

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

R. Patrick Magrath
Alcorn Sage Schwartz & Magrath, LLP
Madison, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General
Indianapolis, Indiana
Samuel Dayton
Deputy Attorney General
Indianapolis, Indiana
David P. Dekold
Certified Legal Intern
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Daniel Willard,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

November 15, 2023

Court of Appeals Case No.
23A-CR-1024

Appeal from the Ripley Superior
Court

The Honorable Jeffrey Sharp,
Judge

Trial Court Cause No.
69D01-1806-F6-134

Memorandum Decision by Judge May
Chief Judge Altice and Judge Foley concur.

May, Judge.

- [1] Daniel Willard appeals the trial court's denial of his motion for alternative placement. Willard argues the trial court abused its discretion when it did not grant his motion for alternate placement. We affirm.

Facts and Procedural History

- [2] On June 1, 2018, the State charged Willard with Level 6 felony possession of marijuana,¹ Level 6 felony maintaining a common nuisance,² Class A misdemeanor resisting law enforcement,³ and Class C misdemeanor possession of paraphernalia⁴ based on an incident with police on May 15, 2018. On January 15, 2019, Willard pled guilty to Level 6 felony possession of marijuana, Level 6 felony maintaining a common nuisance, and Class A misdemeanor resisting law enforcement in exchange for the State dismissing the charge of Class C misdemeanor possession of paraphernalia. As part of that plea agreement, Willard agreed to the following concurrent sentences: 910 days for Level 6 felony possession of marijuana, 910 days for maintaining a common nuisance, and 365 days for Class A misdemeanor resisting law enforcement. Also on January 15, 2019, the trial court sentenced Willard pursuant to the

¹ Ind. Code § 35-48-4-11(c).

² Ind. Code § 35-45-1-5(c).

³ Ind. Code § 35-44.1-3-1(a).

⁴ Ind. Code § 35-48-4-8.3(b).

terms of his plea agreement and suspended the aggregate sentence to probation except for time served.

[3] On April 5, 2019, the State charged Willard with Level 2 felony dealing in methamphetamine,⁵ Level 4 felony possession of methamphetamine,⁶ Level 6 felony maintaining a common nuisance, and Class A misdemeanor possession of marijuana.⁷ Based thereon, the probation department filed a notice of violation of probation. On June 8, 2021, Willard admitted the violation, and the trial court ordered him to serve incarcerated 600 days of his previously suspended sentence.

[4] Willard filed four requests, pro se, to modify his sentence. He filed these motions on January 11, 2022, January 18, 2022, July 29, 2022, and October 7, 2022. The trial court denied all four requests. On October 18, 2022, the trial court entered an order, regarding Willard's October 7, 2022, motion, that indicated "defendant is will [sic] within his rights to hire counsel. Should he do so and that counsel file [sic] for a modification, the court would set it for hearing on the merits." (App. Vol. II at 94) (formatting in original omitted). The record indicates no hearing was ever held.

⁵ Ind. Code § 35-48-4-1.1(e).

⁶ Ind. Code § 35-48-4-6.1(c)

⁷ Ind. Code § 35-48-4-11(b).

[5] On April 4, 2023, Willard, pro se, filed a motion for alternative placement, asking the trial court to allow him to serve the rest of his sentence on work release, community corrections, or home detention. On the same day, the trial court denied Willard’s motion for alternative placement.

Discussion and Decision

[6] Willard argues the trial court erred when it denied the motion for alternative placement that he filed pursuant to Indiana Code chapter 35-38-2.6. Indiana Code section 35-38-2.6-3 states, in relevant part, “[t]he court may, *at the time of sentencing*, suspend the sentence and order a person to be placed in a community corrections program as an alternative to commitment to the department of correction[.]” (emphasis added). Willard filed his motion for consideration of alternative placement approximately four years after he was sentenced. Thus, the trial court here could not have granted Willard’s motion for alternative placement under Indiana Code chapter 35-38-2.6 because his request was not made “at the time of sentencing[.]” *See Keys v. State*, 746 N.E.2d 405, 407 (Ind. Ct. App. 2001) (Ind. Code § 35-38-2.6-3 “merely authorizes the trial court to suspend a sentence and place defendant in a community corrections program at the time of sentencing . . . it does not allow the trial court to modify placement after sentencing.”).

[7] However, if a defendant asks the trial court to modify his placement allowing him to serve his sentence in a community correction program, that is a request for a modification of sentence. *Keys*, 746 N.E.2d at 407. Pursuant to Indiana

Code section 35-38-1-17(j), Willard could file a motion for modification of sentence “(1) not more than one (1) time in any three hundred sixty-five day period; and (2) a maximum of two (2) times during an consecutive period of incarceration; without the consent of the prosecuting attorney.” Here, Willard filed three motions for modification of sentence in a 365 day period – July 29, 2022, October 7, 2022, and April 4, 2023. Therefore, the order he appeals, which denied his motion for alternative placement, is his third request for a modification of sentence in a 365-day period. As such it is ineligible for consideration by the trial court. *See Vasquez v. State*, 37 N.E.3d 962, 964 (Ind. Ct. App. 2015) (offender’s third motion for modification of sentence exceeded the authorized number of filings under Indiana Code section 35-38-1-17(j) and thus the trial court properly dismissed it).

[8] Based on the inapplicability of Indiana Code chapter 35-38-2.6 and the unavailability of relief from a third request within a year for sentence modification pursuant to Indiana Code section 35-38-1-17(j), we conclude the trial court did not abuse its discretion when it denied Willard’s motion.

Conclusion

[9] The trial court did not abuse its discretion when it denied Willard’s motion to for alternative placement. Accordingly, we affirm.

[10] Affirmed.

Altice, C.J., and Foley, J., concur.