

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08CA0008
BRIAN A. LEE	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Morrow County Court of
Common Pleas Case No. 01CR4483

JUDGMENT: REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY: September 25, 2008

APPEARANCES:

For Plaintiff-Appellee:

CHARLES S. HOWLAND
MORROW COUNTY PROSECUTOR

BRENT W. YAGER
Assistant Prosecutor
60 E. High St.
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For Defendant-Appellant:

BRIAN A. LEE, #427325
Pickway Correctional Institution
P.O. Box 209
Orient, OH 43146-0209

Delaney, J.

{¶1} Defendant-Appellant, Brian A. Lee, appeals the June 3, 2008 judgment entry issued by the Morrow County Court of Common Pleas denying his Motion for Reduction of Prison Term. The procedural history necessary for the disposition of this appeal is as follows.

{¶2} Appellant pleaded guilty to one count of burglary in violation of R.C. 2911.12(A)(3), five counts of receiving stolen property in violation of R.C. 2913.51, three counts of theft in violation of R.C. 2913.02, one count of breaking and entering in violation of R.C. 2911.13, and one count of criminal damaging in violation of R.C. 2909.06. The trial court sentenced Appellant to four years and ten months in prison. On April 25, 2003, Appellant was judicially released from prison and was placed on community control.

{¶3} Appellant violated the terms of community control. The trial court revoked the community control sanctions and Appellant was sentenced to serve the remainder of the four year and ten month prison sentence. (Journal Entry, Mar. 16, 2006). The judgment entry was silent as to the amount of jail time credit Appellant was entitled.

{¶4} On October 26, 2007, Appellant filed a motion for reduction of prison term.¹ He argued that he was entitled to jail time credit for the time he was enrolled in a program at the Diversified Halfway House, ordered by the trial court on September 30, 2003 as part of his original community control sanctions. The trial court did not hold a hearing on Appellant's motion. By judgment entry filed on June 3, 2008, the trial court

¹ On May 13, 2008, Appellant filed a Complaint for Writ of Procedendo with this Court in regards to his motion for reduction of prison time. See, Case No. 08CA0006, *State of Ohio ex rel. Brian A. Lee v. Howard E. Hall, Judge*. On June 11, 2008, Appellee filed a Motion to Dismiss.

determined that “the half-way house time is not confinement for which [defendant] is entitled to jail time credit, based upon the Court’s understanding and interpretation of Ohio Law.”

{¶5} Appellant now appeals and raises one Assignment of Error:

{¶6} “I. THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT CREDIT FOR TIME SERVED AT THE DIVERSIFIED HALFWAY HOUSE.”

I.

{¶7} This matter comes to us on the accelerated calendar. App.R. 11.1, which governs the accelerated calendar, states in pertinent part: “The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court’s decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form.”

{¶8} R.C. 2967.191 requires the Department of Rehabilitation and Corrections to 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.

{¶9} In *State v. Napier*, 93 Ohio St.3d 646, 2001-Ohio-1890, syllabus, the Ohio Supreme Court held that all time served in a community-based correctional facility (CBCF) constitutes confinement for purposes of R.C. 2967.191. However, a reviewing court’s determination of whether time served in a CBCF constitutes confinement is dependent on a record that evidences the level of restriction placed on the defendant during his participation at the facility. *State v. McEldowney*, 5th Dist. No. 2003CA00170,

2003-Ohio-5634, ¶ 4 citing *State v. Edwards*, 9th Dist. No. 20840, 2002-Ohio-1973. The Ohio Supreme Court in *Napier* held that when the evidence demonstrates that the confinee is “not free to come and go as he wished” and “was subject to the control of the staff regarding personal liberties,” the confinement meets the definition of R.C. 2967.191. *Napier*, supra, at 648.

{¶10} When the record fails to indicate whether an Appellant’s participation in a CBCF program was confinement as defined in *Napier* and the trial court fails to provide any reasoning for its denial of the motion, the trial court must reconsider the issue of crediting time served in light of the level of the defendant’s participation at the CBCF. *State v. Edwards*, supra. At the proceeding where the trial court reconsiders the issue of crediting time, the defendant bears the burden of presenting evidence to demonstrate the level of participation at the CBCF. *Id.*

{¶11} In the instant case, the trial court denied Appellant’s motion for reduction of prison time without a hearing to determine the level of Appellant’s confinement at Diversified Halfway House. The trial court determined that the halfway house time was not confinement without any evidence on the record as to nature of Appellant’s confinement. Consistent with our opinions in *State v. McEldowney*, supra, and *State v. Allen*, 5th Dist. No. 2004CA00117, 2004-Ohio-3968, we find the court erred in failing to allow Appellant to present evidence to demonstrate his level of participation in the community based correctional facility.

{¶12} Appellant’s Assignment of Error is sustained.

{¶13} The judgment of the Morrow County Court of Common Pleas denying Appellant’s motion for reduction of prison time is reversed. This cause is remanded to

the trial court with instructions to hold a hearing to determine the level of Appellant's participation and confinement in Diversified Halfway House in order to make a determination of whether Appellant is entitled to jail time credit.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

S/L Patricia A. Delaney

S/L Sheila G. Farmer

S/L John W. Wise

JUDGES

PAD:kgb

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BRIAN A. LEE	:	
	:	
	:	Case No. 08CA0008
Defendant-Appellant	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Morrow County Court of Common Pleas is reversed and remanded to the trial court for further proceedings consistent with this opinion.

S/L Patricia A. Delaney

S/L Sheila G. Farmer

S/L John W. Wise
JUDGES