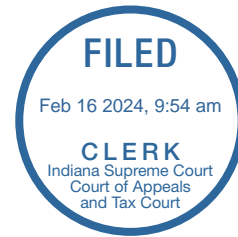


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Kurt Wertz,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

February 16, 2024

Court of Appeals Case No.
23A-CR-1052

Appeal from the Montgomery
Circuit Court

The Honorable Stephanie S.
Campbell, Special Judge

Trial Court Cause No.
54C01-0004-CF-51

Memorandum Decision by Judge Pyle

Judges Bailey and Crone concur.

Pyle, Judge.

Statement of the Case

- [1] Kurt Wertz (“Wertz”) appeals the denial of his motion for a sentence modification. He argues that the trial court abused its discretion in denying his motion. Concluding that the trial court did not abuse its discretion in denying Wertz’s motion, we affirm the trial court’s judgment.
- [2] We affirm.

Issue

Whether the trial court abused its discretion in denying Wertz’s motion for a sentence modification.

Facts

- [3] In May 2002, a jury convicted Wertz of Class A felony dealing in cocaine. The trial court sentenced Wertz to fifty years with forty-five years executed and five years suspended to probation. In addition, the trial court ordered the sentence in that cause to run concurrently with Wertz’s sentence in another cause. In September 2003, this Court affirmed Wertz’s conviction. *See Wertz v. State*, No. 54A01-0210-CR-396 (Ind. Ct. App. Sept. 30, 2003) (mem).
- [4] In November 2019, Wertz filed a motion for a sentence modification. Following a November 2020 hearing, the trial court denied Wertz’s motion in January 2021. The trial court specifically found that since May 2018, Wertz had committed four major conduct violations in the Department of Correction (“the DOC”), including rioting and threatening. The trial court further found

that Wertz had committed at least thirty-six conduct violations while incarcerated and that several of those violations had included violent behavior. The trial court also found that Wertz had been ordered to serve the sentence for his conviction in that cause consecutively with the sentence for his conviction in another cause.

[5] Wertz appealed the trial court's denial of his motion. In April 2022, this Court concluded that Wertz's appeal was untimely and dismissed it. *See Wertz v. State*, No. 21A-CR-0456 (Ind. Ct. App. Apr. 29, 2022) (mem). In May 2022, Wertz filed a petition for rehearing. In July 2022, this Court granted Wertz's petition for rehearing. We explained that, upon further reflection regarding the timeliness of Wertz's appeal, we had determined that Wertz had not forfeited his right to appeal and elected to address his arguments. *Wertz v. State*, No. 21A-CR-456, at *2 (Ind. Ct. App. July 27, 2022) (mem). We first noted that the trial court had erred in finding that Wertz had been ordered to serve consecutive sentences for his conviction in that cause and his conviction in another cause. *Id.* We further noted that the trial court had found that Wertz had committed rioting while incarcerated. *Id.* However, we explained that the United States District Court for the Southern District of Indiana had granted Wertz's petition for writ of habeas corpus challenging the prison disciplinary sanction related to the allegation of rioting. *Id.* Specifically, the District Court had determined that there was a total absence of evidence showing that a riot had occurred. *Id.* In addition, the District Court had determined that Wertz's conduct did not fit the DOC's own definition of rioting. *Id.* The District Court

therefore ordered the warden to vacate Wertz's disciplinary conviction for rioting and to restore his credit time. *Id.* In light of the trial court's error regarding its finding that Wertz's sentences had been ordered to be served consecutively and its reliance on a disciplinary report of rioting that was vacated by the District Court, we reversed the trial court, remanded the case, and ordered the trial court to hold another hearing to determine the merits of Wertz's petition for a sentence modification. *Id.* at *3.

[6] In December 2022, the trial court held another hearing on Wertz's motion. During the hearing, Wertz read a self-prepared statement, wherein he told the trial court that he had been "over[-]sentenced" in 2002 and that "[m]ost of [his] conduct issues in recent years [had been] based on policy violations committed by [DOC] staff." (Tr. Vol. 2 at 11, 13). Wertz further told the trial court that it was his "belief the Indiana Court of Appeals [had] remanded this proceeding back to [the trial court] for the simple fact that [he] should be given the opportunity for grace noting the totality of the circumstances[.]" (Tr. Vol. 2 at 11). In addition, several of Wertz's family members testified that they would provide Wertz with housing and help him find employment if the trial court modified his sentence.

[7] Also, at the hearing, the trial court admitted into evidence an eleven-page DOC report that set forth more than forty conduct violations that Wertz had committed from 2003 through 2022. The report revealed that since the previous hearing on his motion in November 2020, Wertz had committed seven additional violations. These violations included threatening, business activity,

disruptive behavior, unauthorized possession of property, refusing an order, violation of safety and sanitation rules, and possession of dangerous or deadly contraband or property. Wertz received the violation for threatening after this Court had reversed the trial court's denial of his motion and granted him a new hearing.

[8] Following the December 2022 hearing, the trial court issued an order denying Wertz's motion. The trial court's order specifically provides, in relevant part, as follows:

While incarcerated [Wertz] has received 43 institutional behavior conduct violations. Two are classified as "A" conduct, 16 classified as "B" conduct, 21 classified as "C" conduct and four classified as "D" conduct. "A" is the higher level of conduct, "D" is the lower level. Seven of the violations have been since the hearing on November 25, 2020. On January 13, 2021 [Wertz] had an A conduct violation for possessing dangerous or deadly contraband.

* * * * *

The majority of [Wertz]'s testimony focused on the errors he believes the sentencing Court made rather than rehabilitation he has achieved while incarcerated. The Court acknowledges that the underlying offense is not of a violent nature but notes that [Wertz] has engaged in violent conduct repeatedly while incarcerated.

(App. Vol. 2 at 6-7).

[9] Wertz now appeals.

Decision

- [10] Wertz argues that the trial court abused its discretion in denying his motion for a sentence modification. He specifically contends that “his attitude and behavior have changed for the better. He is not the same person he was at the time of the offense. . . . He has learned to think before he acts.” (Wertz’s Br. 14).
- [11] As a general rule, a trial court has no authority over a criminal defendant after sentencing. *Newman v. State*, 177 N.E.3d 888, 890 (Ind. Ct. App. 2021), *trans. denied*. An exception to this general rule is set forth in INDIANA CODE § 35-38-1-17(e), which provides that after a defendant has begun serving his sentence and the trial court has obtained a DOC progress report, a trial court “may reduce or suspend the sentence and impose a sentence that the court was authorized to impose at the time of sentencing.” *Id.* at 890-91.
- [12] Trial courts have broad discretion to modify a sentence, and we review a trial court’s denial of a motion to modify a sentence for an abuse of that discretion. *Id.* at 891. An abuse of discretion occurs where the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.* “In determining whether an abuse of discretion occurred, we may not reweigh the evidence, but will consider only the evidence favorable to the judgment.” *Schmitt v. State*, 108 N.E.3d 423, 428 (Ind. Ct. App. 2018).
- [13] Here, our review of the evidence reveals that Wertz has received more than forty conduct violations during his incarceration. Notably, he received seven of

those violations after the November 2020 hearing on his motion for a sentence modification and one of those violations after this Court reversed the trial court's denial of his motion and granted him a new hearing. These violations include threatening, business activity, disruptive behavior, unauthorized possession of property, refusing an order, violation of safety and sanitation rules, and possession of dangerous or deadly contraband or property. Based on the number and severity of these conduct violations, the trial court's denial of Wertz's motion is not clearly against the logic and effect of the facts and circumstances before it. Accordingly, we find no abuse of the trial court's discretion and affirm the trial court's denial of Wertz's motion.¹

[14] Affirmed.

Bailey, J., and Crone, J., concur.

¹ We further note that Wertz's argument that the trial court overlooked his participation in rehabilitative programs is not persuasive. In the *Newman* case, we explained that "a trial court does not abuse its discretion in declining to modify a defendant's sentence even where there is plentiful evidence presented of his efforts at rehabilitation." *Newman*, 177 N.E.3d at 891. See also *Marshall v. State*, 563 N.E.2d 1341, 1343 (Ind. Ct. App. 1990) (explaining that Marshall's evidence of his remorsefulness, his good conduct and rehabilitative efforts while incarcerated, and his employment opportunity if he were to be released was all self-serving and did not inevitably lead to the conclusion that the trial court had abused its discretion in declining to reduce Marshall's sentences), *trans. denied*.