

David Pemberton (“Pemberton”) filed a motion requesting jail time credit in the amount of 769 days. The Marion Superior Court denied the motion and Pemberton appeals pro se. We affirm.

Facts and Procedural History

On January 19, 2005, Pemberton was charged in Marion Superior Court with Class A felony dealing in methamphetamine, Class C felony possession of methamphetamine, Class D felony possession of a controlled substance, Class A misdemeanor possession of marijuana, and Class A misdemeanor driving while license suspended. On October 14, 2008, Pemberton pleaded guilty to Class B felony dealing in methamphetamine and the remaining charges were dismissed. Pemberton was ordered to serve an eight-year sentence in the Department of Correction and was given credit for twenty days served prior to sentencing.

The following facts are also pertinent to Pemberton’s appeal of the denial of his motion for jail time credit. Pemberton was convicted in Boone County of Class B felony burglary and Class D felony residential entry in 1993. He was ordered to serve a sixteen year sentence in the Department of Correction, with eight years suspended to probation. Pemberton was released to probation in 1999.

On January 16, 2005, while he was on probation for the Boone County burglary offense, Pemberton was arrested in this cause and conditionally released while awaiting trial. A warrant was later issued for his arrest when he failed to appear at a February 8, 2005 pretrial conference, and the arrest warrant remained active when he also failed to appear at a March 21, 2005 hearing on the violation of his pretrial release.

On May 31, 2005, Pemberton was charged in Putnam County with Class D felony operating a vehicle with a controlled substance in his body, Class D felony possession of methamphetamine, Class A misdemeanor resisting law enforcement, Class A misdemeanor possession of marijuana, Class A misdemeanor driving while license suspended, and Class B misdemeanor reckless driving. On October 7, 2005, Pemberton was convicted in Putnam County of the Class D felony charges and the Class A misdemeanor resisting law enforcement charge. He was ordered to serve an aggregate sentence of three years.

On August 28, 2006, the Putnamville Correctional Facility notified the Marion County Sheriff that Pemberton was incarcerated in its facility. In response, the Marion County Sheriff indicated its intention to extradite Pemberton for trial on the pending Marion County charges. But on March 7, 2007, Pemberton was transferred to Boone County where he was found to have violated his probation in that county and ordered to serve four years of his originally suspended sentence, which would have been completed on November 2, 2008 absent the probation violation.

In September 2008, Pemberton was finally transferred to Marion County, and he appeared at the September 30, 2008 pretrial hearing. Pemberton remained in the Marion County Jail until his October 14, 2008 guilty plea and sentencing hearing on the charges in this cause. Pemberton received twenty days of jail time credit for time served prior to sentencing.

On September 17, 2009, Pemberton filed a motion in Marion Superior Court for jail time credit, and on February 4, 2010, he filed an amended motion requesting 769

days of credit. A hearing was held on Pemberton's motion on June 11, 2010, and the trial court denied his motion shortly thereafter. In its order, the trial court concluded that "the defendant has failed to establish by a preponderance of the evidence that this Court ordered his sentence to be concurrent to any existing matter, has further failed to establish that the Court was aware as to whether or not the Defendant was held on this charge at the time of his sentencing, or on another charge."¹ Appellant's App. p. 114. Pemberton now appeals.

Discussion and Decision

An inmate who believes he has been erroneously sentenced may file a motion to correct the sentence pursuant to Indiana Code Section 35-38-1-15.² Neff v. State, 888 N.E.2d 1249, 1250-51 (Ind. 2008). That statute provides:

If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

Ind. Code § 35-38-1-15. This type of motion may only be filed to address a sentence that is "erroneous on its face." Neff, 888 N.E.2d at 1251 (quoting Robinson v. State, 805 N.E.2d 783, 786 (Ind. 2004)). "An allegation by an inmate that the trial court has not

¹ On Pemberton's abstract of judgment, there is an "x" marking the box under the term "concurrent." Appellant's App. p. 55. But in a footnote, the trial court noted that "[w]hile not offered in evidence, the Court is aware that when entering information into the Court's JUSTIS system for completion of transcripts, the default setting is 'concurrent' and will appear on any abstract unless physically overwritten." Appellant's App. p. 114.

² Although Pemberton titled his motion as a "Verified Motion for Jail Time Credit," we will treat it as a Motion to Correct Sentence.

included credit time earned in its sentencing is the type of claim appropriately advanced by a motion to correct sentence.” Id.

Indiana Code section 35-50-6-4(a) provides: “A person . . . imprisoned for a crime or imprisoned awaiting trial or sentencing is initially assigned to Class I.” Furthermore, Section 35-50-6-3(a) provides: “A person assigned to Class I earns one (1) day of credit time for each day the person is imprisoned for a crime or confined awaiting trial or sentencing.” Because presentence jail time credit is a matter of statutory right, a trial court generally does not have discretion in awarding or denying such credit. Molden v. State, 750 N.E.2d 448, 449 (Ind. Ct. App. 2001).

However, there is a limit to this statutory right. When a defendant receives consecutive sentences, the credit time may only be applied against the total or aggregate of the sentences. Jones v. State, 775 N.E.2d 322, 333 (Ind. Ct. App. 2002) (citing Stephens v. State, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), trans. denied). Indiana Code section 30-50-1-2 provides for mandatory consecutive sentences when a person commits a crime while on probation:

(d) If, after being arrested for one (1) crime, a person commits another crime:

(1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or

(2) while the person is released:

(A) upon the person’s own recognizance; or

(B) on bond;

the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

Ind. Code § 35-50-1-2(d).

“[W]here consecutive sentences are required, credit time cannot be earned against each of the underlying sentences.” Brown v. State, 907 N.E.2d 591, 596 n.2 (Ind. Ct. App. 2009). See also Payne v. State, 838 N.E.2d 503, 510 (Ind. Ct. App. 2005), trans. denied (“It has been observed on several occasions that we should avoid construing the credit time statutes as permitting a defendant to claim ‘double or extra credit’ for pre-sentencing confinement.”); Diedrich v. State, 744 N.E.2d 1004, 1006 (Ind. Ct. App. 2001) (awarding a person who has mandatory consecutive sentences credit for time served against each separate sentence rather than against the aggregate of the consecutive sentences improperly results in double credit and effectively “enables a defendant to serve part of his sentences concurrently, a result the legislature could not have intended”).

On the record before us, it does not appear that the trial court specifically informed Pemberton that his eight-year sentence for Class B felony dealing in methamphetamine would be served consecutive to the sentence imposed for his Boone County burglary conviction. But because Pemberton committed the instant offense while he was on probation for the Boone County burglary conviction, Pemberton is required to serve his eight-year sentence for the Marion County dealing in methamphetamine conviction consecutive to the sentence imposed for the Boone County conviction pursuant to Indiana Code section 35-50-1-2(d).

Moreover, while Pemberton was released on his own recognizance for the Marion County charges,³ he committed offenses in Putnam County that resulted in two Class D

³ However, an arrest warrant was eventually issued because Pemberton failed to appear at a pretrial conference.

felony convictions and a Class A misdemeanor conviction. Pemberton was ordered to serve an aggregate three-year sentence. Again, pursuant to section 35-50-1-2(d), Pemberton is required to serve that aggregate three-year sentence for the Putnam County convictions consecutive to his eight-year sentence that stems from the Marion County convictions.

Pemberton's request for jail time credit from September 5, 2006, the date that Marion County placed a hold on Pemberton for the charges in the instant cause, through October 14, 2008, the date of his sentencing in this cause, a total of 769 days, is simply a claim for double credit for presentence confinement. The record reasonably supports the conclusion that during that time period Pemberton was serving his sentences for the Boone County and Putnam County convictions, and Pemberton failed to present any evidence that would lead us to conclude otherwise. We therefore conclude that the trial court did not err when it denied Pemberton's request for an additional 769 days of jail time credit.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.