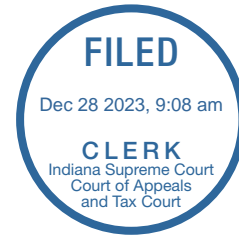


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case



ATTORNEY FOR APPELLANT

Andrew Adams
Jeffersonville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Erica S. Sullivan
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Joseph D. Hook,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 28, 2023

Court of Appeals Case No.
23A-CR-820

Appeal from the Jefferson Circuit
Court

The Honorable Jon W. Webster,
Special Judge

Trial Court Cause No.
39C01-1703-F1-234

Memorandum Decision by Judge Riley.
Judges Crone and Mathias concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Joseph D. Hook (Hook), appeals his sentence for two Counts of Level 4 felony child molesting, Ind. Code § 35-42-4-3(b).

[2] We dismiss.

ISSUE

[3] Hook presents this court with two issues. However, we find the cross-appeal issue brought by the State to be dispositive, and we restate that issue as: Whether Hook waived his right to appeal his sentence by entering into a plea agreement with the State.

FACTS AND PROCEDURAL HISTORY

[4] On March 16, 2017, the State filed an Information, charging Hook with two Counts of Level 1 felony child molesting, Class A felony child molesting, and Level 4 felony child molesting for offenses committed against two separate victims. On September 13, 2022, the parties entered into a plea agreement whereby Hook would plead guilty to two Counts of Level 4 felony child molesting and the State would dismiss the remaining charges. The plea agreement contained no sentencing recommendation except that Hook's individual sentences would be served concurrently. The plea agreement further contained the following waiver provision:

You acknowledge that [d]efendants generally would have a right to appeal their sentence in a case by way of direct appeal and seek to have their sentence revised, pursuant to Ind[iana]

App[ellate] Rule 7. By entering into this agreement, you are expressly waiving your right to such appeal under Appellate Rule 7, and are expressly waiving your right to appeal your sentence on the basis that it is erroneous or otherwise challenge the appropriateness of your sentence, or on the basis that the court abused its discretion so long as the Judge sentences you within the terms of this plea agreement. *See Creech v. State*, 887 NE2d 73 (Ind. 2008).

(Appellant's App. Vol. II, pp. 46-47). Hook placed his initials beside this waiver provision.

[5] On September 14, 2022, the trial court held Hook's guilty plea hearing. Prior to accepting Hook's guilty plea, the trial court reviewed the nature of the charges, the possible penalties Hook faced, the terms of Hook's plea agreement, and the rights Hook would waive through his plea, including the following:

You also give up your right to remain silent, your right not to testify against yourself, you give up your right to subpoena any witness to court who will not show up voluntarily. You through your attorneys give up your right to question any witness that would testify in your case, and you give up your right to appeal the convictions. *You are not agreeing to your sentences, so you don't give up your right to appeal your sentences*, but you are pleading guilty to two charges, and you give up your right to appeal those convictions to higher court of this State. Do you understand that by pleading guilty you give up those rights?

(Guilty Plea Transcript, Vol. I, p. 6) (emphasis added). Hook then established a factual basis for his plea.

[6] On March 20, 2023, the trial court convened Hook’s sentencing hearing. After hearing the evidence and arguments of the parties and finding and weighing the aggravating and mitigating circumstances, the trial court sentenced Hook to concurrent ten-year sentences on each of his Level 4 felony child molesting convictions. After issuing this sentence, the trial court advised Hook that “[s]ince you did not agree to your sentence other than that it would be concurrent, you have the right under Indiana law to appeal my sentence.” (Sentencing Transcript Vol. I, p. 69). The State objected, citing the sentencing appeal waiver provision of Hook’s plea agreement. The trial court again advised Hook of his right to appeal his sentence. On March 23, 2023, at Hook’s request, the trial court appointed appellate counsel.

[7] On July 14, 2023, Hook filed his Appellant’s Brief in which he requested that this court review his sentence pursuant to our authority under Indiana Appellate Rule 7(B), arguing that his sentence is inappropriate given the nature of his offenses and his character. On August 14, 2023, the State filed a motion to dismiss Hook’s appeal, asserting that Hook had waived his right to challenge his sentence through the terms of his plea agreement and that he could not challenge the voluntariness of his guilty plea on direct appeal. On September 15, 2023, the motions panel of this court denied the State’s motion to dismiss. On September 29, 2023, the State filed its Appellee’s Brief in which it cross-appealed Hook’s ability to bring the instant appeal.

[8] Hook now appeals, and the State cross-appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

[9] Hook challenges the appropriateness of his sentence. Addressing the sentencing appeal waiver provision of his plea agreement, Hook asserts that his guilty plea was required to have been entered into knowingly and voluntarily and that, prior to entering his guilty plea, the trial court specifically advised him that he retained his right to appeal his sentence. Therefore, Hook contends that he may challenge his sentence in this direct appeal. On cross-appeal, the State counters that Hook waived his right to directly appeal his sentence.

[10] Before reaching the merits of the parties' argument as to whether this appeal is subject to dismissal, we observe that the motions panel of this court has already denied the State's motion to dismiss. Although we do not do so lightly, it is well-established that we retain the authority to reconsider rulings by the motions panel while an appeal remains pending. *Beasley v. State*, 192 N.E.3d 1026, 1029 (Ind. Ct. App. 2022), *trans. denied*.

[11] On October 3, 2023, after Hook submitted his appellate brief and after the motions panel of this court had denied the State's motion to dismiss, the Indiana Supreme Court issued its decision on rehearing in *Davis v. State*, 217 N.E.3d 1229 (Ind. 2023). Davis pleaded guilty to four theft-related charges in two separate criminal cases pursuant to a consolidated plea agreement which contained the following sentencing waiver provision:

The Defendant hereby waives the right to appeal any sentence imposed by the [c]ourt, including the right to seek appellate review of the sentence pursuant to Indiana Appellate Rule 7(B),

so long as the [c]ourt sentences the [D]efendent within the terms of this plea agreement.

Id. at 1231. The State agreed to an executed sentence of no more than four years, with only a maximum of two years to be served with the Indiana Department of Correction. *Id.* Prior to accepting Davis' plea, in contravention to the terms of Davis' plea agreement, the trial court advised Davis that "because you have a plea agreement that provides the court some discretion about where your sentence is, in a certain range, you would have the ability to appeal my use of discretion in that sentencing." *Id.* The trial court subsequently accepted Davis' guilty plea and sentenced him within the terms of his plea agreement. *Id.* At the conclusion of Davis' sentencing hearing, the trial court again incorrectly advised Davis that he retained his right to appeal his sentences based upon the trial court's belief that, because it had exercised some discretion in sentencing Davis, he retained his right to appeal his sentence. *Id.* at 1231-32. Davis pursued direct appeals, challenging his sentences. *Id.* at 1232. Another panel of this court dismissed both appeals, holding that Davis could not challenge his convictions following his guilty plea and that he could not challenge his sentences because he had waived that right through his plea agreement. *Id.*

[12] Our supreme court granted transfer to address whether the trial court's contradictory advisements of his right to appeal his sentence rendered Davis' guilty plea involuntary and nullified his sentencing appeal waiver. *Id.* The *Davis* court held that Davis had waived his right to appeal his sentences through

the unambiguous terms of his written plea agreement with the State, an agreement which Davis did not claim was unclear or that he misunderstood at the time he signed it. *Id.* The *Davis* court further held that if the trial court's contradictory advisements about whether Davis retained the right to appeal his sentence had misled Davis, his only remedy was to pursue post-conviction relief to vacate his conviction, a remedy which would invalidate all the terms of Davis' plea agreement, including his favorable sentencing provision. *Id.* at 1233-35. The *Davis* court dismissed the appeal. *Id.* at 1236.

[13] We reach the same conclusion here. Hook waived his right to appeal his sentence through the terms of a plea agreement which is similar, if even more detailed, to that at issue in *Davis*, and Hook does not contend on appeal that his plea agreement was ambiguous or that he did not understand it at the time he signed it. *See id.* at 1231. Like Davis, Hook now claims that his plea was unknowing and involuntary and attempts to invalidate the waiver provision of his plea agreement based on a mistaken trial court advisement at his guilty plea hearing that he retained his sentencing appeal rights. *See id.* at 1232. However, Hook may only pursue these claims through post-conviction relief, not through this direct appeal. *See id.* at 1233-34. Therefore, we dismiss the instant appeal. *See id.* at 1236.

CONCLUSION

[14] Based on the foregoing, we hold that Hook may not challenge his sentence through this direct appeal.

[15] Dismissed.

[16] Crone, J. and Mathias, J. concur