

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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### ATTORNEY FOR APPELLANT

Talisha Griffin  
Indianapolis, Indiana

### ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Attorney General of Indiana

George P. Sherman  
Supervising Deputy Attorney  
General  
Indianapolis, Indiana

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## IN THE COURT OF APPEALS OF INDIANA

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Brandon Nickens,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

December 1, 2021

Court of Appeals Case No.  
21A-CR-1032

Appeal from the Marion Superior  
Court

The Honorable Grant W.  
Hawkins, Judge

Trial Court Cause No.  
49D31-1812-F1-42319

**Tavitas, Judge.**

## Case Summary

- [1] Brandon Nickens appeals the trial court’s determination of jail time credit following his conviction of attempted robbery resulting in serious bodily injury, a Level 2 felony. Nickens maintains that he was denied jail time credit to which he was entitled. The State concedes that, based upon an erroneous presentence investigation report (“PSI”), the trial court did, in fact, deny Nickens one year of jail time credit. Because jail time credit is a matter of statutory right, we reverse and remand for recalculation of Nickens’ credit time.

### Issue

- [2] The issue on appeal is whether Nickens was improperly denied jail time credit.

### Facts

- [3] On December 3, 2018, the State charged Nickens with attempted murder, a Level 1 felony, and attempted robbery resulting in serious bodily injury, a Level 2 felony. Also that day, the trial court issued a bench warrant for Nickens’ arrest. Nickens has remained incarcerated since the service of the warrant on December 4, 2018. The jury was unable to reach a verdict on the attempted murder count, which was later dismissed; however, the jury found Nickens guilty on the attempted robbery resulting in serious bodily injury count.
- [4] The probation department filed its PSI on April 5, 2021, in advance of the anticipated May 4, 2021 sentencing hearing. In an apparent oversight, the PSI calculated Nickens’ jail time credit for the period spanning December 4, 2018, through May 4, 2020, rather than May 4, 2021. *See* Conf. App. Vol. III p. 121.

The trial court conducted Nickens’ sentencing hearing on May 21, 2021, and, without objection, awarded Nickens 535 days of jail time credit.<sup>1</sup> The trial court sentenced Nickens to twenty-three years in the Department of Correction, with three years suspended to probation. On June 3, 2021, and again on July 18, 2021, Nickens wrote to the trial court seeking correction of the alleged credit time error. The trial court granted neither a hearing nor relief. Nickens now appeals.

## Analysis

[5] Nickens alleges fundamental error from the calculation of his jail time credit.

Generally, a failure to object to error in a proceeding, and thus preserve an issue on appeal, results in waiver. However, a court may remedy an unpreserved error when it determines the trial court committed fundamental error.<sup>[2]</sup> An improper sentence constitutes fundamental error and “cannot be ignored on review.” We may correct sentencing errors by the trial court on appeal even though the issue was not raised below. *Groves v. State*, 823 N.E.2d 1229, 1232 (Ind. Ct. App. 2005) (citations omitted).

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<sup>1</sup> As the probation department did in its PSI, the trial court failed to account for Nickens’ incarceration through 2021 in reaching its jail time credit determination.

<sup>2</sup> “The ‘fundamental error’ exception is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). “The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process.” *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (internal quotation omitted).

*Hardley v. State*, 893 N.E.2d 1140, 1145 (Ind. Ct. App. 2008), *aff'd on other grounds*, 905 N.E.2d 399 (Ind. 2009). Although Nickens failed to object below, this Court cannot ignore the issue because the denial of credit time implicates Nickens' liberty interest and fundamental due process.

- [6] Ultimately, however, there is no disagreement between the parties regarding the disposition of this appeal. Nickens argues that the trial court erroneously denied him jail time credit to which he was entitled. The State concedes the error and “does not oppose remand” for recalculation of Nickens' credit time. State's Br. p. 5. It is undisputed that the trial court awarded Nickens jail time credit for his incarceration through May 21, 2020, when Nickens was, in fact, entitled to credit time through May 21, 2021. Because Nickens was improperly denied credit time, we must reverse and remand for recalculation thereof. *See Roberts v. State*, 998 N.E.2d 743, 747 (Ind. Ct. App. 2013) (“[P]re-trial jail time credit is a matter of statutory right, [and] trial courts generally do not have discretion in awarding or denying such credit.”).

## **Conclusion**

- [7] Nickens was denied pretrial credit time to which he was entitled. We reverse and remand for recalculation of his credit time.
- [8] Reversed and remanded.

Bailey, J., and Crone, J., concur.