

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*

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IN THE COURT OF APPEALS OF INDIANA

Lionel Gibson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 18, 2021

Court of Appeals Case No.
20A-CR-1534

Appeal from the Lake Superior
Court

The Honorable Kathleen A. Sullivan,
Magistrate

Trial Court Cause No.
45G03-9703-CF-43

Bailey, Judge.

Case Summary

- [1] Lionel Gibson (“Gibson”) appeals the denial of his motion to correct error, which challenged the denial of his successive motion to correct an erroneous sentence pursuant to Indiana Code Section 35-38-1-15. We address the issue of whether Gibson presented a proper claim for statutory relief.¹ We affirm.

Facts and Procedural History

- [2] In November of 1998, a jury convicted Gibson of Murder² and Attempted Murder, a Class A felony.³ On January 8, 1999, Gibson was sentenced to fifty years imprisonment for Murder, which was five years less than the presumptive sentence,⁴ and forty years for Attempted Murder, which was ten years more than the presumptive sentence.⁵ The trial court ordered that Gibson serve those sentences consecutively, providing for an aggregate sentence of ninety years.

¹ Gibson articulates two other issues for review, specifically, whether his access to Indiana courts was impeded when he belatedly pursued an appeal from the denial of post-conviction relief, and whether he has been subjected in prison to cruel and unusual punishment by State agents. These issues were not litigated in the context of Gibson’s statutory motion to correct an erroneous sentence. However, our review of the Appendix indicates that he filed a civil rights claim, pursuant to 42 U.S.C. § 1983, in the United States District Court, Southern District of Indiana. Gibson also filed in that court a purported “denial of access” complaint that was dismissed for failure to state a claim upon which relief could be granted. (App. Vol. II, pg. 44.) The disposition of these contentions is not a proper focus of an appeal from denial of relief under Indiana Code Section 35-38-1-15, which provides a limited remedy to correct facial sentencing error.

² Ind. Code § 35-42-1-1 (1998). The jury also convicted Gibson of Murder while Perpetrating a Robbery, but due to Double Jeopardy concerns, the trial court did not enter a judgment of conviction upon this count.

³ I.C. §§ 35-42-1-1, 35-41-5-1 (1998).

⁴ I.C. § 35-50-2-3.

⁵ I.C. § 35-50-2-4.

His convictions were affirmed on direct appeal. *Gibson v. State*, No. 45A05-9903-CR-93 (Ind. Ct. App. Feb. 29, 2000).

- [3] Thereafter, Gibson challenged his convictions and sentence as described by a panel of this Court in *Gibson v. State*, No. 18A-CR-59 (Ind. Ct. App. July 23, 2018), *trans. denied*:

Gibson initially filed a petition for post-conviction relief in 2001 and, after withdrawing the petition in 2002, re-filed it in April 2006. On April 10, 2007, the court held a post-conviction hearing; on August 6, 2008, it denied Gibson's petition for post-conviction relief. On September 17, 2008, Gibson filed a notice of appeal which was denied as untimely.

On December 10, 2015, Gibson filed a motion to correct erroneous sentence and memorandum in support of the motion. On December 14, 2015, the court entered an order which denied the motion and stated: "The motion is denied as res judicata. The sentencing issues were addressed in the defendant's petition for post-conviction relief. The defendant failed to timely appeal the Court's ruling. The defendant cannot circumvent his failure to timely appeal by filing this pleading." Appellant's Appendix Volume 2 at 42. On January 7, 2016, the court entered an order stating that Gibson had offered a notice of appeal on January 4, 2016, which was "refused for filing for the reason that is not the proper forum." *Id.* at 43. On January 20, 2016, the court entered an order stating that Gibson offered a notice of appeal on January 15, 2016, which was refused for filing and noted that a notice of appeal must be filed with the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court ("Appellate Clerk").

On February 2, 2016, Gibson filed a notice of appeal with the Appellate Clerk under cause number 45A03-1602-CR-232

(“Cause No. 232”) stating that he wished to appeal the trial court’s December 14, 2015 order. On May 26, 2016, this Court entered an order dismissing the appeal with prejudice. This Court denied rehearing, and the Indiana Supreme Court denied transfer.

On December 15, 2017, Gibson filed a Motion for Relief Pursuant to Indiana Trial Rule 72(E) and a memorandum in support of the motion. He argued that the court denied his petition for post-conviction relief on August 6, 2008, without addressing the issues of his illegal sentence. He stated that notice of the August 6, 2008 order was sent to the Wabash Valley Correctional Facility and that he was housed at the Indiana State Prison and was stabbed there on October 1, 2008. He also argued that, when he filed his appeal from the court’s December 14, 2015 denial of his motion to correct erroneous sentence, he filed it with the trial court and that the prison where he was housed provided only the 2005 version of the Indiana Rules. He stated that he “became frustrated and conceded to the denial of his right to appeal.” Appellant’s Appendix Volume 2 at 19. He also argued that he was attacked by two offenders on January 11, 2016, and was held in segregation from January 12 to January 28, 2016.

On December 19, 2017, the court entered an order denying Gibson’s Motion for Relief Pursuant to Indiana Trial Rule 72(E). The order stated the court “cannot accept belated appeals, other than belated direct appeals pursuant to Indiana Rule PC2, regardless of the reasons for delay.” *Id.* at 15. Gibson appeals the trial court’s December 19, 2017 order.

Slip op. at 1-2. The Court held: “[t]he trial court did not err or abuse its discretion in denying Gibson’s motion under Trial Rule 72(E)” and additionally “note[d] that, to the extent Gibson challenges the imposition of consecutive

sentences and his crimes related to two victims, the Indiana Supreme Court has held that “[c]onsecutive sentences reflect the significance of multiple victims.” *See id.* (citing *Pittman v. State*, 885 N.E.2d 1246, 1259 (Ind. 2008)).

[4] On June 23, 2020, Gibson sent a letter to the trial court, which was treated as a motion for sentence modification and denied on July 14, 2020. Also on July 14, 2020, Gibson filed his “Emergency Motion to Correct Erroneous Sentence and Placement Modification” pursuant to Indiana Code Section 35-38-1-15. (App. Vol. II, pg. 75.) He alleged that he was in extreme danger due to the “intentional and malicious” actions of DOC officers and that “the root is an illegal sentence in violation of express statutory authority.” (*Id.*) He argued that the trial court, in sentencing him, had relied upon two improper aggravators. According to Gibson, the only properly found sentencing factor was the mitigator of his lack of criminal history and this recognized mitigation together with his physical peril warranted the imposition of a lesser sentence. On July 16, 2020, the trial court denied the successive motion to correct an erroneous sentence and stated that such motions would not be docketed in the future.

[5] On July 17, 2020, Gibson submitted for filing in the trial court a Motion for Relief from Judgment, arguing that the 2008 denial of his petition for post-conviction relief was in error. He contemporaneously submitted a Motion to Correct error, alleging that his Abstract of Judgment was fraudulent, and that he possessed newly discovered evidence. He requested a new sentencing hearing. On August 20, 2020, Gibson submitted a “Judicial Complaint” and

“Objection and Appeal to the Trial Court.” (*Id.* at 105.) On August 21, 2020, the trial court issued an order addressing Gibson’s submissions. The “Judicial Complaint” was refused filing, as was the Motion for Relief from Judgment. The trial court denied the Motion to Correct Error. Gibson now appeals.

Discussion and Decision

[6] A ruling upon a motion to correct error is generally reviewable under an abuse of discretion standard, but when the motion to correct error presents a question of law, our review is de novo. *Christenson v. Struss*, 855 N.E.2d 1029, 1032 (Ind. Ct. App. 2006). Indiana Code Section 35-38-1-15, under which Gibson claims entitlement to relief, provides:

If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

[7] “The purpose of the statute is to provide prompt, direct access to an uncomplicated legal process for correcting the occasional erroneous or illegal sentence.” *Davis v. State*, 937 N.E.2d 8, 10 (Ind. Ct. App. 2010), *trans. denied*. A motion to correct an erroneous sentence may only be used to correct sentencing errors that are “clear from the face of the judgment imposing the sentence in light of the statutory authority.” *Robinson v. State*, 805 N.E.2d 783, 787 (Ind. 2004). Thus, use of this statutory motion should be reserved for the correction

of “obvious sentencing errors.” *Id.* at 787 n.3. Claims that require consideration of matters outside the face of the sentencing judgment may not be addressed via this type of motion. *See, e.g., Neff v. State*, 888 N.E.2d 1249 (Ind. 2008).

- [8] In sentencing Gibson, the trial court stated that it had found two aggravating circumstances: the need for correctional treatment and a reduced sentence would depreciate the seriousness of the crimes. Gibson’s lack of a criminal history was the sole mitigating circumstance found. Gibson now claims that both aggravating circumstances considered by the trial court at sentencing are improper considerations. A claim that the trial court abused its discretion with respect to the finding of an aggravating circumstance “is not a proper claim for a motion to correct erroneous sentence because it necessarily requires consideration of the sentencing hearing, at which the trial court made findings” and must rather be addressed on direct appeal or post-conviction relief. *Godby v. State*, 976 N.E.2d 1235, 1236 (Ind. Ct. App. 2012).⁶

⁶ Gibson has pursued both a direct appeal and post-conviction relief. However, he contends that he was significantly hampered in developing his claims due to deficient prison library resources, a life-threatening attack by other inmates, and his subsequent protective isolation. Gibson’s remedy, if any, may lie in a successive petition for post-conviction relief so that he may factually develop these contentions.

Conclusion

[9] The trial court properly denied Gibson's motion to correct an erroneous sentence and his subsequent motion to correct error.

[10] Affirmed.

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