the prosecution's failure to reserve the right to seek conditions of probation created an ambiguity that should be construed against the State.

Most important, the facts show that the prosecution did not intend to reserve the right to recommend incarceration as a condition of probation when Landera entered his plea. Instead, the State had a change of heart after the court ordered Landera's sex offender evaluation. But that is exactly the kind of government conduct that the Due Process Clause prohibits. I believe that the majority opinion will raise serious constitutional questions whether a defendant has voluntarily and knowingly entered a plea of guilty, particularly if the court did not advise the defendant that it could confine him or her to a longer period in jail than what the defendant had agreed to in a plea agreement.[7]

McCormack, J., joins in this concurrence.

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[7] See *State v. Cutler*, 121 Ariz. 328, 590 P.2d 444 (1979).

State of Nebraska, appellee, v.
Micheal C. Wills, appellant.
826 N.W.2d 581

Filed February 22, 2013. Nos. S-11-1026, S-12-415.

1. **Sentences: Appeal and Error.** Whether a defendant is entitled to credit for time served and in what amount are questions of law. An appellate court reviews questions of law independently of the lower court.
2. ____: ____. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Sentences.** Credit for time served should be taken into account so that the effective sentence is within the statutory limits.
4. ____. With consecutive sentences, periods of presentence incarceration are credited against the aggregate of all terms imposed. With concurrent sentences, such periods are credited against the longest sentence, but are, in effect, applied against all the sentences.
5. **Sentences: Probation and Parole: Appeal and Error.** It is within the discretion of the trial court whether to impose probation or incarceration, and an appellate court will uphold the court's decision denying probation absent an abuse of discretion.

Appeals from the District Court for Lancaster County: JEFFRE CHEUVRONT and STEPHANIE F. STACY, Judges. Affirmed in part, and in part reversed and remanded.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, George R. Love, and Dain J. Johnson, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

In these consolidated cases, the primary issue presented is how to properly credit a defendant with time served because of two separate criminal cases, in which two different judges sentenced the defendant at different times.

BACKGROUND

A timeline of events is necessary to set the stage for this appeal. On March 26, 2010, law enforcement arrested and jailed Micheal C. Wills for fleeing from law enforcement and leaving the scene of an injury accident (case No. S-12-415). Wills remained in jail until April 2, when the district court apparently released him on bond.

On May 28, 2010, law enforcement again arrested and jailed Wills, but on an unrelated charge of child abuse resulting in death (case No. S-11-1026). Wills apparently was unable to post bond in case No. S-11-1026. Presumably because Wills was already in jail, on June 3, Wills surrendered on his bond in case No. S-12-415. So at that point, Wills was in jail because of both cases.

On October 14, 2011, in case No. S-11-1026, a jury convicted Wills of the lesser crime of negligent child abuse, a Class I misdemeanor.[1] That same day, the court released Wills on bond, though he remained in jail because he had previously

[1] See Neb. Rev. Stat. § 28-707 (Reissue 2008).

surrendered on his bond in case No. S-12-415. On October 17, 2011, however, the court reinstated Wills' bond in case No. S-12-415 and Wills was released from jail.

In sum, the record shows that Wills was in jail solely because of case No. S-11-1026 from May 28 through June 2, 2010, a total of 6 days. The record shows that Wills was in jail solely because of case No. S-12-415 from March 26 through April 2, 2010, and from October 14 through 16, 2011, a total of 11 days. Finally, the record shows that Wills was in jail because of both cases from June 3, 2010, through October 13, 2011, a total of 498 days.

On November 2, 2011, in case No. S-11-1026, the court sentenced Wills to 1 year in jail, with credit for 504 days already served, which included all 498 days spent in jail on both cases. On January 24, 2012, in case No. S-12-415, Wills pleaded guilty to operating a motor vehicle to avoid arrest, a Class I misdemeanor,[2] and leaving the scene of an injury accident, a Class IIIA felony.[3] On April 18, a different judge of the court sentenced Wills to 2 to 4 years in prison, with credit for 11 days served. The court did not give Wills credit for any remaining days from the 498 days credited toward his earlier 1-year sentence. The court also revoked his operator's license for 5 years and ordered him not to drive any vehicle for 5 years.

This appeal involves the proper way to credit Wills for the 498 days he spent in jail on both cases.

ASSIGNMENTS OF ERROR

Wills assigns, restated and consolidated, that the district court erred in:

(1) applying all 498 days of credit for time served toward his 1-year sentence in case No. S-11-1026, thereby preventing the court from applying some of that time toward his sentence in case No. S-12-415; and

(2) imposing excessive sentences in case No. S-12-415.

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[2] See Neb. Rev. Stat. § 28-905 (Reissue 2008).

[3] See Neb. Rev. Stat. §§ 60-697 and 60-698 (Reissue 2010).

STANDARD OF REVIEW

Our standard for reviewing a district court's calculation and application of credit for time served is a bit unclear. For example, in *State v. Torres*,[4] the sole assigned error was that the court erred in failing "to credit [the defendant] for time served in jail while awaiting trial and sentence."[5] We first noted that we would not disturb a sentence within statutory limits unless the court had abused its discretion.[6] But we noted that interpretation of a statute presented a question of law, which we would review independently of the lower court.[7] In more recent cases, however, we have noted that interpretation of a statute is a question of law and that "[w]hether a defendant is entitled to credit for time served is also a question of law."[8]

[1] The latter approach is correct. No part of crediting time served requires a court to exercise its discretion, so we do not review the court's findings for abuse of discretion. We made this clear in *State v. Clark*[9]:

> [T]he credit for time served to which a defendant is entitled is an absolute and objective number that is established by the record. Therefore, the exact credit for time served to which a defendant is entitled is objective and not discretionary. The court has no discretion to grant the defendant more or less credit than is established by the record.

So, we clarify that whether a defendant is entitled to credit for time served and in what amount are questions of law. We review questions of law independently of the lower court.[10]

[2] The standard for reviewing an excessive sentence claim is well established: We will not disturb a sentence imposed

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[4] *State v. Torres*, 256 Neb. 380, 590 N.W.2d 184 (1999).

[5] *Id.* at 382, 590 N.W.2d at 185.

[6] See *id.*

[7] See *id.*

[8] *State v. Becker*, 282 Neb. 449, 451, 804 N.W.2d 27, 29 (2011).

[9] *State v. Clark*, 278 Neb. 557, 562, 772 N.W.2d 559, 563 (2009).

[10] See, e.g., *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012).

within the statutory limits absent an abuse of discretion by the trial court.[11]

ANALYSIS

Credit for Time Served

Wills takes issue with the court's crediting of his time served. The record shows that 498 days of Wills' presentence confinement qualified as credit in either case. Wills asserts that the sentencing judge in case No. S-11-1026 erred in crediting all 498 days to his 1-year sentence and that the sentencing judge in case No. S-12-415 erred in failing to credit him with the would-be remaining time. The State argues that the first sentencing judge had no discretion to enter an amount other than Wills' total credit for time served, which included all 498 days. And the State argues that once the first sentencing judge credited all the time to the first sentence, the second sentencing judge could not grant credit for the same time, because time served may be credited only once.

The calculation and application of credit for time served are controlled by statute. Different statutes address credit for time served based on whether the defendant is sentenced to jail or prison.[12] But those provisions are similar,[13] and the reasoning of cases involving either provision is applicable here. This case hinges on the court's credit for time served in case No. S-11-1026, involving a jail sentence, so we look to § 47-503. It provides, in relevant part:

> Credit against a jail term shall be given to any person sentenced to a city or county jail for time spent in jail as a result of the criminal charge for which the jail term is imposed or as a result of conduct upon which such charge is based.

Wills argues that the court in case No. S-11-1026 erred in applying all 498 days of credit to his 1-year sentence. He

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[11] See, e.g., *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013).

[12] See Neb. Rev. Stat. §§ 47-503 (Reissue 2010) and 83-1,106 (Reissue 2008).

[13] Compare § 47-503 with § 83-1,106(1).

argues that the court should have applied only the amount of credit necessary to satisfy his sentence, which after good time reduction, he alleged was 190 days. Wills argues that the court was aware of his pending case in case No. S-12-415 and that if the court's crediting all 498 days "truly exhausted" Wills' credit, then Wills essentially served a sentence in excess of the statutory maximum.[14]

We have not found any factually comparable cases in Nebraska or in other jurisdictions. The answer is not obvious. But certain principles of law are relevant. It is clear that Wills was entitled to credit for time spent in jail before sentencing.[15] It is also clear that Wills was entitled to good time reduction for time spent in jail before sentencing.[16] And credit for time served may be applied only once.[17]

We conclude that the court erred in crediting all 498 days to Wills' 1-year sentence. Section 47-503 provides that a defendant is entitled to "[c]redit against" his jail term. In this context, "credit" is best defined as "a deduction from an amount otherwise due."[18] Unlike a bank account, a defendant cannot go below zero in terms of days left on a prison sentence. So the judge could not "credit" Wills with more time served than the length of his sentence. Moreover, in this context, "against" is best defined as "in exchange for," "in return for," "as a charge upon," or "to the debit of."[19] Section 47-503 grants credit for time served on a 1-to-1 ratio—so the court could not grant credit "against" Wills' jail term in excess of the length of the sentence.

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[14] Brief for appellant at 18.

[15] See § 47-503.

[16] See, 2010 Neb. Laws, L.B. 712, § 40; Neb. Rev. Stat. § 47-502 (Reissue 2010); *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996); *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988).

[17] See, e.g., *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004).

[18] Webster's Third New International Dictionary of the English Language, Unabridged 533 (1993).

[19] *Id.* at 39.

Though factually distinguishable, the rationale of *State v. Knight*[20] supports our conclusion. In *Knight*, Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981) mandated that the minimum term of an indeterminate sentence not exceed more than one-third of the maximum term. The court sentenced the defendant to 18 months to 3 years in prison on a Class IV felony, for which the maximum term was 5 years, and the court, exercising its discretion, gave no credit for 151 days already served. We concluded that "[w]hen the approximately 5-month period that defendant was in jail is added to the 18-month sentence, defendant is serving a minimum of 23 months—an amount in excess of the statutory minimum."[21] We concluded that the court, by withholding credit for time served, had improperly exceeded the statutory sentencing limit.[22]

[3] The underlying principle of *Knight* is that credit for time served should be taken into account so that the effective sentence is within the statutory limits. The court did not withhold credit for time served, but granted credit in *excess* of the sentence. But if all 498 days of Wills' credit were exhausted on a 1-year sentence, then Wills effectively served a term of imprisonment greater than the possible maximum sentence for negligent child abuse under then-existing Nebraska law.

We also note that *State v. Banes*,[23] like this case, involved time which could have been credited toward the defendant's sentence in either of two unrelated criminal cases. But in *Banes*, the court—and presumably the same judge—was able to sentence the defendant on both cases on the same day to concurrent sentences. So the defendant received full credit for all of the time he spent in presentence confinement.

[4] Had Wills' cases similarly lined up as in *Banes* for sentencing—regardless whether the sentences imposed were consecutive or concurrent—he would have received the full benefit of his 498 days already served. This is because, with

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[20] *State v. Knight*, 220 Neb. 666, 371 N.W.2d 317 (1985).

[21] *Id.* at 668, 371 N.W.2d at 319.

[22] See *id.* See, also, *State v. Ross*, 220 Neb. 843, 374 N.W.2d 228 (1985).

[23] See *Banes, supra* note 17.

consecutive sentences, periods of presentence incarceration are credited against the *aggregate* of all terms imposed.[24] And with concurrent sentences, such periods are credited against the longest sentence, but are, in effect, applied against all the sentences.[25] We see no reason for Wills to receive less than the full benefit of his time already served simply because his cases progressed differently or because he was not sentenced contemporaneously for his offenses by the same judge.

We remand the cause for the court to apply the appropriate amount of credit to Wills' sentences. In case No. S-11-1026, this requires the court to calculate and apply only the credit necessary to satisfy Wills' 1-year sentence after any reduction for good time. And in case No. S-12-415, the court would then credit any remaining days as time served against Wills' 2- to 4-year combined sentences.[26]

The State disagrees with this result. It argues that this requires the court to exercise discretion in calculating the amount of time to credit against Wills' sentences, in contravention of our mandate in *Clark*. We disagree. The court will not be exercising its discretion, but simply calculating the length of Wills' sentence following good time reduction and then applying credit against his sentence in that amount. This is all done by statute and basic math.

Second, the State argues that requiring the judge to consider good time credit assumes that Wills would have been granted that credit. But the judge need not speculate whether the defendant has earned good time credit for time already spent in jail; that information is readily discoverable. The judge simply must determine whether Wills followed the jail rules during the time spent in jail.[27] This determination is nothing new, as

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[24] See, *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011); *State v. Sanchez*, 2 Neb. App. 1008, 520 N.W.2d 33 (1994). See, also, Arthur W. Campbell, Law of Sentencing § 9:28 (3d ed. 2004 & Supp. 2012-13).

[25] See, e.g., *Banes, supra* note 17.

[26] See, *id.*; § 83-1,106.

[27] See § 47-502.

it is well established that good time credit is granted for time served before sentencing.[28]

Finally, this result does not permit a defendant to "bank" credit against a future sentence.[29] Instead, we are simply concluding that a court cannot credit more time served against a sentence than the actual length of the sentence. It just so happens that Wills accrued the 498 days of credit on *both* criminal cases, though they were separate, unrelated incidents. And because not all of the credit was used, he is able to use any applicable remaining credit to offset part of the other sentences.

Excessive Sentences

Wills argues that the court imposed excessive sentences in case No. S-12-415. Specifically, Wills argues that the court should have imposed probation rather than incarceration. The State, of course, argues that incarceration was appropriate. The record shows that the court did not abuse its discretion, so we affirm its sentencing order.

[5] The relevant principles of law are well known. It is within the discretion of the trial court whether to impose probation or incarceration, and we will uphold the court's decision denying probation absent an abuse of discretion.[30] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[31]

In imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[32]

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[28] See sources cited *supra* note 16.

[29] See, e.g., *State v. Fisher*, 218 Neb. 479, 356 N.W.2d 880 (1984).

[30] See, e.g., *State v. White*, 276 Neb. 573, 755 N.W.2d 604 (2008).

[31] See, e.g., *Pereira, supra* note 11.

[32] See, e.g., *id.*

The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[33]

Wills pleaded guilty to operating a motor vehicle to avoid arrest, a Class I misdemeanor, and leaving the scene of an injury accident, a Class IIIA felony. The record shows that law enforcement attempted to pull Wills' vehicle over for failure to stop at a stop sign. Wills fled from law enforcement at high speeds, and law enforcement pursued Wills' vehicle, both in cars and by helicopter. During the pursuit, Wills hit a deer and crashed his vehicle, and then fled the scene. Wills' wife was a passenger in the vehicle, and she was seriously injured in the crash. Law enforcement tracked Wills and found him hiding in a wooded area.

The court determined that probation was inappropriate and sentenced Wills to consecutive prison terms of 1 year for the misdemeanor and from 1 to 3 years for the felony. In rejecting probation, the court emphasized the serious nature of the crimes and Wills' history of driving at high rates of speed. The court also emphasized that incarceration was necessary for the protection of the public because there was a substantial risk, supported by the presentence report, that Wills would engage in further criminal conduct if placed on probation.

The sentences imposed were within the permissible statutory ranges.[34] And based on the evidence in the record, the court did not abuse its discretion in imposing incarceration. Wills' crimes were serious, and Wills' conduct was obviously dangerous to himself, his wife, law enforcement, and the general public. The presentence report also catalogs Wills' fairly extensive criminal history, which includes eight separate traffic violations (four for various levels of speeding), as well as other crimes such as marijuana possession and disturbing the peace. The court did not abuse its discretion in imposing incarceration, and we affirm the court's sentencing order.

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[33] See, e.g., *id*.

[34] See, §§ 28-905, 60-697, and 60-698; Neb. Rev. Stat. §§ 28-105 and 28-106 (Reissue 2008).

CONCLUSION

The court improperly credited all 498 days of Wills' time served to his 1-year sentence. A court cannot credit more time to a sentence than the length of the sentence. On remand, the court should credit only enough time served to satisfy the sentence in case No. S-11-1026, after reducing the sentence for good time. The court should then credit any applicable remaining time to Wills' sentences in case No. S-12-415. We also conclude that the record supports the court's sentencing order in case No. S-12-415, and so the court did not abuse its discretion. We affirm the court's decision in that regard.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

CASSEL, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. LARRY L. BRAUER, RESPONDENT.

827 N.W.2d 464

Filed February 22, 2013. No. S-11-1061.

Original action. Judgment of disbarment.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Larry L. Brauer, on January 10, 2013. The court accepts respondent's voluntary surrender of his license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on April 5, 1979. Formal charges were filed against respondent on December 7, 2011, generally alleging that respondent neglected matters and failed to respond to the