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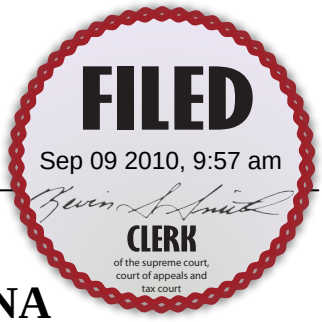

IN THE COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A05-0911-PC-627
	)	
CHARLES BOYLE,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben B. Hill, Judge
Cause No. 49F18-9709-PC-137207

September 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

The State of Indiana appeals the trial court's order granting Charles Boyle's petition to modify his conviction for operation of a motor vehicle while habitual traffic violator as a class D felony[1] to a class A misdemeanor. The State raises one issue which we revise and restate as whether the trial court erred in granting Boyle's petition. We reverse.

The relevant facts follow. On September 15, 1997, Boyle was charged with Count I, operation of a motor vehicle while habitual traffic offender as a class D felony; and Count II, failure to stop after accident resulting in personal injury as a class A misdemeanor, in Marion County, Indiana. On June 30, 1999, Boyle and the State entered into a plea agreement whereby Boyle agreed to plead guilty to Count I. The State agreed to make the following recommendations at sentencing: "Open Argument As to AMS; 365 days/ 365 days Susp., 365 days Probation; Drivers License Suspended For Life," and for Boyle to pay restitution to the victim of the accident. Appellant's Appendix at 17.

On September 2, 1999, Judge Elizabeth Christ accepted the plea agreement and held a sentencing hearing. The chronological case summary ("CCS") describes Boyle's sentence in relevant part as follows:

> Imposed 0 D MCJ 365 D DOC
> with 365 D suspended; Total executed 0 D
> with 15 days credit for time served;
> Defendant placed on probation for 365 days;
>
> * * * * *

[1] Ind. Code § 9-30-10-16 (Supp. 1994) (subsequently amended by Pub. L. No. 120-2000, § 2 (eff. July 1, 2000); Pub. L. No. 1-2001, § 9 (eff. May 7, 2001)).

> Defendant's drivers license suspended for 99999 days;
> with 0 days credit.

Id. at 5.[2] The State dismissed Count II. On August 3, 2000, Judge Reuben B. Hill granted Boyle's discharge from probation.

On October 17, 2008, Boyle filed a verified petition for post-conviction relief. On February 26, 2009, Commissioner Maryann Oldham presided over Boyle's post-conviction relief hearing. At the hearing, Boyle's counsel stated that he "is actually eligible for a [sic] Alternative Misdemeanor Sentencing based upon the plea agreement." Transcript at 1. After noting that the clerk could not locate the transcript of the sentencing hearing, Boyle's counsel stated that "the only thing I can say as to whether or not he would be getting A.M.S. on the backend if he completed probation successfully is [that it has] always been . . . Judge Hill's policy to do so." Id. Boyle's counsel therefore asked Commissioner Oldham if she "would rather allow Judge Hill to determine the A.M.S. rather than [herself] since he is the one that actually sentenced him." Id. Boyle also filed a "PETITION FOR MODIFICATION OF SENTENCING FROM 'D' FELONY TO ALTERNATE MISDEMANOR SENTENCE" the same day based upon the arguments he made to the post-conviction court. Appellant's Appendix at 34. The State argued that it did not "consent to any modification on the sentence." Transcript at 1-2. The State argued that:

[2] We note that neither the sentencing order nor a transcript from Boyle's sentencing hearing is contained in the record.

> The plea agreement itself said open to argument as to A.M.S. which implies that the State could contest A.M.S. Also in the Court's file there is [a] copy of the certification of Indiana abstracts court record. That shows that [Boyle's] driving privileges were suspended for life which also is indicative of a D Felony with no A.M.S.

Id. at 2. Commissioner Oldham decided to set the matter onto Judge Hill's calendar.

On August 25, 2009, Judge Hill held a hearing on Boyle's motion for modification. At the hearing, Boyle argued that "the Court advised Mr. Boyle that upon successful completion of probation, probation would notify the Court he had successfully completed and the Court would then . . . convert it to a Misdemeanor," and that "[i]t is not really a modification, it is really just a reconsidering hearing (sic)." Id. at 3. Boyle also argued that had Boyle violated his probation, the court would have lost jurisdiction to modify, but "if he doesn't violate it then the Court doesn't lose jurisdiction." Id. at 5. The court ordered the parties to brief the alternative misdemeanor sentencing issue and "tabled" ruling on the post-conviction petition. Id.

On September 9, 2009, Boyle submitted a memorandum in support of his motion arguing that "[p]ursuant to I.C. 35-38-1-1.5(a), [a] court may enter judgment of conviction as a Class D felony with the express provision that the conviction will be converted as a Class A misdemeanor within three (3) years if the person fulfills certain conditions," that, pursuant to I.C. 35-38-1-1.5(d), the court "**shall**" modify the conviction to a class A misdemeanor "if the person fulfills the conditions," and that Boyle fulfilled the conditions "and even did so earlier than expected as evidenced by the successful early termination by the probation department." Appellant's Appendix at 37-38. Boyle also

argued that "[t]he Court was so notified and inadvertently failed to reduce [his] conviction . . . ." Id. at 38. On September 18, 2009, the State filed its memorandum arguing that "[t]he 1999 Guilty Plea agreement states that the parties would *argue* the issue of AMS, which shows that the State did not agree to AMS," and that the reliance in Boyle's memorandum on Ind. Code § 35-38-1-1.5 is misplaced because that statute "was added by P.L. 98-2003 . . . [and thus] was not in effect at the time of [Boyle's] sentencing," that even if Boyle could avail himself of Ind. Code § 35-38-1-1.5, "the statute requires the consent of the prosecuting attorney," and finally that the statute "requires the conversion . . . 'within three (3) years . . .'" and Boyle sought modification ten years after he pled guilty. Id. at 39-40.

On October 9, 2009, the trial court held another modification hearing and the parties reiterated the arguments made in their memoranda. Also, Boyle testified under oath that at the time of sentencing "the Judge promise[d] [him] to give [him] Alternative Misdemeanor Sentencing upon successful completion of [his] probation." Transcript at 12. At the hearing's conclusion the trial court stated and ruled as follows:

> Well see, I don't know if the Court promised him A.M.S. or not. The file does not indicate that. And generally there is an entry made to that effect. Sometimes I can look at the criminal history and tell if the Court would have favorably considered A.M.S. But his criminal history really doesn't indicate that the Court would make that kind of consideration. But I believe that if the Court is going to sit in judgment on every case that comes before it and try to be fair that it must in the light of or the absence of evidence to the contrary, just give the benefit of the doubt to the Defendant. . . . [Boyle's] request is granted over the objection of the State.

Id. at 12-13. The court issued an order modifying Boyle's "D Felony to a misdemeanor." Appellant's Appendix at 42.

The sole issue is whether the trial court erred in granting Boyle's petition for modification of his conviction for operation of a motor vehicle while habitual traffic violator as a class D felony to a class A misdemeanor.[3] "Sentencing is conducted within the 'discretion of the trial court and will be reversed only upon a showing of abuse of that discretion.'" State v. Fulkrod, 735 N.E.2d 851, 852 (Ind. Ct. App. 2000) (quoting Sims v. State, 585 N.E.2d 271, 272 (Ind. 1992)), reh'g denied, summarily aff'd, 753 N.E.2d 630 (Ind. 2001). "Generally, a trial judge has no authority over a defendant after he or she pronounces sentence." Id. (citing Dier v. State, 524 N.E.2d 789, 790 (Ind. 1988)). "Any continuing jurisdiction after final judgment has been pronounced must either derive from the judgment itself or be granted to the court by statute or rule." Id. (citing Schweitzer v. State, 700 N.E.2d 488, 492 (Ind. Ct. App. 1998), trans. denied).

[3] We note that, on October 17, 2008, Boyle made the following allegations in his verified petition for post-conviction relief:

> [Boyle] did not admit to a factual basis as required by I.C. 35-35-1-3. The guilty plea violated the requirements of I.C. 35-35-1-2, because [Boyle] did not plead to specific facts from which it can be concluded that [his] decision to plead guilty was voluntary and intelligent[]. [Boyle] was not advised fully of the effect of his guilty plea, i.e., that his driving privileges would be suspended for life. [His] State and Federal Constitutional rights to due process were violated. Indiana Statutory standards for guilty pleas were not met (I.C. 9-30-3-11; and I.C. 35-35-1 et seq). That [Boyle's] counsel was ineffective by failing to inform [him] that his driving privileges were in fact not suspended, that he did not have to plead guilty, and the full effect of his guilty plea.

Appellant's Appendix at 22. As noted above, at the August 25, 2009 hearing the trial court "tabled" ruling on the verified petition. Transcript at 5.

This court recently examined a similar issue in State v. Brunner, 931 N.E.2d 903 (Ind. Ct. App. 2010), trans. pending. In Brunner, the defendant pled guilty to operating a vehicle while intoxicated as a class D felony on August 10, 2000. Brunner, 931 N.E.2d at 904. In December 2007, Brunner sent a letter to the trial court asking to "change . . . the above felony conviction to a misdemeanor." Id. Brunner wrote "that he had had no other problems with law enforcement . . . in the ensuing seven years," that his status as a felon "has played some part in [his] inability to secure a new job," and that he therefore had struggled to support his family. Id. (internal quotations omitted). The trial court eventually "granted Brunner's request to change his conviction from a Class D felony to a Class A misdemeanor 'pursuant to Indiana Code [§] 35-50-2-7(b).'" Id. at 905.

After first discussing the fact that Brunner's request was to be treated as a petition for post-conviction relief under Ind. Post-Conviction Rule 1(1)(a)(4),[4] id. at 907, we interpreted Ind. Code § 35-50-2-7(b), noting that the issue required us "to divine the intent of the legislature." Id. at 907. Ind. Code § 35-50-2-7(b) provides in part that "if a person has committed a Class D felony, the court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly." The court held that "the General Assembly intended to limit the application of that authority to the moment the court first enters its judgment of conviction and before the court announces the defendant's sentence." Id. at 908. The court explained:

[4] Ind. Post-Conviction Rule 1(1)(a)(4) allows for post-conviction proceedings in situations where "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice[.]"

Our reading of Section 35-50-2-7(b) is further supported by Indiana Code Section 35-38-1-1.5. Section 35-38-1-1.5 became effective in 2003, several years after Brunner's third OWI, and therefore it does not apply to him. See, e.g., Williams v. State, 891 N.E.2d 621, 631 (Ind. Ct. App. 2008) (noting that the law in effect at the time of the crime is the law that applies to the defendant). But it is instructive in determining the legislative intent behind Section 35-50-2-7(b). In relevant part, Section 35-38-1-1.5 states:

> (a) A court may enter judgment of conviction as a Class D felony with the express provision that the conviction will be converted to a conviction as a Class A misdemeanor within three (3) years if the person fulfills certain conditions. A court may enter a judgment of conviction as a Class D felony with the express provision that the conviction will be converted to a conviction as a Class A misdemeanor only if the person pleads guilty to a Class D felony that qualifies for consideration as a Class A misdemeanor under IC 35-50-2-7, and the following conditions are met:
>
> (1) The prosecuting attorney consents.
> (2) The person agrees to the conditions set by the court.
>
> (b) For a judgment of conviction to be entered under subsection (a), the court, the prosecuting attorney, and the person must all agree to the conditions set by the court under subsection (a).

That is, a trial court may conditionally enter judgment as a Class D felony with the understanding that that felony will be converted to a Class A misdemeanor within three years of the entry of judgment upon the defendant's satisfaction of certain conditions. But the decision to invoke that procedure must be made at the time of the original entry of judgment.

Section 35-38-1-1.5 confirms our reading of Section 35-50-2-7(b). *Again, the trial court's decision on whether to enter judgment on a Class D felony or a Class A misdemeanor—or, since 2003, a conditional Class D felony—may be made only at the moment of the original entry of the judgment of conviction. That did not happen here.* Instead, more than nine years after the trial court entered its judgment of conviction against Brunner as a Class D felony, the trial court revisited that issue, vacated the Class D

> felony conviction, and imposed a Class A misdemeanor conviction. The trial court's reliance on Section 35-50-2-7(b) to grant the requested relief was contrary to the plain meaning of the statute and an abuse of discretion.

Id. at 908-909 (emphasis added).

Here, the State argues that the trial court "exceeded its authority when it modified a conviction it had no jurisdiction to modify." Appellant's Brief at 5. We agree.

As we stated in Brunner, in 1999 the trial court's decision "on whether to enter judgment on a Class D felony or a Class A misdemeanor . . . may [have been] made only at the moment of the original entry of the judgment of conviction." Brunner, 931 N.E.2d at 909. We note that a copy of Boyle's sentencing order is not in the record, and the CCS does not mention the possibility of modifying Boyle's sentence from a class D felony to a class A misdemeanor.[5] Moreover, even if Boyle's sentencing order had contained such a provision, as explained in Brunner the trial court was without authority to make such a sentencing provision prior to the enactment of Ind. Code § 35-38-1-1.5; otherwise there would have been no need for the General Assembly to have enacted the statute in 2003. See C.C. v. State, 907 N.E.2d 556, 559 (Ind. Ct. App. 2009) ("[I]t is a rule of statutory interpretation that courts will not presume the legislature intended to do a useless thing . .

[5] We observe that much of the premise of Boyle's argument, both to the trial court and on appeal, is based on the erroneous premise that it was Judge Hill who sentenced Boyle in September 1999. As noted in the facts section, the CCS reveals that Judge Christ sentenced Boyle. Also, although Boyle's sentencing order is not contained in the record, the record does contain the State's motion to dismiss Count II which appears to have been signed by Judge Christ rather than Judge Hill. Thus, Boyle's argument that "getting A.M.S. on the backend if [a defendant] completed probation successfully" as "always [having] been Judge Hill's policy . . ." is not compelling. Transcript at 1.

. .") (quoting N. Indiana Bank and Trust Co. v. State Bd. of Finance, 457 N.E.2d 527, 532 (Ind. 1983)).

Finally, we note that were the court's ruling on Boyle's petition allowed to stand, Boyle would be receiving a benefit which he could not receive were it to fall under the purview of Ind. Code § 35-38-1-1.5 because the three-year-window has closed. We do not believe that the purpose of the statute was to constrain the power of the trial court to grant such relief; rather, as inferred in Brunner, Ind. Code § 35-38-1-1.5 bestowed upon trial courts a power which they did not previously possess. We therefore conclude that the trial court abused its discretion when it granted Boyle's petition for modification. See Leeth v. State, 868 N.E.2d 65, 67 (Ind. Ct. App. 2007) (noting that Ind. Code § 35-38-1-1.5 "explicitly governs" a sentencing provision contained in a judgment order for converting a class D felony to a class A misdemeanor); see also State v. Fulkrod, 753 N.E.2d 630, 633 (Ind. 2001) (holding that "[t]he fact that the sentencing judge 'particularly reserved . . . the right to modify this sentence,' [pursuant to Ind. Code § 35-38-1-17] is of no moment" because "[t]he court was seeking to reserve a power that it did not possess beyond the 365-day limit," and that "[a] sentencing judge cannot circumvent the plain provisions in the sentence modification statute simply by declaring that he or she reserves the right to change the sentence at any future time") (internal citation omitted).

For the foregoing reasons, we reverse the trial court's grant of Boyle's petition for modification.

Reversed.

NAJAM, J., and VAIDIK, J., concur.