

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.

APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

JAMES M. SMITHES
Plainfield, Indiana

STEVE CARTER
Attorney General of Indiana

NICHOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JAMES M. SMITHES,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 60A01-0706-CR-283

APPEAL FROM THE OWEN CIRCUIT COURT
The Honorable Frank M. Nardi, Judge
Cause No. 60C01-0406-FD-284

November 7, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant James Smithes appeals the trial court's denial of his petition for jail time credit. Specifically, Smithes argues that he was entitled to receive jail time credit toward the two-year sentence the trial court imposed following his probation violation. Concluding that the trial court properly denied Smithes's petition, we affirm the judgment of the trial court.

FACTS

Smithes was sentenced to 1,081 days probation for theft on June 28, 2005. The State filed an amended¹ petition to revoke probation on December 13, 2006, alleging that Smithes violated the terms of his probation by committing another crime. Smithes ultimately pleaded guilty to class D felony operating a vehicle while being a habitual traffic violator (OWHTV) and was sentenced to three years imprisonment with 171 days credit time on January 24, 2007. Appellant's App. p. 3; Tr. p. 4.

On May 8, 2007, the trial court held an evidentiary hearing on the State's petition to revoke Smithes's probation. At the hearing, Smithes admitted that he committed OWHTV while he was on probation. Tr. p. 7-8. As a result, the trial court sentenced Smithes to two years imprisonment and ordered the sentence to be served consecutively to the OWHTV sentence. Smithes filed a petition for jail time credit on May 31, 2007, which the trial court denied the next day. Smithes now appeals.

¹ The State filed four petitions to revoke Smithes's probation between September 2005 and December 2006.

DISCUSSION AND DECISION

A defendant earns one day of jail credit time for each day he is imprisoned awaiting trial or sentencing. Ind. Code §§ 35-50-6-3, -4. We have previously held that

[i]t is well-settled that where a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, I.C. 35-50-6-3 entitles him to receive credit time applied against each separate term. However, where he receives consecutive terms he is only allowed credit time against the total or aggregate of the terms.

Stephens v. State, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000). Indiana Code section 35-50-1-

2(d) reads, in pertinent part, that

If, after being arrested for one (1) crime, a person commits another crime:

(1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime;

the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

(Emphases added).

Pursuant to Indiana Code section 35-50-1-2(d), the trial court was required to impose the probation violation sentence consecutively to the OWHTV sentence. Thus, Smithes was only entitled to receive 171 days jail time credit against the aggregate sentence.² Stephens, 735 N.E.2d at 284. Because Smithes received jail time credit on the OWHTV sentence, it would have been improper for the trial court to award Smithes additional jail time credit on

² To the extent that Smithes relies on Muff v. State, 647 N.E.2d 681 (Ind. Ct. App. 1995), and Dolan v. State, 420 N.E.2d 1364 (Ind. Ct. App. 1981), to support his argument, those cases have been “impliedly overruled” by Corn v. State, 659 N.E.2d 554, 558-59 (Ind. 1995). Diedrich v. State, 744 N.E.2d 1004, 1006 (Ind. Ct. App. 2001).

the probation revocation sentence. Thus, the trial court properly denied Smithes’s petition, and we affirm the judgment of the trial court.³

The judgment of the trial court is affirmed.

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

³ As an aside, we note that the trial court had the authority to impose the entire portion of Smithes’s suspended sentence—1,081 days—when it sentenced him for the probation violation. Ind. Code § 35-38-2-3(g). Instead, the trial court imposed two years imprisonment—730 days. In an exchange between the trial court and Smithes’s counsel, the trial court disclosed that “part of the reason I didn’t do the whole . . . 1,081 days” was because Smithes could not receive jail time credit toward that sentence. Tr. p. 18.