

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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IN THE COURT OF APPEALS OF INDIANA

Zachary Weaver,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 23, 2022

Court of Appeals Case No.
22A-CR-23

Appeal from the Kosciusko
Superior Court

The Honorable Karin A. McGrath,
Judge

Trial Court Cause No.
43D01-1904-F3-296

Bailey, Judge.

Case Summary

- [1] Zachary Weaver (“Weaver”) brings a belated appeal, pursuant to Indiana Post-Conviction Rule 2, to challenge the legality of the sentence imposed after his plea of guilty to Child Molesting, as a Level 4 felony.¹ He presents the sole issue of whether the sentence is contrary to law because he was ordered to serve a two-year probationary term before serving ten years of incarceration. We affirm.

Facts and Procedural History

- [2] On April 11, 2019, the State of Indiana charged sixteen-year-old Weaver with Rape, as a Level 3 felony,² and Child Molesting, as a Level 3 felony. On May 7, 2020, pursuant to a plea agreement with the State, Weaver pled guilty to Child Molesting, as a Level 4 felony. The charge of Rape was dismissed.
- [3] As part of his plea agreement with the State, which was accepted by the trial court, Weaver agreed that he would not appeal his sentence:

The Defendant hereby knowingly, intelligently, and voluntarily agrees to waive the right to appeal any sentence imposed by the Court, under any standard of review, including but not limited to, an abuse of discretion standard and the appropriateness of the

¹ Ind. Code § 35-42-4-3.

² I.C. § 35-42-4-1.

sentence under Indiana Appellate Rule 7(B), so long as the Court sentences the defendant within the terms of the plea agreement.

(App. Vol. II, pg. 36.)

[4] Weaver submitted a pre-sentence memorandum to the trial court, requesting that he be allowed to participate in the Lifeline Youth Services Program, which had a maximum participation age of twenty-one. On July 2, 2020, the trial court conducted a sentencing hearing, at which Weaver’s mental health counselor recommended that Weaver be placed in a residential treatment program operated in conjunction with the Lifeline program.

[5] The trial court sentenced Weaver to twelve years’ incarceration in the Indiana Department of Correction (“the DOC”), with two years suspended to probation. The probationary period was to be served at the outset of the sentence, while Weaver still met the age qualification for the residential treatment program.

[6] On June 11, 2021, the State of Indiana filed a notice of probation violation, alleging that Weaver violated the terms of his probation while in the residential treatment program. On August 24, 2021, Weaver was ordered to serve the suspended portion of his sentence in the DOC. Weaver was granted permission by the trial court to pursue this belated appeal of his 2020 sentence.

Discussion and Decision

[7] Indiana Post-Conviction Rule 2(1)(a) provides:

An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;

(1) the defendant failed to file a timely notice of appeal;

(2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

(3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

[8] An “eligible defendant” is defined as “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 by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal.” P-C. Rule 2. If Weaver waived his right to appeal his sentence, then he is not an “eligible defendant” under Indiana Post-Conviction Rule 2. *See Bowling v. State*, 960 N.E.2d 837, 841 (Ind. Ct. App. 2012) (holding that whether the defendant waived her right to appeal her sentence in her plea agreement was relevant to the threshold determination of whether she was an eligible defendant under Post-Conviction Rule 2), *trans. denied*.

[9] It is well settled that a defendant may waive the right to appellate review of a sentence as part of a written plea agreement. *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008). In *Creech*, the defendant entered into a plea agreement including a provision that read in relevant part: “I hereby waive my right to appeal my

sentence so long as the Judge sentences me within the terms of my plea agreement.” *Id.* at 74. Our supreme court held that this waiver was valid. *Id.*

[10] The decision to accept or reject a plea agreement is a matter left to a trial court’s discretion. *Allen v. State*, 865 N.E.2d 686, 689 (Ind. Ct. App. 2007). Once a plea agreement is accepted by the trial court, the plea agreement, like a contract, is binding upon both parties and the trial court. *Id.* If the trial court accepts the plea agreement, it is strictly bound by the sentencing provisions of the plea agreement. *Id.*

[11] To circumvent waiver, Weaver has claimed that his sentence is illegal, specifically as to the sequence of placements.³ According to Weaver, “the trial court imposed a sentence contrary to law and sentencing policy of the State of Indiana” because probation should be a “vehicle to assist with transition from incarceration” and front-loading probation could “skirt the non-suspendability [sic] provisions by ordering decades on probation followed by a period of incarceration.” Appellant’s Brief at 4 - 5. At bottom, he presents public policy arguments.

[12] Indiana Code section 35-38-1-15 provides that an erroneous sentence is not void but shall be corrected, providing “prompt, direct access to an uncomplicated legal process for correcting the occasional erroneous or illegal sentence.” *Davis*

³ Weaver does not claim that the length of his sentence is erroneous on its face. Indiana Code Section 35-50-2-5.5 provides that one who commits a Level 4 felony shall be sentenced to a term of two years to twelve years, with an advisory sentence of six years. Weaver’s sentence fell within this statutory range.

v. State, 937 N.E.2d 8, 10 (Ind. Ct. App. 2010), *trans. denied*. “However, the process is only available to correct a sentence that is erroneous on its face.” *Koontz v. State*, 975 N.E.2d 846, 848 (Ind. Ct. App. 2012) (citing *Neff v. State*, 888 N.E.2d 1249, 1251 (Ind. 2008)). Moreover, our Indiana supreme court has held that “even if subject to collateral attack, a defendant may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence.” *Collins v. State*, 509 N.E.2d 827, 833 (Ind. 1987).

[13] “Whether a defendant has benefitted from a plea agreement with an illegal sentencing provision generally is measured by whether the plea reduced the defendant’s penal exposure.” Here, Weaver entered into a plea agreement whereby the State agreed to dismissal of the charge of Rape, as a Level 3 felony, and reduction of the Child Molesting charge from a Level 3 felony to a Level 4 felony. Weaver also had a portion of his sentence suspended to probation. He may not now complain that he received an illegal sentence.

Conclusion

[14] Having waived his right to appeal his sentence, Weaver is not an eligible defendant for post-conviction relief under Post-Conviction Rule 2. Having reaped the benefits of a plea agreement accepted by the trial court, Weaver may not complain of sentence illegality, even if the sentence were otherwise subject to collateral attack.

[15] **Affirmed.**

Najam, J., and Bradford, C.J., concur.