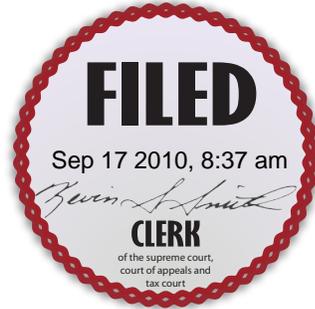


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

GORDON NORTHRUP, JR.,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 79A04-1003-CR-192

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy J. Williams, Judge
Cause No. 79D01-9908-CF-76

September 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Gordon Northrup, pro se, appeals the trial court's denial of his motion to correct error following its denial of his motion for modification of sentence. Northrup raises four issues for our review, which we consolidate and restate as whether the trial court properly denied Northrup's motion for modification of sentence pursuant to Indiana Code section 35-38-1-17. Concluding the trial court lacked authority to modify Northrup's sentence and therefore properly denied his motion, we affirm.

Facts and Procedural History

In the second of two prior appeals in this case, we recited the following factual and procedural background:

Northrup attempted to molest ten-year-old S.B. in March of 1999 when he pressed his penis against her vagina. On August 5, 1999, the State charged him with Class A felony attempted child molesting, Class B felony attempted child molesting, and two counts of Class C felony child molesting. On February 25, 2000, Northrup pled guilty to Class B felony attempted child molesting and to being an habitual offender. On March 22, 2000, the trial court sentenced Northrup to eighteen years executed with a thirty-year enhancement for being an habitual offender, for a total sentence of forty-eight years. * * * Northrup filed a belated appeal on May 19, 2006. He contended that the trial court erred by considering aggravators that were not found by a jury as required by Blakely v. Washington, 542 U.S. 296 (2004). We agreed to some extent and held:

In sum, with respect to Northrup's sentencing claims, we have found that the trial court erred upon Blakely grounds in considering as an aggravator the fact that Northrup knew he had a sexually transmitted disease and understood the risk of infecting the victim. We have also determined that the trial court should not have attributed additional aggravating weight to the factors of "failure to rehabilitate" and "need for correctional treatment of penal facility," both of which were derivative of the separate aggravator of Northrup's criminal history. Further, while we cannot say that the victim's age of ten may not be considered as a separate aggravator, this finding should be supported by specific facts and reasons

indicating why such age contributed to a particularly egregious form of attempted child molesting. Accordingly, we instruct the trial court upon remand to resentence Northrup in a manner not inconsistent with this opinion.

Northrup v. State, No. 79A02-0605-CR-413, slip op. at 6 (Ind. Ct. App. May 24, 2007). The trial court held a re-sentencing hearing on January 17, 2008. The trial court found two aggravators: Northrup's criminal history, including the fact that he was on probation at the time of the offense, and the fact that the victim recommended an aggravated sentence. After finding these two aggravators, the trial court again sentenced Northrup to forty-eight years.

Northrup v. State, No. 79A04-0803-CR-173, slip op. at 2-3 (Ind. Ct. App. June 18, 2008), trans. denied. Northrup again appealed, and we affirmed his sentence, rejecting his argument the trial court abused its discretion in resentencing him. We reasoned that even though the victim recommendation was not a valid aggravating factor, Northrup's criminal history was a serious aggravator and supported the enhanced sentence. Slip op. at 4-6.

On December 8, 2009, Northrup filed a motion for modification of his sentence. The State filed a response objecting to any modification. On December 30, 2009, the trial court issued its order denying Northrup's motion. Northrup then filed a motion to correct error, which the trial court also denied. Northrup now appeals.

Discussion and Decision

A trial court's authority to modify a sentence is governed by Indiana Code section 35-38-1-17, which provides:

- (a) Within three hundred sixty-five (365) days after:
 - (1) a convicted person begins serving the person's sentence;
 - (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. The court must incorporate its reasons in the record.

(b) If more than three hundred sixty-five (365) days have elapsed since the convicted person began serving the sentence and after a hearing at which the convicted person is present, the court may reduce or suspend the sentence, subject to the approval of the prosecuting attorney. . . .

* * *

(e) The court may deny a request to suspend or reduce a sentence under this section without making written findings and conclusions.

(Emphasis added).¹ Northrup filed his motion for modification of sentence well more than 365 days after he began serving his sentence. When more than 365 days have so elapsed, “a trial court lacks the requisite jurisdiction to modify a sentence . . . unless the prosecutor acquiesces in a defendant’s petition for sentence modification.” State v. Fulkrod, 735 N.E.2d 851, 854 (Ind. Ct. App. 2000), summarily aff’d, 753 N.E.2d 630 (Ind. 2001).² Here, the prosecutor objected to Northrup’s motion for sentence modification, and as a result, the trial court lacked authority to grant Northrup the relief he requested.

Northrup makes several arguments to the effect that the trial court’s application of Indiana Code section 35-38-1-17(b) was improper in the circumstances of this case. We address each in turn. First, Northrup argues his open plea agreement gave the trial court continuing authority to modify his sentence. However, the plea agreement has no

¹ This current version of the statute is materially the same as the version in effect at the time Northrup filed his motion, subject to a change in the wording of subsection (a)(1). See P.L. 1-2010, § 141.

² Indiana Code section 35-38-1-17(b) contains an exception that provides:
[I]f in a sentencing hearing for a convicted person conducted after June 30, 2001, the court could have placed the convicted person in a community corrections program as an alternative to commitment to the department of correction, the court may modify the convicted person’s sentence under this section without the approval of the prosecuting attorney to place the convicted person in a community corrections program under [Indiana Code chapter] 35-38-2.6.
However, Northrup does not argue the community corrections exception applies in this case.

language reserving authority to modify Northrup's sentence after it was imposed.³ As noted in the supreme court's opinion in Fulkrod, Indiana Code section 35-38-1-17(b) has provided since 1991 that if more than 365 days have elapsed since a defendant began serving a sentence, any modification of the sentence is subject to the prosecutor's approval. 753 N.E.2d at 632-33. Thus, nothing suggests Northrup had a right to believe his open plea agreement, executed in 2000, would provide the trial court continuing jurisdiction to modify his sentence absent the prosecutor's approval.

Second, Northrup appears to argue that Indiana Code section 35-38-1-17(b), as applied to him, violates the requirement of the Indiana Constitution, article 1, section 18, that "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice." However, we have previously rejected the argument that this constitutional principle is violated by requiring prosecutorial consent for a sentence modification after a defendant has served 365 days of a sentence, Schweitzer v. State, 700 N.E.2d 488, 490-91 (Ind. Ct. App. 1998), trans. denied, even if the defendant has established "extraordinary progress" toward rehabilitation, id. at 494 (Sullivan, J., concurring in result). Northrup presents no argument for reconsidering our holding in Schweitzer.

Third, Northrup argues that certain comments and references by the State in its response to his motion for sentence modification were unsupported by the record, were calculated to improperly prejudice him, and were inconsistent with the constitutional

³ Even if the plea agreement had contained reservation of authority language, it is doubtful such language could properly have given the trial court authority it otherwise lacked pursuant to statute. See Fulkrod, 753 N.E.2d at 633 ("A sentencing judge cannot circumvent the plain provisions in the sentence modification statute simply by declaring that he or she reserves the right to change the sentence at any future time. Such language only raises false hope on the defendant's part.").

principle of reformation. However, as explained above, the trial court was required to deny Northrup's motion based simply on the fact the prosecutor objected. There is no requirement in the statute that the prosecutor's objection be based on specific facts or reasons. Thus, the specific contents of the State's response did not harm Northrup.

Fourth, Northrup argues the trial court erred by denying his motion for sentence modification without first ordering a progress report from the Department of Correction. Again, however, the trial court was required to deny Northrup's motion based on the sole fact the prosecutor objected. After that point, obtaining a progress report would have been futile. Moreover, Indiana Code section 35-38-1-17 requires a trial court to obtain a progress report before granting a sentence modification, not before denying one. Banks v. State, 847 N.E.2d 1050, 1053 (Ind. Ct. App. 2006), trans. denied. For these reasons, the trial court properly applied Indiana Code section 35-38-1-17, and properly denied Northrup's motion for modification of his sentence.

Conclusion

The trial court properly denied Northrup's motion for modification of his sentence and therefore properly denied his motion to correct error.

Affirmed.

MAY, J., and VAIDIK, J., concur.