MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Bruce A. Wilson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 15, 2022

Court of Appeals Case No. 21A-CR-2178

Appeal from the Whitley Circuit Court

The Honorable James R. Heuer, Senior Judge

Trial Court Cause No. 92C01-1801-F4-5

Najam, Judge.

Statement of the Case

[1] Bruce A. Wilson, pro se,[1] appeals the trial court's denial of his motion to correct erroneous sentence. He raises one issue for our review, namely, whether the trial court abused its discretion when it denied his motion to correct erroneous sentence.

[2] We affirm.

Facts and Procedural History

[3] In Wilson's direct appeal, this Court stated the facts and procedural history as follows:

> On December 23 or 24, 2016, Ronald Wesenberg and Linda Ort left their home in Whitley County, Indiana, to visit family in Pennsylvania. While traveling, they stopped at Tina Schmidt's house in Ohio. Tina is the girlfriend of Ort's son. The couple dropped off Christmas presents for Ort's son and Tina and also for Tina's grandson, visited for a half-hour, and then continued on their trip. On their way back to Indiana, Wesenberg and Ort stopped at Tina's house again to drop off boots for Tina's grandson, and then headed home.
>
> When the couple returned to their home on December 28, they found that it had been "ransacked." "[A]ll of [their] files had been gone through, they were picked up and dumped down on the floor. Jewelry boxes open, dumped on the floor. The

[1] Pro se litigants are held to the same standard as licensed attorneys. *Lowrance v. State*, 64 N.E.3d 935, 938 (Ind. Ct. App. 2016), *trans. denied*. This means that they must follow the established rules of procedure and accept the consequences when they fail to do so. *Id.*

drawers in the living room, books that were on the bookshelf had been pulled off and they were on the floor. Papers [were] all over the place." Wesenberg and Ort contacted the Whitley County Sheriff's Office and two deputies responded. Detective Andrew Mills and Sergeant John Petro, both with the Indiana State Police ("ISP"), arrived shortly thereafter and began investigating. Many items were missing from the home, including tools, a generator, a power washer, four handguns, jewelry, televisions, a speaker bar, several vacuum cleaners, and an antique money collection. Wesenberg went into the garage and immediately noticed that his brand new 2016 Chevrolet Cruz appeared to be dirty and had large scratch marks on the hood, and the gas tank was empty even though Wesenberg always kept the tank full. A key-fob for the vehicle was located in a toolbox in the garage; Wesenberg told Sergeant Petro he did not leave the fob in that location.

Later, while cleaning the upstairs computer room, Wesenberg discovered a handkerchief[] on the floor that did not belong to him or Ort. Wesenberg placed the handkerchief in a clear plastic bag. He also discovered a broken tip of a knife in a door casing, pulled it out with a pair of pliers, and placed it in a plastic bag. Wesenberg provided the items to Detective Mills and then Sergeant Petro submitted the items to the lab. Testing of the handkerchief and a swab of the gear shift lever from the Chevrolet Cruz revealed a DNA profile matching Wilson.[]

On January 9, 2018, the State charged Wilson with Count I, burglary, a Level 4 felony, and Count II, theft, a Level 6 felony. The State also filed a Notice of Intent to Seek Habitual Offender Status due to Wilson's previous convictions for theft and felony burglary.

* * *

> The jury found Wilson guilty as charged and in the second phase of the trial, found him to be an habitual offender.

Wilson v. State, No. 18A-CR-3092, 2019 WL 3022785, at *1-2 (Ind. Ct. App. July 11, 2019) (citations omitted), *trans. denied*. In support of the habitual offender enhancement, the State alleged that Wilson had two prior unrelated felony convictions: forgery, a Class C felony under cause number 17C01-9306-CF-38, and burglary, a Class C felony under separate cause number 17C01-0501-FC-3.

[4] At the sentencing hearing,

> the trial court found no mitigating circumstances and identified the following aggravating circumstances: (1) Wilson's juvenile history; (2) his prior adult criminal history; (3) his "significant history" of violating probation; (4) significant victim impact; and (5) the victims' ages. The trial court sentenced Wilson to twelve years for his burglary conviction and a concurrent term of two and one-half years for his theft conviction.
>
> Wilson's sentence was enhanced by ten years based on the habitual offender finding for a total of twenty-two years in the DOC.

Id. at *2.

[5] On direct appeal, Wilson argued, in relevant part, that the trial court had abused its discretion when it entered a sentencing statement that explained reasons for imposing the sentence that, according to Wilson, were unsupported by the record. *Id.* at *5. Specifically, Wilson challenged the trial court's

identification of his history of probation violations. *Id.* We determined that the trial court's finding that Wilson had a significant history of probation violations was unsupported by the evidence in the record, but we ultimately found that the remaining four aggravating factors identified by the court were all valid to support Wilson's enhanced sentence. *Id.* Thus, we held that the court did not abuse its discretion when it sentenced Wilson, and we affirmed the trial court's judgment in all respects. *Id.*

[6] On December 23, 2019, Wilson filed a petition for post-conviction relief ("PCR petition"), alleging ineffective assistance of trial and appellate counsel, and the State filed its response on December 30.[2] However, on August 6, 2021, Wilson filed a motion to withdraw his PCR petition without prejudice, which the trial court granted that same day.

[7] On August 26, Wilson filed a motion to correct erroneous sentence, and the State filed a response. On September 29, the trial court denied Wilson's motion. This appeal ensued.

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[2] Wilson's PCR petition was filed under cause number 92C01-1912-PC-980. He has not provided this Court with a copy of his PCR petition or the State's response thereto. However, pursuant to Indiana Evidence Rule 201(b)(5), we may take judicial notice of the records of a court of this state, and judicial notice may be taken at any stage of the proceedings, including on appeal. Ind. Evidence Rule 201(d). Thus, we take judicial notice of Wilson's PCR Petition and the State's response, as well as the post-conviction case chronological case summary that are contained in Odyssey.

Discussion and Decision

[8] Wilson appeals the trial court's denial of his motion to correct erroneous sentence. We note that Wilson has not provided this Court with a copy of his sentencing order,[3] and he does not allege that his sentence is facially erroneous. Instead, he argues that the State "used an ineligible felony to illegally charge [him] with the [h]abitual [o]ffender [e]nhancement." Appellant's Br. at 6.

[9] Wilson maintains that his sentence was enhanced pursuant to Indiana Code Section 35-50-2-8(d) (2015), which provides that a person convicted of any felony is a habitual offender

> if the state proves beyond a reasonable doubt that:
>
> > (1) the person has been convicted of three (3) prior unrelated felonies; and
> >
> > (2) if the person is alleged to have committed a prior unrelated:
> >
> > > (A) Level 5 felony;
> > >
> > > (B) Level 6 felony;
> > >
> > > (C) Class C felony; or

[3] Indiana Appellate Rule 49(B) provides that "[a]ny party's failure to include any item in an Appendix shall not waive any issue or argument."

(D) Class D felony;

> not more than ten (10) years have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) and the time the person committed the current offense.

Wilson argues that his sentence is erroneous because the prior unrelated 1993 felony conviction for forgery did not meet the requirements for enhancement as a habitual offender under Indiana Code Section 35-50-2-8(d)(2). Specifically, Wilson asserts that his habitual offender enhancement runs afoul of this statute because his forgery conviction is over ten years old; the offense was committed on June 3, 1993; the sentencing took place on March 14, 1994; and, by March 14, 1998 (more than ten years before his current offense was committed), Wilson "had completed any and all obligations pertaining to [the forgery] felony conviction[.]" Appellant's Br. at 9.

[10] The State, on the other hand, argues that Wilson's arguments are "beyond the scope of a motion to correct erroneous sentence" and cannot be litigated through such a motion because Wilson's arguments "go beyond the four corners of his sentencing order and seek reconsideration of whether his habitual offender enhancement was proper based on collateral facts regarding his prior convictions." Appellee's Br. at 6, 7-8. In the alternative, the State argues that, "[e]ven if this Court were to consider Wilson's collateral attack on his habitual offender enhancement," Wilson's claim is barred by res judicata. Appellee's Br. at 6. According to the State, the "merits of [Wilson's] claim could have been

litigated at his trial and direct appeal, but were not raised then." *Id.* at 10. However, the State acknowledges that "[t]o the extent Wilson has any opportunity for relief, it lies in post-conviction relief proceedings[.]" *Id.*

[11] We review a trial court's decision on a motion to correct erroneous sentence only for an abuse of discretion. *Fry v. State*, 939 N.E.2d 687, 689 (Ind. Ct. App. 2010). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id.*

[12] An inmate who believes he has been erroneously sentenced may file a motion to correct the sentence pursuant to Indiana Code Section 35-38-1-15, which 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.

Our Supreme Court has held that a motion to correct erroneous sentence is appropriate only when the sentence is "erroneous on its face." *Robinson v. State*, 805 N.E.2d 783, 786 (Ind. 2004). The facially erroneous prerequisite is to be strictly applied; accordingly, "[c]laims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct sentence." *Id.* at 787. Indeed, our Supreme Court specifically stated that, "[a]s to sentencing claims not facially apparent, the motion to

correct sentence is an improper remedy. Such claims may be raised only on direct appeal and, where appropriate, by post-conviction proceedings." *Id.*

[13] As for Wilson's argument that his sentence is erroneous because his prior unrelated felony conviction for forgery does not meet the requirement for enhancement of his sentence as a habitual offender, any resolution of this issue would require consideration of factors outside of the face of the judgment. *See Robinson*, 805 N.E.2d at 786. To address this claim would require a consideration of proceedings before, during, or after his sentencing. *See id.* at 787. As such, Wilson's argument is not properly presented by way of a motion to correct erroneous sentence.

Conclusion

[14] We conclude that the trial court did not abuse its discretion when it denied Wilson's motion to correct erroneous sentence.[4] The judgment of the trial court is affirmed.

[15] Affirmed.

Vaidik, J., concurs.

Weissmann, J., concurs with separate opinion.

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[4] We find this issue dispositive. Therefore, we do not address the State's alternative argument of res judicata.

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Weissmann, Judge, concurring.

[16] I concur in the result but write separately because I do not believe we are constrained from affirming the trial court on the basis that Wilson's claim is meritless. As the appellant, Wilson must convince this court that the trial court abused its discretion in denying his request to correct a sentence he claims to be erroneous on its face. *Fry v. State*, 939 N.E.2d 687, 689 (Ind. Ct. App. 2010). But his only argument relies on a misunderstanding of his habitual offender status.

[17] When Wilson committed his Level 4 felony burglary in 2016, the relevant statute provided two ways for the State to establish his habitual offender status The State could have shown: 1) Wilson had obtained two prior felonies, one of

which could not be a Level 6 or Class D felony; or 2) Wilson had three prior felonies, all of which could be lower-level offenses, provided not more than ten years had elapsed from the prior offense. Indiana Code § 35-50-2-8(b), (d). The State chose the first option, which had no ten-year restriction on prior felonies at the time of Wilson's underlying offense. App. Vol. II, p. 24. But Wilson argues as though the State chose the second, and then relies on this misapprehension to complain that its conditions were not met.

[18] On appeal, we review the trial court's denial of Wilson's motion to correct erroneous sentence for an abuse of discretion. *Fry*, 939 N.E.2d at 689. It's clear there was no such abuse here. I fear we will waste precious time and resources in future proceedings if we fail to recognize Wilson's argument for the substantively meritless claim it is. *Robinson* holds that "a motion to correct 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) (emphasis added). This case presents the opposite side of that coin. Here the trial court *denied* sentencing relief on a claim solely rooted in misapprehension of the law's application to undisputed facts. I disagree with my colleagues that this matter "require[s] consideration of factors outside of the face of the judgment" and that "to address this claim would require a consideration of proceedings before, during, or after his sentencing." Slip op. at * 9. Because the trial court denied Wilson's request—which was based only on a mistaken application of law—I do not think *Robinson* mandates we put off the matter for another day.