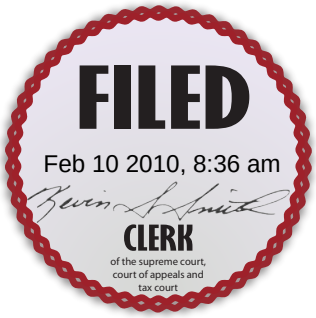


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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| OVANDO BOYD, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 49A05-0905-PC-288 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 1
The Honorable Kurt Eisgruber, Judge
Cause No. 49G01-9506-CF-77330

**February 10, 2010**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Petitioner, Ovando Boyd (Boyd), appeals the trial court's denial of his motion to correct erroneous sentence.

We affirm.

## ISSUE

Boyd presents one issue for our review, which we restate as: Whether the trial court properly denied his motion to correct erroneous sentence which alleged that his sentencing order did not account for credit time which he should have accrued prior to being sentenced.

## FACTS AND PROCEDURAL HISTORY

On May 30, 1995, Boyd fired several shots at Gloria Jacobs (Gloria) and her son, Anthony, hitting Anthony in the leg, but missing Gloria altogether. Later, Anthony explained to police officers that Boyd fired the shots because he had stolen $43,000 from Boyd. Police officers obtained a search warrant to search Boyd's home and business. During the search, they found various weapons and marijuana. In June 1995, Boyd was charged with two counts of attempted murder and dealing marijuana. On September 11 and 12, 1995, Boyd was tried and convicted as charged and sentenced to twenty-five years for each count of attempted murder, to be served consecutively, and 547 days for dealing marijuana, to be served concurrent to the sentences for attempted murder, for an aggregate sentence of fifty years. The trial court ordered Boyd to the Department of Correction and he was given credit for the 109 days he had served awaiting trial and sentencing. Boyd's convictions were

affirmed on direct appeal. Boyd later filed for post-conviction relief, and, on February 20, 2001, we affirmed the denial of post-conviction relief.

On October 24, 2001, Boyd filed a petition to modify his sentence, which the trial court denied on October 29, 2001. On December 17, 2004, Boyd filed a motion to correct erroneous sentence, which the trial court denied on December 29, 2004. Apparently, the trial court chose to *sua sponte* consider a modification of Boyd's sentence by asking for a progress report on August 16, 2006.[1] After scheduling but then rescheduling a hearing on the modification of Boyd's sentence several times, the trial court held a hearing on August 10, 2007. On August 24, 2007, the trial court announced its intention to reduce Boyd's aggregate fifty year sentence by one year. On January 31, 2008, the trial court issued an order effectuating the sentence modification and stating "Defendant ordered committed to Department of Correction and given 109 days credit time." (Appellant's App. p. 52). On December 18, 2008, the trial court again modified Boyd's sentence by shifting four years of his placement to the community correction work release program, and again noted his 109 days of credit time. On January 20, 2009, the trial court reiterated its modification of Boyd's placement along with its statement of 109 days of credit time, but also added "CREDIT TIME AS OF 12-18-08. DOC TO AWARD CREDIT IN ACCORDANCE WITH INDIANA LAW." (Appellant's App. p. 55). On March 3, 2009, Boyd filed a motion to correct erroneous sentence arguing that his release date was inaccurate because he had never

[1] We do not have a copy of the "ORDER FOR PROGRESS REPORT" that is mentioned in the CCS or the resulting report, but it appears to have been the impetus for the trial court's eventual modification of Boyd's sentence. (Appellant's App. p. 47). There is no record in the CCS that Boyd requested the progress report.

received day for day time credit for the time he served prior to sentencing. On March 11, 2009, the trial court summarily denied Boyd's motion to correct erroneous sentence.

Boyd now appeals.[2] Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Boyd contends that the trial court erred when it denied his motion to correct erroneous sentence because the judgment announcing his sentence did not state the amount of credit time he had earned in addition to the amount of credit he was due for time he had served. Specifically, he contends that he served 109 days while awaiting trial and sentencing, and, therefore, deserves credit for a total of 218 days—109 days served, and 109 days earned.

Typically, we review a trial court's ruling on a motion to correct erroneous sentence for an abuse of discretion with respect to its factual determinations. *Osborn v. State*, 919 N.E.2d 1228 (Ind. Ct. App. 2010). An abuse of discretion occurs when the trial court's decision is against the logic and effects of the facts and circumstances before it. *Id.* However, the trial court summarily denied Boyd's motion, and, thus, we have only the legal conclusion that the sentence was not erroneous to review. The trial court's legal conclusions are reviewed under a *de novo* standard of review. *Id.*

A motion to correct erroneous sentence derives from Indiana Code section 35-38-1-15, which 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

[2] A series of motions and orders eventually resulted in our Order on July 9, 2009, permitting Boyd to proceed with this direct appeal of the denial of his motion to correct erroneous sentence.

> 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.

The purpose of the law "is to provide prompt, direct access to an uncomplicated legal process for correcting the occasional erroneous or illegal sentence." *Robinson v. State*, 805 N.E.2d 783, 785 (Ind. 2004) (quoting *Gaddie v. State*, 566 N.E.2d 535, 537 (Ind. 1991)). However, motions to correct erroneous sentences should be confined to claims apparent from the face of the sentencing judgment. *Id*.

> [A] motion to correct sentence may only be used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of the statutory authority. Claims that require consideration of the proceedings before, during or after trial may not be presented by way of a motion to correct erroneous sentence.

*Id*. at 787.

Assuming that Boyd was in credit time Class I, Boyd would have earned one day of credit time for each day he was imprisoned awaiting trial and sentencing. Ind. Code § 35-50-6-3. "Every inmate is initially assigned to Class I, and may only be reassigned if certain rule violations occur and after a hearing." *Neff v. State*, 888 N.E.2d 1249, 1250 (Ind. 2008). We find nothing in the record which leads us to believe that Boyd had been placed into a "class" other than "Class I." Indiana Code section 35-38-3-2(b) states that a "judgment must include: . . . (4) the amount of credit, including credit time earned, for time spent in confinement before sentencing."

In *Robinson*, our supreme court analyzed the same argument which Boyd advances:

> that the trial court did not properly credit Robinson's sentence with time served and credit time for the 187 days of imprisonment awaiting trial or sentencing.

> [] He argues that he is entitled to a trial court judgment expressly awarding credit not only for the 187 days of imprisonment before sentencing but also for an additional equal amount of credit time for a total of 374 days of credit.

*Robinson*, 805 N.E.2d at 785. The *Robinson* court acknowledged varying authorities that had developed on the trial court's duty to express credit time owed in a sentencing judgment. *Id*. at 791-92. It came to the conclusion based upon Indiana Code section 35-38-3-2(b), and to effectuate Indiana Code sections 35-50-6-3 through 5, that "a trial court's sentencing judgment must include both days imprisoned before sentencing and the credit time earned thereby, thus reflecting any credit time deprivation imposed before sentencing." *Id*. at 792. However, where a trial court had failed to enunciate the credit time earned in addition to time served, our supreme court did not approve of a remedy by way of a motion to correct erroneous sentence, but rather announced a new presumption.

> In an effort to facilitate the fair and expeditious resolution of appellate litigation arising from these judgments, we adopt the following appellate presumption. Sentencing judgments that report only days spent in pre-sentence confinement and fail to expressly designate credit time earned shall be understood by courts and by the Department of Correction automatically to award the number of credit time days equal to the number of pre-sentence confinement days. In the event of any pre-sentence deprivation of credit time, the trial court must report it in the sentencing judgment. Because the omission of designation of the statutory credit time entitlement is thus corrected by this presumption, such omission may not be raised as an erroneous sentence.

*Id*. (footnote omitted). Therefore, Boyd's sentencing report must be understood as automatically awarding a number of credit days equal to the number of pre-sentence confinement days, for a total of 218 days worth of credit accrued prior to sentencing. Thus,

there was no error in Boyd's sentence and the trial court did not err by denying his motion to correct erroneous sentence.

## CONCLUSION

Based on the foregoing, the trial court's sentencing statement automatically awarded the credit time which Boyd claims was omitted and the trial court did not err when denying Boyd's motion to correct erroneous sentence.

Affirmed.

VAIDIK, J., and CRONE, J., concur.