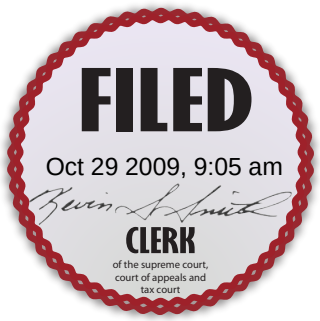

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IN THE
COURT OF APPEALS OF INDIANA

DALLAS BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0905-PC-481
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael S. Jensen, Judge
Cause No. 49G20-0802-FD-41507

October 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Dallas Brown, *pro se*, appeals the trial court's denial of his motion to correct erroneous sentence. Brown raises one issue, which we revise and restate as whether the trial court abused its discretion by denying Brown's motion to correct erroneous sentence. The State raises one issue, which we restate as whether Brown's appeal is timely. We affirm.

The relevant facts follow. On June 24, 2008, Brown pled guilty to strangulation as a class D felony in Cause Number 49G20-0802-FD-041507 ("Cause No. 41507") and theft as a class D felony in Cause Number 49G20-0803-FD-063287 ("Cause No. 63287"). On December 2, 2008, the trial court sentenced Brown to one year in the Department of Correction for strangulation as a class D felony and one year for theft as a class D felony. The trial court ordered that the sentences be served consecutively.

On December 5, 2008, Brown filed a petition for jail time credit in Cause No. 41507. The trial court denied Brown's petition. On December 23, 2008, Brown filed a petition for jail credit time in Cause No. 41507, which the trial court denied. On March 23, 2009, Brown filed a verified motion for jail time credit in Cause No. 41507. Brown argued that the trial court should "enter an Order granting the appropriate amount of credit days i.e. eighty-two (82) days Jail Time Credit to be applied to the thirty-seven (37) days jail Time Credit already awarded for a total or aggregate amount of one hundred nineteen (119) days Jail Time Credit due Petitioner for his incarceration awaiting trial and sentencing." Appellant's Appendix at 30.

On March 25, 2009, the trial court found that Brown was entitled to fifty-seven days for time spent in confinement before sentencing and an additional fifty-seven days for class one credit time. That same day, the trial court ordered the clerk to issue an amended abstract in Cause No. 41507. The revised abstract of judgment states that the modification date was March 25, 2009. Brown's notice of appeal was file stamped April 28, 2009.

I.

We first address the State's argument that Brown's appeal is untimely because, if it has merit, it would be dispositive. Ind. Appellate Rule 9(A)(1) provides that:

> A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court's ruling on such motion, or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

Ind. Appellate Rule 9(A)(5) provides that "[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited . . . ." The State argues that Brown should have filed a notice of appeal by April 24, 2009, but it was not filed until April 28, 2009.

Brown's notice of appeal, filed while he was incarcerated, implicates the "prison mailbox rule." Under the "prison mailbox rule," recognized by the United States Supreme Court in Houston v. Lack, the date a *pro se* prisoner delivers notice to prison authorities for mailing should be considered the date of filing, not the date of receipt.

McGill v. Ind. Dep't of Correction, 636 N.E.2d 199, 202 (Ind. Ct. App. 1994) (citing Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379 (1988)), reh'g denied.

In Houston, the Court addressed " whether under Federal Rule of Appellate Procedure 4(a)(1) such notices are to be considered filed at the moment of delivery to prison authorities for forwarding or at some later point in time." 487 U.S. at 268, 108 S. Ct. at 2381. At that time, Federal Rule of Appellate Procedure 4(a)(1) provided:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . .

Id. at 272, 108 S. Ct. at 2383. This language is similar to Ind. App. Rule 9(A)(1), which provides that "[a] party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment."

The Court held:

> The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30-day deadline. Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the *pro se* prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service (or a private express carrier); and they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not

> stamped on the date the court received it. *Pro se* prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them. Worse, the *pro se* prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the *pro se* prisoner delivers his notice to the prison authorities, he can never be sure that it will ultimately get stamped "filed" on time. And if there is a delay the prisoner suspects is attributable to the prison authorities, he is unlikely to have any means of proving it, for his confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the notice on the date received. Unskilled in law, unaided by counsel, and unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access – the prison authorities – and the only information he will likely have is the date he delivered the notice to those prison authorities and the date ultimately stamped on his notice.

487 U.S. at 270-272, 108 S. Ct. at 2382-2383.

We also find Baker v. State, 505 N.E.2d 498 (Ind. Ct. App. 1987), instructive. In that case, the court examined then-Indiana Rule of Trial Procedure 5(E)(2) (now Indiana Rule of Trial Procedure 5(F)(3)) and held:

> Since [the pro se prisoner litigant] was unable due to his incarceration to personally take his motion to correct errors to a post office, he 'deposited' his motion in the institutional mail pouch in the Westville Correctional Center's law library on February 8, 1985. This deposit conformed with the requirements of T.R. 5(E)(2) as construed by this Court in Seastrom [Inc. v. Amick Constr. Co., Inc., 159 Ind. App. 266, 306 N.E.2d 125, 127 (1974)] because Baker, as best as he was able, mailed his motion four days prior to the filing deadline. The denial of Baker's motion to correct errors because it was postmarked late due to no fault of his own is inconsistent with the Seventh Circuit's holding in Childs v. Duckworth (7th Cir. 1983), 705 F.2d 915, 922, that it is the duty of the trial court to insure that the claims of a pro se litigant are given a fair and meaningful consideration. The denial of Baker's motion to correct errors here was also contrary to this Court's policy of preferring to decide cases on their merits rather than dismiss them

> because of harmless timing failures. See, Sekerez v. Gehring (1981), Ind. App., 419 N.E.2d 1004, 1008. Because his motion was put in the mail prior to the filing deadline, Baker's motion to correct errors was erroneously denied by the trial court.

505 N.E.2d at 499-500.

This court recently held that given Baker and Houston, "the the prison mailbox rule is applicable to state post-conviction matters." Dowell v. State, 908 N.E.2d 643, 648 (Ind. Ct. App. 2009), trans. pending. Because Brown has provided evidence that he delivered his notice of appeal to prison officials within thirty days of the date of the trial court's ruling on Brown's petition for credit time, his notice was timely filed.[1] See Dowell v. State, 908 N.E.2d 643, 648 (Ind. Ct. App. 2009) (holding that the prison mailbox rule applied and that "because Dowell has provided evidence that he delivered his motion to correct error to prison officials within thirty days of the date of the post-conviction court's final judgment, his motion was timely filed"), trans. pending. Thus, we will address the merits of Brown's arguments.

[1] Here, Brown included his own affidavit in his Appellant's Reply Appendix, which stated:

> That on the week in question I was not able to attend the P.M. law library session on April 23rd, 2009 due to the dorm I was in being on "shake down" status;
>
> That due to my not being able to attend on my regular scheduled day, and having a deadline, the law library Supervisor rescheduled me for the following day Friday April 24th, 2009 at which time, my Notice of Appeal was Notarized and mailed.

Appellant's Reply Appendix at 1. Brown also included a law library notary work log which reveals that Brown had a document certified on April 24, 2009. Lastly, Brown included a document, which appears to indicate that Brown submitted payment for postage on April 24, 2009. The document also appears to indicate that Brown purchased envelopes from the prison on April 23, 2009.

II.

The next issue is whether the trial court abused its discretion by denying Brown's motion to correct erroneous sentence. Brown's petition for credit time is tantamount to a motion to correct erroneous sentence. See Brattain v. State, 777 N.E.2d 774, 776 (Ind. Ct. App. 2002) (holding that request for credit for time served was tantamount to a motion to correct erroneous sentence). We review a trial court's decision on a motion to correct erroneous sentence "only for abuse of discretion." Mitchell v. State, 726 N.E.2d 1228, 1243 (Ind. 2000), reh'g denied, overruled on other grounds by Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. Myers v. State, 718 N.E.2d 783, 789 (Ind. Ct. App. 1999).

An inmate who believes he has been erroneously sentenced may file a motion to correct the sentence pursuant to Ind. Code § 35-38-1-15. Neff v. State, 888 N.E.2d 1249, 1250-1251 (Ind. 2008). Ind. Code § 35-38-1-15, which governs a motion to correct erroneous sentence, provides:

> If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

An allegation by an inmate that the trial court has not included credit time earned in its sentencing is the type of claim appropriately advanced by a motion to correct sentence. Neff, 888 N.E.2d at 1251.

In Robinson v. State, the Indiana Supreme Court addressed the difference between a motion to correct erroneous sentence and a petition for post-conviction relief. 805 N.E.2d 783, 787 (Ind. 2004). The court held that a motion to correct erroneous sentence may be used only to correct sentencing errors that are clear from the face of the judgment. Id. Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct erroneous sentence. Id. Sentencing claims that are not facially apparent "may be raised only on direct appeal and, where appropriate, by post-conviction proceedings." Id. "Use of the statutory motion to correct sentence should thus be narrowly confined to claims apparent from the face of the sentencing judgment, and the 'facially erroneous' prerequisite should henceforth be strictly applied . . . ." Id.

Normally, "a motion to correct sentence may not be used to seek correction of claimed errors in an abstract of judgment." Id. at 794. However, the Indiana Supreme Court pointed out in Neff that sentences from Marion County present a special circumstance because the trial court does not issue judgments of conviction. 888 N.E.2d at 1251. As a result, a motion to correct a sentence issued in Marion County may be based on an abstract of judgment alone. Id.

Brown appears to rely in part upon his plea agreement and argues that he "is entitled to pre-sentence jail time credit for incarceration on February 16 to February 21, 2008; March 20, 2008; April 2, 2008 to June 24, 2008; and November 3, 2008 to December 2, 2008 for a total of one hundred nineteen (119) calendar days." Appellant's Brief at 4. Brown also cites to the presentence investigation report and argues that "[t]he Probation Department reviewed [Brown]'s pre-sentence jail time credit and forwarded the report to the trial court indicating [Brown] was entitled to receive 91 days credit; however, the report did not include the incarceration period of November 3, 2008 to December 2, 2008." Id. at 6.

Resolution of this issue necessarily requires consideration of factors outside of the face of the judgments. As noted above, a motion to correct erroneous sentence is "available only to correct sentencing errors clear from the face of the judgment." Robinson, 805 N.E.2d at 794. Thus, Brown's argument is not properly presented by way of a motion to correct erroneous sentence. As a result, we cannot say that the trial court abused its discretion by denying Brown's motion to correct erroneous sentence on this issue. See, e.g., Murfitt v. State, 812 N.E.2d 809, 811 (Ind. Ct. App. 2004) (holding that the trial court properly denied the defendant's motion for credit time because such a claim must be presented by way of a petition for post-conviction relief).

For the foregoing reasons, we affirm the trial court's denial of Brown's motion to correct erroneous sentence.

Affirmed.

CRONE, J., and MAY, J., concur.