

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. 2017-1701, 2017-1547
Plaintiff-Appellant,	:	
	:	On Appeal from the Geauga County
v.	:	Court of Appeals,
	:	Eleventh Appellate District
ADAM R. CUPP,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 2016-G-0097

**BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE ADAM R. CUPP**

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INTRODUCTION

This case concerns a fundamental right in the criminal justice system: the right to credit for time spent incarcerated on a case toward the sentence for that case. In Ohio, R.C. 2967.191 codifies the Equal Protection guarantees of both the Ohio and United States Constitutions, which protect defendants from disparate treatment based solely on their economic status. *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, ¶ 7. Specifically, this Court must consider the plain meaning of R.C. 2967.191. As explained below in greater detail, this Court should affirm the Eleventh District’s application of the plain meaning of the statute to ensure all individuals receive “properly determined jail-time credit” to guarantee freedom “from unauthorized incarceration.” *State v. Thompson*, 147 Ohio St.3d 29, 2016-Ohio-2769, 59 N.E.3d 1264, ¶ 9.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency, statutorily created to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

In the last year, the OPD has received 231 formal requests for assistance specifically regarding jail-time credit. This figure does not include inquiries made to OPD attorneys working directly in the jails and prisons and does not include inquiries made by current direct appeal clients. In the last decade, the OPD has fielded concerns regarding jail-time credit from individuals in 87

out of Ohio's 88 counties. Of the hundreds of requests made annually, OPD provides litigation assistance in approximately 20% of cases. Additionally, the OPD has a jail-time credit working group made up of attorneys from multiple departments in the agency whose mission is to develop and implement an organized approach to the very large problem of Ohio citizens being illegally confined as a result of errors related to jail-time credit. The group has jointly authored a bench card with the Department of Rehabilitation and Correction that is hosted and distributed by the Ohio Judicial Conference and members of the group have presented on the topic of jail-time credit for CLE credit.

As amicus curiae, the OPD offers this Court the perspective of practitioners who have expertise in this area and routinely litigate issues relating to jail-time credit in all courts across the state. The OPD has an interest in the case sub judice, as this Court's decision will impact the application of Ohio's jail-time credit statute which will affect nearly all of Ohio's incarcerated individuals. As amicus curiae, the OPD urges this Court to apply the plain meaning of the jail-time credit statute.

STATEMENT OF THE CASE AND FACTS

Amicus curiae hereby adopts the statement of the case and facts set forth in Appellee Adam Cupp's merit brief.

LAW AND ARGUMENT

STATE'S PROPOSITION OF LAW I

A defendant is not entitled to jail credit for pre-sentence detention time when held on bond on a case if, during the same period, the defendant is serving a jail sentence on a separate case.

RESPONSE TO THE STATE'S PROPOSITION OF LAW I

The jail-time credit statute, R.C. 2967.191, requires trial courts to grant credit for time an individual is held prior to sentencing, regardless of whether he is also held for a separate purpose.

- I. The Revised Code mandates that jail-time credit be given for the total number of days an individual is confined for any reason arising out of the offense for which the person was convicted and sentenced.**

This Court has stated that “receiving properly determined jail-time credit implicates an offender’s liberty interest in being free from unauthorized incarceration and the right to jail-time credit is protected by at least three statutory provisions.” *State v. Thompson*, 147 Ohio St.3d 29, 2016-Ohio-2769, 59 N.E.3d 1264, ¶ 9, citing R.C. 2949.08(B), 2967.191, and 2929.19. One of those statutory provisions, R.C. 2967.191, requires that when a trial court imposes its sentence, the court must give the defendant credit for all time that he was confined in relation to the offense at hand.

Ohio Revised Code Section 2967.191 specifically provides that “[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 * * *.” Although the Department of Rehabilitation and Correction has a mandatory duty pursuant to R.C. 2967.191 to credit an inmate with time already served, it is the trial court’s responsibility to properly calculate the amount of days for which such credit may be given. *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-

Ohio-2061, 786 N.E.2d 1286, ¶ 7; R.C. 2929.19(B)(2)(g)(i); accord *State ex rel. Corder v. Wilson*, 68 Ohio App.3d 567, 572-573, 589 N.E.2d 113 (1991) (the Department of Rehabilitation and Correction may credit only the amount of jail time that the trial court determines the inmate is entitled to by law; it cannot substitute its own judgment in complying with the mandate of R.C. 2967.191.)

II. The nascence of “separate and apart” in jail-time credit jurisprudence and the subsequent departure by appellate courts from the original logic underlying the concept.

In 1975, the First District Court of Appeals held that a defendant was not entitled to credit for time served pursuant to a prior conviction in another jurisdiction towards a later, totally unrelated conviction where such prior conviction was reversed. *State v. Dawn*, 45 Ohio App.2d 43, 44, 340 N.E.2d 421 (1st Dist.1975). In *Dawn*, the appellant was seeking credit toward his 1974 Hamilton County theft charge for time that he had served in 1971 and 1972 on a Clermont County burglary conviction that had been reversed in November of 1972. *Id.* at 43. In denying the credit, the First District stated, “Clearly, Ohio statutory law provides that a defendant is entitled to credit for time served if such imprisonment is related to the offense for which he was tried and convicted. *See* R. C. 2967.191. However, where, as here, the time sought to be utilized arose out of a set of facts separate and apart from the instant conviction and arose in another jurisdiction, such statute is inapplicable.” *Id.* at 44.

Decades later, Ohio’s appellate courts have continued to use the “separate and apart” language from *Dawn*, but have departed from the logic the *Dawn* court relied on when it coined that phrase. Now appellate courts are using the “separate and apart” language to deny individuals credit for time served when the confinement was related to the offense for which the individual was convicted and sentenced. *See e.g. State v. Smith*, 71 Ohio App.3d 302, 304, 593 N.E.2d 402

(1992) (denied appellant credit for time he was held in jail prior to sentencing when he was also serving an unrelated misdemeanor sentence and stating “R.C. 2967.191 requires that jail credit be given only for the time the prisoner was confined for any reason arising out of the offense for which he was convicted and sentenced. It does not entitle a defendant to jail-time credit for any period of incarceration which arose from facts which are separate and apart from those on which his current sentence is based”)(misdemeanor sentence); *State v. Brooks*, 9th Dist. Lorain No. 05CA008786, 2006-Ohio-1485, ¶ 6 (denied appellant credit for time held in jail on bond because he was simultaneously serving an unrelated eight-month probation-violation sentence and noting, “[s]uccinctly stated, ‘a defendant is not entitled to jail-time credit for any period of incarceration which arose from facts which are separate and apart from those on which his current sentence is based.’”), quoting *State v. Goehring*, 6th Dist. Ottawa No. OT-03-035, 2004-Ohio-5240, ¶ 10(probation-violation sentence); *State v. Washington*, 1st Dist. Hamilton No. C-050462, 2006-Ohio-4790, ¶ 8 (denied appellate credit for time held on new case when also held on a community control violation and noting “while the trafficking and possession were the facts that triggered his community-control violation, they were not the facts upon which his sentences in the cases numbered B-0202311 and B-0400107 were based. Accordingly, during the majority of the days for which he received jail-time credit, Washington was serving a sentence on offenses separate and apart from his current offenses.”)(community-control-violation sentence).

III. Affirming the court of appeals’ plain reading of the statute would correct lower courts’ impermissible selective grants of jail-time credit in additional factual scenarios.

Lower courts in Ohio have latched onto the “separate and apart” language originated in *Dawn* and expanded in *Smith* to justify not granting credit to a pending felony when a defendant

is serving an unrelated jail or prison sentence and have further used that language in scenarios where a defendant is being held concurrently on multiple pending charges.

For example, in *State v. Edmonds*, 12th Dist. Warren No. CA2014-03-045, 2015-Ohio-2733, it was undisputed that Mr. Edmonds had served approximately three months in jail for both theft and escape charges arising out of conduct that occurred at different times and that was charged under different case numbers. The trial court sentenced Mr. Edmonds on the escape charge and did not credit any of his jail time credit to that sentence, noting that the jail time credit would be applied to the sentence in the theft case. However, the next day the State dismissed the theft charge, and Mr. Edmonds was denied any jail time credit. He appealed that decision and the Twelfth District affirmed, concluding that “[d]espite the Ohio Supreme Court’s holding in *Fugate*, this court and others have found that an offender is not entitled to jail-time credit for any period of incarceration that arose from facts which are *separate and apart* from those on which his current sentence is based.” *Edmonds* at ¶12.

Under the plain reading of R.C. 2967.191, as applied in *Cupp*, because Mr. Edmonds was incarcerated for three months prior to sentencing on his escape charges, he was entitled to credit for those three months toward his escape sentence. *See also State v. Rios*, 2d Dist. Clark No. 10CA0059, 2011-Ohio-4720 (denying defendant credit for the time he spent in jail for a murder charge, when it arose from facts separate from his vandalism charge, even though the time the defendant spent in jail awaiting trial on the murder charge overlapped the time he spent in jail prior to trial on his vandalism charge).

The “separate and apart” language was created and propagated by the appellate courts, not this Court, and not the legislature. This appellate-court concept has shifted from an explanation of the statute in *Dawn* to a tool that lower courts have used to avoid applying the plain meaning of

R.C. 2967.191. Notably, the court below applied the plain meaning of the statute and avoided the misuse of the “separate and apart” language seen by other appellate court decisions. *State v. Cupp*, 11th Dist. Geauga No. 2016-G-0097, 2017-Ohio-7948, ¶ 63.

Affirming the ruling of the Eleventh District Court of Appeals below would instruct lower courts to follow the plain language of R.C. 2967.191 and grant credit for any days an individual was confined for any reason arising out of that offense and would address the problem of lower courts using the “separate and apart” language to deny credit that is due.

CONCLUSION

This Court has previously recognized that “R.C. 2967.191 requires that jail-time credit be applied to all prison terms imposed for charges on which the offender has been held.” *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, ¶ 12. The way the court below handled this case avoids the growing problem of courts over-expanding the inapposite “separate and apart” language. This Court should affirm the Eleventh District’s decision to ensure all defendants receive the jail-time credit to which they are entitled under the statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE ADAM CUPP was forwarded by regular U.S. Mail to Nicholas A. Burling, Geauga County Assistant Prosecutor, Courthouse Annex, 231 Main Street, 3rd Floor, Chardon, Ohio 44024; Sean C. Buchanan, Slater & Zurc, One Cascade Plaza, Suite 2210, Akron, Ohio 44240, on this 8th day of May, 2018.

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