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IN THE
COURT OF APPEALS OF INDIANA

NED GARRETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0906-CR-519
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Magistrate
Cause No. 49G02-9003-CF-31741

October 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Ned Garrett appeals the trial court's denial of his motion to correct erroneous sentence. Garrett raises one issue, which we revise and restate as whether the trial court abused its discretion by denying Garrett's motion to correct erroneous sentence. We affirm.

The relevant facts, as set forth in Garrett's direct appeal, follow:

> In the early morning of August 9, 1989, Ollie Robinson and his younger brother, Timmy Robinson (the victim in this case), were "out getting high" on cocaine. In order to raise more money to purchase cocaine, the brothers packaged flour and sold it to others as cocaine.
>
> Some time later that morning, near 23rd Street and College Avenue, the brothers were approached by a man later identified as appellant. He complained to the brothers that they had sold him "fake" cocaine. During the confrontation, appellant produced a sawed-off shotgun and ordered the brothers into some bushes. He shot Timmy once in the chest resulting in his death. Ollie ran with appellant in pursuit. During the pursuit, he shot Ollie in the arm and buttocks and beat him with the shotgun.
>
> Larry Garrett, not related to appellant, lived at 2249 North Park Avenue. He heard the shots and saw a running man throw something down. Later that morning he found a sawed-off shotgun in his yard. He called the police and they recovered the shotgun. There were no readable fingerprints on the shotgun nor were they able to establish that the pellets found in Timmy's body in fact had been fired from that shotgun. However, they were able to determine that the shotgun was 12 gauge and that Timmy had been killed by a 12 gauge shotgun.
>
> Before trial, Connie Kincaid, appellant's girlfriend, identified the shotgun as the gun appellant once owned. Sheila Mitchell identified the shotgun as the one she had given to appellant. In an unrecorded statement to Detective Larkins, appellant admitted the weapon he used was a shotgun. However, in a recorded statement made by appellant, he made several incriminating statements, exculpatory statements, and a statement that he had used a pistol in committing the shooting. Also, during this statement, he said that he was not telling the truth.

Garrett v. State, 602 N.E.2d 139, 140 (Ind. 1992), reh'g denied.

The State charged Garrett with murder, dealing in a sawed-off shotgun as a class D felony, and being an habitual offender. After a jury trial, Garrett was convicted as charged. In January 1991, the trial court sentenced Garrett to an aggregate sentence of seventy years. The trial court granted Garrett 310 days of credit time.

Garrett appealed his convictions and sentence. The Indiana Supreme Court affirmed Garrett's convictions but remanded for reconsideration of Garrett's habitual offender enhancement. Id. at 142-143. On remand, the trial court reduced the habitual offender enhancement from thirty years to twenty years, which resulted in an aggregate sentence of sixty years. The abstract of judgment revealed that Garrett had been confined for 310 days prior to sentencing.

In January 1995, Garrett filed a petition for post-conviction relief. In April 2004, the post-conviction court held a hearing on Garrett's motion. In June 2004, the post-conviction court denied Garrett's petition for post-conviction relief. Garrett appealed, and this court affirmed the post-conviction court's denial of Garrett's petition for post-conviction relief.

In April 2009, Garrett filed an offender grievance with the Indiana Department of Correction. The Indiana Department of Correction responded as follows:

> In regard to your grievance, records indicate that your date of sentence was 01-11-1991 and 310 days of jail time credit was deducted from this making your effective date of sentence 03-07-1990 . . . . Your sentence consisted of 60 years. 03-07-1990 through 03-06-2050 is 60 years. Your original EPRD for this cause number was 03-06-2020 (see attached), this is a 30

> year sentence. Half of 60 is 30 years anyway you look at it. Your jail time credit was calculated correctly. Grievance denied.

Appellant's Appendix at 59.

On April 22, 2009, Garrett filed a motion to correct erroneous sentence. On May 7, 2009, the trial court denied Garrett's motion to correct erroneous sentence.

The sole issue is whether the trial court abused its discretion by denying Garrett's motion to correct erroneous sentence. We review a trial court's decision on a motion to correct erroneous sentence "only for abuse of discretion." Mitchell v. State, 726 N.E.2d 1228, 1243 (Ind. 2000), reh'g denied, overruled on other grounds by Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. Myers v. State, 718 N.E.2d 783, 789 (Ind. Ct. App. 1999).

An inmate who believes he has been erroneously sentenced may file a motion to correct the sentence pursuant to Ind. Code § 35-38-1-15. Neff v. State, 888 N.E.2d 1249, 1250-1251 (Ind. 2008). Ind. Code § 35-38-1-15, which governs a motion to correct erroneous sentence, provides:

> If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

An allegation by an inmate that the trial court has not included credit time earned in its sentencing is the type of claim appropriately advanced by a motion to correct sentence. Neff, 888 N.E.2d at 1251.

In Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004), the Indiana Supreme Court addressed the difference between a motion to correct erroneous sentence and a petition for post-conviction relief. The court held that a motion to correct erroneous sentence may be used only to correct sentencing errors that are clear from the face of the judgment. 805 N.E.2d at 787. Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct erroneous sentence. Id. Sentencing claims that are not facially apparent "may be raised only on direct appeal and, where appropriate, by post-conviction proceedings." Id. "Use of the statutory motion to correct sentence should thus be narrowly confined to claims apparent from the face of the sentencing judgment, and the 'facially erroneous' prerequisite should henceforth be strictly applied . . . ." Id.

Normally, "a motion to correct sentence may not be used to seek correction of claimed errors in an abstract of judgment." Id. at 794. However, the Indiana Supreme Court pointed out in Neff that sentences from Marion County present a special circumstance because the trial court does not issue judgments of conviction. 888 N.E.2d at 1251. As a result, a motion to correct a sentence issued in Marion County may be based on an abstract of judgment alone. Id.

Garrett argues that the trial court failed to include 310 days of earned credit time for "remaining in time class I while in pre-trial confinement awaiting disposition of his case."[1] Appellant's Brief at 3. The abstract of judgment revealed that Garrett had been confined for 310 days prior to sentencing, but did not expressly designate credit time. However, "[s]entencing judgments that report only days spent in pre-sentence confinement and fail to expressly designate credit time earned shall be understood by courts and by the Department of Correction automatically to award the number of credit time days equal to the number of pre-sentence confinement days." Robinson, 805 N.E.2d at 792. In light of this presumption, we cannot say that the abstract of judgment was improper. See Neff, 888 N.E.2d at 1252 (holding that the presumption in Robinson "removed the need for state courts to adjudicate these types of sentence claims on an individual basis," and "[h]ere, where the abstract of judgment does not mention Class I credit time, under Robinson the DOC would have known to award credit time equal to the amount of time served if necessary").

Garrett also argues that his earliest release date should be approximately April 30, 2019 instead of March 6, 2020, which was the date calculated by the Department of Correction. However, resolution of this issue necessarily requires consideration of factors outside of the face of the judgments. As noted above, a motion to correct erroneous sentence is "available only to correct sentencing errors clear from the face of the judgment." Robinson, 805 N.E.2d at 794. Thus, Garrett's argument is not properly

[1] Garrett does not challenge the determination that he was confined for 310 days prior to sentencing.

presented by way of a motion to correct erroneous sentence. As a result, we cannot say that the trial court abused its discretion by denying Garrett's motion to correct erroneous sentence on this issue. See, e.g., Murfitt v. State, 812 N.E.2d 809, 811 (Ind. Ct. App. 2004) (holding that the trial court properly denied the defendant's motion for credit time because such a claim must be presented by way of a petition for post-conviction relief).

For the foregoing reasons, we affirm the trial court's denial of Garrett's motion to correct erroneous sentence.

Affirmed.

MAY, J., and CRONE, J., concur.