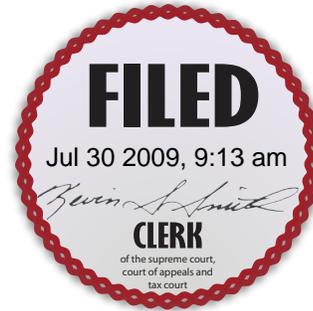


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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PAUL J. LIVERS, II, )

Appellant-Defendant, )

vs. )

STATE OF INDIANA, )

Appellee-Plaintiff. )

No. 06A05-0812-CR-744

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APPEAL FROM THE BOONE SUPERIOR COURT  
The Honorable Rebecca S. McClure, Judge  
Cause No. 06D02-0606-FC-0561

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**July 30, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Paul J. Livers II (“Livers”) admitted to violating the terms of community corrections and violating probation in Boone Superior Court. The trial court ordered that Livers execute the remainder of his sentence with credit for time served of 110 actual days and 110 days of good time credit, despite having served 169 actual days. Livers appeals and argues that the trial court exceeded its authority by denying his motion for credit time.

We reverse and remand.

### **Facts and Procedural History**

On May 15, 2008, Livers was sentenced to one and one half years executed with direct placement in the Boone County Community Corrections work release program. As a term of probation, Livers was required to maintain employment, notify his probation officer within 48 hours of any change of employment and successfully complete his direct placement in the Boone County Community Corrections work release program.

Livers worked for Tradesmen Temporary Agency during his direct placement in the work release program from May 15, 2008 until August 15, 2008. However, Livers failed to notify his probation officer or community corrections that he was not employed during a period of time from August 15, 2008 to October 14, 2008. During this time period, Livers provided false employment documentation and continued to report to the jail for twelve hours a day. Once discovered, Livers was arrested and incarcerated on October 14, 2008. He remained incarcerated throughout the proceedings.

On October 29, 2008, Livers admitted to a violation of his community corrections work release program and probation. The trial court revoked the balance of Livers’s

work release and probation and ordered him to execute the remainder of his sentence with the Department of Correction (“DOC”). The trial court then credited Livers with 110 days of time served and 110 days of good time credit. Livers received credit for time served from May 15, 2008 until August 15, 2008 and from October 14, 2008 until October 29, 2008. The trial court declined to give Livers credit for time served from August 15, 2008 until October 14, 2008, the period when Livers was in violation of his community corrections work release program. Livers now appeals

### **Discussion and Decision**

Livers argues that the trial court exceeded its authority by denying him credit time for the time served between August 15, 2008 and October 14, 2008, during his violation of community corrections. For purposes of appellate review, we treat a hearing on a petition to revoke a placement in a community corrections program the same as we do a hearing on a petition to revoke probation. Brooks v. State, 692 N.E.2d 951, 953 (Ind. Ct. App. 1998), trans. denied. The similarities between the two dictate this approach. Both probation and community corrections programs serve as alternatives to commitment to the DOC and both are made at the sole discretion of the trial court. Million v. State, 646 N.E.2d 998, 1001 (Ind. Ct. App. 1995). A defendant is not entitled to serve a sentence in either probation or a community corrections program. Rather, placement in either is a “matter of grace” and a “conditional liberty that is a favor, not a right.” Id. at 1002 (quoting Gilfillen v. State, 582 N.E.2d 821, 824 (Ind. 1991)).

As an initial matter, the State argues that Livers waived this issue by failing to raise it before the trial court. “It is well-settled that in order to properly preserve an issue

for appellate review, one must state with reasonable specificity the grounds for his objection while before the trial court.” Yurina v. State, 474 N.E.2d 93, 99 (Ind. 1985). Because Livers failed to raise this issue before the trial court, the issue must constitute a fundamental error which is an exception to waiver. Benson v. State, 762 N.E.2d 478, 755 (Ind. 2002).

The fundamental error exception is extremely narrow. Jewell v. State, 887 N.E.2d 939, 942 (Ind. 2008). Fundamental error is a substantial, blatant violation of basic principles rendering the trial unfair to the defendant and, thereby, depriving the defendant of fundamental due process. Carter v. State, 738 N.E.2d 665, 677 (Ind. 2000). The error must be so prejudicial to the rights of a defendant as to make a fair trial impossible. Id. An improper sentence constitutes fundamental error and cannot be ignored on appeal. Groves v. State, 823 N.E.2d 1229, 1232 (Ind. Ct. App. 2005). While Livers failed to raise this issue before the trial court, we will address the issue since the denial of credit time implicates Livers’s liberty interest and fundamental due process.

As we noted in Campbell v. State, 714 N.E.2d 678 (Ind. Ct. App. 1999), only the DOC may deny credit time. Thus, the Campbell court held that the trial court exceeded its authority when it denied the defendant’s credit time for time served in community corrections prior to his violation. In Campbell, the defendant was ordered to serve two years in the work release program. After several warnings by a staff member and being fired by his employer, the community corrections work release program notified the trial court that Campbell had violated the terms of his release. Campbell admitted to the violations, the trial court terminated his placement in work release and remanded him to

the DOC for the balance of his sentence. Campbell requested credit for the time he spent on work release; however, the trial court denied him any credit for time spent on work release. On appeal, we determined that only the DOC has the authority to deny credit time and that the trial court exceeded its authority when it denied Campbell credit time for time spent on work release. The Indiana Supreme Court in Robinson v. State, 805 N.E.2d 783, 792 (Ind. 2004), corrected Campbell by stating that the trial court determines credit for time served as of the date of sentencing subject to modification by the DOC pursuant to statute, not that the DOC makes the initial determination of credit for time served.

While we acknowledge the factual differences between Campbell and the instant case, the underlying statutory analysis remains the same. Indiana Code section 35-38-2.6-5 (2004) states:

If a person who is placed under this chapter violates the terms of the placement, the court may, after a hearing, do any of the following:

- (1) Change the terms of the placement.
- (2) Continue the placement.
- (3) Revoke the placement and commit the person to the department of correction for the remainder of the person's sentence.

Indiana Code section 35-38-2.6-5(a), (b) (2004) provides that a person placed in a community corrections program is entitled to credit time and may be deprived of that credit time “under rules adopted by the department of correction under IC 4-22-2.” The DOC is statutorily required to adopt rules related to the discipline of committed persons. Id. Indiana Code section 11-11-5-3 (2004) expressly permits the DOC to deprive a prisoner of earned credit time. However, Indiana Code section 35-50-6-5(b) requires that

before that deprivation of credit time occurs, the prisoner must be granted a hearing to determine guilt or innocence and is entitled to procedural safeguards. See Ind. Code § 35-50-6-4 (2004).

In this case, the trial court did not have the authority to deprive Livers of the earned time credit, when that authority was vested by statute in the DOC. For the foregoing reasons, the trial court's judgment is reversed with instructions to vacate its order regarding the denial of Livers's credit time in accordance with this opinion.

Reversed and remanded.

RILEY, J., and KIRSCH, J., concur.