

**STATE of New Mexico, Plaintiff-Appellee,  
vs.  
Joseph Benjamin BACA, Defendant-Appellant.**

No. 1692

COURT OF APPEALS OF NEW MEXICO

1975-NMCA-053, 87 N.M. 495, 535 P.2d 1346

May 07, 1975

**COUNSEL**

Chester H. Walter Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Gerald H. Chakerian, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Santa Fe, Morton A. Resnick, Asst. Atty. Gen., for plaintiff-appellee.

**JUDGES**

WOOD, C.J., wrote the opinion. HERNANDEZ and LOPEZ, JJ., concur.

**AUTHOR:** WOOD

**OPINION**

WOOD, Chief Judge.

{1} Defendant does not complain of his burglary conviction; his complaint is directed to his sentence. The trial court sentenced defendant to a term of not less than one nor more than five years in the penitentiary "with credit for all pre-sentence confinement to be taken off the long end of said sentence." Defendant asserts the trial court has no authority to refuse to credit pre-sentence confinement against his minimum sentence. We agree.

{2} The fixing of penalties is a legislative function. State v. Hovey, (Ct. App.) 534 P.2d 777, 1975. Section 40A-29-25, N.M.S.A. 1953 (2d Repl. Vol.6) states:

"A person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the

period spent in pre-sentence confinement against any sentence finally imposed for that offense."

**{3}** The State contends that § 40A-29-25, supra, should be read as giving the sentencing judge discretion as to how pre-sentence confinement should be credited. That is not how the statute reads. The statute provides that pre-sentence confinement time is to be credited "against any sentence finally imposed for that offense." <sup>{\*496}</sup> "Any sentence" includes the minimum as well as the maximum sentence. See *Cooper v. Mailler*, 1 A.D.2d 279, 149 N.Y.S.2d 761 (1956); N.M. Att'y Gen. Op. No. 73-66, September 11, 1973; compare *State v. La Badie*, (Ct. App.), 534 P.2d 483, 1975.

**{4}** The Legislature having provided that pre-sentence confinement under § 40A-29-25, supra, is to be credited against "any sentence", the trial court had no authority to limit pre-sentence confinement to the maximum sentence. The judgment is unauthorized to the extent it has the effect of providing that pre-sentence confinement time is not to be credited against the minimum sentence.

**{5}** Oral argument in this case is unnecessary; the oral argument setting is vacated. The burglary conviction is affirmed. The cause is remanded with instructions to vacate the present sentence and impose a new sentence consistent with this opinion.

**{6}** It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.