

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff – Appellee,	:	Case No. 2014-1230
v.	:	On Appeal from the Madison County Court of Appeals, Twelfth Appellate District
LOWELL W. THOMPSON,	:	Case No. CA2014-04-010
Defendant – Appellant.		

MERIT BRIEF OF APPELLEE STATE OF OHIO

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STATEMENT OF FACTS

Lowell W. Thompson was charged in the Madison County Municipal Court on July 7, 2010. He was then indicted by the Madison County Grand Jury on July 14, 2010 with multiple counts of sexually oriented offenses. Prior to the charges filed in Madison County, he had been held in the Franklin County jail while he was investigated for possible federal felony charges.

Ultimately, Mr. Thompson pled to charges in Madison County. In an entry file stamped January 11, 2011, Mr. Thompson was given credit for 184 days in jail. On May 19, 2011, Mr. Thompson filed a notice of appeal and request to file a delayed appeal ninety plus days after the date for a timely appeal. One of his possible arguments for the appeal was for jail-time credit. The Twelfth District Court of Appeals denied his request for a delayed appeal.

Mr. Thompson then filed a motion on February 24, 2014 with the trial court for his jail time to be corrected to include the time he was incarcerated pending the federal charges. The trial court, by entry, file stamped on March 7, 2014, denied his request.

He then filed an appeal with the Twelfth District Court of Appeals within the appropriate time frame. The State filed a motion to dismiss based on the fact that the order was not a final appealable order. Mr. Thompson did not file an

objection to the motion. The Twelfth District agreed with the State and dismissed the appeal. Mr. Thompson then filed a timely appeal with this Court.

ARGUMENT

Proposition of Law:

An order denying a motion to correct jail-time credit filed under R.C. 2929.19(B)(2)(g)(iii) is an order that affects a substantial right, and is therefore a final, appealable, order. R.C. 2505.02(B).

The State does not disagree that whether or not someone receives jail-time credit is a substantial right. R.C. 2505.02(A)(1) defines a substantial right as “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” In this case, that substantial right is the inmate’s freedom from incarceration after he has served his sentence.

Prior to the creation of R.C. 2929.19(B)(2)(g)(iii), there was not a way to correct jail-time credit after the time for an appeal had run on a final sentencing entry. Trial courts had found that a motion to reconsider jail time credit was a nullity and courts of appeals had dismissed appeals based on that premise.

Where the undersigned is not in agreement with the Appellant is whether a special proceeding was created when R.C. 2929.19(B)(2)(g)(iii) was enacted that would produce a final appealable order. Even if this Court finds that it did, the State would assert that Appellant is not entitled to the benefit of that statute.

A. The procedure outlined in R.C. 2929.19(B)(2)(g) for challenging incorrect jail-time-credit calculation is a special proceeding that affects a substantial right. The result of a motion filed under that statute is a final, appealable order.

B. No published-appellate court opinions in Ohio agree with the Twelfth District in holding that the denial of a jail-time-credit motion brought under R.C. 2929.19(B)(2)(g) does not result in a final, appealable order.

The term “special proceeding” is defined by R.C. 2505.02(A)(2) as “an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.” What is not defined by the revised code is what is needed to constitute “an action or a proceeding” under this statute. Is a motion without a further hearing enough to rise to the level of an action?

This court has previously held that, “...orders that are entered in actions that were recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02.” *Polikoff v. Adam*(1993), 67 Ohio St.3d 100, 107, 616 N.E.2d 213. In applying this finding to R.C. 2929.19(B)(2)(g)(iii), the undersigned is still unclear as to whether this would be a special proceeding or action. It appears that it might be.

The State does not dispute Appellant's assertion that currently there does not appear to be case law that finds that it is not a final appealable order. Although there may be other dismissals or non-reported cases, the undersigned was also unable to find any.

That being said, the State would assert that Appellant is not entitled to benefit from R.C. 2929.19(B)(2)(g). The Appellant was sentenced for his crimes on July 11, 2011. The statute did not take effect until September 28, 2012 which was over a year after his sentencing. During that period of time, the Appellant had also been denied the right to file a delayed appeal.

According to R.C. 1.48, a statute is deemed to be prospective unless it is explicitly made retrospective. That is not the case with R.C. 2929.19(B)(2)(g). A review of R.C. 2929.19 and the comments at the end of the section do not show that the legislature intended for the statute to apply retroactively.

The Eighth District Court of Appeals has held that when considering whether or not to hear a motion on jail-time-credit, the court must look at the law at the time of the sentencing. *State v. Ford*, 2014 WL 504798 (Ohio App. 8 Dist.), 2014-Ohio-395 ¶6 FN1. *Ford* had been sentenced on September 25, 2012 prior to the September 28, 2012 effective date of the new version of R.C. 2929.19. He did not appeal his sentencing. As such, the Eighth District found his appeal was

barred by res judicata. *Id.* See also *State v. Morgan*, 2014 WL 6783082, (Ohio App. 1 Dist.), 2014-Ohio-5325.

Even if R.C. 2929.19(B)(2)(g) does apply to cases prior to the September 2012 effective date, the Appellant would still be barred to his claim for jail-time-credit by res judicata. Appellant's claim regarding jail-time credit was for substantive issues not merely a clerical error.

The Sixth District Court of Appeals reviewed a case almost identical to the case at bar. *State v. Verdi*, 2013 WL 6795629 (Ohio App. 6 Dist.), 2013-Ohio-5630. In *Verdi*, the appellant had been held on federal charges as well as state charges. Ultimately, he was convicted by both the federal government as well as the state government in 1991 and 1995. Appellant received 315 days of jail-time-credit instead of the 2,346 days he believed he should have awarded. *Id.* ¶¶5-7.

The Sixth District held that even after R.C. 2929.19(B)(2)(g)(iii) was enacted a claim for jail-time-credit can only be heard after the appeal period has expired if it is for a clerical mistake not for a substantive claim. A claim for a substantive issue must be brought before the trial court on direct appeal. *Id.* ¶¶11-12.

The Fourth District Court of Appeals also reviewed the issue of res judicata as a bar to jail-time-credit in the case of *State v. Carpenter*. *State v. Carpenter*, 2014 WL 7345690 (Ohio App. 4 Dist.), 2014-Ohio-5698. *Carpenter* was

decided after the amendments to R.C. 2929.19 took effect. The appellant in the case did not appeal his original sentence but instead filed for jail-time-credit pursuant to R.C. 2929.19(B)(2)(g). In this case, the Fourth District held that the appellant's request for further jail-time credit was barred by res judicata because he had requested a legal determination of the confinement periods not a correction for a mathematical error. Id ¶14.

CONCLUSION

The Twelfth District Court of Appeals did not err in dismissing the appeal in this matter. Whether R.C. 2929.19(B)(2)(g) creates a special proceeding or action is immaterial in this case. The Appellant was sentenced prior to the effect of the amendment and could not benefit from it. Further, he was barred by res judicata as the issue was one of a substantive nature and not a clerical error. The State prays that this Court will uphold the Twelfth Districts decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MERIT BRIEF OF APPELLEE STATE OF OHIO was forwarded by regular U.S. Mail to Stephen A. Goldmeier, Assistant State Public Defender, 250 East Broad Street, Suite 1400. Columbus, Ohio 43215, this 23rd day of March, 2015.

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