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**IN THE
COURT OF APPEALS OF INDIANA**

JERRY CRAIG,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-1012-CR-1421
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
Cause No. 49G04-0305-PC-70307

September 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jerry Craig, *pro se*, appeals the trial court's denial of his motion to correct erroneous sentence. Craig raises several issues.¹ We find the following issue dispositive: whether the trial court erred by denying Craig's motion to correct erroneous sentence. We affirm.

The relevant facts follow. On May 1, 2003, the State charged Craig with rape as a class A felony, two counts of criminal deviate conduct as class A felonies, robbery as a class B felony, possession of a firearm by a serious violent felon as a class B felony, and being a habitual offender. On July 22, 2004, Craig pled guilty to unlawful possession of a firearm by a serious violent felon as a class B felony and to being an habitual offender, and the State agreed to dismiss the remaining charges. The plea agreement stated that sentencing would be "open to argument, subject to the following limitations: there shall be an overall cap of twenty-five (25) years on the initially imposed executed portion of the sentence." Appellant's Appendix at 4. The agreement also stated that probation was "open to argument." *Id.* The court accepted the plea agreement and sentenced Craig to fifteen years with five years suspended for unlawful possession of a firearm by a serious violent felon as a class B felony. The court enhanced the sentence by fifteen years due to Craig's status as an habitual felony offender, for an aggregate sentence of thirty years with five years suspended.

¹ Craig raises the following issues: (1) whether his sentence is in "violation of Indiana law, namely I.C. 35-35-3-3;" (2) whether the trial court abused its discretion or committed judicial misconduct "when knowingly sentencing petitioner illegally;" (3) whether prosecutorial misconduct denied Craig due process of law; (4) whether Craig's trial counsel provided ineffective assistance; and (5) whether the court reviewing his motion abused its discretion by vacating its "position as an impartial and fair magistrate." Appellant's Brief at iii.

The chronological case summary reveals that Craig filed petitions for post-conviction relief on September 30, 2004 and August 24, 2007.² On September 1, 2009, the court denied Craig's petition for post-conviction relief.³

On November 16, 2010, Craig, *pro se*, filed a motion to correct erroneous sentence and argued that "it is plain on the face of the record that [he] was sentenced to a term of imprisonment that is over the amount agreed to by [him]" and that he was led to believe that he would receive a sentence "totaling no more than twenty-five years." *Id.* at 35. Craig also argued the court and the prosecutor acted in a conspiracy and that the court illegally added conditions to his sentence. In a memorandum of law in support of his motion, Craig argued that his sentence was erroneous on its face, that the court was without power to impose restitution, and that he should not be required to register as a sex offender. The trial court summarily denied the motion the same day.

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 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.

² The record does not contain Craig's petitions for post-conviction relief.

³ The record does not contain the court's order denying Craig's petition for post-conviction relief.

In Robinson v. State, the Indiana Supreme Court noted that a motion to correct erroneous sentence is available only when the sentence is “erroneous on its face.” 805 N.E.2d 783, 786 (Ind. 2004) (citations omitted). 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. See id. at 787. 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 . . . 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.

Craig relies upon his plea agreement and argues that his sentence is “outside the terms of the plea agreement” and that “Item #5, of the agreement, specifying ‘special sex offender probation’, ‘sex offender treatment’, and other conditions, was removed by all of the parties, to induce the appellant’s guilty plea.” Appellant’s Brief at 5. Craig argues that “the plea agreement as represented to [him], and the explanations and oral inducements made by [the trial court], the prosecutor, and [his] trial counsel, on the record, comprised all of the terms of the agreement relied upon by [him] to procure his

guilty plea.” Id. at 6. Craig argues that the court was without power to impose restitution as part of the sentence or order that he register on any sex offender registry. Craig argues that the court committed misconduct by “assisting the State in making claims and/or promises to entice [him] into an agreement she knew she would not honor” Id. at 12. Craig argues that the prosecutor engaged in misconduct by “falsely promising [him] that conditions and terms objected to were removed” and “actively engaged in misrepresentation with” the court. Id. at 14-15. Craig argues that his trial counsel was ineffective for failing to object to an illegal sentence, moving to withdraw the guilty plea, or protecting her client from judicial and prosecutorial abuse. Craig argues that “[n]otwithstanding the fact that [he] already had his predicate felony enhanced once, to fifteen (15) years for a class ‘B’ felony, but then [the trial court] enhanced this previously-enhanced felony a second time with the imposition of a habitual offender, additional enhancement of fifteen more years.” Id. at 6. Lastly, Craig argues that the court reviewing his motion abused its discretion and abrogated its role as a neutral and detached or fair and impartial court when it “actively took on the State’s role, summarily denying [his] motion to correct erroneous sentence, ‘without a hearing.’” Id. at 18. In his reply brief, Craig argues that “[i]t is apparent that [his] sentence is in violation of express statutory authority; is plain on the face of the record it is erroneous on it’s [sic] face, and is subject to correction by a motion to correct erroneous sentence.” Appellant’s Reply Brief at 2.

The State points out that Craig is appealing the summary denial of a motion to correct erroneous sentence and thus his freestanding claims of judicial misconduct,

prosecutorial misconduct, and ineffective assistance of trial counsel are “entirely misplaced and should be dismissed.” Appellee’s Brief at 4. The State argues that “[g]iven that the sentence is within the allowable range for a class B felony with an habitual offender enhancement, [Craig’s] claims require this Court to look beyond the face of the sentence and are therefore beyond the reach of this Court on an appeal from the denial of [Craig’s] motion to correct erroneous sentence.” Id. at 5. The State also argues that “[n]either the term of [Craig’s] sentence, nor the trial court’s order that he receive sex offender *counseling* contravened the explicit terms of [the] plea agreement.” Id.

Initially, we observe that Craig did not allege that his trial counsel was ineffective in his motion to correct erroneous sentence and raises that issue for the first time on appeal. Moreover, resolution of the issues necessarily requires consideration of factors outside of the face of the judgments, including the contents of his plea agreement and the sentencing hearing. 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, Craig’s argument is not properly 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 Craig’s motion to correct erroneous sentence. See Jackson v. State, 806 N.E.2d 773, 774 (Ind. 2004) (holding that the trial court properly denied the defendant’s motion to correct erroneous sentence and noting that a motion to correct erroneous sentence is available only to correct sentencing errors clear from the face of the judgment); Murfitt v. State, 812 N.E.2d 809, 810-811 (Ind. Ct. App. 2004) (holding that

the trial court properly denied the defendant's motion for credit time where the alleged calculation error required consideration of matters outside the face of the sentencing judgment and noting that the claim was not presented by way of a petition for post-conviction relief); see also Bauer v. State, 875 N.E.2d 744, 746 (Ind. Ct. App. 2007) (noting that the defendant's claims required consideration of matters in the record outside the face of the judgment and accordingly they are not the types of claims that are properly presented in a motion to correct erroneous sentence), trans. denied.

For the foregoing reasons, we affirm the denial of Craig's motion to correct erroneous sentence without prejudice to his right to seek successive post-conviction relief.

Affirmed.

BAKER, J., and KIRSCH, J., concur.