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**IN THE
COURT OF APPEALS OF INDIANA**

JEFFERY WHITACRE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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) No. 35A02-0708-CR-677
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APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause No. 35C01-0608-FB-40

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Jeffery Whitacre (“Whitacre”) appeals the trial court’s calculation of credit time towards his sentence for Criminal Deviate Conduct, as a Class B felony.¹ We reverse and remand.

Issue

On appeal, Whitacre raises the issue of whether the trial court erred in determining his credit time to be zero.

Facts and Procedural History

On August 17, 2006, the State charged Whitacre with criminal deviate conduct, as a Class B felony, attempted criminal deviate conduct, as a Class B felony, and sexual battery, as a Class D felony.² Whitacre was arrested for these charges as well as for driving with a suspended license on September 1, 2006.

Four days later, he was sentenced to twenty days incarceration for the driving offense under cause number 35D01-0608-CM-62 (“CM-62”). That same day, a bench warrant was issued for Whitacre’s arrest for failure to appear for a hearing on fees and court costs under a separate cause number, 35D01-0510-CM-864 (“CM-864”). In that cause, Whitacre was found not to be indigent and that he failed to pay fines and court costs. Because Whitacre failed to pay despite his ability to do so, the trial court ordered Whitacre imprisoned to “sit out fees & court costs in the amount of \$906.00 at the rate of \$20 per day” or pay the remaining balance owed. Appendix at 157. This sentence was ordered consecutive to the

¹ Ind. Code § 35-42-4-2.

² Ind. Code § 35-42-4-8.

sentence to be given for the current offenses. In addition to these cases in Huntington County, Whitacre also had been sentenced to one-year incarceration with all but thirty days suspended in cause number 90D01-0507-CM-00338 (“CM-338”) in Wells County. This sentence was to run consecutive to Whitacre’s sentence in cause number CM-864. Upon his arrest for the current offenses, a trial court in Wells County ordered the balance of the sentence under CM-338 be served.

On April 9, 2007, Whitacre filed a motion to plead guilty to the charge of criminal deviate conduct with the understanding that the State would dismiss the other charges and recommend an executed sentence not to exceed ten years. In his motion, Whitacre also waived his right to appeal his sentence. The trial court accepted the guilty plea and sentenced Whitacre to eighteen years, suspending eight years. The sentencing order noted that Whitacre would receive zero days credit for his incarceration prior to his sentencing, because Whitacre was incarcerated on other matters. Whitacre now appeals.

Discussion and Decision

We must first address the State’s contention that Whitacre waived his ability to challenge the calculation of credit time due to his waiver of his right to appeal his sentence. Essentially, the State argues that the determination of credit time is a part of a defendant’s sentence.

Indiana Code Section 35-38-3-2 requires a trial court’s sentencing judgment to include “the amount of credit, including credit time earned, for time spent in confinement before sentencing.” “The time spend in confinement before sentencing applies toward a prisoner’s

fixed term of imprisonment.” Robinson v. State, 805 N.E.2d 783, 789 (Ind. 2004). Credit towards one’s criminal sentence for time in confinement prior to sentencing is not part of the actual sentence. Rather, it is a statute-driven calculation of the days the defendant has already served while waiting for his or her trial and sentencing. In fact, the trial court’s determination of credit time is subject to modification thereafter by the Department of Correction pursuant to statutory procedures. Id. at 792. Because a trial court’s determination of credit time is not part of a defendant’s sentence, Whitacre’s waiver of his right to appeal his sentence does not affect his ability to challenge the calculation of credit time.

Whitacre argues that the trial court erred in refusing to give him any credit time for his pre-sentence confinement. Specifically, he contends that he should receive credit for one hundred and ninety-three days after taking into account the two other Huntington County cause numbers and that the revocation of his probation under the Wells County cause number CM-338 is irrelevant to the calculation.

Indiana Code Section 35-50-6-3 provides that a person who is assigned to Class I earns one day of credit time for each day he is imprisoned while awaiting trial or sentencing. “A person . . . imprisoned awaiting trial or sentencing is initially assigned to Class I.” Ind. Code § 35-50-6-4(a). “The determination of a defendant’s pre-trial credit depends on (1) pretrial confinement, and (2) the pretrial confinement being a result of the criminal charge for which sentence is being imposed.” James v. State, 872 N.E.2d 669, 672 (Ind. Ct. App. 2007). If a defendant is incarcerated on multiple related charges at the same time, it is possible that a portion of the confinement time may be the result of more than one offense.

Diedrich v. State, 744 N.E.2d 1004, 1005 (Ind. Ct. App. 2001). As explained in Dolan v.

State:

Where a defendant is confined during the same time period for multiple offenses and the offenses are tried separately, the defendant is entitled to a “full credit” for each offense for which he is sentenced. Each “full credit” is determined by the number of days the defendant spent in confinement for the offense for which the defendant is sentenced up to the date of the sentencing for that offense The credit will be the number of days the defendant spent in confinement from the date of arrest for the offense to the date of sentencing for that same offense.

Dolan v. State, 420 N.E.2d 1364, 1373 (Ind. Ct. App. 1981). However, where the sentences for the multiple offenses are to be served consecutively, the defendant is only allowed credit time against the total or aggregate of the terms. Jones v. State, 775 N.E.2d 322, 333 (Ind. Ct. App. 2002) (quoting Stephens v. State, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), trans. denied).

Whitacre was arrested on September 1, 2006, and was sentenced on May 7, 2007. This amounts to two hundred and forty-eight days of imprisonment. Whitacre’s sentences under cause numbers CM-62 (twenty days served in ten days)³ and CM-864 (forty-five days)⁴ were ordered consecutive to the sentence for the case at hand. The State accepts Whitacre’s calculation that the days served under these two sentences would amount to fifty-five days, assuming Whitacre was in credit class I for CM-62. Appellee’s Brief at 6, n.1. Subtracting this from the total days in jail results in a difference of one hundred and ninety-three days. This is where the parties’ agreement in the calculation ends.

³ This assumes that Whitacre was in Class I, crediting him one day of time served and one day of good time credit for each day in jail.

The dispute revolves around how to treat the reinstatement of Whitacre's suspended sentence under CM-338 from Wells County. Under CM-338, a petition to revoke probably was filed on September 7, 2006. On November 30, 2006, an order was entered in CM-338 stating that Whitacre was to serve the balance of the suspended sentence. However, the pre-sentence report does not indicate that an arrest warrant was issued for the probation revocation or that Whitacre immediately began to serve the balance of the suspended sentence upon issuance of the order. The record is unclear as to whether Whitacre did or did not receive credit in cause number CM-338 upon the revocation of his probation for the remaining time spent in jail prior to sentencing on the current charge. Furthermore, there is no indication by the trial court whether the sentence in this cause is to be served consecutive to or concurrent with the reinstated sentence under CM-338. Therefore, we remand to the trial court to determine the total credit time to which Whitacre is entitled. See Senn v. State, 766 N.E.2d 1190, 1203 (Ind. Ct. App. 2002) (remand necessary where it is not clear in the record whether the trial court properly credited the defendant's sentence with credit time for time spend in jail).

Reversed and remanded.

NAJAM, J., and CRONE, J., concur.

⁴ This is the number of days needed to satisfy the outstanding \$906.00 in costs if each day in jail is equivalent to \$20 with rounding down the decimal remainder.