

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.



APPELLANT *PRO SE*

Tracey L. Wheeler
Branchville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jesse R. Drum
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Tracey L. Wheeler,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

February 15, 2021

Court of Appeals Case No.
20A-CR-1260

Appeal from the Vigo Superior
Court

The Honorable Michael J. Lewis,
Judge

Trial Court Cause No.
84D01-0709-FA-2987

Bailey, Judge.

Case Summary

[1] Tracey Wheeler (“Wheeler”) appeals the trial court’s denial of his petition for sentence modification. He raises three issues on appeal. However, we address only the dispositive issue of whether the petition for sentence modification was correctly denied because it failed to comply with the requirements of Indiana Code Section 35-38-1-17.

[2] We affirm.

Facts and Procedural History

[3] Following a jury trial, Wheeler was convicted of four counts of dealing in cocaine, as Class A felonies,¹ and one count of maintaining a common nuisance, as a Class D felony.² On August 21, 2008, the trial court sentenced Wheeler to thirty-five years in the Indiana Department of Correction (“DOC”). On or about August 7, 2015, Wheeler filed his first “Motion for Modification of Sentence,” which the trial court denied on August 7, 2015. (Aug. 11, 2015, entry in Cause No. 84D06-0709-FA-2987 (“FA-2987”), Odyssey Events at p. 7.)³ There is no indication in the record that the prosecutor responded to

¹ Ind. Code § 35-48-4-1(a), (b) (2008).

² I.C. § 35-48-4-13(b) (2008).

³ Although certain filings below were not provided on appeal, we located the documents through the Odyssey system. *See* Ind. Appellate Rule 27 (“The Record on Appeal shall consist of the Clerk’s Record and all proceedings before the trial court . . . whether or not transcribed or transmitted to the Court on Appeal.”). A copy of Wheeler’s first motion to reconsider his sentence was not contained in the trial court’s record on

Wheeler's August 7 motion or consented to the requested sentence modification.

[4] On November 9, 2017, Wheeler filed, pro se, an ex parte letter with the court in which he noted his completion of the PLUS program and stated, "Therefore I am requesting and pleading to this court to grant me Alternative Placement...." (Nov. 9, 2017, entry in FA-2987, Odyssey Events at p. 8.) Wheeler stated that he was "not asking for this court to modify or commute [his] sentence," but asking that the court "place [him] in some form of work release or home detention." (*Id.*) Wheeler's ex parte letter continues, "What I am asking this court is to accept my plea for alternative placement to incarceration. I am seeking placement in the: County work release program, Home detention[,] GPS monitoring, or any other community transitional program." (*Id.*) The trial court took "no action on [the ex parte] letter received 11/9/17." (Nov. 14, 2017, entry in FA-2987, Odyssey Events at p. 8; App. at 14). The record contains no indication that the prosecutor consented to Wheeler's November 9 letter requesting sentence modification.

[5] On December 7, 2018, Wheeler filed, pro se, his appearance as his own counsel. On that same date he filed two additional documents with the trial court which the trial court apparently consolidated as a "Petition" filed on December 7. (Dec. 7, 2018, entry in FA-2987, Odyssey Events at p. 8). The

Odyssey, but was referenced in the August 7, 2015, order denying it. Wheeler does not dispute that he filed that motion without consent of the prosecutor and that it was denied.

first December 7 document was a handwritten document that did not show service upon the prosecutor (“Doc. 1”), and the second was a typed document with a Certificate of Service (“Doc. 2”). Doc. 1 was addressed to the trial court judge and stated that it was “Re: Request for Additional time credit/Placement (Alternative).” (*Id.*) That document noted that Wheeler had completed the PLUS program and requested that the court “could entertain a request for a reduction of [Wheeler’s] sentence and alternative placement in an outside drug treatment facility such as club soda....)”⁴ (*Id.*) Doc. 1 concluded, “I pray that this court considers me as a perfect candidate for a reduction/modification of sentence and alternative placement.” (*Id.*)

[6] Doc. 2 was captioned, “Petition for Additional Credit Time for Completion of Substance Abuse Program,” and stated that, “pursuant to § [sic] Ind. Code 35-50-6-3.3, ... [Wheeler] respectfully requests the Court to award reasonable months [sic] time cut for the successful completion of [t]he P.L.U.S. program.” (*Id.*) Doc. 2 does not indicate that Wheeler sought credit time from the DOC or that the DOC denied such credit time.

[7] The record contains no indication that the prosecutor consented to Wheeler’s requests in either Doc. 1 or Doc. 2. On December 10, 2017, the trial court issued its order denying Wheeler’s December 7, 2018, petition.

⁴ Doc. 1 refers to exhibits that are not attached to it or contained in the record.

[8] On April 29, 2020, Wheeler filed, pro se, a document captioned “Motion for Alternative Placement” in which he sought court-ordered modification of his placement to a work release program or home detention. (App. at 22.) The motion contained a Certificate of Service, but the record does not indicate that the State responded to that motion. There is no indication in the record that the prosecutor consented to the requested sentence modification. The trial court denied the April 29 motion on May 6. This appeal ensued.

Discussion and Decision

[9] Wheeler appeals the trial court’s denial of his April 29, 2020, petition for sentence modification. We generally review such a denial for an abuse of discretion. *Gardiner v. State*, 928 N.E.2d 194, 196 (Ind. 2010). However, where matters of statutory interpretation are at issue, our review is de novo. *Id.*

[10] Indiana Code Section 35-38-1-17 allows a convicted person who is not a violent criminal to file a petition for sentence modification not more than once in any 365-day period and a maximum of two times during any consecutive period of incarceration without the consent of the prosecuting attorney. I.C. § 35-38-1-17(j). A trial court may deny such a petition without written findings or conclusions. I.C. § 35-38-1-17(h). A trial court is not required to hold a hearing on such a petition or await the prosecutor’s response unless the court has made a preliminary determination to suspend or reduce the sentence. *Robinett v. State*, 798 N.E.2d 537, 539 (Ind. Ct. App. 2003), *trans. denied*. Otherwise, the trial court may deny the petition without a hearing and without the State’s response.

Id. The trial court may also deny the petition without first reviewing a progress report prepared by the DOC regarding the petitioner's conduct, unless the court has made a preliminary determination to grant the petition. *Banks v. State*, 847 N.E.2d 1050, 1053 (Ind. Ct. App. 2006), *trans. denied*.

[11] The State contends the trial court did not abuse its discretion when it denied Wheeler's April 29, 2020, petition for sentence modification because that petition was at least the third such petition Wheeler had filed in this criminal case without the consent of the prosecuting attorney, thus exceeding the restrictions of Indiana Code Section 35-38-1-17(j). The parties do not dispute that Wheeler's August 2015 motion was his first request for sentence modification and it was made without the consent of the prosecuting attorney. Rather, the parties dispute whether Wheeler's subsequent motions in November 2017 and December 2018 were also requests for sentence modification without prosecutor consent.

[12] Wheeler's November 9, 2017, ex parte letter filed, pro se, with the trial court was arguably a second petition for sentence modification without prosecutor consent, as it specifically stated that it sought an order modifying Wheeler's placement from incarceration in the DOC to a placement in a work release program, home detention, or some other placement in the community. *See Keys v. State*, 746 N.E.2d 405, 407 (Ind. Ct. App. 2001) (noting a request to be placed in a community corrections program is a request for modification of the sentence). However, the trial court took "no action" on that letter. (App. at 14).

[13] We need not decide whether the November 2017 letter was a second petition for sentence modification filed without prosecutor consent because the subsequent pro se December 2018 petition certainly was such a petition. Doc. 1 (the handwritten document that was part of the petition) clearly requested “a reduction/modification of sentence and alternative placement” and was filed without prosecutor consent. (Dec. 7, 2018, entry in FA-2987, Odyssey Events at p. 8.)⁵ Thus, the December 2018 petition was the second—and, therefore, final—petition for sentence modification that Wheeler was permitted to file in this criminal case without prosecutor consent. I.C. § 35-38-1-17(j). The trial court did not err when it denied the subsequent petition to modify sentence without prosecutor consent.

Conclusion

[14] Because Wheeler’s April 29, 2020, petition for sentence modification was at least the third such petition he filed in this case without prosecutor consent, the April 2020 petition was filed in violation of Indiana Code Section 35-38-1-17(j).

⁵ Wheeler argues that his December 7, 2018, filing was not a petition for sentence modification but a petition for credit time he earned. While Doc. 2 does appear to be a petition for credit time, Wheeler completely ignores the clear language of Doc. 1 in which he sought a “reduction/modification of sentence and alternative placement.” (*Id.*) The latter was a clear request for modification of his sentence, and the trial court denied that petition. *See Keys*, 746 N.E.2d at 401. We do not address other issues Wheeler raised in the December 7, 2018, petition as they are not relevant to the current appeal. However, we note that, to the extent Wheeler disagreed with the trial court’s denial of his request for credit time in Doc. 2, he failed to appeal that decision.

The trial court did not abuse its discretion when it denied the April 2020 petition for sentence modification.

[15] Affirmed.

Robb, J., and Tavitas, J., concur.