

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: 10/13/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0664
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
GARY WALFORD,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-121990-002 SE

The Honorable Barbara L. Spencer, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals Section/Capital Litigation Section
And Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Gary Walford (Appellant) appeals his sentence in CR
2009-121990-002 (the Trial Case) on one count of possession or

use of marijuana, a class six felony. He argues: (1) Arizona law requires the superior court to give a defendant presentence incarceration credit against all sentences ordered to be served concurrently; and (2) because he received credit for time served against his sentence in a separate case to be served concurrently with the Trial Case, the superior court erred by failing to grant the same credit against his sentence in the Trial Case. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 While serving probation on an unrelated felony offense (the Probation Case), Appellant was charged in the Trial Case with misconduct involving weapons, a class four felony, and possession of marijuana, a class six felony. A jury found Appellant not guilty of misconduct involving weapons and guilty of marijuana possession.

¶3 For sentencing purposes, the superior court combined the Trial Case, the Probation Case and an unrelated felony offense committed before Appellant was placed on probation (the Felony Case). The court sentenced Appellant to two and one-half years imprisonment in the Probation Case and one year imprisonment in the Felony Case. Pursuant to Arizona Revised Statutes (A.R.S.) section 13-708.C (2010)¹, the court sentenced

¹ We cite the current version of the applicable statutes when no revisions material to this decision have since occurred.

Appellant to the presumptive term of 3.75 years imprisonment in the Trial Case. In addition, as mandated by A.R.S. § 13-708.C, the superior court ordered that Appellant's sentence in the Trial Case be consecutive to his sentence in the Probation Case. Finally, after deciding that it did not matter whether Appellant's sentence in the Felony Case was concurrent with the sentence in the Probation Case or the Trial Case, the court ordered Appellant's sentence in the Felony Case sentence be consecutive to his sentence in the Probation Case and concurrent with his sentence in the Trial Case.²

¶4 During sentencing, the court also determined the amount of credit Appellant should receive against his sentences for time spent in custody prior to sentencing. Pursuant to A.R.S. § 13-712.B (2010), the court credited Appellant with 646 days in the Probation Case and 464 days in the Felony Case. However, although the court found that Appellant had served 480 days of presentence incarceration on the Trial Case, the court decided Appellant was not entitled to any credit against that sentence because that sentence was to be served consecutive to the Probation Case sentence.

² Based on our review of the record, it appears the superior court assumed the issue was immaterial because Appellant would not actually serve any additional time on the Felony Case since he would receive presentence incarceration credit that exceeded the actual sentence. We do not address this issue because it is not relevant to our analysis of the claim on appeal.

¶15 Appellant filed a timely Notice of Appeal.³ We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21.A.1 (2003), 13-4031 (2010), and 13-4033.A.1 (2010).

DISCUSSION

¶16 Appellant argues the superior court erred by denying him presentence incarceration credit against the Trial Case sentence because he received credit against his concurrent sentence in the Felony Case. As applied to concurrent sentences, the Arizona Supreme Court has held that A.R.S. § 13-712.B⁴ requires courts to "fully credit defendants with the total time spent awaiting trial in each separate count." *State v. Caldera*, 141 Ariz. 634, 638, 688 P.2d 642, 646 (1984) (*citing State v. Cruz-Mata*, 138 Ariz. 370, 674 P.2d 1368 (1983)). Consequently, Appellant contends, because the superior court ordered his sentences in the Felony Case and the Trial Case to run concurrently, he must receive full credit against each of the separate sentences from both cases.

¶17 However, the Arizona Supreme Court has also held that defendants are not entitled to "double credit" of presentence

³ This appeal is from the conviction and sentence in solely the Trial Case.

⁴ Section 13-712.B requires that "[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."

incarceration credit on consecutive sentences. *State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989); see also *State v. Faunt*, 139 Ariz. 111, 113, 677 P.2d 274, 276 (1984) (noting that the trial court did not err in applying presentence incarceration credit against a parole violation sentence instead of against the consecutive sentence on the underlying charge). Thus, “[w]hen consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of those sentences, even if the defendant was in custody pursuant to all of the underlying charges prior to trial.” *State v. McClure*, 189 Ariz. 55, 57, 938 P.2d 104, 106 (App. 1997) (citations omitted). See also *State v. Cuen*, 158 Ariz. 86, 87, 761 P.2d 160, 161 (App. 1988) (noting that defendants are not entitled to a “double credit windfall”); *Cruz-Mata*, 138 Ariz. at 376, 674 P.2d at 1374 (citing *State v. Soddors*, 130 Ariz. 23, 633 P.2d 432 (App. 1981) (relating that “credit . . . should not be given on each consecutive sentence”)).

¶18 We review the interpretation of statutes de novo. *State v. Jensen*, 193 Ariz. 105, 107, ¶ 16, 970 P.2d 937, 939 (App. 1998). In this case, the superior court erred in the first instance by giving Appellant credit against the Felony Case sentence when the Felony Case sentence was ordered to be consecutive to the Probation Case sentence. We decline Appellant’s invitation to compound the error by also giving him

credit against the Trial Case sentence, which was also ordered to be consecutive to the Probation Case sentence.

¶9 Accordingly, Appellant is not entitled to receive any credit against his Trial Case sentence, notwithstanding the fact that he did receive credit on the concurrent sentence in the Felony Case.⁵

CONCLUSION

¶10 For reasons stated above, we affirm Appellant's conviction and sentence in the Trial Case.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Presiding Judge

/S/

PHILIP HALL, Judge

⁵ Because we decide that Appellant is not entitled to receive credit against the Trial Case sentence as a matter of law, we do not address the State's additional arguments regarding the standard of review and invited error by the Appellant.