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IN THE
COURT OF APPEALS OF INDIANA

PHILIP McCOLLUM,	)	
	)	
Appellant/Petitioner,	)	
	)	
vs.	)	No. 79A02-0904-CR-373
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Respondent.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-8704-CF-5547

October 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner Philip McCollum appeals following the trial court's denial of his request for modification of his 110-year sentence. Concluding that McCollum's request should be treated as a successive petition for post-conviction relief ("PCR") for which McCollum failed to request leave to file from the appellate courts, we dismiss this action for lack of jurisdiction pursuant to Indiana Post-Conviction Rule 1(12).

FACTS AND PROCEDURAL HISTORY

The Indiana Supreme Court's opinion in McCollum's direct appeal instructs us as to the underlying facts and procedural history leading to the instant appeal:

> The evidence favorable to the jury's verdict was as follows. In the summer and fall of 1986, Daniel Reynolds was a confidential informant for the Indiana State Police. In exchange for leniency on a drug charge he agreed to work with the police in conducting controlled buys of drugs and providing information about the drug business in the Lafayette area. Controlled buys are drug purchases made by a police informant under strict police supervision and control.
>
> In mid July 1986, Reynolds met with William Kolb and discussed whether Kolb could sell him some cocaine. Kolb said he would check on it and later contacted Reynolds to say he had found a cocaine source. Kolb identified his source as Phillip McCollum.
>
> Kolb contacted McCollum and told him he wanted four ounces of cocaine to sell to someone. Appellant brought four ounces of cocaine to Kolb's house in August 1986. Kolb then contacted Reynolds to inform him that he had the cocaine to sell. Reynolds came over that night, the two discussed the quality and price of the cocaine, and Reynolds sampled it. Kolb told Reynolds that McCollum wanted $2200 per ounce. At Reynolds' request Kolb agreed to talk to appellant about selling it at a lower price. Reynolds did not purchase any cocaine that night because he did not have enough money.
>
> The next day [McCollum] came back to Kolb's house to collect the money from the drug sale. Kolb explained why the sale had not yet taken place, they discussed the price of the cocaine, and then the two went to a nearby convenience store to call Reynolds. That evening, August 20, 1986, Reynolds made a controlled buy of one ounce of cocaine with money supplied by the police. During the sale Kolb again told Reynolds that Phillip McCollum was his supplier.

Reynolds also discussed with Kolb the possibility of buying more cocaine but dealing directly with McCollum. Kolb told [McCollum] about Reynolds' proposal but declined because Reynolds had recently been arrested. [McCollum] also thought Reynolds was not serious about purchasing large quantities of cocaine since the first sale had been for only one ounce.

After Reynolds purchased the cocaine and left the house, Kolb went to the hotel where McCollum was staying to deliver the money from the sale and the unsold cocaine. No one answered at the hotel room. Later that evening, after Kolb had returned home, [McCollum] came over to collect the money. He had Kolb keep the unsold cocaine until the next day. Officers Hole and Shireman of the Indiana State Police and Special Agent Frank Fabian of the FBI monitored this controlled buy. They watched Kolb and Reynolds and Kolb and McCollum on the way to meetings with each other. They also observed the movements of Kolb and McCollum after the controlled buy.

In late October 1986, Reynolds again attempted to persuade Kolb to set up a cocaine buy directly with [McCollum]. To show Kolb that he was serious, Reynolds went to Kolb's house and showed him $40,000 in cash which had been provided by the FBI. Although Kolb told McCollum about the money, he still refused to meet with Reynolds directly.

About two weeks later on November 8, [McCollum] brought another four ounces of cocaine to Kolb at his house and he also left his van in Kolb's driveway. After [McCollum] left, Kolb called Reynolds and a meeting was arranged for that evening. Reynolds made another controlled buy of the four ounces of cocaine, paying $8800. Kolb told Reynolds the cocaine came from McCollum. [McCollum] picked the money up from Kolb the next day. Again, all these events were observed by the Indiana State Police and the FBI.

The same procedure was followed for each controlled buy and meeting between Kolb and Reynolds. Reynolds would first meet with the police and be strip searched and a body transmitter would be attached to his person. Reynolds was then provided with cash to make the purchase. While Reynolds and Kolb were together the police were able to monitor their conversations through the transmitting device. After the meeting was over Reynolds would meet the police at a designated spot. He would be strip searched again, the body transmitter would be removed, and he would turn over the drugs purchased and any remaining money.

Kolb and his wife were arrested in late April 1987. In exchange for leniency for himself and his wife, Kolb agreed to cooperate in the continuing investigation of McCollum. Kolb called [McCollum] to try to arrange another drug deal and recorded this conversation with a police recorder. A meeting was set up for noon the next day, April 26, 1987. Surveillance was maintained at the Kolb residence and a tape recorder was placed under the couch in the living room. [McCollum] was late to the meeting, however, and the tape ran

> out. Kolb called Agent Fabian who came to Kolb's house to fix it. One or two minutes after Fabian's arrival appellant showed up, so Fabian hid behind a bedroom door. Agent Fabian was able to hear the conversation between [McCollum] and Kolb. McCollum and Kolb discussed arrangements for a cocaine deal, the quality of the cocaine, whether Kolb knew how the ultimate buyer would use the cocaine, and money Kolb owed appellant for previous drug transactions. [McCollum] said he would come back in a day or two with the cocaine and Kolb indicated that he would be able to have cash for some of it. Police attempted surveillance of this meeting, but [McCollum] never showed up. Kolb also attempted to set up a meeting with appellant but was unable to reach him. [McCollum] was arrested on April 30, 1987.
>
> The testimony against McCollum was consistent. The witnesses included the participating officers and agents, Reynolds, Kolb, and Kolb's wife.

McCollum v. State, 582 N.E.2d 804, 808-10 (Ind. 1991) ("*McCollum I*"). Following a jury trial,

> McCollum was convicted of four Class A felonies: two counts of conspiracy to commit dealing in cocaine, and two counts of dealing in cocaine. He was sentenced to forty years on each count. Each conspiracy count was ordered to run concurrently with each associated dealing count. These two sets were ordered to be served consecutively. In addition, McCollum was found to be an habitual offender and one of the sentences for dealing was enhanced by thirty years. The total was 110 years.

Id. at 808.

McCollum appealed, challenging, among other issues, the appropriateness of his sentence. Upon direct review, the Indiana Supreme Court affirmed McCollum's 110-year sentence. *Id*. at 817. McCollum next filed a PCR petition, the denial of which was affirmed by this court. *McCollum v. State*, 79A02-96-04-PC-226 (Ind. Ct. App. Apr. 7, 1997) ("*McCollum II*"), *trans. denied*. McCollum has subsequently filed approximately eighteen petitions or motions challenging his sentence. This court has specifically declined two of

McCollum's requests to file successive PCR petitions, pursuant to Indiana Post-Conviction Rule 1(12). *See McCollum v. State*, No. 79A04-0402-SP-108 (Ind. Ct. App. Mar. 8, 2004) ("*McCollum IV*"); *McCollum v. State*, No. 79A04-0802-SP-55 (Ind. Ct. App. Mar. 18, 2008) ("*McCollum VII*").

On September 18, 2008, McCollum filed a letter with the trial court requesting modification of his sentence. Following a hearing on the matter, the trial court denied McCollum's request. McCollum now appeals.

DISCUSSION AND DECISION[1]

On appeal, McCollum challenges the trial court's denial of his request for modification of his 110-year sentence. The State argues in response that this court lacks jurisdiction over the instant matter because McCollum's appeal constitutes a successive PCR petition for which McCollum failed to receive the necessary approval before filing.

A petition to modify a sentence requiring consideration of matters outside the face of the sentencing judgment is best addressed and may be raised only on direct appeal, and where appropriate via post-conviction relief proceedings. *Robinson v. State*, 805 N.E.2d 783, 787 (Ind. 2004). Indiana Post-Conviction Rule 1(12) requires that prisoners desiring to pursue successive PCR petitions obtain leave of the appellate courts before filing a petition with the trial court. Ind. Post-Conviction Rule 1(12). However, in *Robinson*, the Indiana Supreme Court held that "when a motion to correct sentence presents a claim that may be resolved by

[1] McCollum has filed a motion for oral argument, which we deny in an order issued simultaneously with this decision.

considering only the face of the judgment and the applicable statutory authority … such a motion may be expeditiously considered and corrections made without invoking post-conviction proceedings." 805 N.E.2d at 787-88. The Supreme Court further held that "[b]ecause such motions to correct sentence based on clear facial error are not in the nature of post-conviction petitions … they may also be filed after a post-conviction proceeding without seeking the prior authorization necessary for successive petitions for post-conviction relief under Indiana Post-Conviction Rule 1(12)." *Id*. at 788. Therefore, in order to determine whether McCollum's petition to modify his sentence should be treated as a successive PCR petition, we must determine whether McCollum alleges that his sentence was improper because of clear facial error.

Initially, we note that upon direct review, the Indiana Supreme Court concluded that McCollum's sentence was not only lawful, but appropriate. *McCollum I*, 582 N.E.2d at 817. McCollum has subsequently filed a PCR petition, *see McCollum II*, 79A02-9604-PC-226, and approximately eighteen petitions for modification of sentence or motions to correct erroneous sentence. This court has specifically declined McCollum's requests to file successive PCR petitions, pursuant to Indiana Post-Conviction Rule 1(12), on at least two occasions. *See McCollum IV*, No. 79A04-0402-SP-108; *McCollum VII*, No. 79A04-0802-SP-55. In addition, each of the remaining petitions and motions was denied.

McCollum's instant request for sentence modification was made by letter to the trial court on September 18, 2008. McCollum's September 18, 2008 letter provided as follows:

> Prior to you coming onto the bench. Judge Thayer sentenced me to 110 years for two sales of cocaine and the habitual attached to it. Since than things

> have changed. The Habitual is no longer applied to drug cases, if you have no prior drug cases, which I didn't have any prior drug cases. Since I was sentenced, Beno V. State come out. Which states, that sentences are to be run concurrently, if the sales are to the same informant, same drug.
>
> Sentencing drug cases these days are done with more discretion by using a comprehensive psychological evaluation. This is done in more than 70 Indiana counties that have community correctional facilities. I'm sure Tippecanoe County has this. Could I be considered for this test?
>
> I'm 56 years old now. Since I've been incarcerated, I've received an G.E.D. graduated from college, completed the drugs programs offered and much more.
>
> I don't have the time to mature out another judge. Your retiring this January. This will be the last chance I'll have for you to consider a modification before you retire.
>
> I'm asking to be giving a Sentence Modification Hearing. Your smart enough to know, if someone is rehabilitated or not. Please give me a shot at this before you retire. No one gets sentenced to 110 years for nonviolent drugs anymore. If you sentenced anyone, since you have been on the bench to 110 years for drugs, with no violence leave me in here. If you haven't, consider a hearing. All I'm asking for, is to be considered for an equal sentence as the rest of the drug offenders have received.

Appellant's App. p. 1337. The trial court construed McCollum's letter as a Petition to Modify Sentence. McCollum's September 18, 2008 letter does not allege that his sentence is unlawful under the sentencing authority that was controlling at the time his sentence was imposed. McCollum's letter merely highlights what he believes to be changes in the law since the imposition of his sentence and argues that in light of those changes and his alleged good behavior, his sentence should be reduced. Therefore, McCollum's claim is not based upon clear facial error, and his request should be treated as a successive PCR petition. *See generally Robinson*, 805 N.E.2d at 787; P-C.R. 1(12). Furthermore, because nothing in the record suggests that McCollum requested leave to file a successive PCR petition with either of Indiana's appellate courts, we dismiss McCollum's instant appeal, with prejudice, for lack

of jurisdiction pursuant to Indiana Post-Conviction Rule 1(12).[2]

The instant appeal is hereby dismissed.

BAILEY, J., and VAIDIK, J., concur.

[2] Having concluded that this court lacks jurisdiction over McCollum's appeal, we refrain from considering McCollum's argument regarding the constitutionality of Indiana Code section 35-38-1-17(b), which provides that the prosecutor must approve of any sentence modification if more than three hundred sixty-five days have elapsed since the convicted person began serving his sentence.