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.

FILED
Nov 30 2010, 9:57 am
CLERK
of the supreme court, court of appeals and tax court

APPELLANT PRO SE:

KIENO AUSTIN
Carlisle, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KIENO AUSTIN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-1007-CR-820
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt Eisgruber, Judge
The Honorable Steven J. Rubick, Commissioner
Cause No. 49G01-9409-CF-125328

November 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Kieno Austin, pro se, appeals the trial court's denial of his motion to correct erroneous sentence. We affirm.

Issue

Austin raises one issue, which we restate as whether the trial court properly denied his motion to correct erroneous sentence.

Facts

In 1995, a jury found Austin guilty of murder and conspiracy to commit murder. The trial court sentenced him to sixty years in the Department of Correction. Our supreme court affirmed his convictions on direct appeal. Austin v. State, 682 N.E.2d 1287 (Ind. 1997). On May 19, 2010, Austin filed a motion to correct erroneous sentence, arguing that the aggravating factors considered by the trial court in imposing the maximum sentence were improper. The trial court denied the motion because the trial court found that "a Motion to Correct Error must be filed within thirty (30) days of sentencing. As such, Defendant's Motion is not timely and no relief may be granted." App. p. 34. Austin filed a motion to reconsider, pointing out that he had filed a motion to correct erroneous sentence, not a motion to correct error. The trial court then denied Austin's motion to reconsider.

Analysis

Austin argues that the trial court erred by denying his motion to correct erroneous sentence and motion to reconsider. When reviewing a trial court's decision to deny a motion to correct an erroneous sentence, we defer to the trial court's factual findings and

review such decision for an abuse of discretion. Felder v. State, 870 N.E.2d 554, 560 (Ind. Ct. App. 2007). An abuse of discretion will be found only when the trial court's decision is against the logic and effect of the facts and circumstances before it. Id. However, the trial court's legal conclusions are reviewed under a de novo standard of review. Id.

In particular, Austin argues that the trial court improperly considered his motion as a motion to correct error, rather than a motion to correct erroneous sentence. It is true that the trial court seems to have improperly treated the motion as a motion to correct error. However, we conclude that, even if the trial court had treated the motion as a motion to correct erroneous sentence, the motion and the motion to reconsider were properly denied.

An inmate who believes he has been erroneously sentenced may file a motion to correct the sentence pursuant to Indiana Code Section 35-38-1-15:

> 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.

A motion to correct erroneous sentence may be filed only to address a sentence that is "erroneous on its face." Neff v. State, 888 N.E.2d 1249, 1251 (Ind. 2008) (quoting Robinson v. State, 805 N.E.2d 783, 786 (Ind. 2004)). Other sentencing errors must be addressed via direct appeal or post-conviction relief. Id. In addition, a motion to correct

erroneous sentence may only arise out of information contained on the formal judgment of conviction, not from the abstract of judgment. Id. If the county does not issue judgments of conviction, such as in Marion County, then the trial court's abstract of judgment will serve as an appropriate substitute for purposes of making the claim. Id.

Austin was convicted in Marion County. On appeal, he submits the Chronological Case Summary and a partial transcript of his sentencing hearing. He has not submitted the abstract of judgment. Moreover, Austin's arguments regarding the aggravating factors used to support the enhancement of his sentence may be considered only by reference to matters outside of the face of the trial court's orders. Austin has failed to establish any facial error in his sentencing judgment. Consequently, Austin's argument must be raised through a petition for post-conviction relief. The trial court did not abuse its discretion when it denied Austin's motion to correct erroneous sentence and motion to reconsider.

Conclusion

Because Austin failed to establish a facial error in his sentencing judgment, the trial court properly denied his motion to correct erroneous sentence and motion to reconsider. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.