

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

Lamarr T. Crittenden,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 26, 2021

Court of Appeals Case No.
20A-CR-1663

Appeal from the Marion Superior
Court

The Honorable Anne Flannelly,
Magistrate

Trial Court Cause No.
49G04-0810-FA-227401

Pyle, Judge.

Statement of the Case

[1] Lamarr Crittenden (“Crittenden”) appeals pro se the trial court’s denial of his petition to modify the conditions of his probation. Concluding that, procedurally, Crittenden has utilized the wrong vehicle for his petition, we affirm the denial of his request to modify his probation conditions.

[2] We affirm.

Issue

Whether the trial court erred by denying Crittenden’s petition to modify conditions of his probation.

Facts

[3] In 2009, Crittenden was convicted of Class A felony child molesting and Class C felony child molesting. He was sentenced to an aggregate term of thirty-five (35) years with five (5) years suspended. On direct appeal, we affirmed Crittenden’s convictions and sentence. *See Crittenden v. State*, No. 49A05-0906-CR-355 (Ind. Ct. App. Jan. 21, 2010), *trans. denied*.

[4] In 2010, Crittenden filed a pro se petition for post-conviction relief (“PCR”) arguing, in part, that his trial and appellate counsel rendered ineffective assistance with regard to sentencing. The post-conviction court agreed and remanded Crittenden’s case for a new sentencing hearing. Crittenden appealed, challenging several of the post-conviction court’s procedural rulings as well as its denial of his remaining claims of ineffective assistance of trial and appellate

counsel. This Court affirmed the post-conviction court's rulings and decision. *See Crittenden v. State*, 49A05-1405-PC-227 (Ind. Ct. App. June 30, 2015), *trans. denied*.

[5] In 2015, the trial court held a resentencing hearing and sentenced Crittenden to the same sentence previously imposed. He did not object to the trial court's imposition of his probation conditions. Crittenden filed another appeal with this Court challenging the sentence imposed on several grounds. Crittenden did not challenge his probation conditions on appeal. This Court affirmed Crittenden's sentence. *See Crittenden v State*, 49A04-1512-CR-2183 (Ind. Ct. App. Mar. 13, 2017), *trans. denied*.

[6] Years later, on August 25, 2020, Crittenden who was still serving his executed sentence, filed a petition to challenge his probation conditions. Specifically, he filed a "verified petition for removal or modification of imposition of excessive, and unconstitutional sex offender probation conditions[.]" (App. Vol. 2 at 21). Crittenden sought a hearing on his challenges to his probation conditions. Part of Crittenden's challenge to his probation conditions was based on *Weida v. State*, 94 N.E.3d 682 (Ind. 2018), which was handed down after his resentencing appeal. That same day, Crittenden also filed a "motion for the court to take judicial notice of trial court's records of trial proceedings" as an "exhibit in his probation stipulation modification proceedings." (App. Vol. 2 at 35). The trial court denied both of Crittenden's requests, explaining that "[t]here are no 'probation stipulation modification proceedings' pending." (App. Vol. 2 at 35). Crittenden now appeals.

Decision

- [7] Crittenden challenges the trial court's denial of his petition for modification of his probation conditions. Specifically, he relies on INDIANA CODE § 35-38-2-1.8 and argues the trial court abused its discretion "because it flat out denied [his] petition without even holding a hearing on the matter." (Crittenden's Br. 18).
- [8] As an initial matter, the State argues Crittenden has waived his argument due to his failure to raise the issue on direct appeal. We agree with the State. Crittenden did not challenge his probation conditions at his resentencing hearing or in his direct appeal from resentencing. *See Washington v. State*, 808 N.E.2d 617, 625 (Ind. 2004) (concluding that failure to raise an argument in the trial court constituted waiver on appeal because "a trial court cannot be found to have erred as to an issue or argument that it never had an opportunity to consider").
- [9] Waiver notwithstanding, Crittenden is trying to achieve modification of his probation conditions through INDIANA CODE § 35-38-2-1.8. This statute, however, addresses the trial court's ability to hold a new probation hearing at any time during a probationer's probation period "upon motion of the probation department or upon the court's motion[.]" I.C. § 35-38-2-1.8(b)(1). This statute does not provide a defendant with a mechanism to challenge his probation conditions. Therefore, Crittenden's reliance on this statute is misplaced because, procedurally, it is an improper vehicle for the challenge he

raises.¹ Accordingly, the trial court properly denied Crittenden's petition to modify his probation conditions.

[10] Affirmed.

Vaidik, J., and Brown, J., concur.

¹ Indiana Post-Conviction Rule 1(a) provides that a defendant, who has already had a direct appeal, may challenge his conviction or sentence by filing a petition for post-conviction relief. Because Crittenden has previously sought post-conviction relief, he must follow the procedures found in Post-Conviction Rule 1(12) for successive petitions. *Currie v. State*, 82 N.E.3d 285, 287 (Ind. Ct. App. 2017). *See also* Indiana Post-Conviction Rule 1(12)(a) (providing that before a petitioner may file a successive post-conviction relief petition, the petitioner must request and receive leave to pursue a successive petition from this Court).