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IN THE
COURT OF APPEALS OF INDIANA

VALGENE ROYAL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A04-1105-CR-283
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause No. 77-PSCr-155

December 22, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Valgene Royal (Royal), appeals the trial court's denial of his motion for sentence modification.

We dismiss.

ISSUE

Royal raises one issue on appeal, which we restate as: Whether the trial court properly denied his motion for sentence modification.

On Cross-Appeal, the State raises one issue, which we restate as: Whether Royal's motion amounted to a successive petition for post-conviction relief.

FACTS AND PROCEDURAL HISTORY

On December 19, 1976, while he was incarcerated in the Indiana State Prison, Royal murdered Harold Rice, a prison employee. On or about February 24, 1978, a jury found Royal guilty of first degree murder, Ind. Code § 35-13-4-1(b)(1) (Burns 1975). He was sentenced to life imprisonment. The trial court ordered the term of imprisonment to commence upon the completion of a term of imprisonment Royal was then serving on a previous conviction. Royal pursued a direct appeal of his conviction to the supreme court. On November 13, 1979, the supreme court affirmed his conviction. *See Royal v. State*, 396 N.E.2d 390 (Ind. 1979).

On March 23, 1999, Royal filed his motion for post-conviction relief, which the post-conviction court denied on November 15, 2001. On May 20, 2002, this court dismissed Royal's appeal of the post-conviction court's denial with prejudice.

Thereafter, on June 9, 2009, we denied Royal's verified petition for permission to file a belated appeal of the denial of his petition for post-conviction relief.

On April 5, 2011, Royal filed a verified petition for modification of sentence. In his petition, Royal claimed that the 1977 Indiana Penal Code operated as an ameliorative provision and should retroactively apply to his case. On April 8, 2011, the State filed an answer, objecting to the requested modification. On May 12, 2011, the trial court denied Royal's motion for sentence modification.

Royal now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

CROSS-APPEAL

Because the State presents this court with a threshold procedural question, we will address its cross-appeal before proceeding to Royal's claim. In its cross-appeal, the State asserts that we lack jurisdiction to address the merits of Royal's motion for sentence modification because his motion amounted to a successive post-conviction relief petition which he filed without first obtaining permission from this court.

Reviewing Royal's motion for sentence modification, we note that it is in essence an attempt to pursue a second petition for post-conviction relief. In his motion, Royal claims that the trial court erred when it failed to sentence him pursuant to the sentencing changes instituted by the 1977 Penal Code. Specifically, he asserts that the trial court failed to retroactively apply the sentencing changes that were adopted under the 1977 Penal Code. He contends that application of those sentencing changes would result in a lower sentence. Because Royal's claim cannot be resolved by merely looking at the face

of the judgment but would require us to review the record, we characterize Royal's motion as a petition for post-conviction relief. *See Robinson v. State*, 805 N.E.2d 783, 787 (Ind. 2004); *Beech v. State*, 702 N.E.2d 1132, 1137 (Ind. Ct. App. 1998) (although denominated as a motion to correct erroneous sentence, we noted that the motion constituted a successive petition for post-conviction relief.).

Interpreted as such, we conclude Royal is not entitled to pursue a successive petition for post-conviction relief. Although a petitioner may file a successive petition for post-conviction relief under certain circumstances, he or she must first obtain authorization to do so from either our supreme court or this court. *See* Ind. Post-Conviction Rule 1 § 12(b); *Lambert v. State*, 867 N.E.2d 134, 136 (Ind. 2007). Here, Royal failed to obtain authorization from this court or the supreme court prior to filing his successive petition for post-conviction relief. Therefore, we dismiss Royal's claim for lack of jurisdiction.[1]

CONCLUSION

Based on the foregoing, we conclude that Royal did not receive authorization to file a successive petition for post-conviction relief and therefore his petition is dismissed for lack of jurisdiction.

Dismissed.

FRIEDLANDER, J. and MATHIAS, J. concur

[1] Because we dismiss Royal's appeal for lack of jurisdiction, we will not address the merits of his claim. Regardless, even if we were to review the merits of his appeal, we would still deny Royal's request for sentence modification as his contention was available as an argument in his direct appeal. *See State v. Hernandez*, 910 N.E.2d 213, 216 (Ind. 2009)