

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jose Luis Santana,
Appellant / Cross-Appellee / Defendant,

v.

State of Indiana,
Appellee / Cross-Appellant / Plaintiff.

August 29, 2022

Court of Appeals Case No.
22A-CR-41

Appeal from the Elkhart Superior
Court

The Honorable Teresa L. Cataldo,
Judge

Trial Court Cause No.
20D03-1801-FA-2

Tavitas, Judge.

Case Summary

- [1] Jose Santana appeals his sentence for two counts of child molesting. Santana's plea agreement explicitly waives his right to appeal. Accordingly, his appeal is not properly before us, and we dismiss it.

Issue

- [2] We find a single issue to be dispositive: whether Santana waived his right to appeal his sentence.

Facts

- [3] Santana's eleven-year-old victim reported to her mother that Santana had been molesting her for five years. As a result, the State charged Santana with multiple counts of child molesting on January 22, 2018. Santana entered into a plea agreement wherein he pleaded guilty to two counts of child molesting as Class A felonies on September 6, 2018. One of the terms of that plea agreement, initialed and signed by Santana, is as follows:

The Defendant understands that he may have the right to appeal his sentence under Indiana Appellate Rule 7B. Notwithstanding that right, by pleading guilty under this agreement, the Defendant knowingly, intelligently, and voluntarily waives his right to challenge the sentence on the basis that it is erroneous and waives his right to have appellate review of his sentence under Indiana Appellate Rule 7B.

Appellant’s App. Vol. II p. 34. The trial court sentenced Santana to an aggregate of thirty years in the Department of Correction. On December 2, 2021, Santana sought—and was granted—permission to file this belated appeal.

Discussion and Decision

[4] “[I]t is well settled that a defendant can waive his right to appeal a sentence.” *Fields v. State*, 162 N.E.3d 571, 575 (Ind. Ct. App. 2021) (citing *Crider v. State*, 984 N.E.2d 618, 623 (Ind. 2013)), *trans. denied*. “A waiver of that kind should be given effect if ‘the record clearly demonstrates that it was made knowingly and voluntarily.’” *Morris v. State*, 985 N.E.2d 364, 366 (Ind. Ct. App. 2013), *on reh’g*, 2 N.E.3d 7 (Ind. Ct. App. 2013) (quoting *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008)); *see also Brown v. State*, 970 N.E.2d 791, 793 (Ind. Ct. App. 2012) (“Brown signed a clearly stated written waiver of the right to appeal his sentence”). “But even where the waiver appears to be unqualified, a defendant retains the right to appeal his sentence under certain circumstances. A defendant’s waiver of appellate review is only valid if the sentence is imposed in accordance with the law.” *Id.* at 575-76.

[5] Here, Santana purports to challenge the legality of his sentence. *See* Appellant’s App. Vol. II pp. 66-67. Such a challenge, he contends, constitutes an exception to the absolute and unequivocal waiver of his right to appeal. Indeed, were he not challenging the legality of his sentence, he would not be an “eligible defendant” pursuant to Post-Conviction Rule 2, under which he brings this

belated appeal.¹ See, e.g., *Bowling v. State*, 960 N.E.2d 837, 841 (Ind. Ct. App. 2012). The reality, however, as the State correctly points out, is that Santana is not challenging the legality of his sentence.

[6] Santana argues that “[w]ithout supporting evidence that the victim was actually under the age of fourteen, the trial court erred when it found Santana to be a credit-restricted felon.” Appellant’s Br. pp. 8-9. Regardless of how the claim is styled, the core of Santana’s argument is that there was insufficient evidence for the trial court’s **factual** finding that the victim’s age rendered Santana a credit-restricted felon. Even if we were to agree,² Santana’s sentence would still not be illegal. The credit-restricted-felon statutes affect the credit time that a defendant receives against his sentence, not the sentence itself. Credit time is a bonus created by statute, and the deprivation of credit time does nothing more than take that bonus away; it does not render a sentence contrary to law, even if the deprivation is the result of a trial court’s error. *State v. Mullins*, 647 N.E.2d 676, 678 (Ind. Ct. App. 1995). The deprivation of credit time does not lengthen the fixed term of a defendant’s sentence. *Id.* This is precisely the type of claim

¹ An “eligible defendant” is defined under the rule as “a defendant who, but for the defendant’s failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal.” P-C.R. 2. As we explain *infra*, Santana would not have had the right to challenge his sentence because he knowingly waived that right.

² A probable cause affidavit listing the victim’s age was attached to the pre-sentence investigation report that the trial considered for sentencing. Santana had an explicit opportunity to contest or correct the report and made no attempt to argue that the victim’s age was listed incorrectly. To the extent that Santana contests the probable cause affidavit now, his arguments are waived due to Santana’s failure to raise them in the trial court.

that Santana knowingly waived as a part of his plea agreement. Accordingly, the issue is waived, and the appeal is dismissed.

Conclusion

[7] Santana has waived his right to appeal. Accordingly, we dismiss.

[8] Dismissed.

Riley, J., and May, J., concur.