

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/05/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0937 PRPC
)
 Respondent,) DEPARTMENT A
)
 v.) Maricopa County
) Superior Court
 GEORGE DAVID GRIFFITH) No. CR2005-010042-001DT
)
 Petitioner.) **D E C I S I O N**
) **O R D E R**
)
 _____)

Petitioner George David Griffith ("Griffith") petitions this court for review from the summary dismissal of his petition for post-conviction relief. Presiding Judge Philip Hall and Judges Ann A. Scott Timmer and Lawrence F. Winthrop have considered this petition for review, and for the reasons stated, grant review and grant relief.

We discuss only those facts necessary to our decision in this matter. A jury found Griffith guilty of possession or use of a narcotic drug, a class 4 felony. Griffith admitted his prior felony convictions and on December 15, 2006, the trial court sentenced him to 10 years' imprisonment. Griffith was awarded 110 days of presentence incarceration credit.

Griffith successfully prosecuted post-conviction relief proceedings and after his conviction and sentence were vacated, Griffith pled guilty to possession or use of narcotic drugs, a class 4 felony, with one prior felony conviction. On June 22, 2009, the trial court sentenced Griffith to six years' imprisonment, with presentence incarceration credit of 1,014 days. After his readmission to prison, officials provided Griffith with his "time computation" and he became aware that he was entitled to 1,029 days of presentence incarceration credit. Griffith promptly filed a "Request to Correct Back-time Computation." Griffith pointed out that he had been in custody from December 15, 2006 to June 22, 2009, the day on which he was sentenced pursuant to his guilty plea. The time between these two dates is 919 days. Adding the 110 days he was originally awarded, Griffith calculated he was entitled to 1,029 days. Before the state could respond, the trial court treated the motion as an untimely petition for post-conviction relief, and summarily dismissed.

Griffith then filed a petition for post-conviction relief and presented his claim as newly discovered evidence. Before the state could respond, the trial court found Griffith's claim precluded, and summarily dismissed. Griffith timely petitioned this court for review and the state confesses error:

[T]he calculation of 1,014 days is incorrect. Based on its independent investigation, the state agrees with petitioner that the correct number is 1,029 days. Petitioner was correctly credited with 110 days when he was originally sentenced on December 15, 2006. He was resentenced on June 22, 2009, which was 919 [days] after his original sentencing date. Therefore, petitioner should have been credited with 1,029 days of presentence incarceration credit.

Although an untimely claim of an illegal sentence is subject to preclusion, the state can waive this defect, and relief can be granted. See *State v. Peek*, 219 Ariz. 182, 195 P.3d 641 (2008) (because state waived preclusion, court considered otherwise untimely claim of an illegal sentence).

This court has independently calculated the number of days Griffith is entitled to and agrees with the parties the trial court should have awarded Griffith 1,029 days of presentence incarceration. Therefore, we grant review and grant relief and modify Griffith's sentence to reflect 1,029 days' presentence incarceration credit.

_____/s/_____
PHILIP HALL, Presiding Judge