

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Timothy Rush,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 15, 2021

Court of Appeals Case No.
20A-CR-2327

Appeal from the Howard Superior
Court

The Honorable William C.
Menges, Judge

Trial Court Cause No.
34D01-1503-F2-299
34D02-1904-F5-1309

Tavitas, Judge.

Case Summary

- [1] Timothy Rush appeals the trial court's determination that Rush was not entitled to any credit time in Cause No. 34D01-1503-F2-299 ("Cause F2-299") for his incarceration between July 27, 2019, and January 16, 2020. Rush was, however, granted credit time for his incarceration during this same time period in Cause No. 34D02-1904-F5-1309 ("Cause F5-1309"). Because the trial court imposed consecutive sentences, Rush is ineligible for the additional credit time he seeks. Finding no error in the trial court's calculation of Rush's credit time, we affirm.

Issue

- [2] The sole issue on appeal is whether the trial court erred in calculating Rush's credit time in Cause F2-299.

Facts

- [3] On March 26, 2015, in Cause F2-299, the State charged Rush with dealing in cocaine, a Level 2 felony; possession of cocaine, a Level 3 felony; and possession of marijuana, a Level 6 felony. Pursuant to a plea agreement, Rush pleaded guilty to possession of cocaine, a Level 5 felony, and the State dismissed the remaining charges. The trial court then sentenced Rush to 2,190 days in the Indiana Department of Correction ("DOC") with 1,460 days suspended to probation.
- [4] On February 8, 2017, the State filed a petition to revoke Rush's suspended sentence in cause F2-299. On September 6, 2017, Rush admitted to the

allegations in the State's petition. The trial court ordered Rush to serve 120 days of his previously-suspended sentence in the DOC.

[5] On May 10, 2019, the State filed a second petition to revoke Rush's suspended sentence in Cause F2-299 and alleged, in pertinent part, that Rush was charged with three new offenses: operating a motor vehicle after forfeiture of license for life, a Level 5 felony; possession of cocaine, a Level 5 felony; and false informing, a Class B misdemeanor, in Cause F5-1309. Rush failed to appear for the initial hearing on the new charges and was once again arrested on July 27, 2019.

[6] On January 9, 2020, Rush admitted to the allegations in the State's second petition to revoke his suspended sentence in Cause F2-299, and the next day, pursuant to a plea agreement, the trial court granted Rush's request to enter the trial court's re-entry program.¹ On January 16, 2020, Rush pleaded guilty to possession of cocaine in Cause F5-1309, and the trial court sentenced him to 2,190 days in the DOC, suspended to probation and to be served consecutively to his remaining sentence in Cause F2-299. On January 16, 2020, Rush was transported to the sober living facility to participate in the re-entry program.

[7] Rush absconded from the re-entry program, and on May 21, 2020, the re-entry program filed a notice of termination regarding Rush's participation in the

¹ The re-entry program allows offenders, who are admitted to the program, to be put on work release and in some cases, like the instant case, reside in a sober living facility.

program. As a result of Rush's termination from the program, the State filed a third petition to revoke Rush's suspended sentence in Cause F2-299.

- [8] On September 23, 2020, Rush admitted to the allegations in the State's third petition to revoke the suspended sentence in Cause F2-299. On November 28, 2020, the trial court ordered Rush to serve 1,340 days of his previously suspended sentence in Cause F2-299 consecutive to his sentence in Cause F5-1309. Additionally, the trial court found that Rush was not entitled to credit time in Cause F2-299. The trial court also revised Rush's sentence in Cause F5-1309 and ordered Rush to serve 2,190 days in the DOC. The trial court found that Rush had earned 174 accrued days, plus good time credit, for a total of 232 days of credit time in Cause F5-1309. Rush was incarcerated from July 27, 2019, to January 16, 2020, which is 174 days. Rush now appeals from the trial court's determination of credit time in Cause F2-299.

Analysis

- [9] Rush argues that he is entitled to additional credit time applied to his sentence in Cause F2-299 for the "time he spent in confinement for the probation violation." Rush's Br. p. 13. In other words, Rush seeks additional credit time for his confinement period of July 27, 2019, to January 16, 2020.² *Id.* at 12.

² Rush contends that he was entitled to accrued time credit for his confinement between July 27, 2019, to January 31, 2020 (189 days), but Rush was released from confinement and transported to the re-entry program on January 16, 2020. In fact, Rush was confined from July 27, 2019, to January 16, 2020 (174 days).

The State counters that: (1) “Rush was ordered to serve his sentences consecutively”; and (2) because “Rush received all his [] [credit time] in [Cause] F5-1309, he is not entitled to additional credit for the same days in [Cause] F2-299.” Appellee’s Br. p. 7.

[10] Credit time is a matter of statutory right; therefore trial courts “generally do not have discretion in awarding or denying such credit.” *Perry v. State*, 13 N.E.3d 909, 911 (Ind. Ct. App. 2014); *see also Meadows v. State*, 2 N.E.3d 788, 791 (Ind. Ct. App. 2014) (stating that pre-sentence credit time is a matter of statutory right, not a matter of judicial discretion). Two types of credit time are calculated by the trial court: “(1) the credit toward the sentence a prisoner receives for time actually served, and (2) the additional credit a prisoner receives for good behavior and educational attainment.” *Maciaszek v. State*, 75 N.E.3d 1089, 1092 (Ind. Ct. App. 2017) (quoting *Purcell v. State*, 721 N.E.2d 220, 222 (Ind. 1999)).

[11] The legislature has defined “credit time” in Indiana Code Section 35-50-6-0.5(2) as “the sum of a person’s accrued time, good time credit, and educational credit.” Credit for time actually served is denoted as “accrued time” in Indiana Code Section 35-50-6-0.5(1) and is defined as “the amount of time that a person is imprisoned or confined.” Credit time received for either good behavior or educational attainment are denoted as “good time credit” and “educational

credit” respectively.³ Ind. Code § 35-50-6-0.5(3-4). Rush only raises on appeal the validity of the trial court’s calculation of the credit for time actually served or “accrued time.”

[12] The determination of a defendant’s pre-trial or pre-sentence credit time depends upon: (1) the defendant being confined before trial or sentencing; and (2) the confinement resulting from the “criminal charge for which [the] sentence is being imposed.” *Maciaszek*, 75 N.E.3d at 1092 (quoting *Stephens v. State*, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), *trans. denied*). If a person is confined before trial or sentencing on more than one charge and is sentenced to concurrent terms for the separate crimes, credit time is applied against each separate term. *Swihart v. State*, 71 N.E.3d 60, 63 (Ind. Ct. App. 2017). Where, however, the defendant receives consecutive terms for the separate crimes, credit time is applied only “against the aggregate of the sentence.” *Id.* (quoting *Shane v. State*, 716 N.E.2d 391, 400 (Ind. 1999)).

[13] Rush’s contention is addressed in our prior decision in *Swihart*, 71 N.E.3d at 63-64. In *Swihart*, Swihart was convicted on two counts of forgery, and was sentenced to 2 ½ years for each count of forgery, with the sentences to run concurrently to each other, but consecutive to a sentence in an unrelated case.

³ “Good time credit” is defined in Indiana Code Section 35-50-6-0.5(4) as “a reduction in a person’s term of imprisonment or confinement awarded for the person’s good behavior while imprisoned or confined.” “Educational credit” is defined in Indiana Code Section 35-50-6-0.5(3) as “a reduction in a person’s term of imprisonment or confinement for participation in an educational, vocational, rehabilitative, or other program.”

Id. at 62. The trial court granted Swihart 124 days of credit time for his sentence for the forgery offenses. *Id.* On appeal, Swihart argued that he was entitled to credit time in the amount of 353 days, the total amount of time he was confined prior to trial, despite the fact that he was granted the other 229 days of credit time for his sentence in the unrelated case. *Id.* at 64.

[14] Our Court noted that Swihart was required to serve his forgery sentence and his sentence from the unrelated case consecutively. *Id.* In affirming the trial court, our Court found that Swihart received the additional 229 days of credit time applied to his sentence in the unrelated case. *Id.* We, therefore, concluded that Swihart was not entitled to additional credit time for the forgery sentence because credit time is not awarded toward both sentences when the sentences are mandated to be served consecutively. *Id.*

[15] In this case, Rush was required to serve his sentences in Cause F2-299 and Cause F5-1309 consecutively. Rush committed the offenses in Cause F5-1309 while he was on probation for his Cause F2-299 offenses. *See* I.C. § 35-50-1-2(e) (requiring a person, who has been arrested for one crime and commits another crime before being discharged from probation, to serve the terms of imprisonment consecutively).

[16] Inasmuch as Rush was required to serve his terms consecutively, he was entitled to have the 174 actual days of accrued time credit applied to the aggregate of his sentences, not to each separate sentence. To hold otherwise

would allow Rush to receive double or additional credit for his pre-sentencing confinement, which is improper. *See, e.g., Swihart*, 71 N.E.3d at 64.

- [17] Based on the foregoing, the trial court properly calculated Rush's credit time by allowing the 174 actual days of accrued time to apply only to his sentence in Cause F5-1309, and not to both sentences individually.

Conclusion

- [18] The trial court did not err in calculating Rush's credit time for Cause F2-299. Accordingly, we affirm.

- [19] Affirmed.

Najam, J., and Pyle, J., concur.