MEMORANDUM DECISION ON REHEARING

ATTORNEY FOR APPELLANT

Bryan S. Skillman
Terre Haute, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Steven J. Hosler
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Tristin Grant Spencer,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 15, 2023

Court of Appeals Case No. 22A-CR-340

Appeal from the Vigo Superior Court

The Honorable Matthew Sheehan, Judge

Trial Court Cause No. 84D05-1712-MR-3988

Memorandum Decision on Rehearing by Judge Riley.
Judges Bailey and Vaidik concur

Riley, Judge.

[1] Appellant-Defendant, Tristin Spencer (Spencer) has petitioned for rehearing pursuant to our memorandum opinion in *Spencer v. State*, No. 22A-CR-340, 2022 WL 17101455, (Ind. Ct. App. Nov. 22, 2022). The State did not respond to Spencer's motion.

[2] In this case, Spencer pleaded guilty to Level 2 felony voluntary manslaughter and was sentenced to ten years in the Vigo County Community Corrections. In March 2020, to curb the spread of Corona virus, Spencer's sentence was temporarily modified to home detention. Spencer sought to modify his sentence in July 2020, and the State opposed his motion. In December 2020, the trial court *sua sponte* modified Spencer's sentence, and it explained in its order exactly how Indiana Code section 35-38-1-17(e) permitted the modification. On January 21, 2021, the State filed a motion to correct error, arguing that the trial court's modification of Spencer's sentence was outside the scope and parameters of the modification statute. That motion was not ruled upon within 45 days and was therefore deemed denied. On February 14, 2022, the trial court issued an order. Although it did not specify that the order related to the State's motion to correct error, it appears to have belatedly granted the State's motion. With that order, the trial court vacated its December 2020 Order, concluding that Indiana Code section 35-38-1-17(k) prohibited it from issuing Spencer's modification in the first place.

[3] Spencer first argues we should grant his petition for rehearing to "demonstrate how the provisions of Indiana Code section 35-38-1-17(e) should [] be applied to this case." (Rehearing Br. p. 7). Pursuant to the explicit language of

Subsection 17(c), the sentence modification statute does not apply to violent criminals "[e]xcept as provided in subsections (k) and (m)." Subsection 17(k) provides in relevant part:

> 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.

Subsection 17(m) provides:

> (m) Notwithstanding subsection (k), a person who commits an offense after June 30, 2014, and before May 15, 2015, may file one (1) petition for sentence modification without the consent of the prosecuting attorney, even if the person has previously filed a petition for sentence modification.

These are the only portions of the sentence modification statute that are applicable to violent criminals, and Subsection 17(m) is irrelevant to Spencer because he did not commit his offenses after June 30, 2014, and before May 15, 2015. Thus, the only portion of the sentence modification statute that is directly applicable to Spencer is Subsection 17(k).[1]

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[1] Spencer also cites to *Rodriquez v State,* 129 N.E.3d 789 (Ind. 2019), a case cited in Judge Rader's December 2020 *sua sponte* Order, but that case is not controlling, because that case involved a defendant who was convicted of a misdemeanor, and not a defendant like Spencer, who is deemed to be a "violent criminal" by Ind. Code § 35-38-1-17(d)(3).

[4] Next, Spencer argues that we should reconsider our memorandum opinion due to the impact it will have on the provision of Trial Rule 53.3(A). As argued in Spencer's brief and observed in a footnote in our memorandum opinion, after the State filed its motion to correct error, the matter "sat for another 109 days without a ruling by the court. By operation and interpretation of Trial Rule 53.3(A)" the State's motion to correct error was deemed denied, and the period in which the State could have appealed that decision lapsed. (Appellant's Br. p. 5). Trial Rule 53.3(A) provides:

> In the event a court fails . . . to rule on a Motion to Correct Error within thirty (30) days after it was heard . . . the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the praecipe under Appellate Rule 2(A) within thirty (30) days after the Motion to Correct Error is deemed denied.

[5] It is undisputed that the trial court did not timely rule on the State's motion to correct error, and the State's motion was therefore deemed denied. While the February 2022 Order which vacated the December 2020 *sua sponte* Order modifying Spencer's sentence does not reference the State's motion to correct error, it granted the State's claims as argued. It can therefore be said that the February 2022 Order, which belatedly granted the State's motion to correct error, is void and should not be upheld. *See Johnson v. Johnson*, 882 N.E.2d 223, 226-28 (Ind. Ct. App. 2008) (concluding that a motion to correct error was

deemed denied pursuant to Rule 53.3 after the initial time period to rule had elapsed and holding that, because the trial court did not rule on the motion within thirty days of the hearing, it was without power to grant the motion belatedly and that consequently, the court abused its discretion when it issued the belated order granting the motion).

[6] Regardless of this outcome, our supreme court has held that "[a] sentencing judge cannot circumvent the plain provisions in the sentence modification statute. . . ." *State v. Fulkrod*, 753 N.E.2d 630, 633 (Ind. 2001). Due to Spencer's voluntary manslaughter conviction, his sentence should have been modified under the provisions of Indiana Code section 35-38-1-17(k). The December 2020 *sua sponte* Order modifying Spencer's sentence pursuant to Indiana Code section 35-38-1-17(e) was outside the scope the trial court's authority and invalid because it eliminated the prosecutorial consent requirement for Spencer who is violent criminal. "An order is void where the trial court lacks the authority to act." *Kitchen v. Kitchen*, 953 N.E.2d 646, 651 (Ind. Ct. App. 2011). In *M.S. v. C.S.*, 938 N.E.2d 278 (Ind. Ct. App. 2010), we determined that "void in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it[.]" *Id.* at 284 (quoting *Trook v. Lafayette Bank and Trust Co.*, 581 N.E.2d 941, 944 (Ind. Ct. App. 1991), *trans. denied*.

[7] On appeal, the State conceded that its motion to correct error was deemed denied as per the provision of T.R. 53.3(A) but argued that "the void nature of the *sua sponte* modification of Spencer's sentence" permitted direct collateral

attacks at any time and the trial court had the authority to correct its void judgment. (Appellee's Br. p. 10). Based on our observation, it appears that although the February 2022 Order provided the relief that the State had requested in its motion to correct error, it did not declare its connection to the State's motion. It is possible that the order was intended to correct a sentence modification that was void. *See Lockhart v. State*, 671 N.E.2d 893, 904 (Ind. Ct. App. 1996) (trial courts have the power and duty to correct an erroneously imposed sentence). As the sentence modification for Spencer was invalid from its inception, it was incumbent upon the trial court to remedy this with a subsequent order. *See Beanblossom v. State*, 637 N.E.2d 1345, 1349 (Ind. Ct. App. 1994), (holding that a judgment which is void can be attacked directly or collaterally at any time), *trans. denied*. We affirmed the February 2022 Order on appeal on the basis that the December 2020 *sua sponte* Order was outside the trial court's authority and therefore void, and a judgment that is void can be attacked at any time. *Merkel v. State*, 160 N.E.3d 1139, 1141 (Ind. Ct. App. 2020) (holding that trial courts have no statutory authority to modify a sentence of a violent criminal without the prosecuting attorney's consent).

[8] For the foregoing reasons, we grant Spencer's petition for rehearing, but we affirm our original decision in all respects.

[9] Bailey, J. and Vaidik, J. concur