

Appellant/Defendant Travis D. Rutherford appeals following his guilty plea to and conviction for Class D felony Voyeurism.¹ On appeal, Rutherford challenges his conviction by asserting that the trial court failed to make a clear record that he understood that he was waiving certain rights by pleading guilty. Rutherford also contends that the trial court abused its discretion in ordering that he serve the executed portion of his two-year sentence in the Department of Corrections (“DOC”), and erred in failing to grant him credit time for the period that he was incarcerated in the Elkhart County Correctional Facility awaiting his trial and sentencing in the instant matter. We affirm.

FACTS AND PROCEDURAL HISTORY

The stipulated factual basis entered during the August 19, 2009 plea hearing provides that on or about September 23, 2008, Rutherford knowingly or intentionally entered a shopping facility in Elkhart and without permission took pictures of a woman in her underwear with a cell phone. On October 30, 2008, the State charged Rutherford with Class D felony voyeurism and Class D felony theft. On August 19, 2009, Rutherford pled guilty to Class D felony voyeurism. Rutherford also admitted to certain probation violations. In exchange for Rutherford’s plea, the State agreed to a two-year executed sentence with placement open for argument by the parties, to dismiss the Class D felony theft charge, and to refrain from charging Rutherford for crimes associated with certain ongoing criminal investigations. The trial court accepted the plea agreement and scheduled a sentencing hearing on September 2, 2009.

¹ Ind. Code § 35-43-4-2(a) (2008).

During the September 2, 2009 sentencing hearing, Rutherford requested that the executed portion of his sentence be served in community corrections and that the trial court grant him credit for the time he was in jail awaiting the disposition of the instant matter. Following the conclusion of the September 2, 2009 sentencing hearing, the trial court ordered that Rutherford's two year executed sentence be served in the Indiana DOC and that it be served consecutive to the sentences imposed for his probation violations as required by statute. The trial court also ordered "[i]n regard to credit time, this case is consecutive to 20D06-0606-FD-199^[2] wherein all credit time will be granted; therefore, there is no credit time earned in this case." Appellant's App. p. 123. Rutherford now appeals.

DISCUSSION AND DECISION

I. Whether the Trial Court Failed to Make a Clear Record that Rutherford Understood he was Waiving Certain Rights by Pleading Guilty

Initially, we observe that Rutherford asserts that he was denied his constitutional due process rights because the court, in giving an en masse advisement of rights, failed to make a clear record that Rutherford understood the rights he was waiving before entering into his guilty plea. We interpret this assertion as a challenge to the propriety of Rutherford's conviction on constitutional due process grounds. However, in Indiana, it is well-established that "[a] person who pleads guilty cannot challenge the conviction by means of direct appeal but only through a petition for post-conviction relief; one of the things a person gives up by pleading guilty is the right to a direct appeal." *Kling v. State*, 837 N.E.2d 502, 504 (Ind.

² Cause Number 20D06-0606-FD-199 ("Cause No. FD-199") is the cause number for one of the probation violations admitted by Rutherford as part of his guilty plea.

2005) (citing *Tumulty v. State*, 666 N.E.2d 394, 395-96 (Ind. 1996)). Accordingly, Rutherford's challenge to the propriety of his conviction on this ground is not available for review in the present direct appeal.

II. Whether the Trial Court Abused Its Discretion in Ordering that Rutherford Serve the Executed Portion of His Sentence in the DOC

Rutherford contends that the trial court abused its discretion in ordering that he serve the executed portion of his sentence in the DOC rather than community corrections. Specifically, Rutherford claims that the trial court abused its discretion because the State did not object to his request that he serve the executed portion of his sentence in community corrections. The State, on the other hand, contends that Rutherford has waived any challenge to the placement of his executed sentence pursuant to the terms of Rutherford's plea agreement.

The Indiana Supreme Court has held that “[t]he place that a sentence is to be served is an appropriate focus for the application of our review and revise authority.” *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007) (citing *Hole v. State*, 851 N.E.2d 302, 304 n.4 (Ind. 2006) (recognizing that discretion placement is subject to Appellate Rule 7(B) review)). On appeal, this court reviews placement decisions under the Appellate Rule 7(B) appropriateness standard, not an abuse of discretion standard. *See Id.*; *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). This court has held that it will be “quite difficult” for a defendant to prevail on a claim that the placement of his sentence is inappropriate because the question under Appellate Rule 7(B) is not whether another sentence is *more* appropriate, but rather

whether the sentence imposed is appropriate. *King*, 894 N.E.2d at 267-68.

In *Creech v. State*, 887 N.E.2d 75, 75 (Ind. 2008), the Indiana Supreme Court held that a defendant may waive the right to appellate review of his sentence as part of a written plea agreement. Here, the term of Rutherford's plea agreement relating to waiver of his right to appeal his sentence under Appellate Rule 7(B) provides as follows:

20. The defendant understands that he may have the right to appeal his sentence under Indiana Appellate Rule 7B. Notwithstanding that right, by pleading guilty under this agreement the defendant knowingly, intelligently, and voluntarily waives his right to challenge the sentence on the basis that it is erroneous, and waives his right to have appellate review of his sentence under Indiana Appellate Rule 7B.

Appellant's App. p. 82. The record establishes that Rutherford explicitly agreed to this term of his plea agreement. Accordingly, we conclude that Rutherford has waived his challenge to the appropriateness of the placement of his sentence in DOC rather than community corrections.³ See *Biddinger*, 868 N.E.2d at 414; *King*, 894 N.E.2d at 267.

III. Whether the Trial Court Erred in Failing to Grant Rutherford Credit Time for the Period that he was Incarcerated in the Elkhart County Correctional Facility Awaiting Trial and Sentencing

Rutherford also contends that the trial court erred in failing to grant him credit time for the period that he was incarcerated in the Elkhart County Correctional Facility awaiting trial and sentencing for the instant matter. It is undisputed that Rutherford earned Class I

³ To the extent that Rutherford claims that the trial court abused its discretion by failing to include its reasoning for ordering that Rutherford serve the executed portion of his sentence in the DOC, we note that Rutherford has failed to cite to any authority supporting his claim that a trial court abuses its discretion by not including an explanation of why the trial court ordered that defendant's executed sentence be served in DOC rather than community corrections.

credit time while imprisoned awaiting trial and sentencing in the instant matter. A person assigned to Class I credit time earns one day of credit time for each day that he is imprisoned awaiting trial or sentencing. *Jones v. State*, 775 N.E.2d 322, 333 (Ind. Ct. App. 2002) (citing Ind. Code § 35-50-6-3(a)). However, a defendant's statutory right to credit time is not unlimited. *Id.*

It is well-settled that where a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, IC 35-50-6-3 entitles him to receive credit time applied against each separate term. However, where he receives consecutive terms he is only allowed credit time against the total or aggregate of the terms.

Id. (quoting *Stephens v. State*, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000)).

In *Jones*, the defendant was sentenced to one year following his conviction for Class A misdemeanor false informing. *Id.* at 326. The trial court ordered that the defendant's sentence for false informing would run consecutive to his sentences for two unrelated crimes. *Id.* On appeal, the defendant argued that the trial court failed to grant him Class I credit time on each of his sentences. *Id.* at 333. This court concluded that because the defendant's sentences were ordered to run consecutive to one another, defendant was only allowed credit time against the total or aggregate of the terms. *Id.*

Here, the trial court ordered that Rutherford's two-year executed sentence stemming from his voyeurism conviction run consecutive to the sentences imposed for his admitted probation violations. The court, in denying credit time for the instant conviction, noted that because Rutherford's imposed sentences were to run consecutive to one another, Rutherford was only allowed credit time against the aggregate of the terms. The trial court subsequently

attached Rutherford's earned credit time to the sentence ordered in Cause No. FD-199. In light of this court's conclusions in *Jones* and *Stephens*, we conclude that the trial court did not err in this regard.

The judgment of the trial court is affirmed.

DARDEN, J., and BROWN, J., concur.