

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 09/25/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 12-0005  
)  
Appellee, ) DEPARTMENT S  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
TONY LAMONT BROWN, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006334-001

The Honorable Randall H. Warner, Judge

**AFFIRMED AS MODIFIED**

Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Division Chief Counsel  
and Joseph T. Maziarz, Section Chief Counsel  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Louise Stark, Deputy Public Defender  
Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 Tony Lamont Brown ("Appellant") appeals his sentencing for two felony convictions, arguing only that the trial court erred in failing to award him sufficient presentence

incarceration credit. Appellant maintains he should receive credit for two additional days of presentence incarceration, the State confesses error, and we agree.

¶2 A jury convicted Appellant of Count I, unlawful imprisonment, a class six felony; and Count III, sexual assault, a class two felony. The court found Appellant had two historical prior felony convictions and sentenced him to concurrent, presumptive terms of 3.75 years' imprisonment for Count I and 15.75 years' (flat time) imprisonment for Count III. The court also credited Appellant with 449 days of presentence incarceration.

¶3 Appellant filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012),<sup>1</sup> 13-4031, and 13-4033(A).

¶4 Appellant argues the court erred by failing to grant him two additional days of presentence incarceration credit. Because Appellant did not raise this objection in the trial court, we review for fundamental, prejudicial error. See *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *State v. Payne*, 223 Ariz. 555, 560, ¶ 13, 225 P.3d 1131, 1136 (App. 2009). A trial court's failure to grant a

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<sup>1</sup> We cite the current version of the statutes as they appear in Westlaw if no changes material to our decision have since occurred.

defendant full credit for presentence incarceration constitutes such error. See *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989).

¶15 Under A.R.S. § 13-712(B), "[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment . . . shall be credited against the term of imprisonment." Custody commences "when a defendant is booked into a detention facility," *State v. Carnegie*, 174 Ariz. 452, 453-54, 850 P.2d 690, 691-92 (App. 1993), but does not include the date sentence is imposed. *State v. Hamilton*, 153 Ariz. 244, 245-46, 735 P.2d 854, 855-56 (App. 1987).

¶16 The record indicates that Appellant was incarcerated for the current offenses on September 14, 2010, and he remained in custody until his sentencing on December 9, 2011. The period from September 14, 2010, through December 8, 2011 (the day before sentencing) includes 451 days. Therefore, Appellant is entitled to 451 days of presentence incarceration credit, and the trial court committed fundamental error by only crediting him with 449 days of presentence incarceration. See *Ritch*, 160 Ariz. at 498, 774 P.2d at 237. Pursuant to A.R.S. § 13-4037, we modify Appellant's sentences to reflect two additional days of presentence incarceration credit, or a total of 451 days' presentence incarceration credit, to be applied to Counts I and

III. We affirm the court's sentencing order in all other respects.

\_\_\_\_\_/S/\_\_\_\_\_  
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

\_\_\_\_\_/S/\_\_\_\_\_  
DONN KESSLER, Judge

\_\_\_\_\_/S/\_\_\_\_\_  
PATRICIA K. NORRIS, Judge