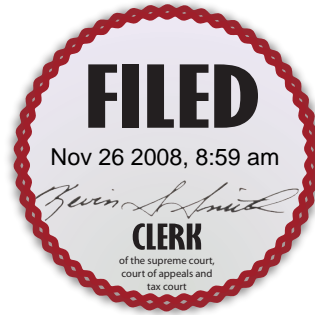


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RODNEY L. MAY,)
)
Appellant-Defendant,)
)
vs.) No. 89A05-0809-PC-548
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Paul Thomas Snow, Judge
Cause No. 89D01-0112-DF-133

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Rodney May appeals the denial of his motion to correct erroneous sentence. We remand.

Issue

The sole issue is whether May's four-year sentence for Class D felony theft and an habitual offender finding is facially erroneous.

Facts

In December 2001, the State charged May with theft and also apparently alleged that he was an habitual offender. After several delays in the proceedings, May pled guilty to theft and admitted he was an habitual offender on June 27, 2005. The trial court accepted the plea, convicted May of theft, and found that he was an habitual offender. It sentenced May as follows:

The defendant, having entered a plea of guilty to the crime of Theft and the Court having accepted such plea, having considered the pre-sentence report, and having entered judgment of conviction of a Class D Felony, now sentences the defendant, Rodney May, to the custody of the Indiana Department of Correction for a period of four (4) years and that he pay the court costs in the sum of \$136.00.

App. p. 10.

On June 20, 2008, May filed a motion to correct erroneous sentence, contending that his four-year sentence was facially erroneous because it exceeded the three-year maximum for a Class D felony. On July 1, 2008, the trial court denied the motion. May now appeals.

Analysis

May contends that his four-year sentence is facially erroneous. A motion to correct sentence is used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of statutory authority. Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). In other words, a facially erroneous sentence is one that has been entered in violation of express statutory authority or based on an erroneous interpretation of a statutory penalty provision. Beliles v. State, 663 N.E.2d 1168, 1173 (Ind. Ct. App. 1996). “Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct sentence.” Robinson, 805 N.E.2d at 787.

May notes that the maximum sentence for a Class D felony is only three years. See Ind. Code § 35-50-2-7(a). The State responds that May’s four-year sentence necessarily must have included an habitual offender enhancement of some length. The enhancement for a Class D felony may range anywhere from one and a half years to four and a half years, or from the Class D felony advisory to three times the advisory. See I.C. § 35-50-2-8(h). The State, in fact, urges that May’s sentence might be impermissibly low, if the trial court had intended to sentence May to the maximum three years for a Class D felony; if that was the case, May’s total sentence with a minimum habitual offender enhancement should be four and a half years.

Both May and the State make valid points, in that it is impossible to tell from the trial court’s current sentencing order whether the sentence imposed is illegal and contrary

to statutory authority. Although the trial court stated elsewhere that it found May to be an habitual offender, it did not mention that finding in pronouncing the sentence; a sentence of four years for a Class D felony without an habitual offender enhancement would be illegal. Likewise, a sentence of four years with an habitual offender enhancement, if May was sentenced to the maximum for a Class D felony, would fall below the statutory minimum possible sentence. We conclude it is necessary to remand to the trial court to clarify the sentence it imposed.

Conclusion

We remand for the trial court to clarify May's sentence.

Remanded.

MAY, J., and BRADFORD, J., concur.