

## MEMORANDUM DECISION

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.



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## IN THE COURT OF APPEALS OF INDIANA

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Michael W. Wise, Sr.,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

May 5, 2021

Court of Appeals Case No.  
20A-CR-2203

Appeal from the Hamilton  
Superior Court

The Honorable William J. Hughes,  
Judge

Trial Court Cause No.  
29D03-1412-FC-9933

**Mathias, Judge.**

- [1] Michael W. Wise was convicted in the Hamilton Superior Court of Class C and Class D felony check fraud and found to be a habitual offender. The court

ordered him to serve sixteen years in the Department of Correction. Wise subsequently filed several sentence-related motions and now appeals the trial court's denial of his latest motion to modify his sentence, arguing that the trial court erred in determining it lacked statutory authority to consider the merits of the motion.

[2] We affirm.

### **Facts and Procedural History**

[3] During the course of his incarceration, which began in 2015, Wise has filed multiple motions related to his sentence. On September 14, 2018, he filed a Motion for Modification of Placement. Appellant's App. Vol. II, p. 101. The trial court denied that motion. Approximately thirteen months later, on October 8, 2019, he filed a Motion for Minimum Security Community Corrections Program. *Id.* at 157. The trial court denied that motion, as well. Wise filed another Motion for Modification of Placement on February 19, 2020, *id.* at 167, which the trial court also denied. And on June 5, Wise filed a Motion for Modification of Sentence. *Id.* at 178.

[4] On October 29, the trial court held a hearing on the June 5 motion. During the hearing, Wise conceded that the June 5 motion was not his first motion for a sentence modification. Tr. p. 5. The court observed that his prior motions were "denied on multiple occasions" and explained that the court is "not permitted to consider" the June 5 motion without the State's consent. *Id.* at 9–10. The court then denied the June 5 motion. *Id.* at 11.

[5] Wise now appeals.

## Discussion and Decision

[6] In most cases, we review the denial of a motion to modify sentence for an abuse of discretion. *Sargent v. State*, 158 N.E.3d 783, 785 (Ind. Ct. App. 2020) (citing *Gardiner v. State*, 928 N.E.2d 194, 196 (Ind. 2010)). However, in denying the June 5 motion, the trial court determined that it lacked statutory authority to modify Wise’s sentence. This presents a question of law which we review de novo. See *State v. Holloway*, 980 N.E.2d 331, 333–34 (Ind. Ct. App. 2012).

[7] A trial court generally has no authority over a defendant after sentencing. *State v. Harper*, 8 N.E.3d 694, 696 (Ind. 2014). However, Indiana Code section 35-38-1-17 provides a notable exception to this general rule and gives trial courts authority under certain circumstances to modify a sentence. *Johnson v. State*, 36 N.E.3d 1130, 1133 (Ind. Ct. App. 2015). Subsection 35-28-1-17(e) provides, “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 trial court “may reduce or suspend the sentence and impose a sentence that the court was authorized to impose at the time of sentencing.”

[8] Moreover, our legislature has determined that a convicted person “who is not a violent criminal,” such as Wise, may file a petition for sentence modification “not more than one (1) time in any three hundred sixty-five (365) day period” and “a maximum of two (2) times during any consecutive period of

incarceration; without the consent of the prosecuting attorney.” [Ind. Code § 35-38-1-17\(j\)](#); *Sargent*, 158 N.E.3d at 785.

Wise argues that the trial court applied the wrong statute in determining it lacked authority to consider the motion. Specifically, he argues that the trial court should have applied [Indiana Code § 35-38-2.6-3](#). He is incorrect.

[9] [Section 35-38-2.6-3](#) “allows the trial court to suspend a sentence and place a defendant in community corrections at the time of the original sentencing.” *Keys v. State*, 746 N.E.2d 405, 407 (Ind. Ct. App. 2001). On the other hand, “[Ind. Code § 35-38-1-17](#) provides the trial court with the authority, under certain circumstances, to modify a defendant’s sentence.” *Id.* Thus, “[i]f after sentencing, a defendant requests to modify his placement . . . this is a request for a modification of sentence under [Ind. Code § 35-38-1-17](#).” *Id.* (citing *State v. Porter*, 729 N.E.2d 591, 593 n.1 (Ind. Ct. App. 2000)).

[10] Wise admits that, including the June 5 motion, he “filed four Motions for Modification of Placement . . . during the course of his incarceration.” Appellant’s Br. at 11. Yet, he asserts at the same time that “the Motions do not count as Motions to Modify Sentence for purposes of [Ind. Code 35-38-1-17](#).” *Id.* Again, Wise is incorrect.

[11] Because he had already filed three motions for modification, his June 5 motion could not be considered by the trial court without the consent of the prosecuting attorney. *See* I.C. [§ 35-38-1-17\(j\)\(2\)](#). And at the October 29 hearing, the prosecuting attorney expressly declined consent. Tr. p. 10. The trial court

therefore properly concluded it had no authority under subsection [35-38-1-17\(j\)](#) to consider the June 5 motion for modification.

### **Conclusion**

[12] For all of these reasons, we conclude that the trial court did not err in denying Wise's June 5 motion for modification.

Riley, J., and Crone, J., concur.