MEMORANDUM DECISION

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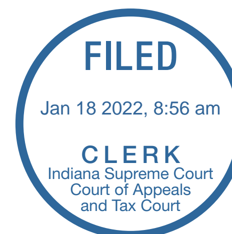

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IN THE

COURT OF APPEALS OF INDIANA

Damon T. Gee,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 18, 2022

Court of Appeals Case No. 21A-CR-438

Appeal from the Grant Superior Court

The Honorable Dana J. Kenworthy, Judge

Trial Court Cause No. 27D02-1111-FB-321

Najam, Judge.

Statement of the Case

[1] Damon T. Gee appeals the trial court's denial of his motion to modify his sentence. Gee presents two issues for our review:

1. Whether the trial court abused its discretion when it denied his motion to modify his sentence.

2. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

[2] We hold that the court did not abuse its discretion when it denied Gee's motion to modify his sentence. And we hold that the question of whether Gee's sentence is inappropriate is not properly before the Court. Accordingly, we affirm.

Facts and Procedural History

[3] In November 2011, the State charged Gee with unlawful possession of a firearm by a serious violent felon, as a Class B felony (Count 1); possession of a stolen vehicle, as a Class D felony (Count 2); resisting law enforcement, as a Class A misdemeanor (Count 4); and escape as a Class C felony (Count 5).[1] In addition, the State alleged that Gee was a habitual offender. Prior to his trial, the State presented Gee with several plea offers. In one of those offers, the State offered Gee a sentence of twenty-five years in exchange for his guilty plea.

[1] The State initially charged Gee with a second count of resisting law enforcement, as a Class A misdemeanor, but ultimately dismissed that charge.

Gee's trial counsel advised him that, if he accepted the plea agreement, he would not be able to appeal his adjudication as a habitual offender even if his remaining convictions were ultimately vacated on appeal. Appellant's App. Vol. 2 at 38.[2] Based on that advice, Gee rejected the plea offers and proceeded to trial.

[4] Following a trifurcated trial, the jury found Gee guilty on all counts. The court entered judgment of conviction accordingly and sentenced Gee to twenty years on Count 1, enhanced by twenty years for the habitual offender adjudication; three years for Count 2; one year for Count 3; and eight years for Count 5. The court then ordered those sentences to run concurrently, for an aggregate term of forty years.

[5] On October 23, 2013, Gee filed a petition for post-conviction relief. The State agreed that Gee had received ineffective assistance from his trial counsel during plea negotiations and that, as a result, Gee received a longer sentence than he would have received had he accepted the plea agreement. *Id*. Gee agreed to withdraw his petition, and, in exchange, the State agreed to request that his sentence on Count 1 be modified to fifteen years, enhanced by ten years for his status as a habitual offender. Thereafter, the parties filed a joint motion to withdraw Gee's petition for post-conviction relief. On April 18, 2016, the court

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[2] Our pagination of the Appellant's Appendix and any other document in the record on appeal refers to the .pdf pagination.

granted the parties' joint motion and modified Gee's sentence on Count 1 as agreed.

[6] On October 20, 2020, Gee, *pro se*, filed a motion to modify his sentence. In that motion, Gee asserted that the court should modify his sentence because he has had "no violence, nor any weapons conduct reported" while he was incarcerated. *Id*. at 63. He further maintained that "[a]n attempt was made" on his life while incarcerated and that he had "attained the Court's desired goal of rehabilitating himself[.]" *Id*. at 64-65. Accordingly, Gee requested that the court modify his sentence and place him on home detention. The State objected, and the trial court summarily denied Gee's motion. This appeal ensued.

Discussion and Decision

Issue One: Motion to Modify Sentence

[7] Gee, *pro se*, first asserts that the trial court abused its discretion when it denied his motion to modify his sentence. We review a trial court's decision regarding modification of a sentence for an abuse of discretion. *Johnson v. State*, 36 N.E.3d 1130, 1133 (Ind. Ct. App. 2015), *trans. denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or when the court misinterprets the law. *Id*.

[8] Sentence modifications are governed by Indiana Code Section 35-38-1-17, which the legislature has amended several times since Gee committed the

offenses in 2010. Relying on the 2010 version of the statute, Gee contends that the trial court had the authority to modify his sentence and place him in a community corrections program without the consent of the prosecutor. *See* Appellant's Br. at 14-17; *see also* Ind. Code § 35-38-1-17(b) (2010).

[9] We acknowledge that, as a general rule, "courts must sentence a convicted person under the statute in effect at the time the person committed the offense." *Moore v. State*, 30 N.E.3d 1241, 1246 (Ind. Ct. App. 2015). However, the legislature modified the statute in 2015 to expressly apply to a person who commits an offense or is sentenced before July 1, 2014. I.C. § 35-38-1-17(a) (2021). And this Court has interpreted that amendment to "expressly provide for retroactivity." *Vazquez v. State*, 37 N.E.3d 962, 964 (Ind. Ct. App. 2015). Thus, the version of the statute applicable to Gee's motion to modify his sentence is the amended version.[3] *See id*.

[10] As amended, Indiana Code Section 35-38-1-17 provides that, at any time after a convicted person begins serving his sentence and the court obtains a report from the Department of Correction concerning his 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." I.C. § 35-38-1-17(e). 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,

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[3] While Gee relies on the 2010 version to support his argument, he briefly mentions the "revised statute" at the end of his argument on this issue. Appellant's Br. at 19.

reduce or suspend the sentence and impose a sentence not authorized by the plea agreement." *Id*.

[11] Relying on the current version of the statute, the State contends that the court properly denied Gee's motion for sentence modification. Specifically, the State asserts that, because the 2016 joint motion to withdraw Gee's petition for post-conviction relief provided for a specific revision to his sentence, it was "[f]unctionally" a plea agreement and that the court did not have the authority to modify Gee's sentence without the prosecutor's consent. Appellee's Br. at 9. In response, Gee asserts that the joint motion cannot be considered a plea agreement because he did not plead guilty to the offenses and because certain provisions of the joint motion would render a true plea agreement "null and void." Reply Br. at 5.

[12] However, we need not determine whether the joint motion to withdraw his petition amounts to a plea agreement. Assuming for the sake of argument that the prosecutor's consent was not required, Gee has still not met his burden on appeal to demonstrate that the court abused its discretion when it denied his motion. As Gee acknowledges, "a sentence modification is not a given" and the court "had the authority to grant or deny" the motion. Appellant's Br. at 18. Indeed, Indiana Code Section 35-38-1-17(e) specifies that a court "may" reduce or suspend a convicted person's sentence. In other words, even when the prosecutor's consent is not required, the court has the discretion to deny the motion.

[13] Other than his brief statement that his "life is in danger," Gee makes no argument on appeal to explain why the court's denial of his motion for sentence modification amounted to an abuse of discretion. Appellant's Br. at 17. And while Gee outlined several purported reasons to support his request for a sentence modification in his original motion, he does not explain why any of those reasons are significant in light of the record before the trial court. Indeed, Gee does not acknowledge his lengthy criminal history, which includes numerous violent felony convictions and at least three probation violations, or explain why he was entitled to a sentence modification despite that history. Nor does Gee acknowledge the fact that the court had already reduced his forty-year sentence down to twenty-five years. As such, we cannot say that the court abused its discretion when it denied Gee's motion to modify his sentence.

Issue Two: Inappropriate Sentence

[14] Gee next contends that his sentence is inappropriate in light of the nature of the offenses and his character. However, we do not reach the merits of this issue because we agree with the State that Gee's argument on this issue is "not properly before the Court at this time." Appellee's Br. at 11, n.2. Indiana Appellate Rule 9 prescribes the procedure for filing a party's Notice of Appeal with our Court. Rule 9(A)(1) states that "[a] party initiates an appeal by filing a Notice of Appeal with the Clerk . . . within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary." And Rule 9(A)(5) states that, "[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2." Here, the trial court

modified Gee's sentence in April 2016. Because Gee did not file a Notice of Appeal until March 2021, his appeal was untimely, and he has forfeited his right to appeal.

[15] In his reply brief, Gee concedes that his appeal of his sentence was not timely. Nonetheless, he asserts that Indiana Post-Conviction Rule 2 "permits" him to file a belated notice of appeal. Reply Br. at 9. But because Gee makes this argument for the first time in his reply brief, it is waived. *See Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005).

[16] Waiver notwithstanding, Post-Conviction Rule 2 provides that an eligible defendant is "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[.]" That rule further provides that "[a]n eligible defendant . . . may petition the trial court for permission to file a belated notice of appeal" if the defendant failed to file a timely notice of appeal, the failure to file a timely notice was not due to the fault of the defendant, and the defendant has been diligent in requesting permission to file a belated notice of appeal. P-C.R. 2(1)(a).

[17] We first note that there is no indication in the record that Gee petitioned the trial court for permission to file a belated notice of appeal. In addition, other than simply outlining the requirements of Post-Conviction Rule 2, Gee makes no argument that his failure to file a notice of appeal was due to no fault of his own or that he had been diligent in requesting permission to file a belated notice

of appeal. As a result, Gee has not met his burden on appeal to demonstrate that Post-Conviction Rule 2 applies to him, and we decline to review his purported belated appeal.

[18] In sum, the trial court did not abuse its discretion when it denied Gee's motion to modify his sentence. And Gee failed to timely appeal the appropriateness of his sentence. He has also not shown that he is an eligible defendant entitled to a belated appeal under Post-Conviction Rule 2. We therefore affirm the trial court.

[19] Affirmed.

Vaidik, J., and Weissmann, J., concur.