DIVISION ONE
FILED: 12/21/2010
RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0923
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule
FRANKLIN HENRY NICKERSON, IV,	)	111, Rules of the Arizona
	)	Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-150110-001 SE

The Honorable Teresa A. Sanders, Judge

AFFIRMED IN PART; VACATED IN PART

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Franklin Henry Nickerson, IV timely appeals from his sentence for aggravated assault under Arizona Revised Statutes ("A.R.S.") section 13-1203(A)(1) (2010), a class one misdemeanor

and domestic violence offense. Nickerson contends the superior court, first, should not have ordered him to submit to, and pay for, DNA testing, and, second, should have calculated his actual time spent in custody. We agree with Nickerson as to the first issue and disagree as to the second issue. Thus, although we affirm his conviction, we affirm in part, and vacate in part, the sentence imposed by the court.

DISCUSSION

I. DNA Testing

¶2 Nickerson argues (and the State concedes) the superior court improperly ordered him to submit to DNA testing because the DNA testing statute is not applicable to his convicted offense. Although the State concedes error, we nevertheless must review for fundamental error and prejudice because Nickerson failed to raise this issue in superior court. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 568, ¶ 26, 115 P.3d 601, 607, 608 (2005). When a court imposes a sentence not authorized by statute, it constitutes fundamental and prejudicial error. *State v. McCurdy*, 216 Ariz. 567, 574 n.7, ¶ 18, 169 P.3d 931, 938 n.7 (App. 2007); *State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002) (citing *State v. Cox*, 201 Ariz. 464, 468, ¶ 13, 37 P.3d 437, 441 (App. 2002)).

¶3 As the State correctly explains in conceding error, DNA testing is not a penalty the court can impose for this

offense. Under A.R.S. § 13-610(O) (2010), a defendant must submit to DNA testing if he or she is convicted of a felony offense, is a juvenile adjudicated delinquent of certain enumerated offenses, or is a person "arrested for a violation of any offense in chapter 11 of this title, a violation of § 13-1402, 13-1403, 13-1404, 13-1405, 13-1406, 13-1410, 13-1411, 13-1417, 13-1507, 13-1508, 13-3208, 13-3214, 13-3555 or 13-3608 or a violation of any serious offense as defined in § 13-706 that is a dangerous offense." Here, Nickerson was not convicted of any of the qualifying offenses enumerated in A.R.S. § 13-610(O). Accordingly, the statute did not authorize the court to order Nickerson to submit to DNA testing on this offense.

¶4 Thus, we vacate the portion of the sentence ordering Nickerson to submit to DNA testing. Further, we instruct the superior court to order the Arizona Department of Public Safety to expunge from the DNA identification system any DNA identification sample Nickerson submitted pursuant to the superior court's order and to reimburse Nickerson any fees paid for the DNA testing.

II. Presentence Incarceration Credit

¶5 Nickerson next argues the superior court should have calculated his presentence incarceration credit and requests we correct the sentencing minute entry to reflect his actual time

spent in custody. We disagree and thus affirm the court's presentence incarceration credit award.

¶6 We review for fundamental error because Nickerson failed to object in superior court. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Although "a trial court's failure to grant . . . full credit for presentence incarceration 'clearly constitute[s] fundamental error,'" *State v. Cofield*, 210 Ariz. 84, 86, ¶ 10, 107 P.3d 930, 932 (App. 2005) (quoting *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989)), Nickerson must demonstrate that prejudice resulted from the court failing to calculate full presentence incarceration credit. *See Henderson*, 210 Ariz. at 568, ¶ 26, 115 P.3d at 608.

¶7 Here, the record reflects no prejudice. Although it is impossible for us to determine on this record how long Nickerson was incarcerated, he nevertheless was in custody at least 442 days -- from September 4, 2008, when the court set bond, to November 20, 2009, when the court sentenced Nickerson[1]

[1]On July 8, 2008, police arrested Nickerson for assault. The court released Nickerson on his own recognizance August 11, 2008, but the Notice of Supervening Indictment indicates Nickerson was in custody on August 26, 2008. In its September 4, 2008 release order, the court set a $200 secured appearance bond for Nickerson's release on this charge. The record contains no evidence showing Nickerson posted bond or was released from custody. In fact, at the September 8, 2009 status conference, the court modified Nickerson's release conditions on two prior charges but kept the $200 bond on this matter despite defense counsel's statement that Nickerson has been in custody

to 30 days in jail with 30 days' credit for his time in custody. Thus, after he was sentenced, Nickerson was not required to serve any additional jail time on this offense. If the court had calculated the actual time Nickerson spent in custody for this offense, Nickerson would still have spent the same amount of time in jail after sentencing -- zero days.

¶8 Because defendants cannot use time spent in custody for one offense to reduce their sentence for another offense, Nickerson cannot argue he was prejudiced on another charge. *See* A.R.S. § 13-712(B) (2010). Therefore, Nickerson suffered no prejudice from the court's failure to calculate the actual time spent in custody, and we affirm the sentencing minute entry as it relates to presentence incarceration credit.

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for "over a year" on a misdemeanor charge. The court sentenced Nickerson on November 20, 2009.

CONCLUSION

¶9 For the foregoing reasons, we affirm Nickerson's conviction and his presentence incarceration credit award but vacate the part of the sentence ordering Nickerson to submit to DNA testing. Further, we instruct the superior court to order the Arizona Department of Public Safety to expunge from the DNA identification system any DNA sample Nickerson submitted pursuant to the court's order and to reimburse him any fees paid for the testing.

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge