MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Darren E. Armstead,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

July 28, 2022

Court of Appeals Case No. 22A-CR-228

Appeal from the Vanderburgh Circuit Court

The Honorable Celia M. Pauli, Magistrate

Trial Court Cause Nos.
82C01-1608-F2-4631
82C01-1608-F3-4565
82C01-1609-F5-5385

Robb, Judge.

Case Summary and Issue

[1] In 2016, Darren Armstead pleaded guilty in three separate cases to numerous offenses and received a seventeen and one-half year sentence, all executed. In 2021, Armstead filed a motion for sentence modification which was denied. Armstead appeals the denial of his motion for sentence modification, raising several issues for our review that we consolidate and restate as whether the trial court abused its discretion in denying his motion. Concluding it was not an abuse of discretion to deny the motion for sentence modification, we affirm.

Facts and Procedural History

[2] On December 1, 2016, Armstead entered into a plea agreement with the State to dispose of three pending cases by pleading guilty to the following charges:

- In cause number 82C01-1608-F2-4631 ("4631"), dealing in methamphetamine, a Level 2 felony;
- In cause number 82C01-1608-F3-4565 ("4565"), dealing in methamphetamine, a Level 3 felony; possession of a narcotic drug, a Level 6 felony; false informing, a Class B misdemeanor; reckless driving, a Class C misdemeanor; and driving while suspended, a Class A misdemeanor; and
- In cause number 82C01-1609-F5-5385 ("5385"), fraud on a financial institution and attempted fraud on a financial institution, both Level 5 felonies.

See Appellant's Appendix, Volume 2 at 137. In exchange, the State agreed to dismiss the habitual offender allegation in each case. The parties agreed Armstead's sentence for all offenses would be capped at seventeen and one-half years, with the trial court to determine the sentence and placement. *See id.*

[3] In February 2017, the trial court sentenced Armstead to seventeen and one-half years in the Indiana Department of Correction ("DOC") for the Level 2 dealing in methamphetamine conviction in cause number 4631 and ordered all sentences in cause numbers 4565[1] and 5385[2] to be served concurrently with the sentence in 4631 and with each other. *See id.* at 229-34. In addition, the sentences were to be served consecutively to a sentence in 82C01-1108-FB-933 ("933"). *See id.* Armstead had been convicted of Class B felony robbery, Class D felony theft, and Class A misdemeanor false informing in cause 933 and was on parole in that cause at the time of these offenses. *See id.* at 162. The trial court made the following comment on the Sentencing Order in cause 4631:

> Should [Armstead] successfully complete all available treatment programs, the Court will consider modification of this sentence upon proper petition, and agreement of the State of Indiana.

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[1] The trial court sentenced Armstead to concurrent terms of nine years for dealing in methamphetamine, one year for possession of a narcotic drug, 100 days for false informing, thirty days for reckless driving, and 182 days for driving while suspended, all concurrent. *See id.* at 229-30.

[2] The trial court sentenced Armstead to concurrent three-year terms for attempted fraud on a financial institution and fraud on a financial institution. *See id.* at 233-34.

Id. at 231. The trial court specifically noted that Armstead "has a long standing substance abuse issue, and would benefit from any available treatment programs" at the DOC. *Id*. at 230.

[4] On December 13, 2021, Armstead filed a Motion for Modification of Sentence, alleging the record "furnishes ample evidence that [he] has been offered and has taken full advantage of numerous opportunity [sic] for rehabilitation while incarcerated, and [he] has demonstrated exemplary rehabilitative efforts, including free of conduct violation for the entirety of his incarceration." *Id.* at 204-05. Armstead requested that his placement be modified to the "Safe Haven, and Therapeutic Drug Treatment program as part of his Community Correction." *Id.* at 204. The trial court forwarded Armstead's motion to modify and accompanying filings to the State.

[5] On January 4, 2022, the trial court made the following entry: "The State contacts the Court and takes no position on [Armstead's] pro se Motion to Modify. Without agreement of the State, the Court denies [Armstead's] pro se Motion to Modify filed 12/13/21." *Id.* at 45. Armstead filed a motion to reconsider which the trial court also denied. Armstead now appeals.

Discussion and Decision

I. Standard of Review

[6] Generally, we review a trial court's decision regarding modification of a sentence for an abuse of discretion. *Gardiner v. State*, 928 N.E.2d 194, 196 (Ind.

2010). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or when the court misinterprets the law. *Johnson v. State*, 36 N.E.3d 1130, 1133 (Ind. Ct. App. 2015), *trans. denied*. However, where the question on appeal involves the interpretation of statutes, our review is de novo. *Id.*

II. Sentence Modification

[7] "A trial judge generally has no authority over a defendant after sentencing; however, the legislature may give the court authority, under certain circumstances, to modify a defendant's sentence." *State v. Harper*, 8 N.E.3d 694, 696 (Ind. 2014). Indiana Code section 35-38-1-17 is such an exception to the general rule, as it authorizes a trial court to reduce or suspend a sentence, in certain circumstances, after a defendant has begun serving the sentence.[3] *Barber v. State*, 122 N.E.3d 809, 810 (Ind. 2019). Section 35-38-1-17[4] provides, in relevant part:

> (e) At any time after:

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[3] In addition to Indiana Code section 35-38-1-17, Armstead cites section 35-38-2.6-3 as authority for the trial court to modify his placement. *See, e.g.*, Brief of Appellant at 10. However, section 35-38-2.6-3, which allows a court to suspend a sentence and order a person placed in a community corrections program as an alternative to commitment to the DOC, applies only at the time of sentencing and does not provide separate authority for a trial court to modify placement *after* sentencing. *Keys v. State*, 746 N.E.2d 405, 407 (Ind. Ct. App. 2001). Accordingly, when a defendant requests modification of his placement after sentencing, it is treated as a request for modification of sentence under section 35-38-1-17. *Id.*

[4] The applicable version of the statute is that in effect at the time the petition to modify was filed. *State v. Lamaster*, 84 N.E.3d 630, 634 (Ind. Ct. App. 2017). Here, that is the version that became effective on July 1, 2018.

> (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 sentenced not authorized by the plea agreement. The court must incorporate its reasons in the record.

(f) *If* the court sets a hearing on a petition under this section, the court must give notice to the prosecuting attorney and the prosecuting attorney must give notice to the victim[.]

* * *

(h) The court may deny a request to suspend or reduce a sentence under this section without making written findings and conclusions.

* * *

(j) . . . A convicted person who is not a violent criminal 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;

without the consent of the prosecuting attorney.

(Emphasis added.)

[8] Armstead argues the trial court abused its discretion in denying his motion to modify for several reasons: the trial court did not obtain a report from the DOC prior to denying his motion; the trial court did not hold a hearing on his motion; and the trial court erroneously believed the State's consent was required in order for it to modify his sentence, but even if the State's consent was required, the State took no position on his motion which was not tantamount to withholding its consent.

[9] Armstead is correct that the consent of the prosecuting attorney was not required for him to file this motion for sentence modification because he had previously filed only one motion during this period of incarceration[5] and he had done so more than 365 days prior to filing this motion. Ind. Code § 35-38-1-17(j). Nor was the prosecuting attorney's consent required under section 35-38-1-17(e) because although Armstead pleaded guilty, the plea agreement provided only a sentence cap, leaving the length and placement of the sentence to the trial court. In other words, we agree with Armstead's premise that the trial

[5] Armstead filed a motion to modify in these cases in July 2018, but the State objected to modification and the trial court denied the motion. *See* Appellant's App., Vol. 2 at 24.

court had the authority to rule on his motion without the prosecutor's consent, but we disagree to the extent he argues the trial court was therefore required to grant it. Section 35-38-1-17(e) specifies that a court "may" reduce or suspend a convicted person's sentence, and therefore the court has the discretion to deny a motion to modify even when the prosecutor's consent is not required. For several reasons, we find the trial court did not abuse its discretion here.

[10] First, Armstead's plea agreement imposed a sentence cap of seventeen and one-half years, not a specific sentence. With the sentence and placement left to its discretion, the trial court sentenced Armstead to seventeen and one-half years executed but, addressing Armstead's long standing substance abuse problem, included a provision that it would *consider* modification of that sentence *if* Armstead successfully completed all available treatment programs *and* the State agreed to modification. *See* Appellant's App., Vol. 2 at 231. Although Armstead did state in his motion that he had completed the Purposeful Incarceration therapeutic community program, *see id.* at 205-06, he did not indicate he had completed all available treatment programs and the State did not agree to a modification.[6] Because the trial court specifically conditioned considering a modification of Armstead's sentence on the State's agreement, this case is different from *Schmitt v. State*, a case which we remanded because the record suggested the trial court might have been under the mistaken

[6] Armstead contends the State's "position regarding a modification is *inarguable*": taking no position means the State has no objection. Br. of Appellant at 13. Whether or not that is true, "no position" is not affirmative agreement, which is what the trial court's precondition required.

impression it was statutorily required to have prosecutorial consent. 108 N.E.3d 423, 429 (Ind. Ct. App. 2018). There is no indication here the trial court was confused about the State's statutory role, just a recognition that Armstead failed to meet the conditions it set for considering a modification.

[11] Second, although Armstead is a non-violent offender and offered evidence of his efforts at rehabilitation as part of his motion to modify, the "mere fact that the process of rehabilitation may have started does not compel a reduction or other modification in sentence." *Catt v. State*, 749 N.E.2d 633, 643-44 (Ind. Ct. App. 2001) (affirming denial of sentence modification even where defendant had participated in several rehabilitative programs, was employed in prison, and made restitution), *trans. denied*. In other words, a trial court does not abuse its discretion in declining to modify a defendant's sentence even where there is evidence the defendant has made or is making efforts at rehabilitation.

[12] Armstead also suggests the trial court abused its discretion by failing to order a conduct report from the DOC and to hold a hearing prior to denying his petition. However, it is well-established that a trial court is only required to obtain a report from the DOC or hold a hearing if it has made a preliminary decision to modify the sentence. *Mance v. State*, 163 N.E.3d 367, 370 (Ind. Ct. App. 2021). Given Armstead had not met the conditions the trial court set for considering a modification, there is no indication the trial court had made a

preliminary determination it would grant his motion and therefore, it was not required to obtain a report or hold a hearing.[7]

Conclusion

[13] The trial court did not abuse its discretion by denying Armstead's motion to modify his sentence. Accordingly, the trial court's decision is affirmed.

[14] Affirmed.

Pyle, J., and Weissmann, J., concur.

[7] To the extent Armstead argues the trial court's failure to obtain a report and hold a hearing indicated bias against him, *see* Br. of Appellant at 12, we disagree, as the trial court was not required to do these things.