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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 3/21/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 12-0201
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JIMMY FIERROZ,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-165111-001

The Honorable Connie Contes, Judge

AMENDED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Jimmy Fierroz appeals his convictions and sentences.
He raises one issue on appeal: whether the trial court
committed fundamental error when it awarded presentence

incarceration credit to him totaling 450 days. Fierroz asks this court to amend his sentences to reflect 452 days of presentence incarceration credit. For the following reasons, we amend the sentencing minute entry to reflect 451 days of presentence incarceration credit. We otherwise affirm Fierroz's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 Following a jury trial, Fierroz was convicted of two counts of armed robbery, three counts of kidnapping, burglary in the first degree, theft of means of transportation, misconduct involving weapons, and aggravated assault with a dangerous instrument against a police officer. On March 8, 2012, the trial court sentenced Fierroz to terms in prison ranging from four and a half years to twenty-four years for each of these convictions. The prison terms were imposed concurrently, and they were offset by 450 days of presentence incarceration credit.

¶3 Fierroz timely appeals, and 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) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

ANALYSIS

¶4 Fierroz appeals only the amount of presentence incarceration credit given by the trial court. A trial court's

failure to give proper presentence credit is fundamental error. See *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). Remand is not necessarily required for presentence incarceration credit errors; we may correct the error by modifying the sentencing minute entry to reflect the proper amount of presentence incarceration credit due to the defendant. See *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992); A.R.S. § 13-4037 (2010).

¶15 Under A.R.S. § 13-712(B) (2010), “[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment.” The calculation of incarceration credit includes the first day of custody, even if it is a fraction of a day. *State v. Carnegie*, 174 Ariz. 452, 454, 850 P.2d 690, 692 (App. 1993). “Custody” begins when a defendant is booked into a detention facility. *Id.* The day of final sentencing is not included in presentence incarceration credit. *State v. Hamilton*, 153 Ariz. 244, 245-46, 735 P.2d 854, 855-56 (App. 1987).

¶16 In response to Fierroz’s argument for two additional days of credit, the State concedes that he is due one additional day of presentence incarceration credit but not two. The State’s argument is that Fierroz may have been arrested in the late evening of December 12, 2010, but he was not actually

booked until December 13, 2010. The State bases its argument on a booking form that includes Fierroz's name, photograph, booking number, and a booking date, which is "12/13/2010."

¶7 Fierroz argues that he was booked on the night of December 12, 2010. He points to the arresting officer's release questionnaire, which is dated "2010-12-12" and contains his booking number. Fierroz contends that because a booking number was issued on the same day the questionnaire was prepared, it is clear that he was booked on December 12.

¶8 We agree with Fierroz that he is entitled to one more day of presentence incarceration credit, but we agree with the State that Fierroz has not carried his burden under the principles of fundamental error review to demonstrate that he is entitled to two more days of credit. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 23, 115 P.3d 601, 608 (2005) (stating that under fundamental error review, appellant must first prove that error occurred). The arresting officer's release questionnaire may have been dated December 12 to reflect the date of the arrest, but the form may have been completed after midnight on the next day, at which time a booking number was assigned. Alternatively, the booking number may have been assigned – and therefore available for listing on the release questionnaire – very late on December 12 even though the actual booking process was not completed until December 13. The official booking date

is December 13. On this record, we cannot accept Fierroz's argument that he must have been booked on December 12 simply because the booking number appears on the release questionnaire that is dated December 12.

¶9 Therefore, totaling the days from December 13, 2010, through March 7, 2012 (the day before final sentencing), we find that Fierroz is entitled to 451 days of presentence incarceration credit. The trial court's failure to give proper credit was fundamental error that we will correct on appeal.

CONCLUSION

¶10 We hereby amend Fierroz's sentences to reflect 451 days of presentence incarceration credit. Fierroz's convictions and sentences are otherwise affirmed.

/s/

JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/

JON W. THOMPSON, Judge

/s/

DONN KESSLER, Judge