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APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

LENN IVY
Pendleton, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LENN IVY,)
)
 Appellant-Petitioner,)
)
 vs.) No. 49A02-0903-CR-289
)
 STATE OF INDIANA,)
)
 Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0408-FB-155928

October 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Lenn Ivy, pro se, appeals the trial court's denial of his motion to correct erroneous sentence.

We affirm.

ISSUE

Whether the trial court abused its discretion in denying Ivy's motion to correct erroneous sentence.

FACTS

We adopt the statement of facts set forth in this Court's decision in *Ivy v. State*, No. 49A02-0603-CR-167, slip op. at 2 (Ind. Ct. App. Feb. 28, 2007), which reads, in pertinent part, as follows:

On August 30, 2004, the State charged Ivy with Burglary, as a Class B felony; Theft, as a Class D felony; and Resisting Law Enforcement, as a Class A misdemeanor. On October 20, 2004, over Ivy's objection, the trial court granted the State's motion to add an habitual offender charge. As a result of that amendment to the charging information, Ivy requested and was granted a continuance of his trial date.

On May 11, 2005, Ivy pleaded guilty under a written plea agreement to burglary, as a Class B felony, and to the "habitual offender enhancement [,]" and the State dropped the theft and resisting law enforcement charges. Ivy also agreed to a sixteen-year executed sentence. The trial court sentenced Ivy to six years on the burglary count to be enhanced by ten years based on Ivy's habitual offender status.

(internal footnote and citation omitted). Thus, Ivy received an executed sentence of 5,840 days. On May 25, 2005, the Marion Superior Court entered the abstract of judgment, which showed that Ivy had served 272 days in jail prior to sentencing. The abstract of judgment, however, did not specify an amount of earned credit time.

On or about January 9, 2009, Ivy filed a formal grievance through the Department of Correction's offender grievance program. He complained that he had not been credited with earned credit time, and therefore, sought to have 272 days of earned credit time applied toward his sentence. The DOC denied his request on January 14, 2009.

On March 4, 2009, Ivy filed a motion to correct erroneous sentence, arguing that the trial court failed to award "272 days good time earned credit at sentenc[ing]" (App. 62). The trial court denied Ivy's motion on March 5, 2009.

DECISION

Ivy asserts that the trial court abused its discretion in denying his motion to correct erroneous sentence. Specifically, he argues that his 272 days of earned credit time was not applied to his sentence.

A motion to correct erroneous sentence "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) (quoting *Robinson v. State*, 805 N.E.2d 783, 786 (Ind. 2004)). "An allegation by an inmate that the trial court has not included credit time earned in its sentencing is the type of claim appropriately advanced by a motion to correct sentence." *Id.* We review a trial court's decision on such a motion for abuse of discretion. *Newsom v. State*, 851 N.E.2d 1287, 1289 (Ind. Ct. App. 2006).

¹ Ivy also argued that the DOC incorrectly showed his sentence to be 5,844 days. He does not raise this issue on appeal. Thus, it is waived. *See Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) ("Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."), *trans. denied*.

Generally, “a motion to correct an erroneous sentence may only arise out of information contained on the formal judgment of conviction, and not from an abstract of judgment.” *Neff*, 888 N.E.2d at 1251. Marion County, however, does not issue judgments of conviction. Thus, “the trial court’s abstract of judgment will serve as an appropriate substitute for purposes of making the claim.” *Id.*

Pursuant to Indiana Code section 35-50-6-3(a), “[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.” Where, such as in this case, the abstract of judgment does not specify an amount of earned credit time, “the presumption shall be that the inmate is a Class I offender and has earned an amount of credit time equal to the amount of time already served.” *Young v. State*, 888 N.E.2d 1253, 1254 (Ind. 2008). Accordingly, Ivy is presumed to have earned 272 days of credit time for the 272 days he was incarcerated awaiting trial or sentencing. Thus, the trial court properly denied his motion to correct erroneous sentence. *See id.* (finding that the denial of a motion to correct erroneous sentence is proper where the presumption that an offender is entitled to earned credit time equal to served credit time applies).

Ivy also asserts a calculation error in determining his earliest possible release date. He argues that he has 2,648 days to serve with Class I credit, thereby giving him an earliest possible release date of November 28, 2011, rather than the DOC’s date of August 25, 2012. As to the calculation of his earliest possible release date, Ivy has failed to demonstrate that he has exhausted the remedies available through the offender grievance process. He therefore is precluded from now pursuing a remedy in the state

court system. *See Young*, 888 N.E.2d at 1254; *Neff*, 888 N.E.2d at 1252.² Accordingly, we find no abuse of discretion in the trial court's denial of Ivy's motion to correct erroneous sentence.

Affirmed.

ROBB, J., and MATHIAS, J., concur.

² We note that it appears that Ivy has incorrectly calculated his release date by first applying his prospective Class I earned credit to his 16-year sentence and then subtracting both his time already served at sentencing and earned credit time. This results in the following calculation: (16-year sentence \div 2) - 272 days already served at sentencing - 272 days earned at sentencing. However, "[w]hen 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." *Neff*, 888 N.E.2d at 1251. Thus, the correct calculation is as follows: (16-year sentence - 272 days already served at sentencing - 272 days earned at sentencing) \div 2.