the Tenth District Court of Appeals in *State v. Inboden*, 10th Dist. Franklin Nos. 14AP-312 and 14AP-317, 2014-Ohio-5762. The state did not file a timely response.

{¶14} A court of appeals has a constitutional duty to certify a conflict when its judgment is in conflict with the judgment on the same question by any other court of appeals in Ohio. Ohio Constitution, Article IV, Section 3(B)(4). The following three requirements must exist for a court of appeals to certify a conflict to the Supreme Court of Ohio: (1) the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be on the same question; (2) the alleged conflict must be on the law, not facts; and (3) the journal entry or opinion of the certifying court must clearly set forth the rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993); *State v. Lewis*, 4th Dist. Washington No. 97CA51, 1998 WL 337879, \*1 (June 24, 1998); *State v. Gilmore*, 7th Dist. Mahoning No. 11 MA 30, 2014-Ohio-5059, ¶ 2. The Supreme Court set forth the procedural requirements for motions to certify a conflict in App.R. 25, which requires that the motion “specify the issue

proposed for certification” and “cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed.”

{¶15} Carpenter claims that our judgment conflicts with the judgments of the courts of appeals in *Quarterman* and *Inboden* on the following issue:

May a post-sentencing motion for jail-time credit only be used to address a purported mathematical/clerical mistake by the trial court?

{¶16} In his sole assignment of error Carpenter asserted that the trial court erred in denying his motion for recalculation of jail-time credit and he claimed to have filed his motion under R.C. 2929.19(B)(2)(g)(i), which requires the sentencing court to “[d]etermine, notify the offender of, and include in the sentencing entry the number of days that the offender has been confined for any reason arising out of the offense for which the offender is being sentenced and by which the department of rehabilitation and correction must reduce the stated prison term under section 2967.191 of the Revised Code.”

{¶17} We rejected Carpenter’s assignment of error based on the Sixth District Court of Appeals’ holding in *State v. Verdi*, 6th Dist. Erie No. E-13-025, 2013-Ohio-5630:

Carpenter points to the seemingly expansive language in R.C. 2929.19(B)(2)(g)(iii) to argue it precludes courts from applying *res judicata* to bar postsentence motions for jail-time credit even when these claims could have been raised by timely appeal from the sentencing judgment. R.C. 2929.19(B)(2)(g)(iii) states “[t]he sentencing court retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination under division (B)(2)(g)(i) of this section. The offender may, at any time after sentencing, file a motion in the sentencing court to correct any error made in making a determination under division (B)(2)(g)(i) of this section, and the court may in its discretion grant or deny that motion.”

However, in *State v. Verdi*, 6th Dist. Erie No. E-13-025, 2013-Ohio-5630, ¶ 14-15, the Sixth District Court of Appeals recently rejected a similar claim:

Referencing R.C. 2929.19(B)(2)(g)(iii), appellant contends that the General Assembly intended to create a “statutory exception to the doctrine of res judicata as applied to custody credit determinations.” However, appellant’s argument overlooks several cases decided by appellate courts in this state since the effective date of the amendment, all of which maintain that “[a] post-sentencing motion for jail-time credit may only be used to address a purported mathematical mistake by the trial court, rather than \* \* \* an erroneous legal determination.” *State v. Doyle*, 10th Dist. Franklin Nos. 12AP-567, 12AP-794, 12AP-568, 12AP-793, 2013-Ohio-3262, ¶ 10, citing *State v. Roberts*, 10th Dist. Franklin No. 10AP-729, 2011-Ohio-1760, ¶ 6; see also *State v. Summerall*, 10th Dist. Franklin No. 12AP-445, 2012-Ohio-6234, ¶ 11 (applying res judicata to bar appellant’s motion where appellant “failed to challenge the trial court’s award of jail-time credit at sentencing or on a direct appeal from his conviction” and “did not allege that the trial court committed any mathematical error in the calculation of jail-time credit so as to avoid the res judicata bar”); *State v. McKinney*, 7th Dist. Mahoning No. 12 MA 163, 2013-Ohio-4357 (stating that appellant’s failure to raise his “purely legal argument” concerning jail-time credit on a direct appeal precluded him from raising it in a subsequent appeal under the doctrine of res judicata); *State v. Perry*, 7th Dist. Mahoning No. 12 MA 177, 2013-Ohio-4370, ¶ 12 (finding that appellant’s substantive claim for jail-time credit was barred by res judicata where he failed to raise it on a direct appeal, noting that “[t]his is the view across the state”); *State v. Britton*, 3d Dist. Defiance Nos. 4-12-13, 4-12-14, 4-12-15, 2013-Ohio-1008, ¶ 14 (limiting the use of a motion for correction of jail-time credit to situations where the trial court made a mathematical mistake).

In light of the foregoing, we conclude that principles of res judicata bar appellant’s claim for additional jail-time credit. Accordingly, appellant’s first assignment of error is not well-taken.

We agree with the holding in *Verdi*. Notably, the Supreme Court of Ohio did not accept jurisdiction for a review of the appellate court’s decision in *Verdi*. *State v. Verdi*, 138 Ohio St.3d 1495, 2014-Ohio-2021, 8 N.E.3d 964.

*Id.* at ¶ 15-17.

{¶18} In *Quarterman*, 8th Dist. Cuyahoga No. 101064, 2014-Ohio-5796, the Eighth District Court of Appeals at ¶ 8 applied a different rationale on reconsideration in

that case by opining in dicta that the statutory amendment changed preexisting precedent:

Amended R.C. 2929.19(B)(2)(g)(iii) marks a significant change in the law regarding jail-time credit. Previously, inmates could only challenge errors in jail-time credit on direct appeal unless the error consisted of a mathematical mistake in calculation rather than an erroneous legal determination. See, e.g., *State v. Robinson*, 4th Dist. Scioto No. 00 CA 2698, 2000 Ohio App. LEXIS 5001 (Oct. 23, 2000). R.C. 2929.19(B)(2)(g)(iii) now allows the court to correct “any error,” regardless of whether the error involved a mathematical miscalculation or an erroneous legal determination, i.e., whether the defendant was entitled to jail-time credit for time served in an inpatient rehabilitation facility.

{¶9} Nevertheless, the court of appeals reaffirmed the judgment of the trial court denying part of Quarterman’s request for jail-time credit because he had been released from prison, rendering his appeal on the jail-time credit issue moot. *Id.* at ¶ 6, 9.

{¶10} In *Inboden*, 10th Dist. Franklin Nos. 14AP-312 and 14AP-317, 2014-Ohio-5762, the Tenth District Court of Appeals at ¶ 8 also opined that the statutory amendment legislatively overruled the application of the judicial doctrine of *res judicata*:

R.C. 2929.19(B)(2)(g)(iii), however, states that the court has continuing jurisdiction to correct any jail-time credit error “not previously raised at sentencing,” thereby abating the application of the doctrine of *res judicata* as it relates to issues that could have been raised at sentencing but were not.

{¶11} But the court of appeals ultimately affirmed the trial court’s denial of the appellant’s motion for jail-time credit because it determined that the amendment was inapplicable based on the facts of the case—appellant previously raised his claim at sentencing. *Id.* at ¶ 9-11.

{¶12} It is axiomatic that “[a]n actual conflict must exist in order for the court to order certification.” See generally Painter and Pollis, *Ohio Appellate Practice*, Section 7:41 (2014); *Whitelock*, 66 Ohio St.3d 594, 613 N.E.2d 1032, at paragraph one of the syllabus (“there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination”); *Metcalf v. Kilzer*, 4th Dist. Athens No. 14CA13, 2014-Ohio-4713, ¶ 7, quoting *State v. Hankerson*, 52 Ohio App.3d 73, 557 N.E.2d 847 (2d Dist.1989), paragraph two of the syllabus (“ ‘For a court of appeals to certify a case as being in conflict with another case, it is not enough that the reasoning expressed in the opinions of the two courts of appeals be inconsistent; the judgments of the two courts must be in conflict’ ”).

{¶13} Our judgment here-affirming the denial of Carpenter’s motion for jail-time credit—is not in actual conflict with the judgments of the courts of appeals in *Quarterman* and *Inboden*, which also affirmed judgments denying motions for jail-time credit, although some of the reasoning expressed in these opinions is inconsistent with our rationale in *Carpenter*.

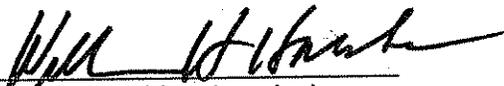
{¶14} Therefore, in the absence of an actual conflict, we deny Carpenter’s motion to certify a conflict and to stay our judgment. However, the Supreme Court of Ohio may wish to allow a discretionary appeal in this case to resolve the seeming inconsistencies between our decision in *Carpenter*, which relied on the Sixth District’s decision in *Verdi*, 6th Dist. Erie No. E-13-025, 2013-Ohio-5630, and the decisions of the Eighth District in *Quarterman* and the Tenth District in *Inboden*. One of the important issues that could be resolved in such an appeal is whether under separation of powers

principles, the General Assembly can legislatively preclude courts from applying the judicial doctrine of res judicata. *See State v. Hochhausler*, 76 Ohio St.3d 455, 463, 668 N.E.2d 457 (1996) (The principle of separation of powers is embedded in the constitutional framework of our state government and each of the three grand divisions of the government must be protected from the encroachments of the others so far that its integrity and independence may be preserved).

MOTION TO CERTIFY A CONFLICT AND TO STAY DENIED.

Abele, J. & McFarland, A.J.: Concur.

For the Court

BY:   
William H. Harsha, Judge



STATE OF OHIO, PLAINTIFF-APPELLEE vs. ALLEN QUARTERMAN, DEFENDANT-APPELLANT

No. 101064

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2014-Ohio-5796; 2014 Ohio App. LEXIS 5606

December 31, 2014, Released And Journalized

SUBSEQUENT HISTORY: Appeal granted by, Dismissed by State v. Quarterman, 2015 Ohio 40, 2015 Ohio LEXIS 15 (Ohio, Jan. 12, 2015)

PRIOR HISTORY: [\*\*1] Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-11-555106-A. State v. Quarterman, 2014-Ohio-4928, 2014 Ohio App. LEXIS 4787 (Ohio Ct. App., Cuyahoga County, Nov. 6, 2014)

DISPOSITION: AFFIRMED.

COUNSEL: Allen Quarterman, Pro se, APPELLANT, Cleveland, Ohio.

FOR APPELLEE: Timothy J. McGinty, Cuyahoga County Prosecutor, BY: Joseph J. Ricotta, Brett Hammond, Assistant Prosecuting Attorneys, Cleveland, Ohio.

JUDGES: BEFORE: E.T. Gallagher, J., E.A. Gallagher, P.J., and Stewart, J. EILEEN A. GALLAGHER, P.J., and MELODY J. STEWART, J., CONCUR.

OPINION BY: EILEEN T. GALLAGHER

OPINION

JOURNAL ENTRY AND OPINION ON RECONSIDERATION<sup>1</sup>

<sup>1</sup> The announcement of decision, State v. Quarterman, 8th Dist. Cuyahoga No. 101064, 2014-Ohio-4928, released November 6, 2014, is hereby vacated. This opinion, issued upon recon-

sideration, is the court's journalized decision in this appeal. See App.R. 22(C); see also S.Ct.Prac.R. 7.01.

EILEEN T. GALLAGHER, J.:

[\*P1] Sua sponte this court reconsiders its decision in State v. Quarterman, 8th Dist. Cuyahoga No. 101064, 2014-Ohio-4928, and affirms the trial court's judgment.

[\*P2] In November 2011, Quarterman pleaded guilty to one count each of burglary and domestic violence, and the court sentenced him to four years of community control sanctions ("probation"). The terms of his probation included a "no contact" order prohibiting Quarterman from contacting the victims, regular drug testing, the attainment and maintenance of verifiable employment, and the completion [\*\*2] of an inpatient drug-treatment program. Quarterman completed an inpatient drug-treatment program but failed to comply with the other terms of his probation.

[\*P3] The court held probation violation hearings on each of Quarterman's probation violations and continued Quarterman's probation four times. Quarterman's violations included contacting the victims in violation of the "no contact" order, testing positive for cocaine a few times, and violating his electronic monitoring program. After a hearing on the fifth probation violation, the court revoked Quarterman's probation and sentenced him to 18 months in prison. The journal entry, dated July 8, 2013, states that Quarterman was to be given 135 days of jail-time credit.

[\*P4] On August 30, 2013, Quarterman filed a motion for jail-time credit requesting 274 days of

jail-time credit. The trial court granted the motion in part and stated in its journal entry that:

Defendant is not to be given any jail time credit for inpatient drug treatment.

Defendant is to be given an additional seven days of Cuyahoga County jail time credit for a total of 142 days of jail time credit.

[\*P5] In his sole assignment of error, Quarterman argues the trial court erroneously [\*\*3] failed to give him jail-time credit for his time spent as an inpatient in a drug rehabilitation facility. He contends he was entitled to the 62 days he spent in the facility because completion of the inpatient-drug-rehabilitation program was a requirement of his probation.

[\*P6] However, Quarterman has been released from prison. Therefore, any grant of jail-time credit would not reduce the amount of time he would spend in jail, and his appeal is moot. *State v. Fitzgerald, 8th Dist. Cuyahoga No. 98723, 2013-Ohio-1893, ¶ 2*, citing *State ex rel. Gordon v. Murphy, 112 Ohio St.3d 329, 2006-Ohio-6572, 859 N.E.2d 928, ¶ 6*.

[\*P7] We note, however, that *R.C. 2929.19(B)(2)(g)(iii)*, as amended by H.B. No. 487 and S.B. 337 of the 129th General Assembly, vests the trial court with "continuing jurisdiction to correct any error not previously raised at sentencing" in the court's calculation of jail-time credit under *R.C. 2929.19(B)(2)(g)(i)*. See *State v. Lovings, 10th Dist. Franklin Nos. 13AP-303 and 13AP-304, 2013-Ohio-5328, 4 N.E.3d 443*.

[\*P8] Amended *R.C. 2929.19(B)(2)(g)(iii)* marks a significant change in the law regarding jail-time credit. Previously, inmates could only challenge errors in jail-time credit on direct appeal unless the error consisted of a mathematical mistake in calculation rather than an erroneous legal determination. See, e.g., *State v. Robinson, 4th Dist. Scioto No. 00 CA 2698, 2000 Ohio 1972, 2000 Ohio App. LEXIS 5001 (Oct. 23, 2000)*. *R.C. 2929.19(B)(2)(g)(iii)* now allows the court to correct "any error," regardless of whether the error involved a mathematical miscalculation or [\*\*4] an erroneous legal determination, i.e., whether the defendant was entitled to jail-time credit for time served in an inpatient rehabilitation facility.

[\*P9] Nevertheless, because Quarterman's appeal is moot by virtue of his release from prison, we overrule the sole assignment of error.

[\*P10] Judgment affirmed.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and MELODY J. STEWART, J., CONCUR



STATE OF OHIO, Plaintiff-Appellee v. ADAM M. BENNETT, Defendant-Appellant

Appellate Case No. 2014-CA-17

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, GREENE COUNTY

2014-Ohio-4102; 2014 Ohio App. LEXIS 4002

September 19, 2014, Rendered

**PRIOR HISTORY:** **[\*\*1]** (Criminal Appeal from Common Pleas Court). Trial Court Case No. 09-CR-557. *State v. Bennett*, 192 Ohio App. 3d 608, 2011 Ohio 961, 949 N.E.2d 1064, 2011 Ohio App. LEXIS 833 (Ohio Ct. App., Greene County, 2011)

**COUNSEL:** STEPHEN K. HALLER, by ELIZABETH A. ELLIS, Greene County Prosecutor's Office, Xenia, Ohio, Attorneys for Plaintiff-Appellee.

ADAM M. BENNETT, Defendant-Appellant, Pro se, Chillicothe, Ohio.

**JUDGES:** HALL, J. FAIN and WELBAUM, JJ., concur.

**OPINION BY:** HALL

**OPINION**

HALL, J.

**[\*P1]** Adam Bennett appeals pro se from the trial court's denial of his motion for additional jail-time credit.

**[\*P2]** Bennett advances two assignments of error. First, he contends the trial court erred in denying him jail-time credit for time spent on electronic monitoring or "house arrest." Second, he claims the trial court erred in denying him jail-time credit for time spent in a half-way house.

**[\*P3]** The record reflects that Bennett entered a guilty plea to multiple fifth-degree felony counts of illegal use of a minor in nudity-oriented material. The trial court sentenced him to community control in May 2010. (Doc. #43). In April 2012, he was charged with violating the conditions of community control. Thereafter, in July

2012, he was charged with additional violations. Pending the outcome of these allegations, Bennett served time in jail and time on electronic monitoring or what he calls "house **[\*\*2]** arrest." In November 2012, the trial court found that he had violated the terms of his community control. It nevertheless continued him on community control with added conditions that he serve a six-month jail sentence and complete the Talbert House's Turtle Creek program. (Doc. #112). Later that month, the trial court held the jail sentence in abeyance pending successful completion of the Turtle Creek program. (Doc. #113).

**[\*P4]** In January 2013, Bennett was charged with additional community control violations. As a result, he was discharged from the Turtle Creek program and arrested. After finding the alleged violations established, the trial court revoked community control on February 6, 2013 and imposed an aggregate thirty-month prison sentence. It awarded Bennett 214 days of jail-time credit. (Doc. #122). Bennett did not appeal. He filed a motion for judicial release in November 2013. The trial court overruled the motion the following month. Thereafter, on March 19, 2014, Bennett filed a pro se motion for additional jail-time credit. (Doc. #136). He argued that he was entitled to jail-time credit for the time he spent on house arrest and at Turtle Creek. Specifically, he claimed he was **[\*\*3]** entitled to an additional forty-nine days of jail-time credit for time spent on house arrest from May 23, 2012 until July 11, 2012. He further claimed entitlement to fifty-one days of jail-time credit for time spent at Turtle Creek from November 20, 2012 until January 11, 2013. Bennett supported his motion with an affidavit describing the terms and conditions of his house arrest and time spent at Turtle Creek. On March 21, 2014, the

trial court filed a judgment entry overruling Bennett's motion. It reasoned:

The Defendant is requesting jail time credit for time served in Turtle Creek residential facility. Turtle Creek is not a CBCF lockdown facility, therefore no jail time is credited. The Defendant also request[s] jail time credit for time on "House Arrest." While the Defendant was required to wear a GPS ankle monitor, he was permitted to leave his residence for employment and medical appointments.

After due consideration, the Court FINDS the defendant was credited with the appropriate jail time credit and the request is therefore DENIED.

(Doc. #137).

[\*P5] The sole issue on appeal is whether the trial court erred in denying Bennett jail-time credit for time spent on electronic monitoring/house arrest [\*\*4] and at Turtle Creek. In opposition to Bennett's argument, the State first asserts that the trial court's denial of his motion for jail-time credit is not an appealable order. Specifically, the State maintains that Bennett was required to raise the jail-time issue in a direct appeal from the revocation of community control. The State reasons that the trial court's denial of the motion for additional jail-time credit was a nullity that did not affect Bennett's substantial rights. We find this argument unpersuasive. Effective September 2012, *R.C. 2929.19(B)(2)(g)(iii)* allows an offender to file a motion "any time after sentencing" challenging the accuracy of a jail-time determination, and a trial court "retains continuing jurisdiction to correct any error not previously raised at sentencing" regarding jail-time credit. (Emphasis added). In light of this statute, we conclude that Bennett was entitled to challenge the trial court's jail-time determination, and the trial court's ruling on his motion was not a nullity. All of the contrary cases cited in the State's appellate brief predate *R.C. 2929.19(B)(2)(g)(iii)*, which the State does not address and which took effect before the trial court revoked Bennett's community control and before [\*\*5] he filed his jail-time credit motion.

[\*P6] Turning to the merits of Bennett's argument, the Revised Code obligates a trial court to "include in the sentencing entry the number of days that the offender has been confined for any reason arising out of the offense for which the offender is being sentenced and by which the department of rehabilitation and correction must reduce the stated prison term[.]" *R.C. 2929.19(B)(2)(g)(i)*; see also *R.C. 2967.191*. The issue here is whether Ben-

nett's time on home electronic monitoring and at Turtle Creek prior to revocation of his community control constituted "confinement" for purposes of jail-time credit.

[\*P7] The record reflects that the trial court subjected Bennett to home electronic monitoring on May 23, 2013 as a condition of granting him an own-recognizance bond pending disposition of the alleged community control violations. (Doc. #83 at 2). We conclude that this electronic monitoring as a condition of bond did not constitute "confinement" for purposes of jail-time credit. See, e.g., *State v. Gopen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 68 ("\*\* \* \* Ohio courts of appeals have generally held that persons under pretrial electronic home monitoring are not entitled to credit for time served, because pretrial electronic home monitoring is a 'constraint [\*\*6] in lieu of bail pursuant to *R.C. 2967.191* and is not detention under *R.C. 2921.01(E)*"); *State v. Holt*, 2d Dist. Montgomery No. 18035, 2000 Ohio App. LEXIS 1990, 2000 WL 569930 (May 12, 2000) ("There is a consistent line of appellate authority that house confinement with electronic monitoring, whether it is called 'arrest' or 'detention' or otherwise, is not assessable as credit time against imprisonment when it is a condition of bail prior to sentencing. \* \* \* In contrast, EHDP time served as part of the sentence is recognized as a form of 'detention' for purposes of applying the escape statute, as this court has held."); *State v. Harris*, 7th Dist. Mahoning No. 11 MA 184, 2012-Ohio-5612, ¶ 28 ("The record does show that [defendant Harris] was subject to electronically monitored house arrest (EMHA) leading up to the trial on June 1, 2010 for the underlying offenses. \* \* \* Harris would not be entitled to jail-time credit for time spent on EMHA."); *In re Helfrich*, 5th Dist. Licking No. 13CA20, 2014-Ohio-1933, ¶ 59 ("But electronic monitoring house arrest as a condition for presentence release on bail is not the type of confinement that justifies credit for time served."); *State v. Delaney*, 12th Dist. Warren No. CA2012-11-124, 2013-Ohio-2282, ¶ 8 (holding that "pretrial EMHA does not constitute confinement for purposes of receiving jail-time credit"); *State v. Osborne*, 5th Dist. Richland No. 11 CA 14, 2011-Ohio-2363, ¶ 26 ("In the instant case, Appellant \* \* \* was placed on electronically [\*\*7] monitored house arrest as a condition of bond. Appellant was free on bond and such constraint was incidental to his release on bail. \* \* \* We therefore find that Appellant's house arrest does not constitute confinement and therefore Appellant is not entitled to jail time credit for time served on house arrest.").

[\*P8] In the present case, of course, Bennett's electronic monitoring was not "pretrial" or "presentence" in relation to his underlying felony convictions. As set forth above, he already had pled guilty to the charges against him and had received community control sanc-

tions. He later allegedly violated the conditions of community control and was placed on electronic monitoring as a condition of bond pending resolution of the violations. In our view, this situation is analogous to those involving pretrial electronic monitoring. The trial court's imposition of electronic monitoring here was incidental to Bennett's release on bail rather than part of a criminal sentence. It was intended to secure his attendance at a hearing to determine whether community control violations had occurred. In that sense, it was equivalent to electronic monitoring ordered as a condition of bail to secure [\*\*8] a criminal defendant's appearance at trial. Because Bennett's time on electronic monitoring did not entitle him to additional jail-time credit, we overrule his first assignment of error.

[\*P9] In his second assignment of error, Bennett challenges the trial court's denial of jail-time credit for his term at Turtle Creek. As noted above, the trial court ordered Bennett to stay at Turtle Creek as part of the community control sentence it imposed for his felony convictions. Unfortunately, the record contains almost no information about the Turtle Creek program or its restrictions on Bennett. Time spent in a half-way house or other "facility where one's ability to leave whenever he or she wishes is restricted may be confinement" for purposes of jail-time credit. *State v. Osborne, 5th Dist. Richland No. 2009CA0119, 2010-Ohio-4100, ¶ 14*. In *State v. McComb, 2d Dist. Montgomery No. 99 CA 8, 1999 Ohio App. LEXIS 2920, 1999 WL 961344 (June 25, 1999)*, this court rejected the proposition that a defendant never is entitled to jail-time credit while serving probation in a treatment facility. *1999 Ohio App. LEXIS 2920, [WL] at \*3*. "Rather, trial courts 'must review the nature of the program to determine whether the restrictions on the participants are so stringent as to constitute "confinement" as contemplated by the legislature.'" (Citations omitted) *1999 Ohio App. LEXIS 2920, [WL] at \*4*. In *McComb*, this court found itself unable to determine whether [\*\*9] in-patient treatment at the Talbert House constituted "confinement" for purposes of jail-time credit. *Id.* This court reasoned:

\* \* \* [T]he record in this case provides minimal information on the nature of the Talbert House program. From the trial court's December 19, 1997 judgment entry, we know that McComb was ordered to complete inpatient treatment at a long-term residential treatment program such as Talbert House and that he was prohibited from terminating his treatment without prior approval from the adult probation department. The trial court's order to convey McComb from the Greene County Jail to Talbert House in

Cincinnati stated that he "will remain at the Institution until treatment is completed." Without further information on the nature of the treatment program, we are unable to determine the severity of the restrictions placed upon McComb's freedom and thus, we cannot conduct a meaningful review of whether McComb was "confinement" within the meaning of the term as intended by the legislature so as to be entitled to jail-time credit for time spent at Talbert House. Accordingly, we must remand this matter to the trial court for reconsideration of McComb's motion in light of the definition [\*\*10] of "confinement" as contained in the above cited statutes and elaborated upon in [*State v. Nagle, 23 Ohio St.3d 185, 23 Ohio B. 348, 492 N.E.2d 158 (1986)*]. On remand, the trial court should focus on whether McComb was confined while at Talbert House rather than whether Talbert House satisfied the *R.C. 2929.01(V)* definition of a "jail." Depending on the trial court's familiarity with the Talbert House program, a hearing may or may not be required to make the determination of whether McComb was confined while undergoing treatment at Talbert House. The trial court should conduct an evidentiary hearing if its knowledge of Talbert House program does not enable it to readily determine whether participation in the program does or does not constitute confinement. Regardless of whether it conducts a hearing, if the relief requested is denied, the trial court should provide an explanation of why McComb's participation in the Talbert House program was not confinement.

*1999 Ohio App. LEXIS 2920, at \*4.*

[\*P10] The State stresses that, on remand, the trial court in *McComb* found time spent at the Talbert House was not "confinement" for purposes of jail-time credit. *See State v. McComb, Greene C.P. No. 1996 CR 0671 (June 21, 2000)*. On the basis of that unappealed ruling, the State contends "it is well established in Greene [\*\*11] County that Talbert House is not confinement for purposes of calculating jail time credit." (Appellee's brief at 10).

[\*P11] We do give credence to the trial court's finding that Bennett's term at Turtle Creek did not constitute confinement because the trial court is in a better

position to evaluate the nature of the programs it utilizes for offenders. But simply "because Turtle Creek is not a CBCF lockdown facility," (Doc. #137) is not sufficient to deny jail-time credit. The Ohio Supreme Court recognized in *State v. Napier*, 93 Ohio St.3d 646, 2001 Ohio 1890, 758 N.E.2d 1127 (2001), that a defendant is "confined" for purposes of jail-time credit when he is on "lockdown" (i.e., when he "cannot leave the facility under any circumstances") in a community based correctional facility (CBCF). *Id.* at 647. The *Napier* court also recognized, however, that "lockdown" status is not necessarily required for a defendant to receive jail-time credit. *Id.* at 647-648. The broader, more appropriate inquiry is the degree to which an offender is "free to come and go," including whether express permission is required to leave, and the extent to which he is "subject to the control of the staff regarding personal liberties." *Id.* at 648; see also *State v. Snowden*, 87 Ohio St.3d 335, 337, 1999 Ohio 135, 720 N.E.2d 909 (1999) ("Snowden stipulated that he was not allowed to leave the CBCF without [\*\*12] permission. It appears beyond doubt that entry into a CBCF constitutes confinement."). The trial court's bare observation that Turtle Creek is not a "lockdown" facility is insufficient, in itself, for us to conclude that Bennett necessarily was not entitled to jail-time credit. A "court must review the nature of the program to determine whether the restrictions on the participants are so stringent as to constitute 'confinement' as contemplated by the legislature." *State v. Jones*, 122 Ohio App. 3d 430, 432, 702 N.E.2d 106 (5th Dist.1997). As this court did in *McComb*, other Ohio "appellate courts have routinely reversed jail time credit decisions where the evidentiary record has not been developed so

as to permit a meaningful review" of the "confinement" issue. *State v. Ventra*, 5th Dist. Geauga No. 2010-G-2968, 2011-Ohio-156, ¶ 20 (citing cases).

[\*P12] Here we believe a remand is necessary for elaboration by the trial court or additional findings regarding the nature of the restrictions placed on Bennett at Turtle Creek. On the limited record before us, we cannot determine whether those restrictions rose to the level of "confinement." As in *McComb*, depending on its familiarity with Turtle Creek, the trial court may or may not be able to provide the required elaboration or additional findings [\*\*13] without conducting an evidentiary hearing. We leave that issue to the trial court to resolve on remand. It would be helpful, however, for the trial court to address the following averments in Bennett's affidavit in support of his jail-time credit motion: (1) that he was not permitted to leave Turtle Creek without permission and an escort, (2) that Turtle Creek at times "became a complete lockdown facility," and (3) that certain unauthorized departures, or even movement within restricted areas, could constitute felony escape. (See affidavit accompanying Doc. #136).

[\*P13] The trial court's judgment entry overruling Bennett's motion for jail-time credit is affirmed in part and reversed in part. The judgment is affirmed insofar as the trial court denied jail-time credit for time Bennett spent on home electronic monitoring. The judgment is reversed insofar as the trial court denied jail-time credit for time he spent at Turtle Creek, and the cause is remanded for further consideration of that issue.

FAIN and WELBAUM, JJ., concur.