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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DONAVAN ANTHONY JOHNSON, Appellant.	)	2 CA-CR 2012-0269 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083679

Honorable Richard S. Fields, Judge

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Nicholas Klingerman — Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By Abigail Jensen — Tucson
Attorneys for Appellant

E C K E R S T R O M, Judge.

¶1 Donavan Johnson was convicted after a jury trial held in his absence of conspiracy to commit possession and/or transportation of marijuana for sale and possession of marijuana for sale. He was sentenced to concurrent, presumptive five-year

prison terms. He argues on appeal that the trial court erroneously entered a criminal restitution order (CRO) at sentencing and failed to award sufficient presentence incarceration credit. We vacate the CRO but otherwise affirm Johnson's convictions and sentences.

¶2 In its sentencing minute entry, the trial court imposed attorney fees, a fine, and a surcharge and ordered that "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." Johnson argues, the state concedes, and we agree that the entry of this CRO "before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This error is not made harmless by a court's delaying the accrual of interest, penalties, or fees. *Id.* ¶ 5. Accordingly, the CRO is vacated.

¶3 The trial court concluded at sentencing that Johnson was entitled to forty-six days of presentence incarceration credit. Johnson contends he was instead entitled to forty-eight days' credit. He states that he was booked into jail following his arrest for the offenses of conviction on September 10, 2008, and released the following day, and he argues that he is entitled to two days of presentence incarceration for this period of confinement. The remaining forty-six days, according to Johnson, are calculated from his April 30, 2012, re-arrest to his sentencing on June 14. The state responds that Johnson has incorrectly included the date of his sentencing in his calculations and that his presentence incarceration credit resulting from his 2008 arrest was only one day because, despite being arrested on September 10, he was not booked into jail until September 11.

¶4 We agree with the state that, because the presentence report included the forty-six-day calculation and Johnson did not object to that report, he has waived all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also* Ariz. R. Crim. P. 26.8(c); *State v. Vermuele*, 226 Ariz. 399, ¶ 14, 249 P.3d 1099, 1103 (App. 2011) (defendant has "duty to challenge all . . . errors related to sentencing" that "become apparent" before trial court pronounces sentence). But, in any event, we find no reversible error, fundamental or otherwise.

¶5 Johnson is entitled to credit for "[a]ll time actually spent in custody pursuant to an offense." A.R.S. § 13-712(B). This court determined in *State v. Cereceres* that there is a "clear distinction between incarceration and arrest," and that a defendant is entitled to credit "only [for] time spent under conditions tantamount to incarceration in a jail or prison." 166 Ariz. 14, 16, 800 P.2d 1, 3 (App. 1990). Thus, we concluded, the defendant there was not entitled to credit for the day he was arrested, only from the following day when he was booked into jail. *Id.* at 15-16, 800 P.2d at 2-3; *see also State v. Reynolds*, 170 Ariz. 233, 235, 823 P.2d 681, 683 (1992) ("[T]he legislature intended the words 'in custody' to mean actual incarceration in a prison or jail and more than simply a restraint on freedom as onerous as jail or prison would be."); *State v. Carnegie*, 174 Ariz. 452, 453-54, 850 P.2d 690, 691-92 (App. 1993) ("[F]or purposes of presentence incarceration credit, 'custody' begins when a defendant is booked into a detention facility.").

¶6 Consistent with the 2008 booking information summary and conditions of release and order, Johnson's presentence report shows he was arrested on September 10, 2008, and incarcerated on September 11, 2008, for one day. Johnson has identified nothing in the record suggesting he was in the custody of jail or prison officials before

September 11. Thus, we find no error in calculating his presentence incarceration credit from that time. He therefore is entitled to only one day of presentence incarceration credit stemming from his time in custody in 2008. And he is not entitled to credit for the date of his sentencing. *See State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987). Johnson was not entitled to more than the forty-six days of presentence incarceration credit he was awarded.[1]

¶7 For the reasons stated, the CRO is vacated; Johnson's convictions and sentences are otherwise affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

[1]The state suggests the presentence report incorrectly calculated that Johnson was entitled to forty-six days presentence incarceration credit because, although the presentence report shows Johnson was arrested and incarcerated on April 30, 2012, his booking photograph instead shows he was booked on May 1. The state acknowledges it neither challenged the presentence report nor filed a cross-appeal to raise this issue. *See State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990) (noting state's failure to appeal or cross-appeal deprives court of jurisdiction to change sentence to defendant's detriment).