

MEMORANDUM DECISION

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

Jason L. Hershberger,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 29, 2022

Court of Appeals Case No.
22A-CR-219

Appeal from the Elkhart Superior
Court

The Honorable Teresa L. Cataldo,
Judge

Trial Court Cause No.
20D03-1502-FA-7

Robb, Judge.

Case Summary and Issue

- [1] Jason Hershberger appeals the trial court’s denial of his motion to correct erroneous sentence. Concluding the trial court properly denied the motion, we affirm.

Facts and Procedural History

- [2] In 2016, Hershberger pleaded guilty to one count of dealing in cocaine, a Class A felony, and agreed to a sentence of thirty years, with ten years to be served in the Indiana Department of Correction (“DOC”), followed by ten years in community corrections on home detention and ten years of reporting probation. The trial court indicated when sentencing Hershberger that “a sentence modification will be considered upon successful completion of the Purposeful Incarceration” program while in the DOC. Appellant’s Appendix, Volume 2 at 56.¹
- [3] After Hershberger completed the Purposeful Incarceration program, he filed a motion for sentence modification which the trial court granted in August 2017, ordering that he serve the remainder of his sentence as a direct commitment to community corrections on home detention. In August 2020, Hershberger was arrested for possession of marijuana and unlawful possession of a firearm by a serious violent felon. Both community corrections and the probation

¹ Citations to the Appellant’s Appendix are to the .pdf pagination.

department filed violation notices stemming from the arrest. A hearing was held in February 2021. Hershberger attended remotely and by counsel, was advised of his rights, and admitted to violating the terms of his placement in community corrections and the terms of his probation by possessing illicit drugs. On March 5, 2021, the trial court issued an order imposing the following sanction for Hershberger's violations:

[T]he court orders the defendant to serve seven (7) years at the [DOC], with the final two (2) years suspended on a like term of reporting probation. . . . The court orders an updated credit time memorandum prepared, which includes educational credits; thereafter, the court will issue an order awarding credit time.

Id. at 148. This order corrects a mistake regarding credit time that was made in the original order at the conclusion of the February hearing. *See id.* at 29. Because of this, the trial court scheduled a hearing for “resolution of credit time issues[.]” *Id.*

[4] On April 1, 2021, the trial court held the hearing about credit time and thereafter issued an “Order Re: Clarification of Sanction Imposed for Violation of Probation and Violation of Community Corrections” which stated that after reviewing the record, the credit time memorandum filed by the probation department, and the discussions of the parties,

the court now restates the previous rulings of the court in more precise language, as follows:

As a sanction, the court impose[s] the balance of [Hershberger’s] sentence to be served at the [DOC], with the final two (2) years suspended on a like term of reporting probation. . . . [Hershberger] is awarded credit for time served (2,089 days), plus educational credits (184 days), together with good-time credit.

Id. at 149.

- [5] In December 2021, Hershberger filed a Motion to Correct Erroneous Sentence alleging the trial court had improperly resentenced him in its April order. The trial court denied the motion without a hearing. Hershberger then filed a notice of appeal.

Discussion and Decision

- [6] Indiana Code section 35-38-1-15 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*.

(Emphasis added.) “We review a trial court’s decision on a motion to correct erroneous sentence only for an abuse of discretion.” *Hobbs v. State*, 71 N.E.3d 46, 48 (Ind. Ct. App. 2017), *trans. denied*. 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.*

[7] Hershberger, proceeding pro se, invokes Indiana Appellate Rule 7(B), double jeopardy, and proportionality in arguing the trial court erred in denying his motion. He also briefly mentions the lack of personal notice to him of the April 1 hearing to clarify credit time issues and challenges the authority of the trial judge to enter the clarified order. However, none of these theories, even if viable, would be properly addressed through a motion to correct erroneous sentence because none of them are discernible through an examination only of the appealed order. A motion to correct erroneous sentence pursuant to Indiana Code section 35-38-1-15 may only be used to correct a sentence that is erroneous on its face. *Neff v. State*, 888 N.E.2d 1249, 1251 (Ind. 2008). Claims that require consideration of matters outside the face of the sentencing order may not be addressed via this type of motion. *Robinson v. State*, 805 N.E.2d 783, 787 (Ind. 2004). Instead, such claims must be raised on direct appeal, or where appropriate, in post-conviction proceedings. *Id.*

[8] Hershberger's motion fails for an even more basic reason, however. Section 35-38-1-15 applies to a "sentence." But the action taken by a trial court in a probation revocation proceeding is not a "sentencing." In such a proceeding, "[t]he court is merely determining whether there has been a violation of probation and, if so, the extent to which the court's conditional suspension of the original sentence should be modified and/or whether additional conditions or terms of probation are appropriate." *Jones v. State*, 885 N.E.2d 1286, 1289 (Ind. 2008). Because Hershberger seeks to challenge the sanction he received upon revocation of his probation/community corrections placement rather than

arguing there was an error in his original sentence, Indiana Code section 35-38-1-15 is not available as an avenue of relief.

[9] The crux of Hershberger’s argument seems to be that he believes he was “re-sentenced and given additional time” pursuant to the hearing and order of April 1, 2021. Brief of Appellant at 5. This is a challenge that must be brought by a direct appeal, *see Robinson*, 805 N.E.2d at 787, but we note that pursuant to Indiana Code section 35-38-2-3, as long as the proper procedures have been followed in conducting a probation revocation hearing the trial court may order full execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence, *Killebrew v. State*, 165 N.E.3d 578, 582 (Ind. Ct. App. 2021), *trans. denied*. The trial court conducted Hershberger’s probation revocation hearing properly. The trial court held a hearing at which it advised Hershberger of his rights and he admitted to his violation. Indiana Code section 35-38-2-3(h)(3) allows the trial court to order execution of all or part of the originally suspended sentence, which the trial court did when it ordered Hershberger to serve the balance of his sentence at the DOC, with the final two years suspended to probation. The trial court’s revocation order does not require Hershberger to serve additional time, it just alters the manner in which he serves that time.

Conclusion

[10] The trial court did not abuse its discretion in denying Hershberger's motion to correct erroneous sentence because that procedure does not apply to Hershberger's claim of error.

[11] Affirmed.

Mathias, J., and Foley, J., concur.