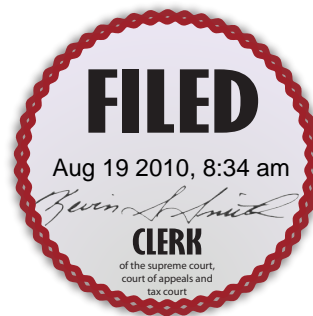


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DARBY HAPE,)

Appellant-Defendant,)

vs.)

No. 19A05-1003-CR-163

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE DUBOIS SUPERIOR COURT
The Honorable Mark R. McConnell, Judge
Cause No. 19D01-0512-FC-1127

August 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Darby Hape appeals the trial court's denial of his petition for jail time credit. Hape contends that he is entitled to 266 days of credit time. Because the trial court sentenced Hape to mandatory consecutive sentences and he was awarded this credit time in another cause number, Hape is not entitled to the credit in this cause number, too. We therefore affirm the trial court.

Facts and Procedural History

In December 2005 the State charged Hape with numerous crimes in Dubois County under Cause No. 19D01-0512-FC-1127 ("Cause No. 1127"), and Hape pled guilty to three of those charges. In January 2007 the trial court sentenced Hape to four years, all suspended to probation, with credit of 131 actual days.

On March 27, 2007, the State filed numerous charges against Hape in Dubois County under Cause No. 19D01-0703-FC-310 ("Cause No. 310") for crimes committed while on probation.

On April 11, 2007, the State filed a petition to revoke Hape's probation in Cause No. 1127.

On April 24, 2007, the State filed numerous charges against Hape in Pike County under Cause No. 63C01-0704-FA-241 ("Cause No. 241") for crimes committed while on probation.

In a bifurcated jury trial in Cause No. 241, Hape was convicted of two felonies and found to be a habitual offender. On January 4, 2008, the trial court sentenced Hape to eighty years, which included a thirty-year habitual offender enhancement, with credit

of 261 actual days. This Court later reversed the thirty-year enhancement on appeal. *See Hape v. State*, 903 N.E.2d 977, 1000 (Ind. Ct. App. 2009), *trans. denied*.

On January 10, 2008, the trial court revoked Hape’s probation in Cause No. 1127 and sentenced him to his previously-suspended sentence of four years with credit of 131 actual days. The court ordered this sentence to run consecutive to his sentence in Cause No. 241 because he was on probation at the time he committed the offenses in Cause No. 241. *See* Appellant’s Br. p. 7 (“Because Hape was on probation in Dubois #1127, the Pike #241 sentence was required to be served consecutively to Dubois #1127.”); Tr. p. 8-9.

On June 30, 2009, Hape pled guilty to three of the charges in Cause No. 310, and the trial court sentenced him to six years. The court ordered the sentence in Cause No. 310 to be served consecutive to the probation revocation sentence in Cause No. 1127 and concurrent to the sentence in Cause No. 241. Taking into account the thirty-year habitual offender enhancement which has since been reversed by this Court, Hape’s sentences are as follows:

Cause No. 241	50 years	261 days credit	
Cause No. 1127	4 years	131 days credit	consecutive to 241
Cause No. 310	6 years		consecutive to 1127, concurrent to 241

In January 2010 Hape filed a *pro se* petition for jail time credit in Cause No. 1127. He alleged that he was arrested for the probation violation in Cause No. 1127 on April 19, 2007, was sentenced for the revocation on January 10, 2008, but was only credited with the 131 actual days which had already been awarded to him at his original sentencing in January 2007. Therefore, Hape argued that he was “entitled to 373 days of

jail time credit spent in confinement pending disposition of the instant matter.” Appellant’s App. p. 60. He reasoned that “from the date of arrest, up to and including the date of sentence, [he] was in continuous confinement as a direct result of the criminal charges for which sentence was imposed in this cause and he is therefore entitled to receive full credit against the sentences imposed herein for all time spent by him in pretrial confinement.” *Id.* at 61. The trial court denied Hape’s *pro se* motion, and Hape, by counsel, now appeals.

Discussion and Decision

Hape contends that the trial court erred in denying his petition for jail time credit. We first point out that Hape filed this petition only in Cause No. 1127, the probation revocation case. To the extent that Hape argues he is entitled to credit in Cause No. 310, we note that this cause number is not properly before us. Hape could have consolidated both Dubois County cases for purposes of appeal but did not do so. As for Cause No. 241, Hape notes that an appeal in this Pike County case has been taken by different counsel. *See* Appellant’s Br. p. 8 n.1. Therefore, we address only whether the trial court erred in denying Hape’s petition for jail time credit in Cause No. 1127. As for this cause number, Hape argues that he is entitled to “his original 131 days credit, plus 266 days from his arrest to sentencing: a total of 397 days credit.” *Id.* at 7-8.

Indiana Code section 35-50-6-4(a) provides: “A person . . . imprisoned for a crime or imprisoned awaiting trial or sentencing is initially assigned to Class I.” Furthermore, Section 35-50-6-3(a) provides: “A person assigned to Class I earns one (1) day of credit time for each day the person is imprisoned for a crime or confined awaiting trial or

sentencing.” Because presentence jail time credit is a matter of statutory right, a trial court generally does not have discretion in awarding or denying such credit. *Molden v. State*, 750 N.E.2d 448, 449 (Ind. Ct. App. 2001), *reh’g denied*. However, there is a limit to this statutory right. When a defendant receives consecutive sentences, the credit time may only be applied against the total or aggregate of the sentences. *Jones v. State*, 775 N.E.2d 322, 333 (Ind. Ct. App. 2002) (citing *Stephens v. State*, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), *trans. denied*).

Indiana Code section 30-50-1-2 provides for mandatory consecutive sentences when a person commits a crime while on probation:

(d) If, after being arrested for one (1) crime, a person commits another crime:

(1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or

(2) while the person is released:

(A) upon the person’s own recognizance; or

(B) on bond;

the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

Ind. Code § 35-50-1-2(d). As Hape concedes on appeal, the sentences in Cause Nos. 1127 and 241 were required to be served consecutively because he was on probation in Cause No. 1127 at the time he committed the offenses in Cause No. 241. *See* Appellant’s Br. p. 7; Tr. p. 8-9. “[W]here consecutive sentences are required, credit time cannot be earned against each of the underlying sentences.” *Brown v. State*, 907 N.E.2d 591, 595, 596 n.2 (Ind. Ct. App. 2009). The record shows that Hape received 261 days of actual credit in Cause No. 241 for the time period of approximately April 2007 to January 2008. Hape is therefore not entitled to 266 days of credit for the same approximate time period

of April 2007 to January 2008¹ for his mandatory consecutive sentence in Cause No. 1127 because it would improperly result in double credit. *See Corn v. State*, 659 N.E.2d 554, 558-59 (Ind. 1995); *Diedrich v. State*, 744 N.E.2d 1004, 1006 (Ind. Ct. App. 2001) (awarding a person who has mandatory consecutive sentences credit for time served against each separate sentence rather than against the aggregate of the consecutive sentences improperly results in double credit and effectively “enables a defendant to serve part of his sentences concurrently, a result the legislature could not have intended”). Because Hape asks us to apply the same credit against each separate term, we must decline his invitation as contrary to Indiana law. We therefore affirm the trial court.

Affirmed.

MAY, J., and ROBB, J., concur.

¹ Hape received credit of 261 actual days in Cause No. 241 but asks for credit of 266 days in this case. Because we are unable to precisely account for the difference of five days from the record on appeal, we do not award Hape the five days credit in this case.