

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ricardo B. Fuller,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 9, 2023

Court of Appeals Case No.
22A-CR-2793

Appeal from the Tippecanoe
Superior Court

The Honorable Steven P. Meyer,
Judge

Trial Court Cause No.
79D02-0603-FA-6

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

[1] Ricardo Brenton Fuller, appearing pro-se, appeals the denial of his motion to correct error,¹ which challenged an order dismissing his petition² to modify his aggregate sixty-five-year sentence imposed in 2007, following his convictions for Burglary, as a Class A felony,³ Criminal Confinement, as a Class B felony,⁴ and Domestic Battery, as a Class D felony,⁵ and his adjudication as a habitual offender.⁶ Fuller presents the issue of whether the trial court erroneously concluded that, pursuant to Indiana Code Section 35-38-1-17(k), it lacked

¹ The order on appeal was entered into the Chronological Case Summary on September 19, 2022. Fuller, by counsel, timely filed a motion to correct error on October 17, 2022. *See* Ind. Trial Rule 59 (providing that a motion to correct error is to be filed not later than thirty days after the entry of a final judgment in the Chronological Case Summary). On October 25, Fuller filed a pro-se motion to correct error. Subsequently, Fuller filed a “notice” of having “fired” his attorney. App. Vol. I, pg. 96. The trial court granted counsel leave to withdraw from his representation of Fuller and additionally indicated that the untimely pro-se motion would be considered as opposed to the motion filed by counsel. However, a trial court is without discretion to extend the time for filing a motion to correct error. *Ball v. Jones*, 52 N.E.3d 813, 818 (Ind. Ct. App. 2016) (citing Indiana Trial Rules 6(b) and 59(C)). In this case, the original motion was timely and each of the motions embodies the assertion that Indiana Code Section 35-38-1-17(k) does not mandate dismissal of Fuller’s petition. The substance of the argument was timely presented and the first motion to correct error is the proper vehicle for its presentation. Accordingly, we do not dismiss this appeal for lack of jurisdiction.

² Although the trial court indicated that the petition was dismissed for lack of jurisdiction, the substance of the order is that Fuller did not meet statutory requirements for the relief requested and thus he was denied relief.

³ Ind. Code § 35-43-2-1.

⁴ I.C. § 35-42-3-3.

⁵ I.C. § 35-42-2-1.3(a).

⁶ I.C. § 35-50-2-8.

authority to modify the sentence imposed upon Fuller, a violent criminal, absent prosecutorial consent.⁷ We affirm.

Facts and Procedural History

[2] In 2006, the State charged Fuller with having committed various offenses against his wife.

[At a] trial held on December 12-13, 2006, a jury found Fuller guilty of Class A felony burglary, Class B felony criminal confinement, Class C felony battery, two counts of Class C felony stalking, Class A misdemeanor domestic battery, and Class A misdemeanor invasion of privacy. Fuller waived a jury trial for the second phase of the trial, after which the trial court found Fuller guilty of Class D felony domestic battery because of a prior domestic battery conviction, and found that Fuller was an habitual offender. At sentencing on January 11, 2007, the trial court did not impose sentences for every charge for which Fuller had been found guilty. It imposed a sentence of twenty years for Class A felony burglary, fifteen years for Class B felony criminal confinement, and four years for Class C felony stalking, all to run consecutively, and three years for Class D felony domestic battery, to run concurrent with the other sentences, for a term of

⁷ Fuller also asserts that he is entitled to a reduction of his habitual offender enhancement because of legislative changes made in 2013. However, Fuller does not develop a corresponding argument.

And, although he does not articulate a separate issue in this regard, nor did he present his claim to the trial court in his petition for modification, Fuller states in his brief that Indiana Code Section 35-38-1-17(k) is constitutionally infirm. Specifically, he states that this statutory provision violates the separation of powers doctrine under the United States and Indiana constitutions and denies due process and due course of law to convicted persons, in violation of the Fourteenth Amendment to the United States Constitution and Article 1, Section 12 of the Indiana Constitution, respectively. As the State observes, such contentions have been decided adversely to Fuller's position. See *Beanblossom v. State*, 637 N.E.2d 1345, 1347-49 (Ind. Ct. App. 1994) (rejecting separation-of-powers, equal protection, and due process challenges to the statutory requirement of prosecutorial consent for sentence modification later than 365 days after sentencing).

thirty-nine years. Four years were suspended. The trial court also enhanced the sentence by thirty years because of the habitual offender finding.

Fuller v. State, 875 N.E.2d 326, 329 (Ind. Ct. App. 2007), *trans. denied*.
(superseded by statute).

[3] Fuller appealed his convictions for Burglary, Criminal Confinement, and Stalking and challenged his sentence as inappropriate. The *Fuller* panel concluded: “[The] conviction and sentence for Class C felony stalking must be reversed because of the untimeliness of the addition of the stalking charges. There is sufficient evidence to support his convictions for Class A felony burglary and Class B felony criminal confinement. Finally, we conclude his sentence is not inappropriate.” *Id.* at 335. On remand, the trial court entered an amended sentencing order, such that Fuller was to serve an aggregate term of imprisonment of sixty-five years. Subsequent to this, Fuller began to pursue various forms of post-conviction and federal habeas corpus relief.

[4] On August 13, 2014, Fuller, proceeding pro se, filed in the trial court a motion requesting that some of his individual sentences be run concurrently to yield an aggregate term of imprisonment of fifty years. The trial court denied this motion on September 2, 2014, and reaffirmed its ruling on September 8, 2014. On September 25, 2014, Fuller, again pro se, filed a petition for modification of his sentence. Construing this to be a second petition for sentence modification in a twelve-month period, the trial court dismissed Fuller’s petition. The

dismissal was made pursuant to Indiana Code section 35-38-1-17(h), which then provided:

A convicted person may file a petition for sentence modification under this section:

(1) not more than one (1) time in any three hundred sixty-five (365) day period; and

(2) a maximum of two (2) times during any consecutive period of incarceration.

[5] Fuller appealed, contending that his motion for concurrent sentences did not constitute a petition for sentence modification, and thus he had filed only a single petition for modification. A panel of this Court disagreed, observing: “a motion filed after a sentence has been entered, where the motion requests that a court change the terms of a sentencing order, can be nothing other than a request for modification of the sentence.” *Fuller v. State*, 79A02-1411-CR-818, 2015 WL 3537066, at *3 (Ind. Ct. App. June 4, 2015) (“*Fuller II*”). The *Fuller II* Court held that the September petition was barred from consideration and the trial court had not erred when it dismissed that petition without consideration of its merits. *Id.* at 4.

[6] On May 8, 2022, Fuller filed a petition to modify or reduce his sentence to time served. His petition detailed his participation in numerous rehabilitation programs and stated that his “accomplishments and good behavior” warranted modification. App. Vol. I, pg. 172. The petition also included a statement that,

subsequent to Fuller's incarceration, the maximum habitual offender enhancement had been reduced from thirty years to twenty years. On May 9, the trial court ordered that the State file a response. On June 10, Fuller filed a motion for default, based upon the lack of response from the State. The trial court scheduled a hearing for August 12, and the hearing was later reset for August 19. On August 18, the State responded and requested dismissal of Fuller's petition.

- [7] The trial court conducted a modification hearing on September 16 and, on September 19, entered an order denying the motion for a default judgment and dismissing Fuller's petition for sentence modification. In so doing, the trial court observed that the prosecutor had not consented to a modification of Fuller's sentence. Fuller's motion to correct error was summarily denied and this appeal ensued.

Discussion and Decision

- [8] Generally, we review a trial court's ruling on a motion to correct error for an abuse of discretion. *City of Indpls. v. Hicks*, 932 N.E.2d 227, 230 (Ind. Ct. App. 2010), *trans. denied*. However, where the issue presented on appeal is a pure question of law, we review the matter de novo. *State v. Moss-Dwyer*, 686 N.E.2d 109, 110 (Ind. 1997).
- [9] At the time Fuller filed his petition for sentence modification, Indiana Code Section 35-38-1-17 provided in relevant part:

(a) Notwithstanding IC 1-1-5.5-21, this section applies to a person who:

(1) commits an offense; or

(2) is sentenced;

before July 1, 2014.

(b) This section does not apply to a credit restricted felon.

(c) Except as provided in subsections (k) and (m), this section does not apply to a violent criminal.

(d) As used in this section, “violent criminal” means a person convicted of any of the following offenses: . . .

(13) Burglary as Class A felony or a Class B felony (IC 35-43-2-1) (for a crime committed before July 1, 2014) or burglary as a Level 1 felony, Level 2 felony, Level 3 felony, or Level 4 felony (IC 35-43-2-1) (for a crime committed after June 30, 2014). . . .

(e) At any time after:

(1) a convicted person begins serving the person’s sentence; and

(2) the court obtains a report from the department of correction concerning the convicted person’s conduct while imprisoned;

the court may reduce or suspend the sentence and impose a sentence that the court was authorized to impose at the time of sentencing. However, if the convicted person was sentenced under the terms of a plea agreement, the court may not, without the consent of the prosecuting attorney, reduce or suspend the sentence and impose a sentence not authorized by the plea agreement. The court must incorporate its reasons in the record.

. . . .

(k) This subsection applies to a convicted person who is a violent criminal. A convicted person who is a violent criminal may, not later than three hundred sixty-five (365) days from the date of sentencing, file one (1) petition for sentence modification under this section without the consent of the prosecuting attorney. After the elapse of the three hundred sixty-five (365) day period, a violent criminal may not file a petition for sentence modification without the consent of the prosecuting attorney[.]

[10] Having been convicted of Burglary, as a Class A felony, Fuller is a violent criminal for purposes of the sentence modification statute. The plain language of subsection (k) prohibits the filing of a petition for modification more than 365 days after the imposition of a sentence, absent prosecutorial consent. As best we can discern Fuller's argument, he claims that there has been prosecutorial acquiescence in his case because the State filed its objection in response to the trial court's order only one day before the second setting of the hearing on the modification petition.

[11] Fuller directs our attention to *Harper v. State*, 8 N.E.3d 694 (Ind. 2014), which involved a sentence modification petition that was governed by the non-violent

offender provisions of Indiana Code Section 35-38-1-17. In that case, our Indiana Supreme Court found that, “in the context of the interactions and communications between the trial court and the prosecutor..., the prosecutor’s conduct satisfied the ‘approval’ requirement of the [modification] statute.” *Id.* at 697. The Court described those interactions:

The deputy prosecutor participated in the January 25 modification hearing. There, the trial court specifically told the deputy prosecutor that the court lacked authority to modify the defendant’s sentence, that it wanted to know whether the prosecutor’s office would approve, and that it would not modify the sentence over the prosecutor’s objection. In seeking the prosecutor’s consent, the trial court also stated: “If you tell me that your office is going to appeal [the court’s modification order] then I will save everybody the time and the energy and save the tax payers the money and I won’t do it.” ... The deputy prosecutor agreed with the trial court that he wanted “to think about that and talk about it with somebody else.” ... At the end of the hearing, the trial court expressed it was “inclined to give it a try” and directed that the prosecutor’s office provide “more input” to the court “in the near future” or “in the next week or so.” ... The deputy prosecutor agreed. ... On March 5, over five weeks later with no response from the prosecutor’s office, the trial court granted the defendant’s motion for modification.

Id. at 697-98 (citations omitted).

[12] In this case, the State was ordered to respond to Fuller’s petition and was not particularly prompt in doing so. That said, however, we cannot ignore the fact that – unlike the circumstances of *Harper* – the State did, by a court filing, demonstrate its opposition. Here, there is no approval by acquiescence.

Conclusion

[13] Pursuant to Indiana Code Section 35-38-1-17(k), the trial court lacked authority to grant a sentence modification petition by Fuller, a violent criminal, filed more than 365 days after his sentence was imposed, absent prosecutorial consent. Thus, the trial court did not misconstrue the law in denying Fuller's motion to correct error.

[14] Affirmed.

Tavitas, J., and Kenworthy, J., concur.