APPELLANT PRO SE:

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IN THE
COURT OF APPEALS OF INDIANA

KELLY S. CRAIG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 63A01-0709-PC-429
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PIKE SUPERIOR COURT
The Honorable Jim R. Osborne, Judge
Cause No. 63C01-9512-CF-627

July 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Kelly S. Craig, *pro se*, appeals the trial court's denial of his petition for sentencing modification. Craig raises several issues on appeal, which we restate as:

I. Whether IC 35-38-1-17(b), which requires the State to agree to any sentencing modification after one year of incarceration, confers "judicial power" on the prosecution and is therefore unconstitutional.

II. Whether a plea agreement that gives all sentencing power to the trial court and is silent about the State's response to a defendant's request for a sentencing modification circumvents IC 35-38-1-17(b).

III. Whether the trial court engaged in vindictive justice when it denied Craig's request for a sentencing modification.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 1997, Craig pled guilty to attempted rape[1] and aiding murder.[2] Craig's plea was entered upon the following factual basis:

> On December 9, 1995, Craig, Brian Powell, and Leon Jones drove to a McDonald's where they met Shannon Wentzel, with whom Craig had a previous relationship. Craig asked Powell if they could give Wentzel a ride home. Powell agreed and the group eventually left McDonald's. Craig invited Wentzel to hang around with them until she had to go home, and she agreed. The group went "four wheeling" through rural areas in Pike County. During this trip, Jones told Wentzel that he was going to have sex with her and she responded "no."
>
> The group eventually stopped along a road so that Powell could urinate, and everyone exited the truck. When Powell returned to the group, Jones struck Wentzel in the head. Jones then started kicking her, and Craig joined in the attack. Jones then struck her with a beer bottle. Jones then had vaginal and anal intercourse with her and then ordered Powell to have sex with her. Powell then had anal sex with her. Jones told Craig that it was his turn, and Craig pulled down his pants and attempted to have intercourse with her. All

[1] *See* IC 35-42-4-1; IC 35-41-5-1.

[2] *See* IC 35-42-1-1; IC 35-41-2-4.

> three men then kicked her. Jones then got into the truck and ran over her ten to fifteen times. Powell and Craig then helped Jones put her into the bed of the truck.
>
> While Powell was driving, Craig and Jones noticed that Wentzel was moving and Jones said, "the bitch ain't dead yet." Powell pulled over and Jones took her out of the truck. Craig and Jones then kicked her and stabbed her with a screwdriver. Craig told Jones that she still was not dead. Jones then got into the truck and ran over her again approximately twenty times. After Jones decided that Wentzel was dead, he and Powell dragged her body to the edge of the woods. [Wentzel] died from the combination of her injuries.
>
> The State charged Craig with murder, attempted rape, criminal deviate conduct while using deadly force, aiding another person to commit the crime of murder, and intentional killing while committing or attempting to commit the crimes of rape and deviate conduct. Pursuant to a plea agreement with the State, Craig pleaded guilty to attempted rape and aiding another person to commit the crime of murder, and the State dismissed the remaining charges.

Craig v. State, No. 63A05-9803-CR-177 (Ind. Ct. App. Nov. 9, 1998) (internal citations omitted).

The trial court sentenced Craig to ten years for the attempted rape to be served consecutively to forty-five years for the aiding murder charge for a total executed sentence of fifty-five years. Craig appealed his sentence, and this court affirmed the trial court's decision in an unpublished memorandum decision, *Craig v. State*, No. 63A05-9803-CR-177 (Ind. Ct. App. Nov. 9, 1998).

In May 2007, Craig petitioned the trial court for a sentencing modification. On June 18, 2007, the trial court held a hearing, and on September 18, 2007, the trial court denied Craig's request. Craig moved for permission to appeal, which the trial court granted. Craig now appeals.

DISCUSSION AND DECISION

I. Judicial Power

Craig contends that IC 35-38-1-17(b) is unconstitutional because it confers judicial power on the prosecution. IC 35-38-1-17(b) provides:

> (b) If more than three hundred sixty-five (365) days have elapsed since the convicted person began serving the sentence and after a hearing at which the convicted person is present, the court may reduce or suspend the sentence, subject to the approval of the prosecuting attorney.

The party challenging the constitutionality of a statute bears the burden of proof and all doubt is resolved against that party. *Manley v. State*, 868 N.E.2d 1175, 1177 (Ind. Ct. App. 2007), *trans. denied.*

Initially, we note that the trial court did not intend to modify Craig's sentence (*see Appellant's Br.* at 24); therefore, any claim that the statute is unconstitutional because it confers judicial power on the prosecutor is not ripe. *In re Paternity of M.G.S.*, 756 N.E.2d 990, 1004 (Ind. Ct. App. 2004), *trans. denied.* However, we address the more general question of the constitutionality of IC 35-38-1-17(b) under the facts of this case.

IC 35-38-1-17(b) has previously survived several constitutional challenges. In *Manley,* we addressed the defendant's claim that the statute was unconstitutional because it did not require a hearing before the trial court denied a petition for sentence modification, and that a failure to require a hearing amounted to vindictive justice. *Manley*, 868 N.E.2d at 1179. Based on existing caselaw, this court held that IC 35-38-1-17(b) was not unconstitutional and that a defendant did not have an identifiable right at a sentencing modification hearing. *Id.* (citing *Beanblossom v. State*, 637 N.E.2d 1345, 1348-49 (Ind. Ct.

App. 1994), *trans. denied*). This court also held that a delay in offering rehabilitative programs to defendants within their first 365 days of incarceration did not unfairly deny the defendants their rights. *Id.* at 1178-79 (defendant did not exhaust his administrative remedies to raise challenge to DOC programs).[3]

In *State v. Fulkrod*, 753 N.E.2d 630, 632 (Ind. 2004), under the section heading, "False Hope for a Reduced Sentence," our Supreme Court vindicated IC 35-38-1-17(b) when it held that a trial court does not have authority to modify a sentence without the prosecutor's approval, and a trial court's effort to usurp the State's authority constituted an abuse of its discretion. In *Fulkrod*, the defendant claimed that the trial court properly retained jurisdiction and discretion to reduce his sentence since his plea agreement provided a sentencing range and the trial court's reduced sentence fell within that range. *Id.* The Supreme Court cited *Marts v. State*, 478 N.E.2d 63, 64 (Ind. 1985) and its holding that once a sentence has gone beyond the statutory time period to modify the sentence, the trial court no longer has jurisdiction over the alteration of a sentence. *Id.* (citing *State ex rel. Abel v. Vigo Cir. Ct.*, 462 N.E.2d 61, 63 (Ind. 1984)). While recognizing the statutory changes that had been made to IC 35-38-1-17(b) since its decision in Marts, our Supreme Court stated that its reasoning in *Marts* still applies, and that trial courts cannot overlook the plain language of the statute. *Fulkrod*, 753 N.E.2d at 633.

[3] In *Reed v. State*, 796 N.E.2d 771, 774 (Ind. Ct. App. 2003), *trans. denied*, the defendant claimed that his federal and state constitutional rights were violated and that the policy of the Marion County Prosecutor to object to every request for modification of sentence amounted to vindictive justice. This court dismissed the claim since the defendant failed to put forth any evidence to support the factual issues necessary to support his constitutional claim.

Finally, in *Beanblossom*, 637 N.E.2d at 1348-49, we held that a defendant does not have a recognizable liberty interest at a modification hearing nor a right to be free from Indiana's condition that, after 365 days of incarceration, the prosecutor must approve any modification. *Manley*, 868 N.E.2d at 1179. We held that IC 35-38-1-17(b) did not violate the constitution because the trial court did not have an inherent power to modify a sentence. Instead, the trial court held only that power afforded by the legislature, and that power was conditioned on the prosecutor approving the sentencing modification. *Beanblossom*, 637 N.E.2d at 1348-49.

Here, Craig claims that our Supreme Court reserved for trial courts the right to modify a sentence. *See Stephens v. State*, 818 N.E.2d 936, 940 n.5 (Ind. 2004). Craig highlights footnote five in *Stephens* and the language in IC 35-38-1-17(b), which provides that a trial court may modify a sentence without the approval of the prosecutor after 365 days of incarceration if the defendant is currently in community corrections and not the Department of Correction. *Id.* However, that exception to the statute does not apply here. Craig, who is incarcerated within the Department of Correction, contends, like many others before him, that IC 35-38-1-17(b) violates the state and federal constitution. Our legislature created the statute, and our Supreme Court has interpreted the statute to be constitutional and controlling in issues of sentencing modification jurisdiction. Craig has failed to meet his burden to prove the statute is unconstitutional.

II. Sentencing Left to the Trial Court's Discretion

Craig also claims that, since his plea agreement left sentencing to the sound discretion of the trial court and did not contain the material language in IC 35-38-1-17(b) in its terms,

the trial court was not bound by the prosecutor's approval to modify his sentence. Again, we cite *Fulkrod*, 753 N.E.2d at 633, for the proposition that even where a plea agreement affords the trial court discretion to sentence the defendant, IC 35-38-1-17(b) limits the trial court's unfettered discretion to modify the sentence to within one year from when the original sentence is imposed. The plea agreement's omission of IC 35-38-1-17(b) does not waive or "surrender" the prosecutor's right to approve a sentencing modification. *Appellant's Br.* at 10.

A plea agreement is contractual in nature and binding on the parties and the trial court. *Robinett v. State*, 798 N.E.2d 537, 539 (Ind. Ct. App. 2003). "Thus, a reviewing court's consideration involving plea agreements is guided by principles of contract law." *Owens v. State*, 886 N.E.2d 64, 67 (Ind. Ct. App. 2008) (citing *Griffin v. State*, 756 N.E.2d 572, 574 (Ind. Ct. App. 2001), *trans. denied*). In *Owens*, we addressed a plea agreement that included the following language:

> The parties agree that this Plea Agreement will not operate as a waiver of Defendant's right to seek a sentencing modification within 365 days of the sentencing pursuant to I.C. 35-38-1-17(a), and the Prosecuting Attorney *consents and approves* future filings of petitions for sentence modification thereafter under IC 35-38-1-17(b), provided, however, nothing in this agreement shall foreclose the State of Indiana from objecting to any modification of sentence.

756 N.E.2d at 66. We held that the inclusion of the "consents and approves" language must have modified the State's usual right to approve or disapprove of a sentencing modification, otherwise the language would have been rendered meaningless. *Id.* at 67.

Here, the absence of any language in the plea agreement rescinding the State's right to approve a future sentencing modification indicated the State intended to maintain its right. The State maintained a statutory right to disapprove of Craig's sentencing modification.

III. Vindictive Justice

Craig claims that the trial court engaged in vindictive justice when it denied his petition to modify his sentence. Specifically, Craig highlights the trial court's statement during the sentencing modification hearing, which provides in part:

> "The [trial c]ourt would concur that [Craig] has taken major steps in turning his young life around. Steps which would tend to show anyone reviewing his time in prison as a positive approach to overcome negative features of his person and character at the time of the crime. What [Craig] has shown the [trial c]ourt as positive steps towards rehabilitation, are in fact what society would hope all detainees in prison for similar offenses would strive towards.
>
> As [Craig] himself has asked the Court to consider and believe these positive steps are what will help insure that when he is released back into society he will have redefined himself mentally and spiritually. He will be equipped with the tools of his new education and his apparent ability now to recognize and understand the gravity of his crimes and pitfalls in his life which brought him to this point.
>
> The [trial c]ourt has only to read the basic statement of facts available in the transcripts of trial and the appellee's statement of facts in their brief in the Indiana Court of Appeals by the Attorney General, State of Indiana, No. 63A01-9803-CR-177 to remember the horror that fifteen year old girl experienced on the night of December 9, 1995, the savage and inhumane acts, which were perpetrated on her, and the brutal fashion in which it was carried out with [Craig]'s participation, which ultimately lead to her death.
>
> The [trial c]ourt must agree with the stance of the State of Indiana in this "Petition for Modification" and conclude that no amount of rehabilitative efforts and remorse can overcome the murder of this innocent girl. The merit of the efforts made by [Craig] since his imprisonment to obtain educational, spiritual, and other rehabilitative goals is what will ultimately help insure [Craig] will become a positive member of society. If that is truly his desire,

> then the merits of his efforts to rehabilitate will not be wasted and will ultimately allow him to prevail as a productive member of his community and society for the remainder of his life as a free person. The "Petition for Modification" must be denied.

Appellant's Br. at 23-24.

In *Manley*, 868 N.E.2d at 1177 this court conducted a thorough review of vindictive justice claims pursued on appeal. This court held that refusing to reduce the length of a sentence is not the equivalent of denying a defendant their right to rehabilitate and did not constitute vindictive justice.

Here, we too find the trial court's denial of a reduced sentence does not constitute vindictive justice. The trial court stated that Craig had demonstrated that his incarceration has provided meaningful rehabilitation as is consistent with the Indiana Constitution's effort to ensure that "the penal code be found on principles of reformation, and not vindictive justice." Ind. Const. art. 1, sec. 16. We acknowledge Craig's participation in several rehabilitative activities during his incarceration since 2001 and his articulate *pro se* efforts at the trial level and on appeal, and we hope that he continues to improve himself prior to his reentry into society. However, we cannot turn a blind eye to the crimes he committed in December 1995 and must also ensure that the "penalties [are] proportionate to the nature of the offense." *Id.* at sec. 18. The trial court's decision did not constitute vindictive justice.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.