

[Cite as *State v. Cole*, 2009-Ohio-4580.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23327
vs.	:	T.C. CASE NO. 08CR3718-2
MC CLENNEN COLE, II	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 4th day of September, 2009.

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GRADY, J.:

{¶1} Defendant, McClennen Cole, appeals from a judgment denying his motion for jail time credit.

{¶2} Defendant was convicted in Case No. 06-CR-5291 of the offense of receiving stolen property. He was placed on community control for that offense.

{¶3} During that period of community control, on September 5, 2008, Defendant was involved in an incident for which he was charged in Case No. 08-CR-3718 with two counts of felonious assault. Defendant was arrested and incarcerated on those charges on November 13, 2008.

{¶4} As a result of Defendant's indictment in Case No. 08-CR-3718, the court's probation department filed a notice of community control violation in Case No. 06-CR-5291 on November 24, 2008.

{¶5} On January 28, 2009, Defendant entered a negotiated plea of guilty to one count of attempted felonious assault in Case No. 08-CR-3718. Defendant also admitted that his conviction in Case No. 08-CR-3718 constituted a violation of his community control sanctions in Case No. 06-CR-5291. The parties jointly recommended one-year sentences in both cases, to be served concurrently.

{¶6} On February 3, 2009, the trial court imposed sentences of one year in Case No. 06-CR-5291 and in Case No. 08-CR-3718, to be served concurrently. The court awarded Defendant jail time credit of eighty-three days in Case No. 08-CR-3718, for the time since his arrest on November 13, 2008. The court also awarded Defendant one

hundred forty-three days of jail time credit in Case No. 06-CR-5291.

{¶ 7} On February 10, 2009, Defendant filed a motion seeking additional jail time credit against his one year sentence in Case No. 08-CR-3718. Defendant argued that, per *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, he is entitled to the benefit of the one hundred forty-three days credit the court ordered in Case No. 06-CR-5291, not the mere eighty-three days the court awarded, because the sentences in the two cases are to be served concurrently.

{¶ 8} The trial court overruled Defendant's motion on March 6, 2009. (Dkt. 20). The court held that, per *Fugate*, Defendant is not entitled to jail time credit in Case No. 08-CR-3718 for time he served in Case No. 06-CR-5291 prior to September 5, 2008, the date on which the attempted felonious assault offense in Case No. 08-CR-3718 was committed. Defendant filed a notice of appeal from that judgment.

ASSIGNMENT OF ERROR

{¶ 9} "THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR ADDITIONAL JAIL-TIME CREDIT."

{¶ 10} In *Fugate* the defendant's subsequent convictions for burglary and theft were grounds on which the court

found that the defendant had violated community control sanctions imposed on a prior conviction for receiving stolen property. The court imposed a twelve-month sentence for the community control violation, granting a jail-time credit of two hundred thirteen days against that term. The court imposed sentences of two years for the burglary conviction and six months for the theft conviction. All three convictions were concurrent.

{¶ 11} The defendant in *Fugate* argued on appeal that the two hundred thirteen day jail-time credit should apply toward each of his three concurrent sentences. The Supreme Court agreed. The Court noted that jail-time credit is governed by R.C. 2967.191, and that relevant sections of the Ohio Administrative Code mandate that when multiple terms are imposed consecutively, the credit for each stated term is to be applied to the total term. The Court explained, at ¶22 of the Opinion:

{¶ 12} "When a defendant is sentenced to consecutive terms, the terms of imprisonment are served one after another. Jail-time credit applied to one prison term gives full credit that is due, because the credit reduces the entire length of the prison sentence. However, when a defendant is sentenced to concurrent terms, credit must be

applied against all terms, because the sentences are served simultaneously. If an offender is sentenced to concurrent terms, applying credit to one term only would, in effect, negate the credit for time that the offender has been held. To deny such credit would constitute a violation of the Equal Protection Clause. Therefore we hold that when 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."

{¶ 13} The date on which a subsequent offense was committed is irrelevant to the analysis and result the holding in *Fugate* requires. So long as two or more sentences are imposed concurrently, the jail-time credit applicable to each sentence applies to all sentences imposed. Whether the terms of the sentences are identical, as in the present case, or of different lengths, as in *Fugate*, their respective jail-time credits apply to each term of incarceration made concurrent. On that basis, any shorter jail-time credit for one sentence is subsumed into the longest jail time credit available for any of the concurrent sentences. Otherwise, the defendant is denied the credit to which he is entitled for that longer term.

{¶ 14} The trial court erred when, having imposed concurrent sentences in Case Nos. 06-CR-5291 and 08-CR-3718, the court failed to credit Defendant for the one hundred forty-three days of jail-time credit to which he is entitled in Case No. 06-CR-5291 against the sentence the court imposed in Case No. 08-CR-3718. The assignment of error is sustained. Defendant's sentence in Case No. 08-CR-3718 is reversed, and the case will be remanded for resentencing consistent with our opinion.

DONOVAN, P.J. And FROELICH, J., concur.

Copies mailed to:

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Hon. Michael T. Hall