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APPELLANT PRO SE:

ANDREW CATE
Pendleton, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE DONGIEUX WIGGINS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANDREW CATE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0907-PC-626
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-9111-PC-162505

December 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Andrew Cate, acting pro-se, appeals the denial of his motion to correct error whereby he sought reconsideration of the denial of his motion to correct an erroneous sentence. We affirm.

Issue

Cate presents the sole issue of whether he is subject to an erroneous sentence because the trial court failed to specify credit time earned and the Indiana Department of Correction ("the DOC") then calculated his release date by deducting only his actual time served in pre-trial confinement.

Facts and Procedural History

In 1991, Cate shot and killed his two-year-old daughter. He was charged with murder, and a jury found him guilty but mentally ill. He was sentenced to sixty years imprisonment. His conviction was affirmed on direct appeal in Cate v. State, 644 N.E.2d 546 (Ind. 1994). Cate subsequently filed a petition for post-conviction relief, which was denied. Cate appealed, and this Court, finding Cate's sentence to be manifestly unreasonable, reversed and remanded with instructions to resentence Cate to a term of fifty years. Cate v. State, No. 49A05-0407-PC-374, slip op. at 2 (Ind. Ct. App. May 12, 2005).

On September 29, 2005, Cate was resentenced to fifty years imprisonment, and an Abstract of Judgment was submitted to the DOC. It indicated that Cate was in confinement 496 days prior to his original sentencing date of March 30, 1993, and thus had been confined since November 20, 1991. The abstract form did not specify credit time earned. The DOC

calculated Cate's earliest release date as November 18, 2016 (twenty-five years from Cate's initial incarceration date, assigned by the DOC as Cate's adjusted or "effective" commitment date). App. 39.

On February 26, 2009 and on March 5, 2009, Cate filed grievances with the DOC alleging that the DOC had given him 496 days credit for time actually served but had failed to award him 496 days credit time. The DOC denied Cate's request for modification, explaining that he had been given credit time for presentence confinement, as his "effective date of sentence" used by the DOC was November 20, 1991, and his earliest release date was November 18, 2016 (one half of the fifty-year sentence).

On May 12, 2009, Cate filed a pro-se motion to correct erroneous sentence, requesting a new abstract of judgment showing his entitlement to 496 days credit for actual confinement and 496 days credit time. The motion was denied, and Cate filed a motion to correct error, which was also denied. This appeal ensued.

Discussion and Decision

Cate and the State agree that Cate, as of the time of his sentencing, had 496 actual days of time served, and that he was entitled to another 496 days for credit time, for a total of 992 days. The State contends that Cate was given proper credit by the DOC, while Cate contends that he has not been given credit time of 496 days and is entitled to a judgment of conviction specifying this credit time.

Indiana Code Section 35-50-6-3 provides that Indiana prisoners are placed into a class

for the purpose of earning credit time.[1] Each inmate who is not a credit restricted felon is initially assigned to Class I, whereby he or she earns one day of credit time for every day imprisoned for a crime or confined awaiting trial or sentencing. Ind. Code § 35-50-6-4(a). Pursuant to Indiana Code Section 35-38-3-2, trial courts are required to certify copies of the judgment of conviction to the receiving authority, and this sentencing order is to include the amount of credit, including credit time earned, for time spent in confinement before sentencing.

An inmate who believes he has been erroneously sentenced may file a motion to correct the sentence pursuant to Indiana Code Section 35-38-1-15, which provides:

> If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

Such a motion may only be filed to address a sentence that is erroneous on its face. Neff v. State, 888 N.E.2d 1249, 1251 (Ind. 2008). An inmate's allegation that the trial court has not included credit time earned in its sentencing is the type of claim appropriate for a motion to correct sentence. Id. However, the Indiana Supreme Court, in Robinson v. State, 805 N.E.2d 783 (Ind. 2004), adopted a presumption that "[s]entencing judgments that report only days spent in pre-sentence confinement and fail to expressly designate credit time earned shall be understood by courts and by the Department of Correction automatically to award the number

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[1] Credit time is a statutory award for a lack of conduct that violates institutional rules. State v. Mullins, 647 N.E.2d 676, 678 (Ind. Ct. App. 1995).

of credit time days equal to the number of pre-sentence confinement days." Id. at 792. Where, as here, an inmate files a motion to correct an erroneous sentence in a county that regularly does not issue judgments of conviction, the trial court's abstract of judgment functions as the judgment of conviction. Id.

The Neff Court explained the proper method of calculating a prisoner's earliest release date, first observing "when an offender is sentenced and receives credit for time served, earned credit time, or both, that time is applied to the new sentence immediately, before application of prospective earned credit time, in order to determine the defendant's earliest release date." Id. The court then began the calculation with the total days of the sentence, subtracted the time served at sentencing, subtracted the Class I credit at sentencing, and arrived at "time left to serve," which was halved to determine an earliest release date. Id.[2]

Accordingly, an appropriate calculation in this instance is as follows:

Cate's 50-year sentence	18,262 days[3]
Actual presentence time served	-496 days
Credit Time – presentence	-496 days
Time remaining at DOC upon March 30, 1993 commitment	17,270 days
One-half (assuming Credit I class)	8,635 days

[2] The Neff Court included the following calculation table:

20-year sentence	7,300 days
Time already served at sentencing	-856 days
Earned Class I credit at sentencing	-856 days
Time left to serve	5,588 days
Time to serve with Class I credit (half of days time left)	2,794 days

This calculation gave Neff an earliest release date of March 1, 2012. Neff, 888 N.E.2d at 1251-52.

[3] 50 X 365 days = 18,250 days. In a fifty-year span of time, there are twelve leap days to be added.

8,635 days from 3-30-93 – earliest release date – November 18, 2016.

Although the DOC used a different methodology, that of "adjusting" the DOC commitment date back to November 20, 1991, the earliest release date remains November 18, 2016. Cate has been awarded credit time for his presentence incarceration.

Affirmed.

BAKER, C.J., and ROBB, J., concur.