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**IN THE  
COURT OF APPEALS OF INDIANA**

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KENNETH CARSON,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 67A04-1009-CR-585

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APPEAL FROM THE PUTNAM CIRCUIT COURT  
The Honorable Matthew L. Headley, Judge  
Cause No. 67C01-0908-FA-135

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**March 2, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

The Putnam Circuit Court sentenced Kenneth Carson to fifty years with fifteen years suspended for two counts of Class A felony child molesting and awarded him credit time of 444 (222 actual) days. Carson now appeals the trial court's calculation of his credit time. He argues that he is entitled to credit time stemming back to when he was served with the arrest warrant while incarcerated in the Owen County Jail on an unrelated charge, instead of when he was sentenced on that charge in Owen County. Because we are unable to discern whether the trial court ordered Carson's sentence in this case to be served concurrent or consecutive to his Owen County sentence, which impacts the amount of credit time which Carson is entitled to, we remand this case in accordance with the State's request.

## **Facts and Procedural History**

Between March 1 and April 7, 2009, Carson put his finger in his three-year-old grandson's anus and rubbed his penis on the child's anus. These events occurred in Putnam County, Indiana. On August 11, 2009, the State charged Carson in Putnam County with Class A felony child molesting, Class D felony operating as a HTV, and being a habitual offender. The Putnam County arrest warrant was served on Carson on August 14, 2009, while he was confined in the Owen County Jail on an unrelated charge.

Carson was sentenced on the Owen County charge on February 10, 2010. On February 12, 2010, the State added charges in Putnam County of Class A felony child molesting and Class A felony attempted child molesting. Carson's initial hearing on all the Putnam County charges was February 15, 2010.

In July 2010, Carson and the State entered into a plea agreement whereby Carson pled guilty to both counts of Class A felony child molesting, and the State agreed to dismiss the remaining counts. The agreement provided that Carson's sentence "shall be open to argument, except that the sentences on these counts shall run concurrently and that any executed sentence shall be capped at thirty-five (35) years." Appellant's App. p. 46.

A sentencing hearing was held on September 2, 2010. The issue of Carson's credit time immediately surfaced. Carson believed that he was entitled to credit time in this case for the time he spent in the Owen County Jail. Defense counsel had the abstract of judgment from Owen County, which was signed by Judge Nardi on February 10, 2010, and provided that "[the Owen County] sentence was to run concurrent with . . . the Putnam County sentence . . . ." Tr. p. 8. The Putnam Circuit Court found two aggravators, Carson's extensive criminal history and position of trust with the victim, and one mitigator, his guilty plea, and sentenced him to fifty years with fifteen years suspended with credit for 444 (222 actual) days. The court highlighted that it calculated Carson's credit time using "the date of his sentencing in Owen County," which "was 2-10-10." *Id.* at 22. Neither the Sentencing Order nor the Abstract of Judgment affirmatively indicates whether this sentence is to run concurrent or consecutive to Carson's Owen County sentence. Carson now appeals his credit time.

### **Discussion and Decision**

Carson contends that the Putnam Circuit Court erred in calculating his credit time. He argues that because the Owen County judge ordered the sentences in both the Owen

County and Putnam County cases to run concurrently, he should have received credit time in this case dating back to August 14, 2009, which is when the Putnam County arrest warrant was served on him in the Owen County Jail, and not February 10, 2010, which is when he was sentenced in Owen County. The State argues that because it is unclear whether the Putnam Circuit Court intended to run Carson's sentence in this case concurrent or consecutive to his Owen County sentence and that decision impacts whether Carson is entitled to additional credit time dating back to August 14, 2009, this Court should "remand the case back to the trial court for a determination of whether the sentence imposed was to run concurrent[] or consecutive[] to the previously imposed sentence from Owen County." Appellee's Br. p. 3.

The statutory authority to impose consecutive sentences is located at Indiana Code section 35-50-1-2(c), which provides in pertinent part:

Except as provided in subsection (d) or (e), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the:

- (1) aggravating circumstances in IC 35-38-1-7.1(a); and
- (2) mitigating circumstances in IC 35-38-1-7.1(b);

in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively *even if the sentences are not imposed at the same time.*

(Emphasis added). The State acknowledges that consecutive sentences are not mandatory according to Indiana Code section 35-50-1-2(d), which provides:

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; or

(2) while the person is released:

- (A) upon the person's own recognizance; or
- (B) on bond;

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.

Because this discretion exists, if the trial court meant Carson's sentence in this case to run concurrent to his Owen County sentence in accordance with Judge Nardi's abstract of judgment, then Carson is entitled to additional credit time in this case. Indiana Code section 35-50-6-3(a) provides that "[a] person assigned to Class I earns one (1) day of credit time for each day the person is imprisoned for a crime or *confined awaiting trial or sentencing*." (Emphasis added). "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, [Section] 35-50-6-3 entitles him to receive credit time applied against each separate term." *Stephens v. State*, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), *trans. denied*. In contrast, where a person receives consecutive terms, he is only allowed credit time against the total or aggregate of the terms. *Id.* To award "double" credit in that instance would defeat the intent of the legislature. *Id.* Accordingly, if the trial court intended Carson's sentence in this case to run concurrent to his Owen County sentence, then Carson is entitled to credit time from August 14, 2009, to September 2, 2010, the date of sentencing in this case. However, if the court intended Carson's sentence to run consecutively, it would start at the completion of his Owen County

sentence, which we know nothing about from this record. We therefore remand to the trial court for clarification.

Remanded.

BAKER, J., and BARNES, J., concur.