MEMORANDUM DECISION

APPELLANT PRO SE

Duward T. Roby
New Castle, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Monika Prekopa Talbot
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Duward T. Roby,
Appellant-Petitioner,

v.

Mark Sevier,
Appellee-Respondent.

May 3, 2021

Court of Appeals Case No. 20A-MI-1980

Appeal from the Henry Circuit Court

The Honorable Kit C. Dean Crane, Judge

Trial Court Cause No. 33C02-2008-MI-91

Najam, Judge.

Statement of the Case

[1] Duward T. Roby appeals the trial court's grant of a motion to dismiss his petition for writ of habeas corpus filed by Mark Sevier, the superintendent of the New Castle Correctional Facility (hereinafter "the State"). Roby presents two issues for our review, which we consolidate and restate as whether the trial court erred when it granted the State's motion to dismiss.

[2] We affirm.

Facts and Procedural History

[3] In 2008, the State charged Roby with four counts of robbery, as Class B felonies, and alleged that he was a habitual offender. Following a trial, a jury found Roby guilty of the four counts of robbery, and he pleaded guilty to being a habitual offender. The Clark Circuit Court ("original sentencing court") entered a judgment of conviction and sentenced Roby to concurrent terms of twenty years for each of the robbery convictions and to thirty years for the habitual offender adjudication.

[4] Roby appealed and asserted, in relevant part, that his aggregate 50-year sentence was inappropriate, that he could not have properly been convicted of four robberies when he only robbed one bank, and that the court had erred when it imposed a separate sentence for the habitual offender adjudication. *Roby v. State*, No. 10A01-0910-CR-492, 2010 WL 4163550, at *1 (Ind. Ct. App. Oct. 25, 2010) ("*Roby I*"). This Court held that, pursuant to the single larceny rule, only one of Roby's robbery convictions could stand. *Id*. at *3. And we

held that the original sentencing court had erred when it imposed a separate, freestanding sentence for the habitual offender adjudication. *Id*. However, we also held that his aggregate sentence was not inappropriate. *Id*. at *2. Accordingly, we remanded the case and directed the original sentencing court to vacate three of Roby's robbery convictions and to revise Roby's sentencing order such that the habitual offender finding enhanced the sentence for the remaining robbery conviction. *Id*. at *3.

[5] Thereafter, in 2013, the original sentencing court issued a revised abstract of judgment. That abstract provided for a 50-year sentence on one count of robbery, enhanced by the habitual offender adjudication, and for concurrent twenty-year sentences on the other three robbery convictions. Then, in February 2016, Roby filed a motion to correct erroneous sentence and requested that the court correct his sentencing order to reflect this Court's decision in *Roby I*. The court granted that motion and issued another revised abstract of judgment in which it "[o]mitted" three of the robbery convictions, sentenced Roby to 20 years on the remaining robbery conviction, and again imposed a separate, freestanding 30-year sentence for the habitual offender adjudication. Appellant's App. Vol. 2 at 34.[1]

[6] On October 3, Roby filed another motion to correct erroneous sentence. He also requested that the court vacate the habitual offender enhancement.

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[1] Our reference to the pages of the Appendix is to the .pdf pagination.

Specifically, he asserted that the revised abstract of judgment still reflected a freestanding sentence for his habitual offender adjudication, but he had already served his sentence for the underlying robbery and, as such, there was no longer a sentence to which the court could attach the enhancement. Accordingly, Roby contended that he was entitled to an immediate release from custody.

[7] On March 15, 2017, the original sentencing court noted in the CCS that it had granted Roby's motion to correct erroneous sentence and "correct[ed] the Judgment of Conviction and Abstract of Judgment to reflect the corrected sentence." Appellant's App. Vol. 2 at 52. However, the court denied Roby's motion for release. Then, on April 24, the court issued a revised abstract of judgment, which properly reflected one robbery conviction with a twenty-year sentence enhanced by thirty years for the habitual offender adjudication. *See id*. at 36.

[8] Nonetheless, Roby filed various motions to have the case against him dismissed under Indiana Code Section 35-38-1-1 and Indiana Criminal Rule 4(C). He also filed a motion to dismiss for lack of personal jurisdiction. The original sentencing court denied all of Roby's motions.

[9] On August 7, 2020, Roby filed a petition for writ of habeas corpus along with a supporting memorandum of law and various exhibits with the Henry Circuit Court ("trial court"). Roby asserted that he was entitled to immediate release from custody because the original sentencing court never issued a new Judgment of Conviction and, as such, "never resentenced" him as ordered by

this Court in *Roby I*. Appellant's App. Vol. 2 at 76. Accordingly, Roby maintained that the original sentencing court "withh[eld] judgment" in violation of Indiana Code Section 35-38-1-1, which rendered his conviction void. *Id*. at 76-77. He additionally asserted that he was entitled to an immediate release from custody because the original sentencing court had failed to resentence him within seventy days in violation of his Indiana Criminal Rule 4(B) speedy trial request. Finally, he asserted that, due to the delay in sentencing, the original sentencing court lost jurisdiction over him.

[10] On September 11, the State filed a motion to dismiss Roby's petition pursuant to Indiana Trial Rule 12(B)(6). The State asserted that Roby had failed to state a claim upon which relief can be granted because the original sentencing court had corrected Roby's sentence, which change was "clear" from the revised abstract of judgment issued on April 24, 2017. *Id*. at 98. The State also asserted that Roby was not entitled to an immediate release because he was still serving his fifty-year sentence, which had remained unchanged since his original sentencing date. The trial court granted the State's motion to dismiss on September 27 prior to having received Roby's response. This appeal ensued.

Discussion and Decision

Standard of Review

[11] Roby appeals the trial court's grant of the State's Trial Rule 12(B)(6) motion to dismiss his petition for writ of habeas corpus. As our Supreme Court has stated:

> A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. When ruling on a motion to dismiss, the court must view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the non-movant's favor. We review a trial court's grant or denial of a Trial Rule 12(B)(6) motion *de novo.* We will not affirm such a dismissal unless it is apparent that the facts alleged in the challenged pleading are incapable of supporting relief under any set of circumstances.

Thornton v. State, 43 N.E.3d 585, 587 (Ind. 2015) (internal quotation marks and citations omitted). Further, a court "should not accept as true allegations that are contradicted by other allegations in the complaint or exhibits attached to or incorporated in the pleading." *Am. Heritage Banco, Inc. v. McNaughton*, 879 N.E.2d 1110, 1115 (Ind, Ct. App. 2008).

Timeliness of Dismissal

[12] Roby first asserts that the trial court erred when it dismissed his petition only sixteen days after the State had filed its motion. Specifically, Roby contends that, pursuant to Indiana Trial Rules 6(C) and 12(B), he had twenty days to respond to the State's motion and that the court erred when it dismissed his petition prior to the expiration of that twenty-day period.

[13] This Court has previously addressed this question. In *Higgason v. State*, Higgason filed a complaint against the defendants, and, in response, the defendants filed a Trial Rule 12(B)(6) motion to dismiss Higgason's complaint. 789 N.E.2d 22, 26 (Ind. Ct. App. 2003). The trial court granted the defendants'

motion thirteen days later. *Id*. at 27. On appeal, Higgason asserted that the trial court had erred when it granted the defendants' motion to dismiss because, according to Higgason, Indiana Trial Rules 6(C) and 12 provided him with twenty days to respond. *Id*. at 28.

[14] This Court stated that Higgason had "misread[]" the trial rules and that there is "nothing in the language of those rules [that] gave him twenty days to respond" to the defendants' motion to dismiss. *Id*. Further, this Court reiterated a prior holding by our Supreme Court that there "'is no requirement in [Trial Rule 12] requiring the court . . . to receive a response to a motion to dismiss when the motion is addressed on the face of the complaint and not supported by matters outside the pleadings.'" *Id*. at 29 (quoting *Cobb v. Owens*, 492 N.E.2d 19, 20 (Ind. 1986) (alternation original to *Higgason*). This Court then held that, because "the trial court did not have to wait for a response from Higgason, the trial court did not err when it ruled on Defendants' motion thirteen days after it was filed." *Id*.

[15] Similarly, here, Roby has misread our trial rules. There is nothing in our trial rules that allows him twenty days to respond to the State's motion to dismiss. And the trial court was not required to wait for a response from Roby before it ruled on the State's motion to dismiss. Accordingly, the trial court did not err when it granted the State's motion to dismiss after sixteen days.

Merits of Dismissal

[16] Roby next asserts that the trial court erred when it granted the State's motion to dismiss because the allegations in his complaint support a claim for relief. In particular, he contends that his claims demonstrate that he is entitled to an immediate release from custody because the original sentencing court failed to resentence him in accordance with this Court's opinion in *Roby I*.

[17] Indiana Code Section 34-25.5-1-1 (2020) provides that "[e]very person whose liberty is restrained, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered from the restraint if the restraint is illegal." The purpose of the writ of habeas corpus is to bring the person in custody before the court for inquiry into the cause of the restraint. *Manley v. Butts*, 71 N.E.3d 1153, 1156 (Ind. Ct. App. 2017). A petitioner is entitled to habeas corpus relief only if he is entitled to his immediate release from unlawful custody. *Martin v. Stone*, 901 N.E.2d 645, 647 (Ind. Ct. App. 2009).

[18] On appeal, Roby contends that he raised a claim upon which relief can be granted because he asserted in his petition that the original sentencing court never issued a corrected judgment of conviction. And he maintains that that failure by the original sentencing court "is nothing less than a delay in sentencing and a withholding of judgment" that "must result in [Roby] being immediately released from the custody of the Indiana Department of Correction[.]" Appellant's Br. at 23, 25. We cannot agree.

[19] We first note that Roby's claim must fail as a matter of fact. His claim that he is entitled to an immediate release from custody is based on his assertion that the original sentencing court never issued a corrected judgment of conviction following this Court's decision in *Roby I*. But Roby attached to his petition for writ of habeas corpus the CCS from the original sentencing court. And the CCS includes an entry from March 15, 2017, that states that the court "correct[ed] the Judgment of Conviction . . . to reflect the correct sentence." Appellant's App. Vol. 2 at 52. That CCS entry contradicts Roby's allegation in his petition. Accordingly, the trial court was not required to accept as true Roby's allegation that the original sentencing court never corrected his judgment of conviction. *See Am. Heritage Banco, Inc.*, 879 N.E.2d at 1115. Because the trial court was not required to accept as true Roby's factual allegation, which allegation served as the sole basis for his petition, Roby's claim contained in his petition for writ of habeas corpus must fail.

[20] Still, Roby asserts that, despite the original sentencing court's CCS entry, the court "never issued" a corrected judgment of conviction.[2] Appellant's Br. at 25. And Roby maintains that, because the court never entered a corrected judgment, he is being "unlawfully incarcerated and is entitled to immediate

[2] There is no dispute that the original sentencing court issued a corrected abstract of judgment on April 24, 2017. However, as Roby points out, it is the "court's judgment of conviction and not the abstract of judgment that is the official trial court record and which thereafter is the controlling document." *Robinson v. State*, 805 N.E.2d 783, 794 (Ind. 2004).

release." *Id*. at 26. Even if Roby were correct that the original sentencing court did not issue a corrected judgment of conviction, Roby's claim still fails.

[21] Roby is correct that, in certain circumstances, a court loses jurisdiction to sentence a defendant. Indeed, in *Robison v. State*, the trial court "withheld" judgment following a trial. 359 N.E.2d 924, 924 (Ind. Ct. App. 1977). On appeal, this Court held that, "[w]here the court deliberately postpones indefinitely the pronouncement of judgment and sentence, the court loses jurisdiction to sentence and upon application the defendant should be discharged." *Id*. In addition, in *Stack v. State*, the trial court "withheld judgment indefinitely" on a battery charge. 534 N.E.2d 253, 256 (Ind. Ct. App., 1989). This Court reiterated the holding in *Robison* and instructed the court to "discharge Stack on the battery charge." *Id*. at 257.

[22] In both *Robison* and *Stack*, the trial court intentionally withheld entering a judgment of conviction. To the contrary here, the original sentencing court neither withheld judgment nor indefinitely postponed sentencing Roby. Rather, the court entered a judgment of conviction against Roby in 2009 following his trial and promptly sentenced him to an aggregate sentence of fifty years. And even though Roby appealed the court's judgment of conviction and sentence, this Court's opinion in *Roby I* was clear that his original fifty-year aggregate sentence remained intact. *See Roby I*, 2010 WL 4163550, at *2. In other words, Roby has been aware of his fifty-year sentence, which sentence has remained unchanged, since the original sentencing court first sentenced him in 2009.

[23] Further, even though the original sentencing court erroneously convicted Roby of three robberies and sentenced Roby to a separate, freestanding thirty-year sentence for the habitual offender enhancement, an erroneous sentence "does not render the sentence void." Ind. Code § 35-38-1-15. Roby has not directed us to any case law, and we find none, to demonstrate that the court's failure to correct an error in a judgment of conviction invalidates his sentence or otherwise entitles him to an immediate release from custody. Rather, where a court has failed to act when it was under a duty to act, the remedy is a writ of mandamus. *See Chissell v. State*, 705 N.E.2d 501, 506 (Ind. Ct. App. 1999).

[24] Because Roby would not be entitled to an immediate release from custody even if the allegations in his petition were true, Roby has not stated a claim upon which relief can be granted in his petition for writ of habeas corpus.[3] Accordingly, the trial court did not err when it granted the State's motion to dismiss Roby's petition under Trial Rule 12(B)(6), and we affirm that order.

[25] Affirmed.

Pyle, J., and Tavitas, J., concur.

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[3] To the extent Roby contends that he is entitled to have the case against him dismissed because the original sentencing court did not sentence him within seventy days in violation of his Criminal Rule 4(B) speedy trial request, Roby has not directed us to any authority to support that contention. Rather, that rule provides that, if a defendant "held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days[.]" That rule clearly applies only to a defendant awaiting trial. There is nothing in the language of Criminal Rule 4(B) to indicate that it applies to sentencing.