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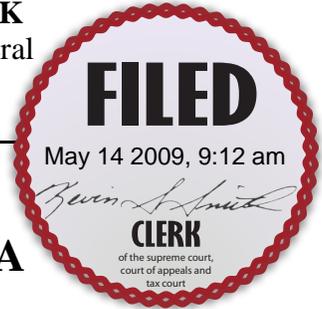
APPELLANT PRO SE:

JAMES A. ALEXANDER
Westville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

JAMES A. ALEXANDER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A04-0811-CR-672

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane W. Miller, Judge
Cause No. 71D01-9504-CF-158

May 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

James Alexander appeals the trial court's denial of his motion for modification of sentence. He raises two issues for our review that we consolidate and restate as whether the trial court properly denied his motion for modification. Concluding that the trial court was without authority to modify Alexander's sentence and therefore properly denied his motion, we affirm.

Facts and Procedural History

This is the third time this case has come before this court. The underlying facts were summarized in our previous unpublished opinion as follows:

On January 17, 1996, following a jury trial, Alexander was found guilty of murder. On March 29, 1996, the trial court issued a sentencing order stating: "[T]he Court has given some thought to all the factors and the Court does believe that the presumptive sentence is appropriate in this case. The Court will impose a sentence of 50 years." Alexander filed an appeal, arguing that he received ineffective assistance of counsel, and this court affirmed in an unpublished opinion.

On February 5, 2007, Alexander filed a motion to correct erroneous sentence. On March 30, 2007, the trial court granted the motion and reduced Alexander's sentence to forty years. The basis for this reduction was that the actual presumptive sentence that applied to Alexander's case was forty years, not fifty years. See Smith v. State, 675 N.E.2d 693, 697 (Ind. 1996) (recognizing that between July 1, 1994, and May 5, 1995, conflicting sentencing statutes existed, and holding that for murders committed in this timeframe, the presumptive sentence is forty years). However, the trial court refused to reassess the aggravating and mitigating circumstances or to consider Alexander's behavior subsequent to his initial sentencing hearing.

Alexander v. State, 2007 WL 4110620 at *1 (Ind. Ct. App., Nov. 20, 2007) (some citations omitted), trans. denied. We affirmed, holding that because a motion to correct erroneous sentence can only correct sentencing errors clear from the face of the

judgment, the trial court properly refused to consider circumstances outside the face of the judgment, including events that transpired subsequent to the original sentencing hearing. Id. at *2.

On March 5, 2008, Alexander filed a motion for modification of sentence pursuant to Indiana Code section 35-38-1-17 seeking to have the remainder of his sentence suspended. The trial court held a hearing at which it stated that although it “would really like to modify this sentence,” transcript at 7, it did not have legal authority to do so and denied Alexander’s motion. Alexander now appeals.

Discussion and Decision

Indiana Code section 35-38-1-17(a) provides that

[w]ithin 365 days after:

- (1) a convicted person begins serving the sentence imposed on the person;
 - (2) a hearing is held:
 - (A) at which the convicted person is present; and
 - (B) of which the prosecuting attorney has been notified; and
 - (3) the court obtains a report from the department of correction concerning the convicted person’s conduct while imprisoned;
- the court may reduce or suspend the sentence.

If more than 365 days have elapsed since the convicted person began serving his sentence, the court may reduce or suspend the sentence after a hearing at which the convicted person is present “subject to the approval of the prosecuting attorney.” Ind. Code § 35-38-1-17(b). Ultimately, the trial court has broad discretion to modify a sentence. Banks v. State, 847 N.E.2d 1050, 1053 (Ind. Ct. App. 2006), trans. denied. We will reverse only upon a showing of abuse of that discretion, that is, a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id.

Alexander was sentenced on March 29, 1996, to what the trial court believed was the then-presumptive sentence of fifty years. There were two conflicting statutes in effect at the time Alexander committed his crime, and it was subsequently determined that the presumptive sentence for his crime was actually forty years. See Smith, 675 N.E.2d at 697. Accordingly, pursuant to Alexander's motion, his erroneous sentence was corrected on March 30, 2007, to reflect a sentence of forty years. Alexander filed his motion for modification of sentence on March 5, 2008. Alexander argues that the sentence imposed on March 29, 1996 was void and that he was resentenced on March 30, 2007 and began serving a new sentence on that date. He thus contends that his March 5, 2008 motion for modification was filed within 365 days after he began serving his sentence and the approval of the prosecuting attorney was not required for the trial court to reduce or suspend his sentence.

Indiana Code section 35-38-1-15 provides that "[i]f the convicted person is erroneously sentenced, the mistake does not render the sentence void." See also Rowold v. State, 629 N.E.2d 1285, 1287-88 (Ind. Ct. App. 1994) ("[A]n erroneously imposed sentence is not void; rather the trial court is required to correct it."). The trial court has the power and the duty to correct an erroneously imposed sentence; however, the power extends only to the illegal portion of the sentence. Lane v. State, 727 N.E.2d 454, 456 (Ind. Ct. App. 2000). The trial court's action in March 2007 merely corrected Alexander's existing sentence to bring it in line with statutory authority. See Alexander, 2007 WL 4110620 at *2. Regardless of subsequent proceedings to determine when Alexander's sentence should properly end, he began serving the sentence on March 29,

1996. Accordingly, Alexander’s motion for modification was filed more than 365 days after he began serving his sentence, and the approval of the prosecuting attorney was required before the trial court could consider modifying his sentence.¹ In the absence of such approval, the trial court lacked authority to reduce or suspend Alexander’s sentence. See State v. Fulkrod, 753 N.E.2d 630, 633 (Ind. 2001) (holding that where the time limit had expired and the prosecutor refused to give approval, “the trial court lacked authority to modify [the] sentence”); see also Lane, 727 N.E.2d at 456 (“[B]arring a statutory grant of authority, the trial court’s judgment is *res judicata* even as to the trial court.”).²

Although we commend Alexander for his accomplishments while in prison,³ we conclude the trial court did not err in denying his motion for modification of sentence.⁴

Conclusion

The trial court properly denied Alexander’s motion for modification of sentence.

¹ We recognize, as Alexander points out, that he could not move to modify his forty-year sentence until the forty-year sentence had been imposed. However, he could have moved to modify his sentence at any time after he began serving it on March 29, 1996, even if the sentence had not been erroneous, and assuming he had so moved after March 29, 1997, would be in the same position he finds himself now: subject to the approval of the prosecuting attorney.

² Alexander also claims that failure to apply Indiana Code section 35-38-1-17(a) to his case violates due process and equal protection. Although he invokes the phrases “due process” and “equal protection,” Alexander does not cite the Fourteenth Amendment of the United States Constitution (other than in his standard of review) or Article I, section 23 of the Indiana Constitution, nor does he advance a constitutional argument to support his claim. As there is no recognized liberty interest in a sentence modification under Indiana law, Beanblossom v. State, 637 N.E.2d 1345, 1348 (Ind. Ct. App. 1994), trans. denied, and as all prisoners similarly situated are treated the same as Alexander, even a more fully developed constitutional argument would lack merit.

³ During the motion to correct erroneous sentence proceedings, Alexander “presented evidence that during his incarceration he had earned a G.E.D., an Associate’s Degree, a Bachelor’s Degree, and certification in carpentry, and had participated in psychological treatment.” Alexander, 2007 WL 4110620 at *1. We assume Alexander has received credit time for his educational degrees.

⁴ As we noted in Schweitzer v. State, 700 N.E.2d 488, 492 (Ind. Ct. App. 1998), trans. denied, if Alexander “believes the current 365-day time limit is too restrictive or that sentences should be reviewed without being subject to the approval of the prosecuting attorney,” such concerns should be addressed to the legislature. We are charged with applying the plain terms of the statute. Gauvin v. State, 883 N.E.2d 99, 103 (Ind. 2008).

Affirmed.

DARDEN, J., and BAILEY, J., concur.