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IN THE
COURT OF APPEALS OF INDIANA

DAMON FRAZIER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 16A05-0907-CR-431
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DECATUR SUPERIOR COURT
The Honorable Matthew D. Bailey, Judge
Cause No. 16D01-0502-FA-118

December 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Damon Frazier appeals his sentence after pleading guilty to Class B felony delivery of cocaine. We affirm.

Issues

Frazier raises the following issues:

I. whether the trial court properly calculated the presentence credit time to which he is entitled; and

II. whether the trial court properly denied his oral motion to withdraw his guilty plea.

Facts

On February 18, 2005, the State arrested and charged Frazier with Class A felony delivery of cocaine. On March 24, 2005, the State filed an allegation that Frazier was an habitual offender, and on April 11, 2005, it added a charge of Class B felony delivery of cocaine to the information. On April 18, 2005, Frazier bonded out of jail.

On June 8, 2005, the trial court was advised that Frazier was in jail in Hamilton County, Ohio, on drug charges. By August 10, 2005, however, Frazier was no longer in jail in Ohio, and he appeared at a motion to suppress hearing for this case. The trial court took the motion to suppress under advisement but later denied it. On November 15, 2005, Frazier's counsel appeared at a hearing, but Frazier did not. On February 10, 2006, Frazier filed a "Motion to Voluntarily Revoke Bond," stating that he was again being held in the Hamilton County, Ohio jail. App. p. 67. The trial court granted this motion the same day.

On February 8, 2007, Frazier appeared in court to plead guilty to Class B felony delivery of cocaine.[1] The plea agreement provided for a sentence of six years executed. It also expressly stated, "The defendant shall receive credit for 423 days (actual) served." Id. at 73. This amount appears to reflect the initial time Frazier spent in jail after being arrested on this charge, plus the time between when he voluntarily moved to revoke his bond and when he pled guilty. However, at the plea hearing Frazier asserted that he might be entitled to a different amount of credit time; the State responded that it was amenable to awarding a different amount of credit time if Frazier could establish that he was entitled to it. The trial court took the plea under advisement and scheduled a sentencing hearing for March 7, 2007.

Frazier failed to appear at the March 7, 2007 sentencing hearing, but he was represented by counsel. The trial court proceeded with the hearing, entered judgment of conviction on the guilty plea, and sentenced Frazier in absentia to six years executed with 423 days of credit time. The trial court also issued a warrant for Frazier's arrest. On December 10, 2007, the trial court was notified that Frazier was in custody in Kentucky on criminal charges; Frazier had been arrested in October 2007 for drug possession. On December 28, 2007, the trial court issued an arrest warrant for Frazier that had nationwide coverage. Frazier ultimately was convicted of the Kentucky drug possession charge.

[1] The plea agreement stated that it was "conditional." App. p. 73. It appears the only "condition" for the guilty plea was the trial court's acceptance of it.

On June 17, 2009, Frazier personally appeared before the trial court to be resentenced, pursuant to Frazier's and the State's mutual request.[2] Frazier was transported to the hearing from Ohio, where he is serving a sentence with a 2014 release date for an aggravated robbery he committed, also in October 2007. Frazier began serving this sentence in June 2008, after he finished serving his sentence for drug possession in Kentucky. During the hearing, Frazier requested that the trial court award him credit time of 536 days dating from December 28, 2007, when the trial court issued the nationwide warrant, because it served as a hold upon him in Kentucky and Ohio. This request was in addition to the 423 days of credit time specified in the plea agreement.

The trial court resentenced Frazier to six years executed, with only 423 days of credit time, with the sentence to be served consecutive to his Kentucky and Ohio sentences. After the trial court pronounced sentence, Frazier's counsel orally moved to withdraw the guilty plea. The trial court took the motion under advisement and denied it the next day. Frazier now appeals.

Analysis

I. Credit Time

Frazier contends the trial court erred in not awarding him 536 days of presentencing credit time, running from the trial court's issuance of the nationwide warrant on December 28, 2007 until his resentencing on June 17, 2009. Frazier spent this

[2] Indiana Code Section 35-38-1-4(a) requires a defendant to be "personally present" at sentencing.

period of time incarcerated in Kentucky and then Ohio for crimes he committed in those states in October 2007. Because presentence jail time credit is a matter of statutory right, trial courts "'do not have discretion in awarding or denying such credit.'" James v. State, 872 N.E.2d 669, 671 (Ind. Ct. App. 2007) (quoting Molden v. State, 750 N.E.2d 448, 449 (Ind. Ct. App. 2001)). Sentencing decisions not mandated by statute are within the discretion of the trial court and are reviewed for an abuse of that discretion. Id.

Indiana Code Section 35-50-1-2(d) provides:

> If, after being arrested for one (1) crime, a person commits another crime:
>
> (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or
>
> (2) while the person is released:
>
> (A) upon the person's own recognizance; or
>
> (B) on bond;
>
> the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

Under this statute, if a defendant is arrested for one crime and commits a second crime before completing the sentence for the first crime, the sentences for the two crimes must be served consecutively. Additionally, for purposes of presentencing jail time credit, a defendant is entitled to credit against only one of the sentences, not both. See Diedrich v. State, 744 N.E.2d 1004, 1006-07 (Ind. Ct. App. 2001). To conclude a defendant was

entitled to credit against both sentences would improperly convert the consecutive sentences into concurrent ones. See Stephens v. State, 735 N.E.2d 278, 285 (Ind. Ct. App. 2000), trans. denied.[3]

Here, Frazier committed two additional offenses in Kentucky and Ohio after being arrested for delivery of cocaine in Indiana but before he served his sentence for that crime. Therefore, the trial court was required to order his sentence in this case to served consecutive to his sentences in Kentucky and Ohio. This also means that he is not entitled to credit for time served in Kentucky and Ohio against his Indiana sentence. See Diedrich, 744 N.E.2d at 1007. The trial court did not err in its award of presentencing credit time.

II. Motion to Withdraw Guilty Plea

Frazier also asserts the trial court improperly denied his oral motion to withdraw his guilty plea, which was made after the trial court had imposed sentence. Indiana Code Section 35-35-1-4 states in part:

> (b) After entry of a plea of guilty, or guilty but mentally ill at the time of the crime, but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea. The motion to withdraw the plea of guilty or guilty but mentally ill at the time of the crime made under this subsection shall be in writing and verified. The motion shall state facts in support of the relief demanded, and the state may file counter-

[3] Frazier's reliance upon Muff v. State, 647 N.E.2d 681 (Ind. Ct. App. 1995), trans. denied, is misplaced. As we noted in both Diedrich and Stephens, our supreme court impliedly overruled Muff in Corn v. State, 659 N.E.2d 554 (Ind. 1995).

affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

(c) After being sentenced following a plea of guilty, or guilty but mentally ill at the time of the crime, the convicted person may not as a matter of right withdraw the plea. However, upon motion of the convicted person, the court shall vacate the judgment and allow the withdrawal whenever the convicted person proves that withdrawal is necessary to correct a manifest injustice. A motion to vacate judgment and withdraw the plea made under this subsection shall be treated by the court as a petition for postconviction relief under the Indiana Rules of Procedure for Postconviction Remedies. For purposes of this section, withdrawal of the plea is necessary to correct a manifest injustice whenever:

> (1) the convicted person was denied the effective assistance of counsel;
>
> (2) the plea was not entered or ratified by the convicted person;
>
> (3) the plea was not knowingly and voluntarily made;
>
> (4) the prosecuting attorney failed to abide by the terms of a plea agreement; or
>
> (5) the plea and judgment of conviction are void or voidable for any other reason.

The motion to vacate the judgment and withdraw the plea need not allege, and it need not be proved, that the convicted person is innocent of the crime charged or that he has a valid defense.

Frazier's oral motion to withdraw his guilty plea was not a proper motion under subsection (b), because it occurred after sentencing, was not in writing or verified, and did not allege any facts in support of the relief demanded.

Furthermore, Frazier's motion was not proper under subsection (c) of the statute. As that subsection plainly states, a post-sentencing motion to withdraw a guilty plea is considered a petition for post-conviction relief governed by the Indiana Rules of Procedure for Post-Conviction Remedies. Frazier's oral motion to withdraw, however, failed to comply with the post-conviction filing requirements found in Post-Conviction Rule 1, Sections 2 and 3. Frazier also makes arguments on appeal regarding why his plea was unknowing and involuntary that he did not make before the trial court, i.e. he believed he was entitled to more presentencing credit time than he ended up receiving. In fact, he never made any statements to the trial court as to why he wanted to withdraw his guilty plea. We conclude Frazier has waived his appellate claims of error with respect to the denial of his motion to withdraw his guilty plea. See Smith v. State, 593 N.E.2d 1208, 1209 (Ind. Ct. App. 1992) (holding that failure to comply with Indiana Code Section 35-35-1-4's filing requirements results in waiver of any claim of error in the denial of a motion to withdraw a guilty plea), trans. denied; Crafton v. State, 821 N.E.2d 907, 912 (Ind. Ct. App. 2005) (noting party may not present an argument or issue on appeal unless party raised same argument or issue before trial court).

Conclusion

The trial court properly calculated the presentencing credit time to which Frazier was entitled, and Frazier has waived any claim of error in the denial of his motion to withdraw his guilty plea. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.