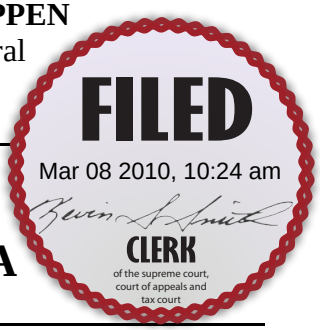
ATTORNEY FOR APPELLANT:

CHARLES E. STEWART, JR.
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MELLISICA K. FLIPPEN
Deputy Attorney General
Indianapolis, Indiana



IN THE COURT OF APPEALS OF INDIANA

ROBERT T. TILLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-0906-CR-343
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0902-FA-6

March 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After this Court reversed Robert Tiller's conviction for Class A felony attempted murder and remanded for a new trial on attempted murder, the State moved to enter judgment of conviction on Class B felony aggravated battery, which the trial court had earlier merged with attempted murder. The trial court entered judgment of conviction on Class B felony aggravated battery, sentenced Tiller to eighteen years, and ordered the sentence to be served consecutive to his other sentences. Tiller now appeals, arguing that the trial court erred when it failed to fully review the transcript from his first sentencing hearing before sentencing him and that the trial court erred in calculating his credit time. Finding no error, we affirm.

Facts and Procedural History

In a November 2007 jury trial, Tiller was convicted of Class A felony attempted murder, Class B felony confinement, Class B felony aggravated battery, Class C felony battery, and Class B felony escape. The trial court merged aggravated battery and battery with attempted murder and entered judgment of conviction on attempted murder, confinement, and escape. In 2008 the trial court sentenced Tiller to forty-eight years for attempted murder, eighteen years for confinement, and eighteen years for escape. The court ordered the attempted murder and escape sentences to run consecutively (but the confinement sentence to run concurrently) for an aggregate term of sixty-six years.

On direct appeal, this Court held that the trial court's instruction on accomplice liability constituted fundamental error because it failed to adequately instruct the jury that it was required to find that Tiller possessed the specific intent to kill the victim when he

aided, supported, helped, or assisted his accomplices commit the crime of attempted murder. *Tiller v. State*, 896 N.E.2d 537, 543 (Ind. Ct. App. 2008), *reh'g denied*. We therefore remanded for a retrial on the charge of attempted murder. *Id.* at 547.

Tiller was remanded from the Indiana Department of Correction to the Lake County Jail on February 18, 2009. However, rather than retry Tiller on attempted murder, the State moved to enter judgment of conviction for Class B felony aggravated battery. Appellant's App. p. 39-40. Judgment of conviction for Class B felony aggravated battery was entered, and an updated presentence investigation report was ordered. At the May 14, 2009, sentencing hearing, the trial court sentenced Tiller to eighteen years for Class B felony aggravated battery and ordered this sentence to be served consecutive to his sentences for confinement and escape, for an aggregate term of thirty-six years. The Amended Abstract of Judgment notes that Tiller was confined for eighty-six days before sentencing: "The defendant is entitled to 86 days of jail time credit, plus 86 days of good time credit, for a total of 172 days. . . . (Credit time in this count is calculated from the time the defendant was returned to LCJ on 02-18-09 through 05-14-09.)." *Id.* at 60 (capitalization omitted). Tiller now appeals.

Discussion and Decision

Tiller raises two issues on appeal. First, he contends that the trial court abused its discretion when it failed to fully review the transcript from his first sentencing hearing, including letters submitted on his behalf, before sentencing him for aggravated battery. Second, he contends that the trial court abused its discretion in calculating his credit time for aggravated battery.

I. Failure to Fully Consider Prior Sentencing Hearing

Tiller contends that the trial court abused its discretion when it failed to fully review the transcript from his 2008 sentencing hearing, including letters submitted on his behalf, before sentencing him for aggravated battery. He asserts that this case must be remanded to the trial court for a new sentencing hearing. Tiller relies solely on Indiana Code section 35-38-1-3, which provides:

> Before sentencing a person for a felony, the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and to present information in his own behalf. The court shall make a record of the hearing, including:
>
> (1) a transcript of the hearing;
>
> (2) a copy of the presentence report; and
>
> (3) if the court finds aggravating circumstances or mitigating circumstances, a statement of the court's reasons for selecting the sentence that it imposes.

At Tiller's 2009 sentencing hearing for Class B felony aggravated battery, Judge Vasquez began as follows:

> THE COURT: All right. We are here in the matter of Tiller. It's a sentencing hearing continued a couple of times to give Mr. Kasich [defense counsel] the opportunity to review all documents relevant to this hearing. A presentence investigation report was prepared. I did have the benefit of reviewing that report. I have also reviewed documents submitted by the state at a prior date. I believe that included a deposition of the victim as well as a statement given by the victim to law enforcement near the time of the incident. This morning I also found on my desk a submission by the probation department. I believe it was forwarded by the public defender's office. It was at the request of Mr. Kasich, transcripts of the sentencing hearing and copies of the DOC records. Is there anything else that either party wished for me to take into account to consider in terms of submissions at this point? State, from you?
>
> MS. BECK: No, your Honor.
>
> THE COURT: Mr. Kasich?
>
> MR. KASICH: Did the Court get a chance to review the letter -- did you review the sentencing hearing that Judge Stefaniak --
>
> THE COURT: *I looked at it. I read most of it.*

MR. KASICH: It referred to --
THE COURT: *And the reason why I did not read it all is because I truly believe I'm not bound by either his findings or his statements.* So I -- I did go through it, but, you know, I did not truly review every single bit of it, mostly because of that mindset that I have in terms of his findings or his statements.
MR. KASICH: The only reason being, he refers to letters that my client's friends and family --
THE COURT: *I did see that.*
MR. KASICH: -- had submitted. They are in the -- we looked yesterday and the court reporter and I found them and they are in the envelope with the original presentence report. I don't know if you had a chance to look at them or not. *I was going to just mention them. We have witnesses, but I also was going to refer to them as further evidence.*
THE COURT: I did see that he was referring to letters that were submitted. I think he also at one point referenced individuals who stood up.
MR. KASICH: 13 people.
THE COURT: In support of Mr. Tiller at the time of that sentencing hearing. I did not look at those letters, *but clearly there were letters that were submitted and clearly there w[ere] individuals who were present who were there in support of your client.*

Tr. p. 2-4 (emphases added).

For the remainder of the sentencing hearing, Tiller was given the opportunity to call witnesses and did so, calling his mother, fiancée, and uncle. The trial court also considered an updated presentence investigation report. As can be seen from the above colloquy, the court reviewed several documents and "most" of the 2008 sentencing hearing conducted by Judge Stefaniak. The only reason Judge Vasquez did not review everything from Tiller's 2008 sentencing hearing is because he did not feel that he was bound by Judge Stefaniak's "findings" and "statements," and not the evidence presented at that hearing. The court then issued a written sentencing order (which, notably, lists as a mitigator that Tiller has the support of his friends and family). All of this provides relevant facts and circumstances to sentence Tiller for Class B felony aggravated battery

and satisfies the requirements of Section 35-38-1-3. Tiller cites no authority which requires a trial court to consider a prior court's sentencing hearing. We therefore affirm on this issue.

II. Credit Time

Tiller next contends that the trial court erred in its calculation of the credit time to which he was entitled for aggravated battery. Tiller baldly asserts, with only one citation to authority that has been impliedly overruled and with only scant analysis of the issue, that he is entitled to credit time from the date of his arrest on December 30, 2005, to the date of his sentencing on May 14, 2009.[1]

Indiana Code section 35-50-6-3(a) provides that a person imprisoned for a crime or confined awaiting trial or sentencing earns one day of credit time for each day he is imprisoned for a crime or confined awaiting trial or sentencing. *See Payne v. State*, 838 N.E.2d 503, 510 (Ind. Ct. App. 2005), *trans. denied*. Determination of a defendant's pretrial credit is dependent upon (1) pretrial confinement and (2) the pretrial confinement being a result of the criminal charge for which sentence is being imposed. *Id.* If a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, he or she is entitled to receive credit time applied against each separate term. *Id.* However, if the defendant receives consecutive terms, he or she is only allowed credit time against the total or aggregate of the terms. *Id.* Our courts have held that we should avoid construing the credit time statutes as permitting a defendant to claim "double or extra credit" for presentencing confinement. *Id.*

[1] Tiller actually argues that he is entitled "to credit for time served from the day of his *arrest* on the charge until the time of his *arrest* on that charge." Appellant's Br. p. 7-8 (emphases added). We adjusted his argument accordingly.

Tiller was arrested on December 30, 2005, on charges of attempted murder, confinement, aggravated battery, battery, and escape and has been held in custody ever since. At Tiller's 2008 sentencing hearing, the trial court awarded him "149 days of jail credit, plus 149 days of good time credit, for a total of 298 days." Appellant's App. p. 61. We reversed his attempted murder conviction on direct appeal, and on February 18, 2009, Tiller was remanded from the DOC, where he was serving his confinement and escape sentences, to the Lake County Jail. At this point, Tiller presumably stopped earning credit against his confinement and escape sentences. Rather than retry Tiller on attempted murder, the State moved to enter judgment of conviction on Class B felony aggravated battery. At the sentencing hearing, the trial court sentenced Tiller to eighteen years and ordered this sentence to be served consecutively to his sentences for confinement and escape, for an aggregate term of thirty-six years. The court awarded Tiller "86 days of jail time credit, plus 86 days of good time credit, for a total of 172 days." *Id.* at 60. The trial court based this calculation on the date he was remanded from the DOC to the Lake County Jail on February 18, 2009.

Tiller is not entitled to additional credit time for his aggravated battery conviction from the date of his arrest on December 30, 2005, to February 17, 2009 (the day before he was remanded to the Lake County Jail), because it would result in double credit. That is, awarding him credit for that time period would result in him receiving credit against both his confinement and escape sentences and his aggravated battery sentence. Because Tiller's aggravated battery sentence was ordered to run consecutive to his confinement and escape sentences, he is only entitled to credit against the total or aggregate of the

terms. The trial court properly awarded credit time from the time that Tiller was remanded from the DOC. We therefore affirm the trial court.

Affirmed.

RILEY, J.. and CRONE, J., concur.