

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-198
 : (C.P.C. No. 06CR05-3599)
 Brian K. Mills, II, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on December 1, 2009

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Brian K. Mills, II ("appellant"), appeals the judgment entry of sentence from the Franklin County Court of Common Pleas, asserting that the trial court improperly calculated his jail-time credit when imposing his sentence. For the following reasons, we find that the record regarding jail-time credit is unclear, and

remand this matter for the trial court to clarify and redetermine his jail-time credit, if necessary.

{¶2} On April 9, 2007, appellant entered a guilty plea to the stipulated lesser included offense of attempted carrying a concealed weapon, a violation of R.C. 2923.02, a felony of the fifth degree. The trial court accepted the plea, and sentenced appellant to two years of community control, subject to the following conditions: that he obtain and maintain full-time verifiable employment, pay \$517 in court costs, and pay a \$250 fine. Ten days of jail-time credit was awarded. The court notified appellant that if he violated community control, the court would impose an 11-month determinate prison sentence to be served at the Ohio Department of Rehabilitation and Corrections ("ODRC").

{¶3} On October 23, 2008, appellant was arrested on charges of having weapons while under a disability and obstructing official business in Hamilton County. A holder was issued in this matter that same day by the Franklin County Probation Department, and a resentencing hearing was held pursuant to R.C. 2929.19 on February 4, 2009. At the resentencing hearing, the probation department sought revocation of appellant's probation based on: the new charges; failure to verify employment since April 2008; and failure to pay court costs. Appellant's defense counsel stipulated to each of the violations, and informed the court that appellant had been incarcerated on holders from both Franklin and Hamilton Counties for 105 days, and requested that 105 days of jail-time credit be recognized.

{¶4} The trial court revoked appellant's community control. However, the court did not impose the 11-month sentence the court had notified appellant of during the original sentencing hearing. Instead, the court imposed a six-month determinate sentence to be served at the ODRC and ordered appellant to pay \$517 in court costs and a \$250 fine. Appellant was given ten days of jail-time credit.

{¶5} Appellant filed a timely notice of appeal and raised the following assignment of error:

The trial court erroneously denied appellant jail-time credit for time spent in custody after a holder was placed against him for alleged violations of the terms of his community control.

{¶6} By his assignment of error, appellant contends that the trial court erred in giving him only ten days of jail-time credit when a holder was placed on October 23, 2008 and he had spent 105 days in jail at the time of the resentencing hearing. He argues that, pursuant to *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, he should be awarded additional jail-time credit.

{¶7} R.C. 2967.191 requires the ODRC 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, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, and confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term." While R.C. 2967.191 requires that the ODRC credit an inmate with jail time already served, "it is the trial court that makes the factual determination as to the number of days of confinement that a defendant is entitled to have credited toward his sentence."

State ex rel. Rankin v. Ohio Adult Parole Auth., 98 Ohio St.3d 476, 2003-Ohio-2061, ¶7. See also Ohio Adm.Code 5120-2-04(B). This information is required to be included within the sentence and entry. See R.C. 2949.12; Ohio Adm.Code 5120-2-04(B).

{¶8} As stated in *Fugate*, the practice of awarding jail-time credit has its roots in the Equal Protection Clauses of the Ohio and United States Constitutions. Failure to credit the prisoner who languishes in jail awaiting adjudication violates principles of equal protection because it would strongly favor the non-indigent prisoner who is capable of posting bail. See *State v. Sparks* (1990), 69 Ohio App.3d 400, 402.

{¶9} In *Fugate*, the defendant was convicted of receiving stolen property and placed on community control. He was subsequently charged with burglary and theft, and the probation department requested revocation of community control. At the revocation hearing, the defendant admitted that his new convictions violated the terms of his community control. The probation officer informed the court that the defendant had 213 days of jail-time credit on the burglary and theft charges, and the prosecutor proposed that the credit be applied only to the sentence for violation of community control. Defense counsel did not object, and the trial court imposed a prison term for the community-control violation and awarded 213 days of jail-time credit. The court stated that the sentence was to be served concurrently with the sentences to be imposed for the burglary and theft convictions in the new case.

{¶10} The trial court then imposed a concurrent two-year prison term for the burglary conviction. Appellant received no jail-time credit, and defense counsel did not object. At a later resentencing, held because the court failed to impose sentence on the theft conviction, the court imposed a six-month prison term to run concurrently with the

two-year term for burglary. Defendant appealed, arguing that he should have received jail-time credit of 213 days toward each of his concurrent prison sentences. This court affirmed. The Supreme Court of Ohio held in the syllabus that "[w]hen a defendant is sentenced to concurrent prison terms for multiple charges, jail-time credit pursuant to R.C. 2967.191 must be applied toward each concurrent prison term."

{¶11} We find *Fugate* to be distinguishable from the facts of this case. *Fugate* involved applying jail-time credit to concurrent prison terms. However, in this case, appellant was arrested on charges in Hamilton County and was being held on a holder issued by the Franklin County Probation Department. Our record does not demonstrate how the Hamilton County charges were resolved, but at the time of sentencing on the probation violation in this case, appellant was not facing concurrent sentences.

{¶12} According to appellant, he was in jail for 105 days on a holder issued by the Franklin County Probation Department prior to his resentencing. The state has not objected to this representation. This court has recognized that "days served following arrest on a probation violation can only be credited toward the sentence on the original charge--i.e., the one for which he was sentenced to probation." *State v. Chafin*, 10th Dist. No. 06AP-1108, 2007-Ohio-1840, ¶9. When an offender violates probation and may not be permitted to be released on bail, that time between the arrest and the hearing on the probation violation can only be credited against the sentence imposed for the probation violation. *Id.*

{¶13} A trial court's failure to properly calculate a felony offender's jail-time credit, pursuant to R.C. 2967.191, and to include the amount of jail-time credit in the body of the offender's sentencing judgment is plain error. *State v. Collier*, 10th Dist. No.

08AP-1099, 2009-Ohio-4652, ¶18, citing *State v. Miller*, 8th Dist. No. 84540, 2005-Ohio-1300, ¶10.

{¶14} In this case, the transcript of the resentencing hearing indicates that the trial court may have intended to recognize appellant's jail-time credit by reducing the 11-month sentence announced at the original sentencing hearing to the six-month sentence imposed at the resentencing hearing. The trial court stated, as follows:

THE COURT: Well, you got the -- I don't know what Hamilton County is gonna do, but there's no way I can put you on community control. The judge there may sentence you to prison and they won't give you, you know what I mean? That just won't work. I'm going to modify sentence to six months. I'm just going to give him ten days because I'm taking it from 12 [sic] months to six months, and the Judge there will run you concurrent or I don't know what they will do, but you got another weapons case and, you know, you really shouldn't have. I mean, weapons just get you in trouble. Get you a lot more time than carrying a concealed weapon unless you shoot somebody.

(Feb. 4, 2009, Tr. 4-5.)

{¶15} However, the entry merely provides that appellant received a six-month sentence, although the court made it clear in the entry that this sentence had been modified from the original 11 months. The court also awarded ten days of jail-time credit. Although it may have been the court's intention to have the 105 days of jail-time credit reflected in the shorter sentence imposed, the entry fails to specifically state this intention, and the record otherwise fails to adequately account for the 105 days. Thus, we are remanding the matter for the trial court to clarify the application of jail-time credit in order to ensure that appellant receives the full amount of jail-time credit to which he is entitled.

{¶16} For the reasons set forth in this decision, we sustain appellant's assignment of error, and remand this matter to the Franklin County Court of Common Pleas with instructions to make a factual determination regarding the calculation and application of jail-time credit in this case, and to issue a sentencing entry that properly reflects that calculation and application.

*Judgment reversed;
cause remanded with instructions.*

FRENCH, P.J., and BROWN, J., concur.
