

Westlaw

616 N.E.2d 213

67 Ohio St.3d 100, 616 N.E.2d 213

(Cite as: 67 Ohio St.3d 100, 616 N.E.2d 213)

Page 1



Supreme Court of Ohio.
POLIKOFF et al., Appellees,
v.
ADAM et al., Appellants.

Nos. 92-1116 to 92-1119.

Submitted May 18, 1993.

Decided Aug. 11, 1993.

Shareholder derivative suit was filed. The Court of Common Pleas, Cuyahoga County, refused to dismiss for failure to make prelitigation demand upon directors. Appeal was taken. The Court of Appeals dismissed appeal. Motion to certify record was allowed. The Supreme Court, Alice Robie Resnick, J., held that denial of motion was not order entered in special proceeding and, therefore, was not appealable.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ¶78(4)

30 Appeal and Error

30III Decisions Reviewable

30III(D) Finality of Determination

30k75 Final Judgments or Decrees

30k78 Nature and Scope of Decision

30k78(4) k. Judgment of dismissal

or nonsuit. Most Cited Cases

Generally, denial of motion to dismiss is not “final order” and, therefore, is not appealable. R.C. § 2505.02.

[2] Appeal and Error 30 ¶91(3)

30 Appeal and Error

30III Decisions Reviewable

30III(E) Nature, Scope, and Effect of Decision

30k91 Affecting Substantial Rights

30k91(3) k. Orders in special proceedings. Most Cited Cases

Denial of motion to dismiss shareholder derivative suit for failure to make prelitigation demand upon directors was not “order that affects a substantial right made in a special proceeding” and, therefore, was not “final order” and was not appealable; derivative suits originated as actions in equity, shareholder did not file special petition seeking remedy conferred by statute, and facts needed to analyze issue would remain unchanged by ultimate disposition of underlying actions. R.C. § 2505.02.

[3] Appeal and Error 30 ¶91(3)

30 Appeal and Error

30III Decisions Reviewable

30III(E) Nature, Scope, and Effect of Decision

30k91 Affecting Substantial Rights

30k91(3) k. Orders in special proceedings. Most Cited Cases

To determine whether order affects substantial right in special proceeding and is final order, Supreme Court first asks whether suit was recognized in equity or at common law or was established by special legislation, and Court then looks to nature of relief sought. R.C. § 2505.02.

[4] Appeal and Error 30 ¶91(3)

30 Appeal and Error

30III Decisions Reviewable

30III(E) Nature, Scope, and Effect of Decision

30k91 Affecting Substantial Rights

30k91(3) k. Orders in special proceedings. Most Cited Cases

Orders 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” within meaning of statute defining final appealable order to include orders that affect substantial right made in special proceeding; over-

ruling *Amato v. Gen. Motors Corp.*, 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452. R.C. § 2505.02.

****213** *Syllabus by the Court*

***100** 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 ***101** special proceedings pursuant to R.C. 2505.02. (*Amato v. Gen. Motors Corp.* [1981], 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, overruled.)

On July 12, 1991, plaintiff-appellee Harry Polikoff, trustee under the will of Marjorie L. Polikoff, filed a shareholder derivative suit against defendants-appellants TRW, ****214** Inc. ("TRW"), members of TRW's board of directors, and officers of TRW.^{FN1} An essentially identical complaint was filed by plaintiff-appellee Libiro DeFillippis on July 30, 1991. Both complaints were filed in the Cuyahoga County Court of Common Pleas.

FN1. Suit was filed against the following individuals: Robin W. Adam, Charles T. Duncan, Martin Feldstein, John S. Foster, Jr., Clifton C. Garvin, Jr., Joseph T. Gorman, Karen N. Horn, E. Bradley Jones, William F. Kieschnick, William S. Kiser, Ruben F. Mettler, P. Roy Vagelos and D.V. Skilling. Martin Abrams and John McGee were later added by amended complaint.

The complaints alleged the following. TRW is an Ohio corporation with its principal executive offices in Cleveland, Ohio. One principal segment of TRW, Information Systems and Services, gathers and disseminates information regarding consumer credit, real estate, target marketing and business credit, and provides services related to systems integration and engineering and debt collection. Products and services from this segment are sold primarily to commercial entities.

Appellants moved for dismissal of the Polikoff

suit on September 11, 1991.^{FN2} On September 17, 1991, appellants moved for consolidation of the Polikoff and DeFillippis cases. The trial court granted the motion for consolidation on October 30.

FN2. Appellants filed three separate motions to dismiss: one by TRW; one by Gorman and Skilling; and a third by Adam, Duncan, Feldstein, Foster, Garvin, Horn, Jones, Kieschnick, Kiser, Mettler and Vagelos.

On December 20, 1991, appellees filed an amended complaint. The complaint alleged, *inter alia*, that appellants had violated various sections of the Fair Credit Reporting Act, Section 1681 *et seq.*, Title 15, U.S. Code, by secretly rating consumers' creditworthiness and by distributing inaccurate and misleading credit material. The amended complaint also set forth eleven reasons supporting ***102** appellees' contention that a Civ.R. 23.1^{FN3} demand on the board of directors would be futile and was therefore excused.

FN3. Civ.R. 23.1 states, in relevant part: "The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors and, if necessary, from the shareholders and the reasons for his failure to obtain the action or for not making the effort."

On January 31, 1992, appellants made or renewed motions to dismiss. Appellants argued that the case should be dismissed because appellees failed to make the requisite demand under Civ.R. 23.1 that the directors bring the action themselves or properly plead that such a demand would have been futile.

The trial court denied the motions to dismiss on March 10, 1992, and appellants appealed to the Cuyahoga County Court of Appeals.^{FN4} On April 8 and April 9, 1992, the court of appeals dismissed the appeals pursuant to R.C. 2505.02. Appellants

requested reconsideration on April 20, 1992. Reconsideration was denied on May 5, 1992.

FN4. Notwithstanding the fact that the cases had been consolidated by the trial court, appellants filed four notices of appeal. Appellant TRW filed separate notices of appeal in the Polikoff and DeFillippis cases as did the individually named appellants, thereby necessitating four new case numbers and four judgment entries from the court of appeals.

This cause is now before this court pursuant to the allowance of a motion to certify the record.^{FN5}

FN5. A notice of appeal to this court was filed from each court of appeals' decision. The four cases were consolidated by this court on August 12, 1992.

Gallagher, Sharp, Fulton & Norman, James F. Koehler, D. John Travis and Timothy J. Fitzgerald, Cleveland, for appellees.

Jones, Day, Reavis & Pogue, Patrick F. McCartan, Hugh R. Whiting and Jefferey D. Ubersax, Cleveland, for appellants Robin W. Adam, Charles T. Duncan, Martin Feldstein, John S. Foster, Jr., Clifton C. Garvin, Jr., Joseph T. Gorman, Karen N. Horn, E. Bradley Jones, William F. Kieschnick, William S. Kiser, Ruben F. Mettler, P. Roy Vagelos, D.V. Skilling, Martin Abrams and John McGee.

Peter S. Levine, Cleveland, for appellant TRW, Inc.

Murray & Murray, Co., L.P.A., Dennis E. Murray, Sr. and Dennis E. Murray, Jr., **215 Sandusky, urging affirmance for amicus curiae, Murray & Murray, Co., L.P.A.

Squire, Sanders & Dempsey and Stacy D. Ballin, Cleveland, urging reversal for amici curiae, Ohio Chamber of Commerce and the Ohio Mfrs' Ass'n.

*103 ALICE ROBIE RESNICK, Justice.

ALICE ROBIE RESNICK, J. In deciding this case, we are once again asked to define the characteristics of a final, appealable order. R.C. 2505.02 defines a "final order" as "[a]n order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial."

[1] Generally, an order denying a motion to dismiss is not a final order. Appellants, however, assert that the order denying their motion to dismiss is an order that was made in a special proceeding and affects a substantial right. Our analysis begins with the question of whether the order was entered in a special proceeding.

Over the past twelve years, the question of whether a particular order was entered in a special proceeding has been determined by the application of a balancing test which was first set forth in *Amato v. Gen. Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452. Formulating the test, this court stated that the balancing test "weighs the harm to the ' prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from the allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable." *Id.* at 258, 21 O.O. 3d at 161, 423 N.E. 2d at 456. Applying the newly adopted balancing test, the *Amato* court concluded that a decision certifying a class action is an order entered in a special proceeding and is, therefore, final and appealable. *Id.* at 258- 259, 21 O.O. 3d at 161- 162, 423 N.E. 2d at 456. See, also, *Dayton Women's Health Ctr. v. Enix* (1990), 52 Ohio St.3d 67, 555 N.E.2d 956, certiorari denied (1991), 498 U.S. 1047, 111 S.Ct. 753, 112 L.Ed.2d 773.

Notwithstanding this court's use of the balancing test, the test itself and the inconsistent application thereof have come under increased criticism in

recent years. See, e.g. *Stewart v. Midwestern Indemn. Co.* (1989), 45 Ohio St.3d 124, 127–128, 543 N.E.2d 1200, 1203–1204 (Douglas, J. dissenting).

Accordingly, a review of the historical development of what constitutes a “special proceeding” is in order. One of the earliest cases to confront the concept of special proceedings was *William Watson & Co. v. Sullivan* (1855), 5 Ohio St. 42. In *Watson*, this court held: “An order of the court of common pleas, discharging an attachment against a resident as to the whole of the property attached, is an order affecting a substantial right made in a special proceeding, which may be reversed, pending the action in which the order of attachment was made.” *Id.* at syllabus.

*104 *Watson & Company* had filed an action against Sullivan and at the same time secured an order attaching Sullivan's property. The attachment was discharged by the court of common pleas and *Watson & Company* sought review of the discharge order in the district court. Sullivan moved the district court to dismiss the appeal on the ground that it could not be entertained until after determination of the underlying action.

This court found that Section 3 of the former Code of Civil Procedure in the State of Ohio, 51 Ohio Laws 57 *et seq.*, “abolishes the distinction between *actions at law* and *suits in chancery*, and substitutes in their place but one form of action, called a civil action. The commissioners, in their report to the legislature upon this section, say: ‘A civil action, under this code, will comprehend every proceeding in court heretofore instituted by any and all the forms hereby abolished. Every other proceeding will be something else than an action—say, “a special proceeding.”’ By section 604 of the code, it is provided that the code shall not affect any special statutory remedy not **216 heretofore obtained by action. The legislature seems to regard all proceedings not theretofore obtained by suit or action, as a special proceeding or special statutory remedy; and it would seem to follow, that a provision in the code providing a proceeding not by ac-

tion would be a special proceeding.” (Emphasis *sic.*) *Id.* at 44.^{FN6}

FN6. Section 604 of the Code, 51 Ohio Laws 161, is the predecessor of Civ.R. 1(C)(7), which provides that the Civil Rules, “to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure * * * (7) in all other special statutory proceedings * * *.”

In *Missionary Soc. of M.E. Church v. Ely* (1897), 56 Ohio St. 405, 47 N.E. 537, this court was asked to determine whether an application to the probate court to admit an alleged will was a special proceeding and whether the order refusing to admit the will was a final order. Answering in the affirmative, the court stated: “As to the first inquiry, it seems to us there can be but little difficulty. Our code does not, as does the code of New York, specify that every remedy which is not an action is a special proceeding, nor does [*sic*] our statutes give any definition of an action or a special proceeding. But we suppose that any ordinary proceedings in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, involving the process and pleadings, and ending in a judgment, is an action, while every proceeding other than an action, where a remedy is sought by an original application to a court for a judgment or an order, is a special proceeding.” *Id.* at 407, 47 N.E. at 538.

In *In re Estate of Wyckoff* (1957), 166 Ohio St. 354, 357–358, 2 O.O.2d 257, 259–260, 142 N.E.2d 660, 663–664, this court stated:

*105 “We think it can accurately be said that the term, ‘civil action,’ as used in our statutes embraces those actions which, prior to the adoption of the Code of Civil Procedure in 1853 abolishing the distinction between actions at law and suits in equity, were denoted as actions at law or suits in equity; and that other court proceedings of a civil nature come, generally at least, within the classific-

ation of special proceedings.

“The proposition is simply and cogently put as follows in the case of *Schuster v. Schuster* [1901], 84 Minn., 403, 407, 87 N.W., 1014, 1015:

“ ‘Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term “special proceedings.” ’

“Therefore, the proceeding provided by Section 2117.07, Revised Code, in connection with which a petition and no other pleadings are required and wherein there is notice only, without service of summons, and which represents essentially an independent judicial inquiry, is a special proceeding. * * * ”

Similar rationale was employed by this court in deciding *Kennedy v. Chalfin* (1974), 38 Ohio St.2d 85, 67 O.O.2d 90, 310 N.E.2d 233, and *Snell v. Cincinnati St. Ry. Co.* (1899), 60 Ohio St. 256, 54 N.E. 270. Evaluating a situation similar to the case before us, the *Snell* court held: “The application [for a change of venue] was made in a pending civil action, and was one authorized to be made in such an action. It was a step taken in that action preliminary to its trial, and one which, to be of any avail, it was necessary should be taken before the trial. * * * The order, nevertheless, was but an interlocutory one in the progress of the case, which could not be made the foundation of an independent proceeding in error, but was properly reviewable on error prosecuted to the final judgment. And, for this reason, the plaintiff did not waive the error in the overruling of his application, by thereafter submitting to the trial of the action without objection. There was nothing else to be done except to dismiss the action; for until final judgment he could not have the error corrected, or be restored to his right to have his change of venue.” *Snell, supra*, at 272, 54 N.E. at 277.

In *Kennedy*, the court reiterated that “[n]either the General Assembly nor this court has attempted

to define with specificity**217 the identifying characteristics of a ‘special proceeding’ under R.C. 2505.02. Instead, each case has been decided by reviewing the specific proceeding in question.” *Kennedy*, 38 Ohio St.2d at 88, 67 O.O.2d at 91, 310 N.E.2d at 235. The court found that discovery techniques were pretrial procedures designed to aid in the final disposition of the lawsuit and that orders entered during the discovery phase were an integral part of the action in which they were entered and were not orders rendered in a special proceeding. *Id.* at 89, 67 O.O.2d at 92, 310 N.E.2d at 235.

*106 In *Bernbaum v. Silverstein* (1980), 62 Ohio St.2d 445, 16 O.O.3d 461, 406 N.E.2d 532, this court deviated slightly from its previous method of analyzing final orders and offered a glimpse of what eventually became the *Amato* balancing test. The *Bernbaum* court set forth a list of decisions exemplifying its reluctance to allow immediate review of rulings that are entered during the pendency of an action and stated that such interlocutory review was in opposition to the prompt and orderly disposition of the litigation. *Id.* at 447, 16 O.O.3d at 462–463, 406 N.E.2d at 534. Basing its analysis on the holdings of two criminal cases, FN7 the court stated that “a prime determinant of whether a particular order is one made in a special proceeding is the practicability of appeal after final judgment.” *Id.* at 447, 16 O.O.3d at 463, 406 N.E.2d at 534. The court found that the proceeding need not “be by ‘original application’ in order to qualify as a special proceeding, because of our concern that there be an effective mode of review of such rulings.” (Footnote omitted.) *Id.* at 448, 16 O.O.3d at 463, 406 N.E.2d at 535. The court acknowledged the argument that a postponed appeal would not be effective, but answered that even an immediate appeal would not necessarily undo damage caused by the participation of an attorney who should have been disqualified. Notwithstanding its deviation from previous methods of inquiry, the court concluded that an order overruling a motion to disqualify counsel was not entered in a special proceeding and was not immediately appealable.

FN7. See *State v. Collins* (1970), 24 Ohio St.2d 107, 53 O.O.2d 302, 265 N.E.2d 261 (an order sustaining a pretrial motion to suppress evidence is an order entered in a special proceeding, although appeal is prohibited by R.C. 2945.70, since repealed), and *State v. Thomas* (1980), 61 Ohio St.2d 254, 15 O.O.3d 262, 400 N.E.2d 897 (the overruling of a motion to dismiss on the grounds of double jeopardy is a final order), overruled in relevant part, *State v. Crago* (1990), 53 Ohio St.3d 243, 559 N.E.2d 1353.

This court's decisions in *Humphry v. Riverside Methodist Hosp.* (1986), 22 Ohio St.3d 94, 22 OBR 129, 488 N.E.2d 877; *Nelson v. Toledo Oxygen & Equip. Co.* (1992), 63 Ohio St.3d 385, 588 N.E.2d 789; and *Dayton Women's Health Ctr., supra*, represent additional examples of the reasons it is necessary for us to return to a more predictable and exacting method of determining what constitutes an order that is entered in a special proceeding. In these cases, the *Amato* balancing test was applied to lead to the following disparate conclusions: a discovery order compelling the disclosure of confidential information was a special proceeding and immediately appealable (*Humphry*); an order determining that an action shall or shall not be maintained as a class action was entered in a special proceeding (*Dayton Women's Health Ctr.*); and an order compelling the production of documents allegedly subject to the work-product exemption was not made in a special proceeding and was not a final appealable order (*Nelson*). The *107 court's application of the balancing test varied with each case, proving that it is impossible to ensure the objective application of subjective criteria. Accordingly, in the interests of justice, clarity, and judicial economy, we find that it is time to abandon the balancing test and return to the method of determining what constitutes a special proceeding that was in use prior to *Amato*. We believe a more exacting method of analysis practiced by our juristic predecessors will result.

[2][3] In the case before us, we are asked to decide whether the order denying appellants' motions to dismiss a shareholder derivative suit on the grounds that appellees**218 failed to make the requisite prelitigation demand upon the directors is an order entered in a special proceeding. Employing our "new" method of analysis, we ask first whether shareholder derivative suits were recognized in equity, at common law, or established by special legislation. See *Wyckoff, supra*, 166 Ohio St. at 357, 2 O.O.2d at 259, 142 N.E.2d at 663, and *Watson, supra*, 5 Ohio St. at 44. We find that derivative suits originated more than one hundred years ago as actions in equity. *Ross v. Bernhard* (1970), 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729. Accordingly, shareholder derivative suits are among the procedures we consider "civil actions."

We look next at the nature of the relief sought. Appellees sought redress of an alleged wrong by filing a lawsuit in the court of common pleas. This is not a case wherein the aggrieved party filed a special petition seeking a remedy that was conferred upon that party by an Ohio statute nor is it a proceeding that represents what is essentially an independent judicial inquiry. See *Wyckoff*, 166 Ohio St. at 358, 2 O.O.2d at 260, 142 N.E.2d at 664. In examining the ultimate reviewability of the order, we find that the facts needed to analyze this precise issue will be unchanged by the ultimate disposition of the underlying action. The question of whether appellees complied with Civ.R. 23.1 will be preserved throughout this litigation. The underlying action can be distinguished from a special proceeding in that it provides for an adversarial hearing on the issues of fact and law which arise from the pleadings and which will result in a judgment for the prevailing party.

[4] Hence, we determine 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. *Amato* is therefore overruled. Applying the analysis set forth herein, we

find that the order denying appellants' motion to dismiss was interlocutory. The order was *108 not entered in a special proceeding and could not be made the foundation of an independent appeal.^{FN8}

FN8. In view of our disposition of this appeal, it is unnecessary for us to determine whether the trial court's order affected a substantial right. In determining appealability pursuant to R.C. 2505.02, under the circumstances of this case, the first inquiry for any reviewing court is whether the order was entered in a special proceeding. If it was, the court must then inquire as to whether the order affected a substantial right.

Judgment affirmed.

MOYER, C.J., and A. WILLIAM SWEENEY,
DOUGLAS, WRIGHT, FRANCIS E. SWEENEY,
Jr. and PFEIFER, JJ., concur.

Ohio,1993.
Polikoff v. Adam
67 Ohio St.3d 100, 616 N.E.2d 213

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Slip Copy, 2014 WL 504798 (Ohio App. 8 Dist.), 2014 -Ohio- 395
 (Cite as: 2014 WL 504798 (Ohio App. 8 Dist.))

C

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Eighth District, Cuyahoga County.
 STATE of Ohio, Plaintiff–Appellee
 v.
 Daniel FORD, Jr., Defendant–Appellant.

No. 99941.
 Decided Feb. 6, 2014.

Criminal Appeal from the Cuyahoga County Court
 of Common Pleas, Case No. CR–552747.
 Daniel Ford, Jr., Mansfield, OH, pro se.

Timothy J. McGinty, Cuyahoga County Prosecutor
 By: Katherine Mullin, Assistant County Prosecutor
 Cleveland, OH, for Appellee.

Before ROCCO J., BOYLE A.J., and S. GALLA-
 GHER, J.

KENNETH A. ROCCO, J.

*1 {¶ 1} In this appeal brought on the acceler-
 ated calendar pursuant to App.R. 11.1 and
 Loc.App.R. 11. 1, pro se defendant-appellant
 Daniel Ford, Jr. asserts that the trial court erred in
 denying his motion to correct jail-time credit. For
 the foregoing reasons, we affirm.

{¶ 2} On August 15, 2011, Ford pleaded guilty
 to one count of burglary. On September 19, 2011,
 the trial court sentenced Ford to two years of com-
 munity control. The trial court determined that Ford
 was eligible for placement in a Community Based
 Correctional Facility (“CBCF”) and Ford was
 ordered to complete the CBCF program. Ford was
 advised that failure to comply with the terms and
 conditions of community control could result in a

prison term of five years.

{¶ 3} On August 17, 2012, the trial court found
 that Ford had violated terms of his community con-
 trol sanctions. The trial court continued the com-
 munity control with modifications. On September
 25, 2012, the trial court found that Ford had, once
 again, violated community control sanctions. This
 time, the trial court terminated community control
 and sentenced Ford to 18 months in prison. In its
 sentencing order, the trial court granted Ford 110
 days of jail-time credit. Ford did not file a direct
 appeal from this sentence.

{¶ 4} On November 8, 2012, Ford filed in the
 trial court a motion for jailtime credit. Ford asserted
 that the trial court had failed to credit him for the
 full amount of time that he had resided at the CB-
 CF. On February 25, 2013, the trial court denied
 Ford's motion. Ford did not file an appeal from the
 trial court's order.

{¶ 5} On February 28, 2013, Ford filed in the
 trial court a motion to correct jail-time credit. The
 trial court issued an order denying the motion, and
 it is from this order that Ford filed his notice of ap-
 peal.

{¶ 6} “[W]e have characterized a motion to
 ‘correct’ a sentence as a petition for postconviction
 relief.”^{FN1} *State v. Fitzgerald*, 8th Dist. Cuyahoga
 No. 98723, 2013–Ohio–1893, ¶ 3, citing *State v.*
Kelly, 8th Dist. Cuyahoga No. 97673,
 2012–Ohio–2930, ¶ 8. Under the doctrine of res ju-
 dicata, a postconviction petitioner is barred from
 asserting any sentencing claim that was not prop-
 erly raised on direct appeal. *Fitzgerald*, citing *Kelly*
 at ¶ 18.

FN1. Our analysis is based on the law that
 was in effect on September 25, 2012, the
 date on which Ford was sentenced. We
 note that on September 28, 2012, a new
 version of R.C. 2929.19 became effective

“that impose[s] certain duties on a trial court at the time of sentencing with respect to jail-time credit.” *Fitzgerald* at ¶ 6, citing R.C. 2929.19(B)(2)(g)(i) (Boyle, J., concurring). The new law “further vests the trial court with ‘continuing jurisdiction to correct any error not previously raised at sentencing in making a determination under division (B)(2)(g)(i) * * *.’” *Id.* at ¶ 7, quoting R.C. 2929.19(B)(2)(g)(iii). Because Ford was sentenced before the effective date of the statute, we apply the law that was in effect on the date of sentencing. We express no opinion on how, if at all, the amendments would impact on the outcome of this case.

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{¶ 7} In this case, Ford could have raised his jail-time credit argument in a direct appeal, but Ford never appealed from his sentence. Accordingly, principles of res judicata bar Ford from raising the argument in a petition for postconviction relief. *See Fitzgerald* at ¶ 3.

{¶ 8} The trial court's judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

MARY J. BOYLE, A.J., and SEAN C. GALLAGHER, J., Concur.

Ohio App. 8 Dist., 2014.

State v. Ford

Slip Copy, 2014 WL 504798 (Ohio App. 8 Dist.),
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C

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 First District, Hamilton County.
 STATE of Ohio, Plaintiff–Appellee,
 v.
 Tyrone MORGAN, Defendant–Appellant.

No. C–140146.
 Decided Dec. 3, 2014.

Criminal Appeal from Hamilton County Court of
 Common Pleas.

Joseph T. Deters, Hamilton County Prosecuting At-
 torney, and Rachel Lipman Curran, Assistant Pro-
 secuting Attorney, for Plaintiff–Appellee.

Tyrone Morgan, pro se.

PER CURIAM.

*1 {¶ 1} Defendant-appellant Tyrone Morgan advances on appeal a single assignment of error challenging the Hamilton County Common Pleas Court's judgment overruling his "Motion for Jail Time Credit." Because the trial court miscalculated Morgan's days of confinement prior to his convictions, we reverse in part the judgment overruling his motion.

{¶ 2} On September 2010, in the case numbered B–1004025, Morgan was convicted upon guilty pleas to six counts of drug trafficking, sentenced to concurrent prison terms of four and one-half years, and credited with two days for his confinement prior to his convictions. Three days later, in the case numbered B1004092, Morgan was convicted upon guilty pleas to trafficking and having weapons under a disability, sentenced to concurrent prison terms of four years to be served concurrently

with the sentences imposed in the case numbered B–1004025, and credited with 65 days for his pre-conviction confinement.

{¶ 3} Morgan voluntarily dismissed his direct appeals from those convictions, but thereafter filed in each case a series of motions seeking correction of his jail-time credit. In February 2014, in each case, Morgan filed, and the common pleas court overruled, a "Motion for Jail Time Credit." But he here appeals from only the judgment overruling his motion in the case numbered B–1004092.

{¶ 4} In seeking correction of his jail-time credit, Morgan argued that the trial court had miscalculated the credit and had misapplied it against his sentences, and that he was, instead, entitled to jail-time credit of 76 days against each prison sentence imposed in the cases. He asserted that the trial court should have credited him with 67 days, rather than 65 days, for his preconviction confinement in the case numbered B1004092, credited against each sentence the total days of confinement preceding his convictions in both cases, and included in his jail-time credit the days of confinement following his convictions awaiting his conveyance to prison.

{¶ 5} *No jurisdiction to correct jail-time credit under R.C. 2929.19(B)(2)(g)(iii).* In 2010, when Morgan was sentenced, the various Ohio Revised Code sections governing jail-time credit had been construed to impose on the trial court the duty to calculate, and to specify in the judgment of conviction, the total number of days that the offender had been confined for each offense prior to his conviction, leaving to the department of rehabilitation and correction the task of reducing each sentence by the preconviction-confinement time determined by the court, plus conveyance time. *See State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003–Ohio–2061, 786 N.E.2d 1286, ¶ 7, citing *State ex rel. Corder v. Wilson*, 68 Ohio App.3d 567, 572, 589 N.E.2d 113 (10th Dist.1991); R.C. 2967.191, 2949.08(B), and 2949.12. An offender

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could then challenge his jail-time credit in his direct appeal, in a motion under Crim.R. 36 for “correct[ion]” of a “clerical mistake [],” or in a petition under R.C. 2953.21 et seq. for postconviction relief. *See Heddleston v. Mack*, 84 Ohio St.3d 213, 213, 702 N.E.2d 1198 (1988); *State v. Weaver*, 1st Dist. Hamilton No. C-050923, 2006-Ohio-5072, ¶ 12.

*2 {¶ 6} In 2012, the General Assembly amended R.C. 2929.19 to authorize and codify procedures for determining and correcting jail-time credit. R.C. 2929.19(B)(2)(g)(i) imposes upon a trial court, when imposing a prison term, the following duty:

Determine, 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.

Under the amended statute, an “inaccurate” R.C. 2929.19(B)(2)(g)(i) determination does not provide a basis for setting aside a conviction or render a conviction void or voidable. R.C. 2929.19(B)(2)(g)(iv). Nor may an erroneous determination be challenged in a new-trial motion or postconviction petition. R.C. 2929.19(B)(2)(g)(iii). The error must, instead, be “correct [ed]” pursuant to the following grant of authority and procedure:

The 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. If the court changes the number of days in its determination or redetermination, the court shall cause the entry granting that change to be delivered to the

department of rehabilitation and correction without delay.

R.C. 2929.19(B)(2)(g)(iii).

{¶ 7} R.C. 2929.19(B)(2)(g) went into effect after Morgan had been sentenced, but before he moved to correct his jail-time credit. Under those circumstances, the R.C. 2929.19(B)(2)(g)(iii) procedures for correcting error in a jail-time-credit determination were held to be applicable by the Tenth Appellate District, but inapplicable by the Eighth Appellate District. *See State v. Ford*, 8th Dist. Cuyahoga No. 99941, 2014- Ohio- 395, ¶ 6, fn. 1; *State v. Lovings*, 10th Dist. Franklin Nos. 13AP-303 and 13AP-304, 2013-Ohio-5328, ¶ 9-10. The statute, by its terms, provides the authority and procedure for “correct[ing] any error in making a determination under [R.C. 2929.19(B)(2)(g)(i).]” Because Morgan was sentenced before the amended statute was effective, his jail-time credit was not determined under R.C. 2929.19(B)(2)(g)(i). Therefore, R.C. 2929.19(B)(2)(g)(iii) did not apply to confer upon the common pleas court jurisdiction to entertain his challenge to his 2010 jail-time-credit determination.

{¶ 8} *No jurisdiction to correct jail-time credit under R.C. 2953.21 et seq.* In his motion, Morgan claimed that the trial court had erred as a matter of law in failing to credit against each sentence his total days of preconviction confinement for both cases and in failing to include in his jail-time credit his conveyance time. Because those claims alleged errors of law, they were reviewable under the standards provided by R.C. 2953.21 et seq. for a post-conviction petition. *See State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12. But with respect to those claims, Morgan failed to satisfy either the time restrictions of R.C. 2953.21 or the jurisdictional requirements of R.C. 2953.23. And while a court always has jurisdiction to correct a void judgment, *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19, the trial court's failure to journalize an amendment to Ysrael's bill of particulars would

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not have had the effect of rendering his conviction void. Therefore, the court lacked jurisdiction to entertain those claims on the merits.

*3 {¶ 9} *Jail-time-credit calculation subject to correction under Crim.R. 36.* Morgan also challenged in his motion the trial court's calculation of his jail-time credit in the case numbered B-1004092, arguing that he was entitled to preconviction-confinement credit of 67 days, rather than 65 days. A trial court's calculation of jail-time credit is a ministerial act. *State v. Weaver*, 1st Dist. Hamilton No. C-050923, 2006-Ohio-5072, ¶ 12; *State v. Brewster*, 1st Dist. Hamilton No. C-980484, 1999 Ohio App. LEXIS 1028 (Mar. 19, 1999). And Crim.R. 36 provides that "clerical mistakes in judgments * * * may be corrected by the court at any time." Accordingly, a trial court may, at any time, enter a judgment of conviction, nunc pro tunc to the date of the original conviction, correcting a "mistake[]" in the calculation of jail-time credit. *Weaver* at ¶ 12.

{¶ 10} On July 22, 2014, in the case numbered B-1004092, and thus after the common pleas court had overruled Morgan's February 2012 motion and Morgan had perfected this appeal, the common pleas court placed of record an entry purporting to "grant[]" his motion, at least to the extent of crediting him with "a total of 66 days credit (as of the date of sentencing), plus conveyance time to the institution." By its entry, the court essentially conceded, as the record confirms, that Morgan's preconviction-confinement credit had been miscalculated, and that he was instead entitled to credit of 66 days. This miscalculation was subject to correction pursuant to Crim.R. 36. Thus, to the extent that Morgan had sought in his motion correction of his preconviction-confinement credit in the case numbered B-1004092, the court erred in overruling the motion.

{¶ 11} But in 2010, when Morgan was convicted, Crim.R. 32(C) required that a "judgment of conviction * * * set forth the verdict, or findings, upon which each conviction is based, and the sen-

tence." R.C. 2949.08(B) required that the "[judgment of] conviction" specify the number of days of preconviction confinement to be used to reduce the sentence. R.C. 2949.12 required the sheriff, when delivering a convicted felon to a correctional facility, to present a copy of the judgment of conviction setting forth the Ohio Revised Code section violated, the sentence imposed, and the number of days of preconviction confinement credited. And Ohio Adm.Code 5120-2-04(B) required that the sentencing court "include within the journal entry imposing the sentence or stated prison term," and "forward [to the correctional facility,] a statement of the number of days [of] confinement which [the offender] is entitled by law to have credited." The common pleas court's July 2014 entry purporting to correct the number of preconviction-confinement days in the case numbered B-1004092 did not conform to these requirements. And it was not, as required by Crim.R. 36, entered nunc pro tunc to the date of Morgan's original convictions in that case.

*4 {¶ 12} Moreover, the July 2014 entry was recorded while this appeal was pending. A trial court loses jurisdiction to act in a case after an appeal has been taken, except to take action in aid of the appeal or in a manner not inconsistent with the appeals court's jurisdiction to review, affirm, modify, or reverse the appealed judgment. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978). *Accord In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 9. When, by its July 2014 entry, the common pleas court granted Morgan part of the relief denied by the February 2014 entry that he here appeals, the court acted in a manner inconsistent with this court's jurisdiction to review the February 2014 judgment overruling Morgan's motion. Because the court lacked jurisdiction to correct Morgan's jail-time credit while this appeal was pending, the July 2014 judgment constitutes a legal nullity. *See State v. Clark*, 9th Dist. Summit No. 26673, 2013-Ohio-2984, ¶ 17.

{¶ 13} *We affirm in part and reverse in part.*

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We, therefore, hold that Morgan's claims in his motion that the trial court had erred as a matter of law in determining his jail-time credit motion were subject to dismissal for lack of jurisdiction. Thus, we overrule his assignment of error in part, and upon the authority of App.R. 12(A)(1)(a), we modify the judgment appealed from to reflect a dismissal of those claims. And we affirm the judgment in part as modified.

{¶ 14} But the judgment of conviction in the case numbered B-1004092 was subject to correction pursuant to Crim.R. 36 to the extent that his preconviction-confinement credit had been miscalculated. On that basis, we sustain his assignment of error in part, reverse in part the common pleas court's judgment overruling his motion, and remand for further proceedings consistent with the law and this opinion.

Judgment affirmed in part as modified, reversed in part, and cause remanded.

Please note:

The court has recorded its entry on the date of the release of this opinion.

HILDEBRANDT, P.J., HENDON and
DINKELACKER, JJ.

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H

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Sixth District, Erie County.
 STATE of Ohio, Appellee
 v.
 Mark S. VERDI, Appellant.

No. E-13-025.
 Decided Dec. 20, 2013.

Kevin J. Baxter, Erie County Prosecuting Attorney,
 Mary Ann Barylski and Frank Romeo Zeleznikar,
 Assistant Prosecuting Attorneys, for appellee.

Barry W. Wilford and Sarah M. Schregardus, for
 appellant.

YARBROUGH, J.

I. Introduction

*1 ¶ 1 Appellant, Mark Verdi, appeals the judgment of the Erie County Court of Common Pleas, denying his motion for custody credit. For the following reasons, we affirm.

A. Facts and Procedural Background

¶ 2 The relevant facts are undisputed. On March 3, 1989, appellant was indicted in the U.S. District Court for the Northern District of Ohio on two counts of possession of a firearm, and one count of conspiracy, stemming from appellant's use of a firearm during the commission of various crimes including aggravated murder. He was arrested four days later and placed in federal custody at the Lucas County Jail.

¶ 3 One week after being indicted on the federal charges, appellant was indicted by the Erie County Grand Jury on one count of aggravated

murder in violation of R.C. 2903.01(A), one count of aggravated murder in violation of R.C. 2903.01(B), one count of aggravated murder in violation of R.C. 2903.02(A), one count of murder in violation of R.C. 2903.02, one count of kidnapping in violation of R.C. 2905.01(A)(1), and one count of aggravated robbery in violation of R.C. 2911.01(A)(1). Additionally, a firearm specification was attached to each count in the indictment. Pursuant to the indictment, a warrant was issued for appellant's arrest.

¶ 4 On March 20, 1989, the Erie County prosecuting attorney certified that appellant was notified by the United States Marshal of the pending detainer and untried indictment. The arrest warrant issued pursuant to the Erie County indictment was subsequently executed on May 12, 1989.

¶ 5 A jury trial commenced with regard to the federal charges on January 28, 1991. Ultimately, appellant was found guilty on all counts in the federal indictment and ordered to serve 180 months in federal prison.

¶ 6 Appellant was subsequently transferred into state custody on October 11, 1994, and was finally arraigned on the state charges three days later. On August 11, 1995, following successful plea negotiations, appellant pleaded guilty to one count of aggravated murder with a firearm specification. Pursuant to the plea agreement, the state dismissed the remaining counts in the indictment. The trial court proceeded to sentence appellant to a term of life in prison with the possibility of parole after 20 years, to be served consecutive to the three-year prison term attributable to the firearm specification. The trial court ordered the sentence to be served concurrently to the federal sentence appellant was serving at the time. Additionally, the court granted appellant 315 days of jail-time credit for the time he had served while in state custody as of the date of sentencing.

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{¶ 7} On February 11, 2013, appellant filed a motion for custody credit with the trial court, arguing that he was entitled to 2,346 days of jail-time credit under R.C. 2967.191. On April 5, 2013, without first conducting a hearing, the trial court issued its judgment denying appellant's motion for custody credit. This timely appeal followed.

B. Assignments of Error

*2 {¶ 8} On appeal, appellant asserts the following assignments of error:

Assignment of Error I: THE JUDGMENT OF THE COURT BELOW DENYING CUSTODY CREDIT IS CONTRARY TO LAW AND SHOULD BE REVERSED AND REMANDED.

Assignment of Error II: THE COURT BELOW ERRED BY DENYING A HEARING UPON THE MOTION FOR CUSTODY CREDIT, AND THE JUDGMENT OF THE COURT SHOULD BE REVERSED AND REMANDED FOR HEARING.

II. Analysis

{¶ 9} In his first assignment of error, appellant argues that the trial court erred in denying his motion for custody credit. Appellant contends that he was entitled to receive credit for 2,346 days he served while he was “physically in the Lucas County jail in the legal custody of the U.S. Marshall attendant to related criminal proceedings in federal district court, and thereafter in the legal custody of the U.S. Department of Justice's Bureau of Prisons pursuant to the sentence imposed by the federal district court in those related proceedings.” While he recognizes that his confinement was directly attributable to his conviction for the federal charges, appellant argues that he was entitled to receive jail-time credit under R.C. 2929.19(B)(2)(g)(i) and 2967.191 because he was simultaneously subject to a certified detainer filed by the Erie County prosecuting attorney. Further, appellant asserts that the Ohio Supreme Court's holding in *State v. Fugate*, 117 Ohio St.3d 261, 2008–Ohio–856, 883 N.E.2d 440, requires the trial

court to credit him for such time because the court imposed his sentence concurrently with the remainder of the federal sentence.

{¶ 10} Appellee argues that *Fugate* is inapplicable in this case and, further, that appellant's motion, which was filed more than a decade after the underlying sentence was imposed, was barred by res judicata. We agree with appellee's second argument and conclude that it is dispositive of appellant's first assignment of error.

{¶ 11} This court has previously determined that a motion to correct jail-time credit is an alternative to raising the issue on direct appeal or in post-conviction relief. *State v. McLain*, 6th Dist. Lucas No. L-07-1164, 2008–Ohio–481, ¶ 11, citing *Heddleston v. Mack*, 84 Ohio St.3d 213, 702 N.E.2d 1198 (1998). However, this remedy is limited to cases in which the trial court's alleged error involves a clerical mistake rather than a substantive claim. *State v. Newman*, 6th Dist. Wood No. WD-07-083, 2009–Ohio–2935, ¶ 10. Indeed, we have held that “[f]ailure to timely raise substantive jail time credit claims results in the issue being barred from further consideration by the doctrine of res judicata.” *Id.* at ¶ 11.

{¶ 12} Here, appellant's motion is premised upon his contention that he was entitled to additional credit for time served while he was held in custody under the federal charges. This was not a clerical mistake. Instead, appellant's claim is a substantive claim, “which must be brought to the trial court's attention *before sentencing or raised on direct appeal.*” (Emphasis added.) *McLain* at ¶ 12. Since appellant's claim is substantive, his appeal is barred by res judicata. *Id.*

*3 {¶ 13} Nonetheless, appellant argues that his appeal is not barred by res judicata in light of a recent amendment to R.C. 2929.19(B)(2)(g)(iii), which now provides:

The sentencing court retains continuing jurisdiction to correct any error not previously raised

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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. If the court changes the number of days in its determination or redetermination, the court shall cause the entry granting that change to be delivered to the department of rehabilitation and correction without delay. Sections 2931.15 and 2953.21 of the Revised Code do not apply to a motion made under this section.

{¶ 14} 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).

{¶ 15} 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.

*4 {¶ 16} In his second assignment of error, appellant argues that the trial court erred in denying his motion without first holding a hearing on the matter. Citing R.C. 2929.19(B)(2)(g)(ii), appellant contends that the court was required to conduct a hearing on his motion before issuing its decision, especially in light of appellant’s request for such hearing contained within the motion. Appellee responds by arguing that R.C. 2929.19(B)(2)(g)(ii) does not apply to motions, such as the one at issue here, that seek to correct a trial court’s allegedly erroneous calculation of jail-time credit.

{¶ 17} R.C. 2929.19(B)(2)(g)(ii) provides, “In making a determination under division (B)(2)(g)(i) of this section [concerning the amount of jail-time credit a defendant should receive], the court shall consider the arguments of the parties and conduct a hearing if one is requested.” Under a plain reading of the statute, this provision is limited in its application to the trial court’s *initial* calculation of jail-time credit under R.C. 2929.19(B)(2)(g)(i). Here, appellant’s motion to correct the trial court’s initial determination of jail-time credit was not made under R.C. 2929.19(B)(2)(g)(i), but rather was made under R.C. 2929.19(B)(2)(g)(iii). Thus, R.C. 2929.19(B)(2)(g)(ii) does not apply to require the trial court to hold a hearing. Further, appellant does not argue that he was denied a hearing when he was originally sentenced. On the contrary, the record clearly reveals that a sentencing hearing was held

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on August 11, 1995, at which time the court calculated that appellant was entitled to 315 days of jail-time credit. Thus, the hearing requirement contained in [R.C. 2929.19\(B\)\(2\)\(g\)\(ii\)](#) was satisfied in this case.

{¶ 18} Accordingly, appellant's second assignment of error is not well-taken.

III. Conclusion

{¶ 19} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to [App.R. 24](#).

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to [App.R. 27](#). *See also* 6th Dist.Loc.App.R. 4.

[MARK L. PIETRYKOWSKI](#), [STEPHEN A. YARBROUGH](#), and [JAMES D. JENSEN, JJ.](#), concur.

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¶

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Fourth District, Lawrence County,
 STATE of Ohio, Plaintiff–Appellee,

v.

Carl V. CARPENTER, Defendant–Appellant.

No. 14CA13.
 Decided Dec. 24, 2014.

Timothy Young, Ohio Public Defender, Eric M.
 Hedrick, Ohio Assistant Public Defender, Colum-
 bus, OH, for appellant.

Brigham M. Anderson, Lawrence County Prosecut-
 ing Attorney, W. Mack Anderson, Lawrence
 County Assistant Prosecuting Attorney, Ironton,
 OH, for appellee.

HARSHA, J.

*1 {¶ 1} The Lawrence County Court of Com-
 mon 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 Car-
 penter filed a motion for recalculation of jail-time
 credit. The trial court denied the motion, finding it
 had previously addressed the issue and given Car-
 penter 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 re-
 ject 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 sen-
 tence. Therefore, we overrule his assignment of er-
 ror and affirm the judgment of the trial court.

I. FACTS

{¶ 3} 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 weedeater belonging to another per-
 son. After Carpenter pleaded guilty to the charge,
 the trial court sentenced him to four years of com-
 munity 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.

{¶ 4} In April 2010, the STAR Community
 Justice Center discharged Carpenter without suc-
 cessfully completing the program based on his neg-
 ative behavior, disrespect, and failure to progress in
 the program. The state filed a motion to revoke his
 community control, and Carpenter admitted his vi-
 olation. The trial court ordered him to serve a sen-
 tence 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 continu-
 ation of his community control sanctions upon the

completion of his 30-day jail sentence.

{¶ 5} 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.

*2 {¶ 6} 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.

{¶ 7} 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.

{¶ 8} 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

{¶ 9} 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 ques-

tion of law. *State v. Tolliver*, 4th Dist. Athens No. 12CA36, 2013-Ohio-3861, ¶ 12.

II. LAW AND ANALYSIS

*3 {¶ 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 post-conviction 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”).

*4 {¶ 15} Carpenter points to the seemingly expansive language in R.C. 2929.19(B)(2)(g)(iii) to

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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.

*5 {¶ 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

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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 ap-

peal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

*6 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.

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1.48 Presumption that statute is prospective.

A statute is presumed to be prospective in its operation unless expressly made retrospective.

Effective Date: 01-03-1972