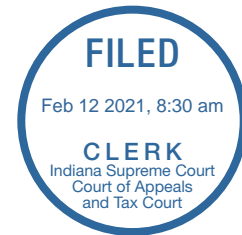


## MEMORANDUM DECISION

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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### APPELLANT PRO SE

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Michigan City, Indiana

### ATTORNEYS FOR APPELLEE

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## IN THE COURT OF APPEALS OF INDIANA

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Kevin Lavell Curry,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

February 12, 2021

Court of Appeals Case No.  
20A-CR-1292

Appeal from the Elkhart Superior  
Court

The Honorable Stephen R.  
Bowers, Judge

Trial Court Cause No.  
20D02-0907-FC-96

**Riley, Judge.**

## STATEMENT OF THE CASE

[1] Appellant-Defendant, Kevin Curry (Curry), appeals the trial court's denial of his petition to modify his sentence.

[2] We affirm and remand.

## ISSUE

[3] Curry presents this court with one issue on appeal, which we restate as:  
Whether the trial court properly denied Curry's request for a modification of his sentence.

## FACTS AND PROCEDURAL HISTORY

[4] On July 24, 2010, Curry was convicted of Class C felony corrupt business influence, fifteen Counts of Class C felony forgery, and was adjudicated to be a habitual offender. On August 8, 2010, Curry was sentenced to an aggregate sentence of forty-three years in the Department of Correction (DOC). On September 19, 2016, Curry filed a motion to modify sentence which was denied. On October 21, 2019, Curry filed another motion seeking alternative placement which was denied the next day. On May 7, 2020, Curry filed his third motion to modify sentence which was also denied by the trial court.

## DISCUSSION AND DECISION

[5] Curry argues that the trial court abused its discretion in denying his petition for a modification of his sentence. A trial court's decision regarding a petition for a modification of a sentence is reviewed for an abuse of discretion. *Gardiner v.*

*State*, 928 N.E.2d 194, 196 (Ind. 2010). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* Trial courts have broad discretion to modify a sentence. *Schmitt v. State*, 108 N.E.3d 423, 428 (Ind. Ct. App. 2018).

[6] The State argues that the trial court did not abuse its discretion by denying Curry's May 2020 motion to modify sentence because Curry never received consent from the prosecuting attorney before filing that motion. Indiana Code section 35-38-1-17 provides that a nonviolent offender "may file a petition for sentence modification . . . (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."

[7] Here, Curry filed three motions to modify his sentence: the first on September 19, 2016, the second on October 21, 2019, and the third on May 7, 2020. Curry's third motion to modify sentence was filed in less than one year, having filed one in October 2019 and the present one almost seven months later, in May 2020 without the consent of the prosecuting attorney. The modification statute expressly prohibits defendants from filing more than one motion for modification within a 365-day period without the consent of the prosecutor. Because consent was required before the trial court could exercise statutory authority to modify his sentence, the trial court did not abuse its discretion by denying relief to Curry. However, we find that the trial court's decision should be more appropriately characterized as a dismissal, and thus we remand to the

trial court with instructions to dismiss Curry's third motion to modify sentence. *See Vazquez v. State*, 37 N.E.3d 962, 964 (Ind. Ct. App. 2015) (holding that trial court properly dismissed defendant's sentence modification petition because it was filed "just three months after his last petition").

## CONCLUSION

[8] Based on the absence of the prosecutor's consent to file his motion to modify sentence, we hold that the trial court's denial of Curry's motion was not an abuse of its discretion but is more appropriately characterized as a dismissal, and thus, we remand to the trial court with instructions to dismiss Curry's motion.

[9] Affirmed and remanded.

[10] Najam, J. and Crone, J. concur