

Randolph Carr, (“Carr”) appeals from the post-conviction trial court’s order denying his petition for post-conviction relief. The State presents the following argument for our review:

- I. Whether Carr’s claims of error regarding the amount of credit for pre-trial confinement reflected in the abstract of judgment are procedurally defaulted.

Carr raises the following issues for our review:

- II. Whether the post-conviction trial court erred by failing to amend the abstract of judgment to reflect the sentence imposed by the trial court; and
- III. Whether Carr’s guilty plea was made knowingly, intelligently, and voluntarily.

We reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On April 14, 1998, the State charged Carr with conspiracy to commit robbery, robbery, conspiracy to commit confinement, confinement, and attempted murder. After entering into plea negotiations with the State, Carr pleaded guilty to robbery, a Class B felony¹, and confinement, a Class B felony.² According to the terms of the plea agreement, the State agreed to dismiss the remaining counts, with sentencing set at twelve years executed on each count to be served consecutively. More specifically, the plea agreement provided in relevant part as follows:

¹ See Ind. Code § 35-42-5-1.

² See Ind. Code § 35-42-3-3.

That should the Defendant enter a plea of guilty to the charge(s) of Count II, Robbery, Class B felony and Count IV-Confinement, Class B felony the State recommends that the defendant receive the following sentence:

Count II—Robbery, Class B felony

Twelve (12) years in the Indiana Department of Corrections. Defendant given credit for ____actual days already served. Fine suspended. \$125.00 Court Cost.

Count IV—Confinement, Class B felony

Twelve(12) years in the Indiana Department of Corrections. Defendant given credit for ___actual days already served. Fine suspended. \$125.00 Court Cost.

Sentence on Count IV to be CONSECUTIVE to Count II.

Exhibits Vol., Defendant's Ex. 2 at 1.

At the plea hearing, the trial court made the following comments about the plea agreement:

Now Mr. Carr, at paragraph two and at paragraph three is the agreement or what we'll call the recommendation the State's going to make if this Court accepts this plea. And paragraph two it says, states as follows: "The State agrees to make the following recommendations to the Court. That should the Defendant enter a plea of guilty to the charge of Count II, Robbery, a class B Felony, and Count IV, Confinement, Class B Felony, the State recommends that Defendant receive the following sentence: Count II, Robbery Class B Felony, twelve (12) years a[sic] the Indiana Department of Corrections,[sic] Defendant given credit for blank actual days already served." And I assume the number of days will be entered in there depending on the days you had served at sentencing. And it says "find suspended, a hundred twenty-five dollars (\$125.00) court costs. Count IV, Confinement, Class B Felony. Twelve (12) years at the Indiana Department of Corrections,[sic] Defendant given credit for blank actual days already served, fine suspended and hundred and twenty-five dollars (\$125.00) court costs. Sentence on Count IV to be consecutive to Count II."

Exhibits Vol., Defendant's Ex. 6 at 15-16.

On April 19, 1999, at Carr’s sentencing hearing, the parties agreed that Carr had served three hundred seventy-one days of pre-trial confinement prior to the imposition of his sentence, and Carr was credited with that amount for each count. *Exhibit Vol., Defendant’s Ex. 6 at 34-35*. The sentencing order also reflected actual credit of three hundred seventy-one days on each count. *Exhibit Vol., Defendant’s Ex. 4 at 1*. However, in the abstract of judgment, the trial court listed in the box entitled “No. of days confined prior to sentencing,” three hundred seventy-one days. *Exhibit Vol., Defendant’s Ex. 5 at 1*.

On January 11, 2004, Carr filed a *pro se* petition for post-conviction relief, which was later amended and re-filed on August 16, 2007. The trial court held a hearing on the amended petition on March 7, 2008. The trial court denied Carr’s petition for post-conviction relief on April 11, 2008. Carr now appeals.

DISCUSSION AND DECISION

Initially, a petitioner has the burden of establishing the grounds for relief alleged in his petition for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). Because Carr is appealing the denial of his petition for post-conviction relief, he stands in the position of one appealing from a negative judgment. *See Willoughby v. State*, 792 N.E.2d 560, 562 (Ind. Ct. App. 2003). On appeal, we will not reweigh the evidence or reassess the credibility of the witnesses. *Id.* We will not reverse the post-conviction court’s decision unless the petitioner shows that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* We accept the post-conviction court’s findings

of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's legal conclusions. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

The State argues that Carr's claims that the abstract of judgment did not properly reflect the sentence imposed, and that the post-conviction court erred by declining to amend the abstract of judgment, are procedurally defaulted because the claims concerning the abstract of judgment were known and available and could have been raised on a direct appeal.

Our Supreme Court has held that a person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal. *See Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004). However, if a defendant pleads guilty, he or she is entitled to contest the merits of a trial court's sentencing decision in cases where the sentence is not fixed by the plea agreement. *Id.* An issue that is known and available, but not raised on direct appeal may not be raised in post-conviction proceedings. *Id.* at 232.

In the present case, Carr's sentence was fixed in the plea agreement. Therefore, the issue could not have been presented in a direct appeal. Carr's claims are not procedurally defaulted.

Carr argues that the post-conviction court erred by failing to correct the abstract of judgment to give him 371 days of credit for pre-trial confinement on both counts for which he was sentenced. The post-conviction court relied on *Lanham v. State*, 540 N.E.2d 612, 613 (Ind. Ct. App. 1989) for the proposition that where a defendant is confined during the same time period for multiple offenses for which he is convicted and sentenced to consecutive terms, credit time is applied against the aggregate sentence, not

against each individual sentence. *See also, Simms v. State*, 421 N.E.2d 698, 702 (Ind. Ct. App. 1981). The post-conviction court concluded that it “was not the intention of the Court to award Carr with more credit time than he was legally entitled to.” *Appellant’s App.* at 99.

Plea agreements “are in the nature of contracts entered into between the defendant and the [S]tate.” *Perez v. State*, 866 N.E.2d 817, 820 (Ind. Ct. App. 2007), *trans. denied*. Specifically,

a plea agreement is contractual in nature, binding the defendant, the [S]tate and the trial court. The prosecutor and the defendant are the contracting parties, and the trial court’s role with respect to their agreement is described by statute: If the court accepts a plea agreement, it shall be bound by its terms.

Id. at 820 (quoting *Lee v. State*, 816 N.E.2d 35, 38 (Ind. 2004)).

During the sentencing hearing, the trial court specifically stated that Carr was entitled to three hundred seventy-one days credit for each count, and that the counts were to run consecutively. Furthermore, the State did not object to the sentence imposed by the trial court at the sentencing hearing. Once the trial court accepted the plea agreement, and the sentence was spelled out in the plea agreement, the trial court, as well as the parties, was bound by the terms of the plea agreement.

Defendants imprisoned while awaiting trial or sentencing earn Class I credit. Ind. Code § 35-50-6-4(a). A person assigned to Class I earns one day of credit time for each day he is imprisoned for a crime or awaiting trial or sentencing. Ind. Code § 35-50-6-3(a). Indiana Code section 35-50-6-3 sets forth that a person confined awaiting trial or sentencing is statutorily entitled to one day of credit for each day he is so confined. *See*

Weaver v. State, 725 N.E.2d 945, 948 (Ind. Ct. App. 2000). Therefore, pre-sentence jail time credit is a matter of statutory right, not a matter of judicial discretion. *Id.* However, it is well-settled that where a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, he is entitled to receive credit time applied against each separate term. *Stephens v. State*, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000). However, where he received consecutive terms he is only allowed credit time against the total or aggregate of the terms. *Id.*

The present case is different in that the parties' written agreement provides for credit applied against each conviction and in that the sentences are to be served consecutively. The language of the agreement provides blank spaces for the credit time applied against each conviction, and provides that the sentences are to be served consecutively. *Exhibits Vol., Defendant's Ex. 2 at 1.* The transcript of the sentencing hearing reveals that the trial court gave Carr credit for pre-trial confinement against each count. *Exhibit Vol., Defendant's Ex. 6 at 34-35.* The written sentencing order provides that the credit time should be applied against each count.

The State argues that "nothing in the record" compelled the post-conviction trial court to find that the parties entered into an agreement calling for the same credit time to be awarded twice. *Appellant's Br. at 11.* The State further argues that "[t]he whole case thus turns on interpreting the terms of the plea agreement as of the time it was made." *Id.* In fact, the post-conviction trial court found that it "was not the intention of the Court to award Carr with more credit time than he was legally entitled to." *Appellant's App. at 99.*

Yet, the plea agreement and the oral and written sentencing orders specifically provide for the credit Carr seeks.

Carr has established by a preponderance of the evidence that he was entitled to credit time against each count. The evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. The abstract of judgment should have been corrected to reflect the agreement of the parties.

Because we find that the abstract of judgment should be corrected to reflect the terms bargained for by the parties, and accepted by the trial court, we do not address Carr's argument that his plea was not entered into knowingly, intelligently, and voluntarily.

Reversed and remanded with instructions to correct the abstract of judgment to reflect that Carr is entitled to credit for his pretrial confinement against each conviction.

RILEY, J., and VAIDIK, J., concur.