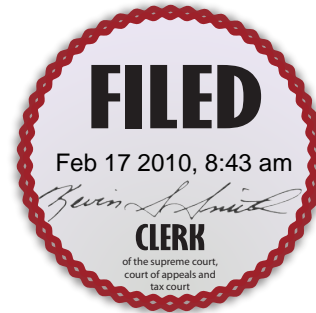


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAVID BURKS-BEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0903-PC-231
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Tanya Walton Pratt, Judge  
Cause No. 49G01-9204-CF-52340

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**February 17, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

David Burks-Bey, acting pro-se, appeals the denial of his motion to correct an erroneous sentence. We affirm.

## **Issue**

Burks-Bey presents the sole issue of whether his sentence is erroneous because he was denied proper pretrial credit time and credit time earned during his incarceration in the Indiana Department of Correction (“the DOC”).

## **Facts and Procedural History**

On April 15, 1992, Burks-Bey was charged with Robbery<sup>1</sup> and Criminal Confinement,<sup>2</sup> as Class B felonies, and Resisting Law Enforcement, as a Class A misdemeanor.<sup>3</sup> On August 14, 1997, at the conclusion of a bench trial, Burks-Bey was convicted of Robbery and Resisting Law Enforcement. He received an aggregate sentence of twenty years.

Burks-Bey was received into the DOC on September 18, 1997, at which time the DOC calculated his earliest and maximum release dates. Burks-Bey was assigned to Class I for purposes of accruing credit time. On December 2, 2005, Burks-Bey was released on parole.<sup>4</sup>

Burks-Bey was arrested pursuant to a parole violation warrant on September 18, 2006.

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<sup>1</sup> Ind. Code § 35-42-5-1.

<sup>2</sup> Ind. Code § 35-42-3-3.

<sup>3</sup> Ind. Code § 35-44-3-3.

<sup>4</sup> Burks-Bey had apparently remained in Class I, and had earned educational credits (purportedly 365 days for completion of an associate’s degree and 90 days for completion of a substance abuse program).

He was subsequently convicted of Possession of Cocaine, as a Class B felony,<sup>5</sup> and sentenced to twelve years imprisonment (with two years to be served in community corrections and two years suspended to probation), with 286 days credit.

On August 29, 2007, at Burks-Bey's parole revocation hearing, it was determined that his maximum release date was December 31, 2016. On February 10, 2009, Burks-Bey filed a pro-se motion to correct erroneous sentence. The motion was denied, and this appeal ensued.

### **Discussion and Decision**

Upon the revocation of his parole, Burks-Bey was ordered to continue serving his sentence, pursuant to Indiana Code Section 35-50-6-1(c), which provides in relevant part: "A person whose parole is revoked shall be imprisoned for all or part of the remainder of the person's fixed term." Burks-Bey contends that he has fully served his Robbery sentence yet the DOC has miscalculated his credit time and the trial court has failed to grant him relief.

First, Burks-Bey asserts that the trial court failed to specify to the DOC that he was entitled to 254 days of credit time earned during his pretrial incarceration. He also argues that the DOC erroneously failed to acknowledge that, because of credit time earned during incarceration in the DOC, his twenty-year sentence should have been halved (resulting in full completion approximately one year after his release to parole).

Indiana Code Section 35-50-6-3 provides that Indiana prisoners are placed into a class

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<sup>5</sup> Ind. Code § 35-48-4-6.

for the purpose of earning credit time.<sup>6</sup> Each inmate who is not a credit restricted felon is initially assigned to Class I, whereby he or she earns one day of credit time for every day imprisoned for a crime or confined awaiting trial or sentencing. Ind. Code § 35-50-6-4(a). Pursuant to Indiana Code Section 35-38-3-2, trial courts are required to certify copies of the judgment of conviction to the receiving authority, and this sentencing order is to include the amount of credit, including credit time earned, for time spent in confinement before sentencing.

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, 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 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.

Such a motion may only be filed to address a sentence that is erroneous on its face. Neff v. State, 888 N.E.2d 1249, 1251 (Ind. 2008). An inmate's allegation that the trial court has not included credit time earned in its sentencing is the type of claim appropriate for a motion to correct sentence. Id. However, the Indiana Supreme Court, in Robinson v. State, 805 N.E.2d 783 (Ind. 2004), adopted a presumption that "[s]entencing 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

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<sup>6</sup> Credit time is a statutory award for a lack of conduct that violates institutional rules. State v. Mullins, 647 N.E.2d 676, 678 (Ind. Ct. App. 1995).

of credit time days equal to the number of pre-sentence confinement days.” Id. at 792. Where, as here, an inmate files a motion to correct an erroneous sentence in a county that regularly does not issue judgments of conviction, the trial court’s abstract of judgment functions as the judgment of conviction. Neff, 888 N.E.2d at 1251.

The Neff Court explained the proper method of calculating a prisoner’s earliest release date, first observing “when an offender is sentenced and receives credit for time served, earned credit time, or both, that time is applied to the new sentence immediately, before application of prospective earned credit time, in order to determine the defendant’s earliest release date.” Id. The court then began the calculation with the total days of the sentence, subtracted the time served at sentencing, subtracted the Class I credit at sentencing, and arrived at “time left to serve,” which was halved to determine an earliest release date. Id.

Accordingly, an appropriate calculation in this instance is as follows:

Burks-Bey’s 20-year sentence	7,300 days <sup>7</sup>
Actual presentence time served	- 254 days
Credit Time – presentence	- 254 days
<hr/>	
Time remaining at DOC upon September 18, 1997 commitment	6,792 days
One-half (assuming Credit I class)	3,396 days

from 9-18-97 – earliest release date – January 7, 2007.

Burks-Bey was released on parole on December 2, 2005, after apparently also receiving the benefit of educational credit time. The record herein does not demonstrate that the DOC failed to apply Burks-Bey’s pretrial credit time.

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<sup>7</sup> 20 X 365 days = 7300 days (not including leap days).

Burks-Bey further argues that January 2007 was actually his maximum release date, not an earliest release date, and that the DOC's confusion in this regard wrongfully deprived him of the benefit of his credit time earned during his incarceration. He asserts that he had no more than 335 days left to serve when he was released on parole and only 45 days left when he was arrested on new charges.

Burks-Bey apparently believes that the determinate twenty-year term should have been halved due to his earning of credit time while imprisoned in the DOC. Assuming Class I credit, a sentence is halved in the calculation of an earliest release date. See Neff, 888 N.E.2d at 1251. However, Neff does not stand for the proposition that a convicted person sentenced to imprisonment is entitled, for good behavior, to an actual sentence reduction of one-half.

Burks-Bey acknowledges our Indiana Supreme Court's directive that credit time "is earned toward release on parole for felons, and does not diminish the fixed term or affect the date on which a felony offender will be discharged." Boyd v. Broglin, 519 N.E.2d 541, 542 (Ind. 1988). He nonetheless argues that refusal to diminish the fixed term is contrary to the intent of the Indiana Legislature in enacting Indiana Code Section 35-50-6-3(a), which provides for one day of credit time for each day imprisoned as a Class I prisoner.

We cannot provide Burks-Bey with the result he seeks, a declaration that his twenty-year sentence was reduced to a ten-year sentence upon accumulation of credit time. This Court, like the trial court, is not at liberty to disregard the decisions of our Supreme Court. See Dragon v. State, 774 N.E.2d 103, 107 (Ind. Ct. App. 2002), trans. denied. Burks-Bey has

not demonstrated error in the trial court's denial of his motion to correct an erroneous sentence.

Affirmed.

BAKER, C.J., and ROBB, J., concur.