

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-A-0016
GRANT PAINTER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2000 CR 78.

Judgment: Reversed and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, N.W., Cleveland, OH 44113-1204 (For Defendant-Appellant).

Grant Painter, pro se, PID: 562-370, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mr. Grant Painter appeals from the Ashtabula County Court of Common Pleas judgment, which sentenced Mr. Painter to two one-year terms of incarceration to be served concurrently for failure to pay child support.

{¶2} While Mr. Painter does not contest the terms of his sentence, he argues the trial court erred by refusing to credit jail time he served in Kentucky while awaiting

extradition to Ohio for this case. Secondly, he raises an ineffective assistance of counsel claim for the failure to credit the jail time allegedly due. He argues he was deprived the effective assistance of counsel even though his counsel properly raised the issue at sentencing, and that, he, pro se, in a later motion on the same day also moved the court for such credit.

{¶3} We determine Mr. Painter's argument has merit insofar as the trial court failed to disclose any basis for its decision regarding the jail time credit or its calculation. No facts surrounding or evidence of his Kentucky jail time, which all acknowledge was served, is in the record. We do not, however, find that the error occurred as a result of the ineffective assistance of Mr. Painter's counsel.

{¶4} Thus, we reverse and remand the matter to the trial court for a calculation of jail time credit and factual findings regarding the calculations.

Substantive and Procedural Facts

{¶5} This case began on May 3, 2000, when Mr. Painter was indicted on two counts of nonsupport of dependents, one count for each child, in violation of R.C. 2919.21(B), felonies of the fifth degree. After pleading not guilty at his arraignment, the case proceeded to trial on November 15, 2000. Mr. Painter did not appear for trial, however, and the court issued a capias.

{¶6} Years later, Mr. Painter was detained by the Kentucky authorities on the capias and eventually transported from Hartford, Kentucky to Ohio on October 3, 2008. While awaiting trial, his notice of withdrawal of motion for bond was granted, and he remained incarcerated until the time of his sentencing. The court accepted Mr. Painter's

guilty plea on both counts on November 25, 2008, and set the matter for sentencing so that a presentence investigation could be conducted, noting on the record that:

{¶7} “*** I think initially Mr. Painter was being held without bond, and under the circumstances, I think I’ll just leave it that way pending the completion of a Presentence Report. We’ll ask the Probation Department to get on that as quickly as they can, and as soon as that’s done, then Mr. Cordova will be notified and we’ll be back here for the purpose of sentencing.”

{¶8} Mr. Painter’s sentencing hearing followed approximately two months later. The court found that he was not amenable to community control, sentenced him to serve a one-year term on each count, concurrently, and notified him that he may be subject to a period of post-release control for up to three years. He was given jail credit of 135 days for the time he was incarcerated in Ohio awaiting the resolution of this case.

{¶9} It would appear that the court reviewed the presentence investigation report, as the court spoke of it on the record without going into any specific detail; however, a report is not included in the record, nor did the court mention the report in the sentencing entry.

{¶10} The only mention of the Kentucky jail time credit was at the sentencing hearing, when Mr. Painter’s counsel raised the issue with the court and asked the court to credit the time Mr. Painter was incarcerated in Kentucky while awaiting extradition to Ohio.

{¶11} Mr. Painter’s counsel noted that: “He has now spent a total of 226 days in jail on this matter, 135 of those days here in the county. 91 of those days he spent in the state of Kentucky at different times when Kentucky picked him up on the warrant, on

the hold from Ohio. He spent 61 days back in 2006. The State of Ohio, you know, did not go get him. So I believe at the very least he's entitled to credit for 226 days. He's spent seven and-a-half months in jail on this thing.

{¶12} "At this last time, when he was picked up on the warrant, he was held there for several days when the judge there said Ohio's probably not coming to get you again; issued him a bond. He posted bond, and, then, after the bond was issued and he left the jail, county jail down there, word was that the state -- that Ashtabula County was on their way. He was notified by the court. He returned to jail and awaited, you know pickup."

{¶13} The state made no comment on the issue of the Kentucky jail time in its sentencing recommendation. The court in calculating jail time credit did not appear to even consider the time spent in Kentucky for this case:

{¶14} "**** The time you're talking about that your attorney's raised that you've spent in custody previously, I'm not too sure you're entitled to any credit that you served outside the jurisdiction awaiting extradition; but aside from that, I don't have any verification.

{¶15} "The Presentence Report shows 135 days as of today's date, so I'll give you credit for that, but I don't have any verification of any other time that you spent in jail in connection with this case."

{¶16} The sentencing judgment entry is also silent as to the jail time served in Kentucky, stating only that "[t]he Court further finds that the Defendant has previously served time in a prison for a criminal offense." And, that "[c]redit is granted for one

hundred thirty-five (135) days, as of February 6, 2009, because of time spent in custody in this case prior to sentence.”

{¶17} Following his sentencing hearing, Mr. Painter, pro se, filed a motion for jail time credit when he realized, at the time he was taken to the correctional facility, that he had not received the 91¹ days of credit for the time he served in Kentucky.

{¶18} On March 2, 2009, the court denied his motion, finding that “the original jail time credit given in the sentencing entry is correct based on the information that was available to the court.” The court further directed Mr. Painter that any claimed errors in sentencing should be asserted by way of direct appeal from his conviction and sentence.

{¶19} Accordingly, Mr. Painter timely appealed, raising the following assignments of error:

{¶20} “[1.] The trial court erred, as a matter of law, by refusing to give the appellant credit for time served in jail in the state of Kentucky awaiting pick up by the Ashtabula County Sheriff’s Department.

{¶21} “[2.] Appellant received ineffective assistance of trial counsel, in violation of the appellant’s federal and Ohio Constitutional Rights, to wit the Sixth Amendment to the United States Constitution and Section 10, Article I of the Constitution of the state of Ohio.”

Reduction of Prison Term for Time Served

{¶22} In his first assignment of error, Mr. Painter contends the court erred in failing to credit him for jail time served while he awaited extradition from Kentucky to

1. Mr. Painter corrected his calculation to 90 days when he realized that he miscounted by counting the day he was extradited twice.

Ohio for this case. He argues that the court committed reversible error in finding that he is not entitled to credit for time served when the record reveals he was held in a Kentucky jail solely based upon a capias issued by the trial court until he was extradited by the state of Ohio. We determine Mr. Painter's contention has merit because the trial court failed to provide any factual findings regarding its calculation and was silent on the issue of the Kentucky jail time Mr. Painter served.

{¶23} "The power to determine the amount of jail credit an offender shall receive is generally within the purview of the trial court." *State v. Ashley*, 11th Dist. No. 2006-L-134, 2007-Ohio-690, ¶32, citing *State v. Struble*, 11th Dist. No. 2005-L-115, 2006-Ohio-3417, ¶9. "The trial court's calculation may only be reversed for plain error. *Id.* Under the plain terms of R.C. 2967.191, an offender is only entitled to credit for time spent incarcerated relating to the offense for which he is convicted. **** [T]here is no jail-time credit for time served on unrelated offenses, even if that time served runs concurrently during the predetention of another matter." *Id.*, quoting *Struble* at ¶11.

{¶24} Pursuant to R.C. 2967.191, "[t]he department of rehabilitation and correction shall reduce the stated prison term of a prisoner *** by the total number of days that the prisoner was confined *for any reason arising out of the offense for which the prisoner was convicted and sentenced* ***." (Emphasis added.)

{¶25} There is no basis that can be gleaned from the record for the trial court's failure to credit Mr. Painter for the 90 days he served awaiting extradition in this case. The state did not object to his assertion. Notably absent from the record is the presentence investigation report that was allegedly reviewed by all the parties. In addition, the court was silent at the sentencing hearing and in its sentencing as to this

issue, as well as in its entry overruling Mr. Painter's motion for additional jail time credit. The court simply stated a conclusion that its calculation was correct.

{¶26} During the sentencing hearing the court clearly did not consider the time Mr. Painter spent incarcerated in Kentucky awaiting extradition, remarking: "**** The time you're talking about that your attorney's raised that you've spent in custody previously, I'm not too sure you're entitled to any credit that you served outside the jurisdiction awaiting extradition; but aside from that, I don't have any verification.

{¶27} "The Presentence Report shows 135 days as of today's date, so I'll give you credit for that, but I don't have any verification of any other time that you spent in jail in connection with this case."

{¶28} It appears to be well-settled that credit is to be given for time spent awaiting extradition on the subject offense. The Second Appellate District explained when credit for served jail time while awaiting extradition is given in *State v. Nunez*, 2d Dist. No. 21495, 2007-Ohio-1054, stating: "**** even though credit for time served while awaiting extradition is not listed in the statute, it does not preclude a defendant from receiving credit for that time served as long as the reason for the confinement arose out of the offense for which the prisoner was convicted and sentenced." Id. at ¶19, quoting *State v. Neville*, 2d Dist. No. 03 BE 68, 2004-Ohio-6840, see, also, *State v. Walker* (May 1, 1998), 2d Dist. No. 16599, 1998 Ohio App. LEXIS 1916 ("remanding matter to trial court for determination of the number of days defendant was confined in Montana pursuant to an Ohio detainer, since Defendant 'had an unquestioned legal right to challenge his extradition***.'")

{¶29} Furthermore, the state’s argument that Mr. Painter waived the issue because he did not object to the court’s decision not to award credit when the court was silent on the issue is not well-founded. The burden shifted to the state to investigate once Mr. Painter raised the issue to the court.

{¶30} “By invoking his R.C. 2967.191 right as entitling him to a particular result, *** Defendant-Appellant put the court and the state on notice of his claim and the alleged facts upon which the claim was grounded. It then became the State’s burden to show that he is not so entitled because some or all of the *** days for which Defendant-Appellant sought jail-time credit actually arose out of a set of facts separate and apart from the criminal conduct involved in his offense.” *Id.* at ¶21. See, also, *State v. Nagy*, 2d Dist. No. 2003CA21, 2003-Ohio-6903, ¶19.

{¶31} Accordingly, “[w]hen the record before an appellate court fails to disclose any basis for a trial court’s decision regarding jail time credit, the remedy is to remand the matter to the trial court, for a calculation of jail time, and *factual findings regarding that calculation.*” (Emphasis added.) *State v. Navedo*, 11th Dist. No. 2007-L-094, 2008-Ohio-2324, ¶24, citing *State v. Soddors* (Aug. 6, 1999), 2d Dist. No. 98 CA 35, 1999 Ohio App. LEXIS 3634, 1-2, accord, *State v. Newport*, 2d Dist. No. 2006 CA 49, 2007-Ohio-1678, ¶7. As the record fails to disclose any basis for the trial court’s denial of 90 days of jail time credit to Mr. Painter, we must reverse and remand for a calculation of jail time credit and factual findings regarding the calculations. *Id.*

{¶32} Mr. Painter’s first assignment of error is with merit.

Ineffective Assistance of Counsel

{¶33} In his second assignment of error, Mr. Painter argues that his counsel was ineffective because counsel did not submit documentary evidence concerning his period of incarceration in Kentucky while awaiting extradition to Ohio. Although he concedes, and the state admits, the burden rested with the state to produce such documentation once he raised the issue with the trial court, he still contends that his counsel was deficient because, ultimately, he was not given credit for jail time served. We disagree.

{¶34} “[W]hen a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.’ *** The [Supreme Court of Ohio] recognized that there are ‘(***) countless ways to provide effective assistance in any given case.’” *State v. Sands*, 11th Dist. No. 2007-L-003, 2008-Ohio-6981, ¶35, quoting *State v. Vinson, Jr.*, 11th Dist. No. 2006-L-238, 2007-Ohio-5199, ¶29, citing *State v. Allen* (Sept. 22, 2000), 11th Dist. No. 99-A-0050, 2000 Ohio App. LEXIS 4356, 10, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 687-689. “Therefore, the court stated judicial scrutiny of counsel’s performance must be highly deferential. (***).” *Id.*

{¶35} “In addition, “because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. (***).” *Id.* Counsel’s performance will not be deemed ineffective unless and until counsel’s performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel’s performance.’ *Id.* (Parallel citations omitted.) Thus, “[t]o warrant reversal, “the defendant must show that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” ***.’ Id. at ¶33, citing *Allen* at 10-11, citing *Bradley* at 142, quoting *Strickland* at 694.” Id. at 36.

{¶36} Quite simply, Mr. Painter’s counsel did not act ineffectively or fall below an objective standard of reasonableness. In fact, during the sentencing hearing, he appropriately raised the issue of the court’s failure to credit Mr. Painter’s time spent incarcerated in Kentucky. It was at this point that the burden shifted to the state and the trial court to investigate the factual nature of Mr. Painter’s claims.

{¶37} As both Mr. Painter and the state concede, Mr. Painter’s trial counsel was not deficient in this regard. It is clear no ineffective assistance of counsel claim has been established in this case. Indeed, we do not even reach the first prong of the *Strickland* test as no deficiency on the part of counsel has even been alleged.

{¶38} It bears repeating that “[b]y invoking his R.C. 2967.191 right as entitling him to a particular result, [90 additional days], Defendant-Appellant put the court and the state on notice of his claim and the alleged facts upon which the claim was grounded. *It then became the State’s burden to show that he is not so entitled because some or all of the *** days for which Defendant-Appellant sought jail-time credit actually arose out of a set of facts separate and apart from the criminal conduct involved in his offense.*” (Emphasis added.) *Nagy* at ¶19.

{¶39} Mr. Painter’s second assignment of error is without merit.

{¶40} The judgment of the Ashtabula County Court of Common Pleas is reversed and remanded for a determination of the time Mr. Painter served in jail

awaiting extradition from Kentucky to Ohio for the present case and if he is entitled to 90 days of jail time credit.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.