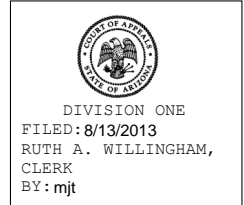


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 12-0205
)
Appellee,) DEPARTMENT S
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
LEONARD SCHMALLIE, JR.,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006448-001

The Honorable Pamela Svoboda, Judge

AFFIRMED AS MODIFIED

Thomas C. Horne, Arizona Attorney General Phoenix
by Joseph T. Maziarz, Section Chief Counsel
Criminal Appeals Section
and Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Jeffrey L. Force, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 Leonard Schmallie, Jr. ("Appellant") appeals his sentencing for four felony convictions, arguing the trial court erred in failing to award him sufficient presentence

incarceration credit. Appellant maintains he should receive credit for sixty-nine additional days of presentence incarceration, the State confesses error, and we agree.

¶2 A jury convicted Appellant of four counts of aggravated DUI, class four felonies committed in Maricopa County on September 15, 2008. On March 16, 2012, the trial court sentenced Appellant to concurrent, presumptive ten-year terms of imprisonment for each count and credited him for 211 days of presentence incarceration. The court ordered that the sentences be served concurrent with Appellant's sentence in Coconino County cause number CR2009-0516.¹

¶3 Appellant filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2013),² 13-4031, and 13-4033(A).

¶4 Appellant argues the trial court erred by failing to credit him for sixty-nine additional days of presentence incarceration. Appellant did not raise this objection during

¹ In April 2008, Appellant committed aggravated DUI in Coconino County, and he was convicted of that offense on January 11, 2010, in Coconino County cause number CR2009-0516. By the time of his sentencing in this case, Appellant had begun serving a term of 2.5 years' imprisonment stemming from his 2010 Coconino County conviction.

² We cite the current version of the applicable statutes if no changes material to our decision have occurred since the crimes were committed.

his sentencing hearing; therefore, we review for fundamental, prejudicial error. See *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *State v. Payne*, 223 Ariz. 555, 560, ¶ 13, 225 P.3d 1131, 1136 (App. 2009). A trial court's failure to grant a defendant full credit for presentence incarceration constitutes such error. See *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989).

¶5 Under A.R.S. § 13-712(B), "[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment." Custody commences "when a defendant is booked into a detention facility," *State v. Carnegie*, 174 Ariz. 452, 453-54, 850 P.2d 690, 691-92 (App. 1993), but does not include the date sentence is imposed. *State v. Hamilton*, 153 Ariz. 244, 245-46, 735 P.2d 854, 855-56 (App. 1987).

¶6 The record reflects and the parties agree that Appellant served eight days of presentence incarceration from September 16, 2008, through September 23, 2008; sixty-eight days of presentence incarceration from March 30, 2010, through June 5, 2010; and 135 days of presentence incarceration from November 2, 2011, through March 15, 2012,³ for a total of 211 days of

³ The record lists March 16, 2012, as Appellant's last day of presentence incarceration, but Appellant's sentencing occurred

presentence incarceration. The record also reflects, however, that on August 25, 2011, the trial court in Maricopa County revoked Appellant's release after he failed to appear at a status hearing, ostensibly due to his incarceration in Coconino County. The court issued orders to secure his attendance in Maricopa County, and Appellant remained incarcerated in either the Coconino County jail or the Arizona Department of Corrections until he was transferred to a Maricopa County detention facility on November 2, 2011.⁴ Consequently, if Appellant had not been serving his sentence in Coconino County cause number CR2009-0516, Appellant would have been incarcerated in Maricopa County from August 25 to November 1, 2011, a total of sixty-nine days to which he is entitled to credit. See *State v. Seay*, 232 Ariz. 146, 148-49, ¶¶ 6-9, 302 P.3d 671, 673-74 (App. 2013); *State v. Prevost*, 118 Ariz. 100, 103-04, 574 P.2d 1319, 1322-23 (App. 1977). Appellant is therefore entitled to 280 days of presentence incarceration credit, and the trial court erred by only crediting him with 211 days of presentence incarceration. See *Ritch*, 160 Ariz. at 498, 774 P.2d at 237.

on that day; accordingly, he does not receive presentence incarceration credit for March 16, 2012. See *Hamilton*, 153 Ariz. at 245-46, 735 P.2d at 855-56. Consequently, the trial court's calculation of 135 days' credit for the period from November 2, 2011, until sentencing is correct.

⁴ Appellant was returned to Maricopa County to await trial in this case, and he remained incarcerated until he was sentenced on March 16, 2012.

Pursuant to A.R.S. § 13-4037, we modify Appellant's sentences (and, accordingly, the trial court's March 16, 2012 sentencing minute entry) to reflect sixty-nine additional days of presentence incarceration credit, or a total of 280 days' presentence incarceration credit, to be applied to all counts. See *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992). We affirm Appellant's sentences in all other respects.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
RANDALL M. HOWE, Judge

_____/S/_____
DIANE M. JOHNSEN, Judge