

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-170210
	:	TRIAL NO. C-17CRB-6267
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
TIMOTHY PIERCE,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Timothy Pierce was arrested on charges that he had violated the conditions of a community control sanction. He spent 18 days in jail awaiting a hearing. At the hearing, the court dismissed a number of charges that had been based on a violation of a civil protection order because, at the time of the alleged violations, Pierce had not yet been served with the order. Pierce then pleaded “no contest” to a charge that he had violated the court’s order to have no contact with his estranged wife. After the trial court accepted Pierce’s plea and found him guilty, Pierce indicated that he had not contacted his wife. The trial court sentenced Pierce to time served, terminated community control, and ordered Pierce to pay costs.

At the outset, we address the state’s contention that Pierce’s appeal is moot because he has served his sentence “and cannot be returned to community control.”

Presumably, the state argues that Pierce has voluntarily completed his sentence. But where a defendant is sentenced to “time served,” the time spent incarcerated on the charge or charges for which he is ultimately sentenced is not time served voluntarily. *State v. Nelson*, 1st Dist. Hamilton No. C-140352, 2015-Ohio-660, ¶ 6. We therefore address the merits of Pierce’s appeal instead of dismissing it as moot.

In his first assignment of error, Pierce contends that his due process rights were violated because he was not afforded a preliminary probable cause hearing as required by *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Pierce asserts that, had he been given a hearing, he would have been spared 18 days of incarceration. Pierce did not object in the trial court. We therefore review for plain error, and find none. Pierce’s argument supposes that there was not probable cause to hold him. But Pierce admitted that he had violated a condition of community control. He therefore cannot show that “but for” the failure to conduct a preliminary hearing, he would not have been jailed. *See State v. Quaterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900. Pierce’s first assignment of error is overruled.

In his second assignment of error, Pierce argues that his attorney was ineffective for allowing him to enter a “no contest” plea, and for failing to move to withdraw his plea after Pierce told the court that he had not contacted his estranged wife.

The plea was valid, and Pierce’s claim that he had not contacted his wife was made after the court had accepted the plea and found him guilty. It was not ineffective for counsel to allow Pierce to enter a “no contest” plea where there was no indication that counsel knew that Pierce would later deny the allegation. And even if counsel had moved the court to allow Pierce to withdraw his plea, Pierce cannot

demonstrate that the trial court would have (1) granted the motion, and (2) subsequently determined that Pierce had not violated the stay away order. *See State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). We therefore overrule the second assignment of error.

In his third assignment of error, Pierce contends that the trial court abused its discretion when it found him guilty because the protection order violations were baseless. But the court dismissed the charges based on those allegations. Pierce's violation was based only on his admission that he did not comply with the court's stay away order.

Pierce next argues that the court should have sua sponte reversed its guilty finding after Pierce stated that he had not contacted his wife. Pierce cites no case law in support of this argument, and we find none. Pierce's third assignment of error is overruled. The trial court's judgment is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., MYERS and MILLER, JJ.

To the clerk:

Enter upon the journal of the court on June 13, 2018

per order of the court _____.

Presiding Judge