

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	W. Scott Gwin, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. 09-CA-115
	:	
	:	
ROBERT M. BARCUS	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Criminal Appeal from Licking County Court of Common Pleas Case No. 04 CR 00089
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	January 8, 2010
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APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, J.

{¶1} Defendant-appellant, Robert Barcus, appeals from the March 25, 2009, Judgment Entry of the Licking County Court of Common Pleas denying his Motion for Jail Time Credit. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 2, 2004, appellant Robert M. Barcus, entered pleas of no contest to one count of complicity to commit trafficking in marijuana in violation of R.C. 2923.03(A)(2) and 2925.03(A)(1)(C)(3)(a), a felony of the fifth degree, one count of possession of marijuana in violation of R.C. 2925.11(A)(C)(3)(c), a felony of the fifth degree, one count of possession of marijuana in violation of R.C. 2925.11 (A)(C)(3)(d), a felony of the third degree, one count of trafficking in marijuana in violation of R.C. 2925.03(A)(2)(C)(3)(d), a felony of the second degree, and one count of trafficking in marijuana in violation of R.C. 2925.03(A)(2)(C)(3)(b), a felony of the fourth degree. As memorialized in a Judgment Entry filed on September 2, 2004, the trial court sentenced appellant to concurrent sentences, for an aggregate sentence of five (5) years. The trial court ordered that the sentence run consecutively to appellant's sentence in Case No. 02 CR 00096. The trial court, in its Judgment Entry, further stated that "Credit for 0 days is granted as of this date, along with future custody days while defendant awaits transportation to the appropriate state institution because the Defendant is currently incarcerated in Case No. 02 CR 00096."

{¶3} On September 22, 2004, appellant filed a motion captioned "Modification of Sentence to Vacate Payment of Fines." Following an oral hearing on such motion,

the trial court, as memorialized in a Judgment Entry filed on November 1, 2004, denied appellant's motion.

{¶4} On March 5, 2009, appellant filed a Notice of Appeal from the trial court's September 2, 2004, Entry, which was assigned Case No. 09-CA-23. On March 5, 2009, appellant also filed a Motion for Jail-Time Credit and a Motion Requesting the Court to Vacate Payment of Fines and Court Costs.

{¶5} Pursuant to a Judgment Entry filed on March 25, 2009, the trial court found that it was without jurisdiction to consider appellant's Motion to Vacate Fines and Costs as a result of the appeal filed in Case No. 09-CA-23. The trial court also stated in its Entry that it had previously ruled on this motion on November 1, 2004, and that such issue was now *res judicata*, because appellant could have filed a direct appeal from the November 1, 2004, Judgment Entry but failed to do so. The trial court, as memorialized in a separate Judgment Entry filed on March 25, 2009, denied appellant's Motion for Jail Time Credit.

{¶6} On March 26, 2009, this Court denied appellant's Motion to File a Delayed Appeal¹ in Case No. 09-CA-23, finding that appellant had not established good cause to file a delayed appeal.

{¶7} On April 20, 2009, appellant filed a Notice of Appeal from the trial court's March 25, 2009, Judgment Entry denying his Motion Requesting the Court to Vacate Payment of Fines and Court Costs. Such case was assigned Case No. 09-CA-0051. Appellant, in his brief in such case, assigned as error the trial court's failure to grant him jail time credit. Appellant also argued that the trial court erred in failing to vacate fines and court costs.

¹ Such motion had been filed on March 9, 2009.

{¶8} This Court, pursuant to an Opinion filed on July 6, 2009, in *State v. Barcus*, Licking App. No. 09 CA 51, 2009-Ohio-3388, declined to address appellant's assignment of error as to jail time credit, noting that appellant's Notice of Appeal and docketing statement only stated that he was appealing from the trial court's entry denying his Motion Requesting the Court to Vacate Payment of Fines and Court Costs.

{¶9} Appellant then filed an Application for Reconsideration with this Court, asking this Court to reopen his appeal to consider the issues relating to jail time credit. Via a Judgment Entry filed on August 31, 2009, this Court denied such motion, stating, in relevant part, as follows: "we find that the appropriate avenue for appellant to pursue is to file a motion for a delayed appeal with regard to the issues raised in 'Brief 1' which were not addressed in the instant case."

{¶10} Pursuant to a Judgment Entry filed on October 8, 2009, this Court granted appellant's Motion for Leave to File a Delayed Appeal from the trial court's March 25, 2009, Judgment Entry relating to his motion for jail time credit.

{¶11} Thereafter, on September 14, 2009, appellant filed a Notice of Appeal from the trial court's March 25, 2009, Judgment Entry denying his Motion for Jail Time Credit.

{¶12} Appellant now raises the following assignments of error on appeal:

{¶13} "I. APPELLANT, WHO WAS SENTENCED ON MULTIPLE CHARGES, WAS ENTITLED TO EQUAL JAIL-TIME CREDIT FOR PRETRIAL DETENTION AGAINST ALL CONCURRENT TERMS, WHICH INCLUDE HIS SENTENCES FOR HIS FELONY DRUG CONVICTIONS. THE FAILURE TO AWARD JAIL TIME CREDIT AGAINST ALL CONCURRENT TERMS VIOLATES OHIO REVISED CODE §2967.191

AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND SECTION 2, ARTICLE 1 OF THE OHIO CONSTITUTION.

{¶14} “II. THE TRIAL COURT DENIED THE DEFENDANT-APPELLANT HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAW WHEN THEY DENIED HIM THE JAIL-TIME CREDIT HE SERVED PRIOR TO CONVICTION AND SENTENCE AND PRIOR TO TRANSPORTATION TO THE PLACE WHERE HE WAS TO BEGIN SERVING THE SENTENCE IMPOSED BY THE TRIAL COURT.”

I, II

{¶15} Appellant, in his two assignments of error, argues that the trial court erred in failing to grant appellant jail time credit.

{¶16} Under the doctrine of res judicata, a final judgment and conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction, or on appeal from that judgment. *State v. Szeftck*, 77 Ohio St.3d 93, 95, 1996-Ohio-337, 671 N.E.2d 233; *State v. Perry* (1967), 10 Ohio St.2d 175, 180, 226 N.E.2d 104. The doctrine of res judicata has also been held to apply to a jail-time credit motion that alleges an erroneous legal determination on jail time credit. See, *State v. Chafin*, Franklin App. No. 06AP-1108, 2007-Ohio-1840; *State v. Lomack*, Franklin App. No 04AP-648, 2005-Ohio-2716, at paragraph 12. Issues regarding jail-time credit are properly addressed on direct appeal. *State ex rel. Rankin v. Ohio Adult Parole Authority*, 98 Ohio St.3d 476, 479, 2003-Ohio-2061, 786 N.E.2d

1286; *State ex rel. Jones v. O'Connor*, 84 Ohio St.3d 426, 1999-Ohio-470, 704 N.E.2d 1223; *State v. Parsons*, Franklin App. No. 03AP-1176, 2005-Ohio-457, at paragraph 8; *State v. Robinson* (Oct. 23, 2000), Scioto App. No. 00CA2698, 2000 WL 1617952, unreported; *State v. Flynn* (Nov. 7, 1997), Ashtabula App. No. 96-A-0079; *State v. Walker*, Muskingum App. No. CT2007-0062, 2007-Ohio-6624.

{¶17} In the case sub judice, appellant entered a plea and was sentenced on September 2, 2004. Appellant entered a plea in accordance with the terms of a negotiated plea agreement and was represented by counsel. The trial court specifically stated in its September 2, 2004, Judgment Entry, that, "Credit for 0 days is granted as of this date, along with future custody days while defendant awaits transportation to the appropriate state institution because the Defendant is currently incarcerated in Case 02 CR 00096." Appellant did not file a timely appeal from the trial court's September 2, 2009, Judgment Entry of conviction and sentence.

{¶18} For these reasons, we find that appellant is barred by the doctrine of res judicata from pursuing his Motion for Jail Time Credit. Appellant had an opportunity to appeal the trial court's denial of jail time credit by means of a timely direct appeal of that denial, but appellant did not file a timely appeal. As a result, his appeal in Case No. 09-CA-23 was dismissed.

{¶19} Accordingly, appellant's first and second assignments of error are not well taken and are hereby overruled.

{¶20} The judgment of the Licking County Court of Common Pleas is, therefore, affirmed.

By: Edwards, J.

Gwin, P.J. and

Wise, J. concur

JUDGES

JAE/d1110

