MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Pedro Toribio Marcelino,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 14, 2021

Court of Appeals Case No. 20A-CR-2050

Appeal from the Johnson Circuit Court

The Honorable K. Mark Loyd, Judge

Trial Court Cause No. 41C01-0502-MR-1

Altice, Judge.

Case Summary

[1] Pedro T. Marcelino is serving a forty-year sentence in the Indiana Department of Correction (the DOC) following his 2006 conviction for voluntary manslaughter. Last year, without the consent of the prosecuting attorney, he filed a pro-se motion for modification of sentence, which the trial court summarily denied. Marcelino's arguments are difficult to decipher on appeal, but he contends, ultimately, that the trial court improperly denied the motion without a hearing.

[2] We affirm.

Facts & Procedural History

[3] In February 2005, the State charged Marcelino with murder. Marcelino, an undocumented immigrant from Mexico, was represented by a court-appointed counsel, and an interpreter also appeared on Marcelino's behalf. Pursuant to a plea agreement, on April 17, 2006, Marcelino pleaded guilty to a reduced charge of Class A felony voluntary manslaughter. Later that month, the trial court held a sentencing hearing and imposed an executed sentence of forty years in the DOC.

[4] After filing a number of other pro-se motions with the trial court between 2016 and 2020, Marcelino filed the instant motion for modification of sentence on September 14, 2020. In the motion, Marcelino indicated that he had sought permission for modification from the Johnson County Prosecutor but had yet to receive a response. His stated goal was to be released from prison so that he could be deported back to Mexico "now as opposed to in 2025, which is what

the end result will be anyways." *Appellant's Appendix Vol. 2* at 9 (emphasis in original). The same day that Marcelino filed his motion, Daylon L. Welliver, Chief Deputy of the Johnson County Prosecutor's Office, notified him by letter as follows: "I have reviewed your case file and am informing you that we would not consent to modify your sentence, based on the serious nature of your crime." *Id*. at 3. Three days later, on September 17, the trial court denied Marcelino's motion for modification of his sentence. Marcelino now appeals.

Discussion & Decision

[5] The law is clear in this case. Marcelino's 2006 conviction for voluntary manslaughter rendered him, for modification purposes, a violent criminal. *See* Ind. Code § 35-38-1-17(d)(3). As such, Marcelino could seek modification of his sentence only under I.C. § 35-38-1-17(k), which provides:

> A convicted person who is a violent criminal may, not later than three hundred sixty-five (365) days from the date of sentencing, file one (1) petition for sentence modification under this section without the consent of the prosecuting attorney. *After the elapse of the three hundred sixty-five (365) day period, a violent criminal may not file a petition for sentence modification without the consent of the prosecuting attorney*.

(Emphasis supplied).

[6] Here, Marcelino filed his motion for modification more than fourteen years after being sentenced, and he did so without the consent of the prosecuting attorney. Under these circumstances, the petition was improperly filed, and the

trial court had no authority to modify the sentence. *See Merkel v. State*, 160 N.E.3d 1139, 1141 (Ind. Ct. App. 2020) ("[A]s Merkel could not request a modification of his sentence without the consent of the State, the trial court was without authority to consider his petition."); *see also State v. Fulkrod*, 753 N.E.2d 630, 633 (Ind. 2001) (reversing modification where time limit had expired and prosecutor refused to give approval and, thus, trial court lacked authority to modify sentence).

[7] Marcelino ignores the reality of the trial court's lack of authority and presents, without cogent reasoning, a number of constitutional arguments. Initially, he contends that he was "unduly denied the opportunity to have a full and fair opportunity to make proper presentment for modification under Ind. Code § 35-38-1-17." *Appellant's Brief* at 11. It appears he is arguing that the trial court should have held a hearing on his motion. We have held, however, that it is not unconstitutional for a trial court to deny a motion for sentence modification without holding a hearing. *See Manley v. State*, 868 N.E.2d 1175, 1178 (Ind. Ct. App. 2007) (declining defendant's "invitation to create a [constitutional] requirement that a hearing must be held before a trial court can rule upon a request for sentence modification … where a prosecutor has refused to approve the request"), *trans. denied*. Indeed, a hearing would have been futile here given the trial court's complete lack of authority to grant the motion without the prosecutor's consent, "a procedural condition precedent to the court's exercise of authority." *Woodford v. State*, 58 N.E.3d 282, 283 n.4 (Ind. Ct. App. 2016).

[8] Additionally, Marcelino asserts that his "language issues have caused a significant violation re: access to the court(s), due process of law and the provision for equal protection under the laws" as guaranteed under both the Indiana and United States Constitutions. *Appellant's Brief* at 17. Marcelino's arguments in this regard are undeveloped and unintelligible, and it is not at all clear to us how any language barriers affected his attempt to obtain a modification of his sentence. Further, we observe that I.C. § 35-38-1-17 "has withstood several constitutional challenges" including claims based on the separation of powers doctrine, due process, equal protection, and equal access to the courts. *Manley*, 868 N.E.2d at 1177; *see also Beanblossom v. State*, 637 N.E.2d 1345, 1348 (Ind. Ct. App. 1994) ("Beanblossom has no recognized liberty interest in a modification of his sentence under Indiana law, and the due process clause of the fourteenth amendment does not require that the decision to modify be free from Indiana's condition that it be subject to the approval of the prosecuting attorney."), *trans. denied*.

[9] We reiterate, the trial court had no authority in this case to grant the motion for sentence modification given the lack of consent from the prosecutor.[1] Accordingly, the trial court did not err by summarily denying the motion without a hearing.

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[1] We reject Marcelino's suggestion in his reply brief that consent should be implied based on the prosecutor's failure to respond within thirty days to a letter requesting modification. *See Mance v. State*, 163 N.E.3d 367, 370 (Ind. Ct. App. 2021) (holding that failure to reply to defendant's letter requesting modification did not show prosecutor's consent).

[10] Judgment affirmed.

Kirsch, J. and Weissmann, J, concur.