

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	CASE NO. 14 BE 35
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
DARION ANDREW FRAZIER,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court
Case No. 14-CR-133

JUDGMENT: Reversed and Remanded in part.

APPEARANCES:

For Plaintiff-Appellee:

For Defendant-Appellant:

Attorney Daniel Balgo
Attorney Scot McMahon
Balgo & Kaminski LC
52171 National Road, Suite 4
St. Clairsville, Ohio 43950

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 5, 2015

DeGENARO, J.

{¶1} Defendant-Appellant, Darion Andrew Frazier, appeals the August 20, 2014 judgment of the Belmont County Court of Common Pleas convicting him of one count of felonious assault and sentencing him accordingly. On appeal, Frazier contends his sentence was erroneous because the trial court failed to order jail-time credit. Frazier's assignment of error is meritorious. In addition, though not specifically raised by Frazier, there is another sentencing error that is obvious from the record: post-release control was not properly imposed. Accordingly, the judgment of the trial court is reversed and the matter remanded for the purpose of ordering jail-time credit and for a limited resentencing pursuant to R.C. 2929.191.

Facts and Procedural History

{¶2} On June 4, 2014, the grand jury indicted Frazier on one count of felonious assault R.C. 2903.11(A)(2), a second-degree felony. Frazier was accused of attacking his girlfriend with a knife. Frazier was arrested pursuant to the warrant on this indictment on June 5, 2014.

{¶3} Frazier was arrested, arraigned, pled not guilty and counsel was appointed. Bond was set at \$100,000 cash or surety, but from the record it does not appear that Frazier was released on bond during the pendency of the proceedings.

{¶4} Frazier later entered into a Crim.R. 11 agreement with the State. Pursuant to the agreement, he agreed to plead guilty to the indicted charge. In exchange, the State agreed to remain silent at the sentencing hearing and to "speak" only through the victim impact statement.

{¶5} A plea hearing was held on July 21, 2014, during which time the trial court engaged in a colloquy with Frazier concerning the rights he would give up by pleading guilty. The trial court accepted Frazier's plea as knowingly, voluntarily and intelligently made and continued sentencing so that a presentence investigation (PSI) and a victim impact statement could be prepared.

{¶6} A sentencing hearing was held on August 4, 2014. The State kept its promise to stand silent. Statements were made by the victim and the defendant.

{¶7} After considering the information presented at the hearing, and in the PSI

and victim impact statement, along with the pertinent sentencing statutes, the trial court sentenced Frazier to a maximum term of eight years in prison. With regard to jail-time credit, during the sentencing hearing, the trial court stated that Frazier "will get credit for time served, of course, in accordance with law." However the sentencing entry made no mention of jail-time credit. With regard to post-release control, the trial court imposed a period of "up to three years," both during the hearing and in the sentencing entry.

{¶8} The State has not filed an appellee's brief, and thus, pursuant to App.R. 18(C), this court may "accept the defendant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action."

Jail-time Credit

{¶9} In his sole assignment of error, Frazier asserts:

"The Court erred in failing to credit Defendant with time served in the Judgment Entry."

{¶10} Frazier asserts that he is entitled to jail-time credit and that while the trial court noted his general right to such credit during the sentencing hearing, the trial court failed to calculate the number of days to which he was entitled and failed to mention jail-time credit in the sentencing entry.

{¶11} Indeed, criminal defendants have a right to jail-time credit. "The Equal Protection Clause requires that all time spent in any jail prior to trial and commitment by [a prisoner who is] unable to make bail because of indigency must be credited to his sentence." *State v. Fugate*, 117 Ohio St.3d 261, 2008–Ohio–856, 883 N.E.2d 440, ¶7.

{¶12} Pursuant to R.C. 2967.191:

The department of rehabilitation and correction shall reduce the stated prison term of a prisoner or, if the prisoner is serving a term for which there is parole eligibility, the minimum and maximum term or the parole eligibility date of the 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, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term, as determined by the sentencing court under division (B)(2)(g)(i) of section 2929.19 of the Revised Code, and confinement in a juvenile facility. The department of rehabilitation and correction also shall reduce the stated prison term of a prisoner or, if the prisoner is serving a term for which there is parole eligibility, the minimum and maximum term or the parole eligibility date of the prisoner by the total number of days, if any, that the prisoner previously served in the custody of the department of rehabilitation and correction arising out of the offense for which the prisoner was convicted and sentenced.

{¶13} Further, R.C. 2929.19(B)(2)(g)(i) provides in relevant part:

Subject to division (B)(3) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

* * *

(g)(i) 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. The court's calculation shall not include the number of days, if any, that the offender previously served in the custody of the department of rehabilitation and correction arising out of the offense for which the prisoner was convicted and sentenced.

{¶14} From the plain language of the statute the trial court was required to calculate jail-time credit. See *also State v. McClellan*, 7th Dist. No. 10 MA 181, 2011-

Ohio-4557, ¶33-40 (concluding that, even under an earlier version of R.C. 2929.19, where trial court's duty regarding calculation of jail-time credit was not explicit, that it was nonetheless plain error for the trial court to fail to calculate jail-time credit in the sentencing entry.)

{¶15} It is also apparent from the record that Frazier is indeed entitled to some jail-time credit. Frazier was arrested and bond was set, but from the record it does not appear that Frazier was released on bond during the pendency of the proceedings. In addition, while, the trial court stated during the sentencing hearing that Frazier "will get credit for time served, of course, in accordance with law", the court failed to state precisely how much credit to which Frazier was entitled, and the sentencing entry made no mention of jail-time credit.

{¶16} Accordingly, Frazier's sole assignment of error is meritorious and the matter is remanded for the trial court to calculate and order jail-time credit.

Post-Release Control

{¶17} Additionally, although not raised by Frazier, it is apparent from the record that post-release control was not properly imposed. During the hearing and in the sentencing entry, the trial court stated that Frazier is subject to a period of post-release control of "up to three years." (Emphasis added.) Frazier was convicted of a second-degree felony. For second-degree felonies that are not sex offenses, the proper post-release control term is a (definite) three years. R.C. 2967.28(B)(2). "The 'up to' three [year] period of postrelease control is for offenders who committed third, fourth, and fifth-degree felonies." *State v. Rodriguez-Baron*, 7th Dist. No. 10–MA–176, 2012-Ohio-1473, ¶17, citing R.C. 2967.28(C).

{¶18} In *Rodriguez-Baron*, this court reversed and remanded for a limited resentencing pursuant to R.C. 2929.191 under the same circumstances, i.e., the trial court imposed post-release control of "up to three years" for a second-degree felony. *Id.* at ¶24. The same outcome is warranted here.

{¶19} Defendants sentenced after July 11, 2006, like Frazier and Rodriguez-Baron, are subject to the sentence correction mechanism in R.C. 2929.191. See *State v. Singleton*, 124 Ohio St.3d 173, 2009–Ohio–6434, 920 N.E.2d 958, ¶1. As the *Singleton* Court explained:

R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of postrelease control. It applies to offenders who have not yet been released from prison and who fall into at least one of three categories: those who did not receive notice at the sentencing hearing that they would be subject to postrelease control, those who did not receive notice that the parole board could impose a prison term for a violation of postrelease control, or those who did not have both of these statutorily mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B).

Id. at ¶23.

{¶20} Here the trial court erred by failing to impose the proper term of post-release control. The remedy for this is a remand for a limited resentencing pursuant to R.C. 2929.191(C). *Singleton* at ¶24.

{¶21} In sum, the trial court erred by failing to calculate jail-time credit and by improperly imposing post-release control. Accordingly, the judgment of the trial court is reversed and the matter remanded for the trial court to calculate and order jail-time credit and for a limited resentencing pursuant to R.C. 2929.191.

Donofrio, J. concurs.
Waite, J. concurs.