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IN THE COURT OF APPEALS OF INDIANA

Torri Newman,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 29, 2021

Court of Appeals Case No. 21A-CR-872

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-1312-FA-10347

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Torri Newman (Newman), appeals the trial court's denial of his petition to modify his sentence for dealing in cocaine, a Class A felony, Ind. Code § 35-48-4-1(b)(1) (2006).

[2] We affirm.

ISSUE

[3] Newman presents the court with one issue, which we restate as: Whether the trial court abused its discretion when it summarily denied his petition to modify his sentence.

FACTS AND PROCEDURAL HISTORY

[4] The facts pertinent to Newman's underlying conviction, as previously found by this court, are as follows:

> In 2013, Detective Darin Troyer with the Hamilton-Boone County Drug Task Force began working with a confidential informant ("CI") to arrange a controlled buy of drugs from Joe Bobish. On December 11, 2013, the CI made arrangements with Bobish to purchase cocaine at Bobish's residence in Fishers the next day. Bobish indicated that he had a source that could deliver the cocaine to his residence. The next day, Bobish told the CI, "I got it," and they set a time to meet. The CI went to Bobish's residence while wearing a transmitter and recorder. Bobish was on the phone and walking around his house for most of the time that the CI was at his house.
>
> After a few minutes, a vehicle stopped in front of Bobish's house. Bobish went outside and briefly talked to the driver, Newman. Bobish went back inside, gave cocaine to the CI, and took money from the CI. Bobish then took the money, went back outside to Newman's vehicle, where he sat in the passenger seat for a minute or two, and returned to the house. The officers did not witness Bobish obtaining cocaine from Newman or delivering money to Newman. Detective Troyer ordered officers to follow Newman's vehicle away from the residence and stop it. Without

> observing a traffic violation, the officers stopped Newman, immediately placed him in handcuffs, and arrested him. His vehicle was later searched, and contraband was found. Newman subsequently gave consent to search his Marion County apartment where officers discovered additional contraband, including cocaine.

Newman v. State, No. 29A02-1706-CR-1327, slip op. at 1 (Ind. Ct. App. Jan. 24, 2018) (record citation omitted), *trans. denied*.

[5] On December 12, 2013, the State filed an Information in Hamilton County, charging Newman with Class A felony dealing in cocaine, Class C felony possession of cocaine, Class D felony possession of cocaine, and Class D felony possession of a controlled substance. Newman also faced charges in Marion County for the contraband found in his residence. In 2016, Newman was tried and convicted in Marion County of Class C felony possession of cocaine, Class D felony possession of a controlled substance, and Class D felony possession of marijuana. Newman was sentenced to six years for those offenses. Newman's first trial on the Hamilton County charges ended in a mistrial, but after a second trial, on April 12, 2017, Newman was convicted of Class A felony dealing in cocaine, the other charges having been dismissed. On May 24, 2017, the trial court sentenced Newman to thirty years in the Department of Correction (DOC), to be served consecutively with his sentence for the Marion County offenses.

[6] In 2018, Newman finished serving his sentence for the Marion County offenses and began serving his sentence for the Hamilton County conviction. On

December 17, 2020, at Newman's request, the DOC filed a progress report with the trial court. The report indicated that Newman had completed MRT and Project Echo, DOC programs meant to address Newman's attitude and employability, among other things. The progress report also indicated that Newman was currently enrolled in PLUS Character 2.0, was a mentor in the prison's SNAP program, had been employed while incarcerated, and had not received any conduct violations during his commitment.

[7] On March 8, 2021, Newman filed a petition to modify his sentence citing the information contained in his DOC progress report. Newman also attached to his petition several letters from members of the community attesting to his positive character, employment record, and community involvement. On April 5, 2021, the State filed its response objecting to any modification of Newman's sentence, arguing that his criminal record consisting of two misdemeanors and five felonies did not justify a sentence modification. On April 12, 2021, the trial court denied Newman's petition without holding a hearing. On April 20, 2021, Newman filed a motion to reconsider in which he argued for the first time that what Newman contended was the favorable treatment of his co-defendant, Bobish, compelled a sentence modification in his own case. The trial court did not rule on Newman's motion to reconsider.

[8] Newman now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[9] Newman argues that the trial court abused its discretion when it denied his petition to modify his sentence. As a general rule, a trial court has no authority over a criminal defendant after sentencing. *State v. Harper*, 8 N.E.3d 694, 696 Ind. 2014). Indiana Code section 35-38-1-17(e) represents an exception to that general rule, as the Legislature has provided that a trial court "may reduce or suspend the sentence and impose a sentence that the court was authorized to impose at the time of sentencing" after a defendant has begun serving his sentence and the trial court has obtained a DOC progress report. We review a trial court's denial of a petition to modify a sentence for an abuse of discretion. *Schmitt v. State*, 108 N.E.3d 423, 425 (Ind. Ct. App. 2018). Trial courts have broad discretion to modify a sentence, and an abuse of discretion occurs only where the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Merkel v. State*, 160 N.E.3d 1139, 1141 (Ind. Ct. App. 2020).

II. *Analysis*

[10] Here, the trial court indicated in its order that it had examined the pleadings and its case file and had determined that a modification of Newman's sentence was not warranted. The record indicates that Newman was convicted of a Class A felony for dealing cocaine after he supplied Bobish with the cocaine which Bobish provided to the CI. By the time of his sentencing in this matter, Newman had a criminal record consisting of two misdemeanors and five

felonies. Newman received an advisory sentence for a Class A felony. *See* I.C. § 35-50-2-4 (2005). Given Newman's culpability and criminal record, we conclude that it was not an abuse of the trial court's discretion to determine that sentence modification was unwarranted after Newman had served less than four years of his thirty-year, advisory sentence.

[11] In his argument on appeal, Newman has not presented us with any legal authority indicating that a trial court abuses its discretion in denying a sentence modification under circumstances similar to his. Rather, Newman argues that his status as a non-violent offender and his progress in rehabilitation at the DOC merited modification. However, we have observed that "the mere fact that the process of rehabilitation, the purpose of incarceration, may have started, does not compel a reduction or other modification [of a defendant's] sentence." *Marshall v. State*, 563 N.E.2d 1341, 1343-44 (Ind. Ct. App. 1990) (upholding the denial of a sentence modification despite evidence of Marshall's remorsefulness, good conduct and rehabilitative efforts in prison, and employment opportunities if released), *trans. denied*. While we agree with Newman that *Marshall* is factually distinguishable due to the different offenses involved and the amount of time served prior to the petition for modification being filed, the case still stands for the proposition that a trial court does not abuse its discretion in declining to modify a defendant's sentence even where there is plentiful evidence presented of his efforts at rehabilitation. *See Banks v. State*, 847 N.E.2d 1050, 1053 (Ind. Ct. App. 2006) (citing *Marshall* in upholding the denial of a petition to modify Banks' sentence despite his contention that all

the evidence in the record supported it), *trans. denied; Catt v. State,* 749 N.E.2d 633, 643-44 (Ind. Ct. App. 2001) (relying on *Marshall* to affirm denial of sentencing modification even where Catt had participated in several rehabilitative programs, was employed in prison, and made restitution), *trans. denied*. Inasmuch as Newman suggests that the trial court abused its discretion by failing to hold a hearing prior to denying his petition, it is well-established that, under the modification statute, a trial court is only required to conduct a hearing if it has made a preliminary decision to modify the sentence at issue. *Merkel*, 160 N.E.3d at 1141-42. Here, the trial court never indicated that it was considering a modification and, thus, it was not required to hold a hearing on Newman's petition.

[12] Next, Newman argues that what he contends was the favorable post-sentencing treatment of Bobish supported a reduction of the sentence in his own case. According to Newman, Bobish was granted a sentence modification and was released from prison to probation after having served fewer than three actual years of his thirty-five-year sentence for dealing cocaine to the CI, despite the terms of Bobish's plea agreement requiring him to serve at least three actual years, Bobish's greater culpability, and Bobish's more severe criminal history. Newman attributes this disparity in post-sentencing outcomes to the fact that he is Black while Bobish is white, implying that the trial court's denial of his petition for modification was the result of racial animus. In addressing these arguments, we first observe that Newman improperly raised them for the first time in his motion to reconsider, after the trial court had already denied his

petition to modify his sentence. *See Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998) (concluding that a motion to reconsider filed after the rendering of final judgment is to be treated as a motion to correct error); *Sanders Kennels, Inc. v. Lane*, 153 N.E.3d 262, 269 (Ind. Ct. App. 2020) ("[I]t is well-settled that [a] party may not raise an issue for the first time in a motion to correct error[.]") (quotation omitted). In addition, Newman offers no citation to the record supporting the fact that Bobish is white, and he does not request that we take judicial notice of some source for that fact or even argue that we may do so.

[13] However, even if Newman's arguments were properly before us and were supported by facts in the record, they would be unavailing. Newman's arguments are premised on his contention that only disparate race could account for the disparate treatment between him and Bobish. This contention is faulty, as unlike Newman, Bobish elected to plead guilty and negotiated a favorable plea agreement which explicitly provided for the possibility of a sentencing modification. We do not agree with Newman's assessment that he was somehow less culpable than Bobish just because Bobish was the original target of law enforcement: Newman supplied cocaine to Bobish, making the successful sale of the cocaine to the CI possible. We fail to understand how this renders Newman less culpable. Furthermore, as Newman acknowledges on appeal, no authority requires that co-defendants receive proportional sentences. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). In addition, when the impartiality of the trial court judge is challenged on appeal, we presume that a

trial court judge is unbiased and unprejudiced. *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002). Newman's comparison of his own post-sentencing treatment to that of Bobish, who negotiated a favorable plea agreement, does not overcome that presumption.

[14] Newman also directs our attention to the fact that just seven months after he committed his Hamilton County offense, the Legislature amended the criminal statutes such that the crime of Class A felony dealing in cocaine was subject to lesser penalties. However, the 2014 revisions in the criminal code do not apply to crimes committed before the effective date of revisions, and the doctrine of amelioration explicitly does not apply to the 2014 revisions. *See* I.C. § 1-1-5.5-21. The criminal defendant himself selects the time that he commits the crime, not the State, and, therefore, it is the defendant who chooses which statute applies to his offense. *Rondon v. State*, 711 N.E.2d 506, 513 (Ind. 1999). Accordingly, we cannot conclude that the trial court abused its discretion in failing to take into account the 2014 revisions of the criminal code to modify Newman's sentence. Neither can we credit Newman's argument that favorable amendments to the sentencing modification statute proposed in 2021 that did not become law supported a modification of his sentence, as a trial court cannot be said to have abused its discretion in applying the current, valid sentencing modification statute.

CONCLUSION

[15] Based on the foregoing, we conclude that the trial court did not abuse its discretion in summarily denying Newman's petition to modify his sentence.

[16] Affirmed.

[17] Najam, J. and Brown, J. concur