

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

John Jay Lacey,
Appellant

v.

State of Indiana,
Appellee

April 12, 2024

Court of Appeals Case No.
23A-CR-2757

Appeal from the Boone Superior Court
The Honorable Matthew C. Kincaid, Judge

Trial Court Cause No.
06D01-1606-F3-149

Memorandum Decision by Judge Brown
Judges Riley and Foley concur.

Brown, Judge.

- [1] John Jay Lacey, *pro se*, appeals the trial court’s order denying his motion for modification of placement. We affirm.

Facts and Procedural History

- [2] On June 22, 2016, the State charged Lacey with aggravated battery as a level 3 felony and subsequently filed a notice seeking an habitual offender enhancement based on an October 16, 2012 Florida conviction for battery on an officer as a level 3 felony and a March 2, 2014 Florida conviction for aggravated battery as a level 3 felony. *Lacey v. State*, 124 N.E.3d 1253, 1255 (Ind. Ct. App. 2019) (“*Lacey I*”).
- [3] On November 18, 2016, Lacey and the State entered into a plea agreement pursuant to which Lacey pled guilty to aggravated battery and admitted his status as an habitual offender. *Id.* The plea agreement left sentencing to the trial court’s discretion and provided for a cap of fourteen years on the habitual offender enhancement. *Id.*
- [4] On February 15, 2017, the trial court sentenced Lacey to fifteen years for aggravated battery, enhanced by thirteen years for being an habitual offender. *Id.* Lacey filed a motion to correct erroneous sentence pursuant to Ind. Code § 35-38-1-15 in August 2018, and the trial court denied that motion. *Id.*
- [5] On appeal, this Court reversed the judgment of the trial court on the habitual offender finding and remanded to the trial court for resentencing. *Id.* at 1257.

- [6] On July 17, 2019, the trial court held a sentencing hearing and entered a resentencing order which vacated its earlier finding that Lacey was an habitual offender, vacated the sentence enhancement, and ordered that the executed sentence of fifteen years for aggravated battery as a level 3 felony remain. *Lacey v. State*, 152 N.E.3d 1075, 2020 WL 4743865, at *1 (Ind. Ct. App. 2020) (“*Lacey II*”).
- [7] On September 11, 2019, Lacey filed a *pro se* Motion to Vacate Conviction, which asserted “[c]urrently, there exists no plea agreement governing Count I: Aggravated Battery” *Id.* On September 17, 2019, the court denied the motion. *Id.*
- [8] On September 25, 2019, Lacey filed a Motion to Vacate Plea Agreement asserting that the habitual offender allegation was the determining factor and benefit in signing the plea agreement, he was not advised by counsel that the habitual offender enhancement was erroneous, and he was no longer receiving the benefit of the sentence cap on the habitual offender enhancement. *Id.* On October 23, 2019, the court denied Lacey’s motion. *Id.*
- [9] On appeal, we observed that Lacey filed both his September 11, 2019 Motion to Vacate Conviction and his September 25, 2019 Motion to Vacate Plea Agreement more than two years after the trial court’s February 15, 2017 sentencing order and more than one month after the court’s July 17, 2019 resentencing order. *Id.* at *2. “Thus, the trial court was required to treat Lacey’s motions challenging the judgment and plea as a petition for post-

conviction relief pursuant to Ind. Code § 35-35-1-4(c).” *Id.* We reversed and remanded for the trial court to treat Lacey’s motion as a petition for post-conviction relief. *Id.* at *3.

[10] On October 16, 2020, Lacey filed an Amended Motion to Set Aside Guilty Plea to Vacate Plea Agreement and Conviction. *Lacey v. State*, 186 N.E.3d 597, 2022 WL 697872, at *2 (Ind. Ct. App. March 9, 2022) (“*Lacey III*”), *trans. denied*. He argued he was deprived of effective assistance of counsel by his trial attorneys. *Id.* He argued Attorney Dennis Williams did not object to the State’s filing of the habitual offender enhancement, his plea was not entered knowingly, intelligibly, or voluntarily due to Attorney Brett Gibson’s failure to inform him that he did not qualify as an habitual offender, and Attorney Matthew Abels did not inform him “that the entire plea had been rendered void by the fact the Indiana Court of Appeals reversed the habitual offender finding . . . which frustrated the entire agreement” and “failed to object to the Court’s decision to leave [the aggravated battery conviction] in place.”¹ *Id.*

[11] On February 5, 2021, the court held a hearing at which it heard testimony from Attorney Gibson. *Id.* On March 12, 2021, the court denied Lacey’s petition. *Id.* On appeal, Lacey argued that he should be allowed to withdraw his guilty plea, cited Ind. Code § 35-35-1-4(c), and argued that “the prohibited and valid

¹ The Court noted that an entry on June 30, 2016, in the chronological case summary stated that, following a request for a public defender, the court appointed Attorney Williams, an entry on August 29, 2016, indicated Attorney Gibson filed an appearance as counsel for Lacey, and an entry on June 25, 2019, indicated Attorney Abels filed an appearance for Lacey. *Lacey III*, 2022 WL 697872, at *1-2 n.2 and n.3.

provisions of his plea agreement are not severable,” “[t]o sever the provisions frustrates the entire contract,” and his counsel did not request that the entire plea agreement be vacated. *Id.* He also argued he was denied the effective assistance of counsel because he was not informed that his Florida convictions would not support an habitual offender enhancement and his counsel on resentencing did not move to set aside his plea. *Id.* This Court affirmed the denial of Lacey’s petition. *Id.* at *6.

[12] On August 30, 2023, Lacey filed a Motion for Modification of Placement and Sentence. He asserted that, “[p]ursuant to I.C. 35-38-1-17(k), [he] has requested permission from the State to modify placement/sentence but has not received response.” Appellant’s Appendix Volume II at 22. He asserted he was an excellent candidate for “modification of placement/sentence” for multiple reasons including his maintenance of a record free of any acts or incidences of violence or aggression, he intended to further his education upon release, and he was remorseful. *Id.* He requested a hearing. On September 12, 2023, the State filed a Response and Objection to Defendant’s Motion.

[13] On September 21, 2023, the court entered an order denying Lacey’s motion for modification of placement. On October 6, 2023, Lacey filed a Motion to Reconsider Defendant’s Request for Modification of Placement. On October 20, 2023, the court denied Lacey’s motion. On November 15, 2023, Lacey filed a notice of appeal of the court’s September 21, 2023 order.

Discussion

[14] We first address the State’s argument that Lacey’s appeal should be dismissed because he filed a motion to reconsider on October 6, 2023, and that motion did not extend the time period to file a notice of appeal. Ind. Appellate Rule 9 provides “[a] party initiates an appeal by filing a Notice of Appeal with the Clerk . . . within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary” and, “[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited” The trial court’s September 21, 2023 order denying Lacey’s motion for modification of placement was noted in the chronological case summary on September 22, 2023. Lacey did not file a notice of appeal until November 15, 2023. While Lacey filed a Motion to Reconsider Defendant’s Request for Modification of Placement on October 6, 2023, Ind. Trial Rule 53.4 governs repetitive motions and motions to reconsider and provides that “[s]uch a motion by any party or the court or such action to reconsider by the court shall not delay the trial or any proceedings in the case, or extend the time for any further required or permitted action, motion, or proceedings under these rules.”

[15] Even assuming that Lacey’s October 6, 2023 motion should be treated as a motion to correct error and his notice of appeal was timely, we cannot say that reversal is warranted. Before discussing Lacey’s allegations of error, we observe that he is proceeding *pro se* and that such litigants are held to the same standard as trained counsel. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. To the extent Lacey challenges the denial of his August 30, 2023

Motion for Modification of Placement and Sentence, generally, we review a trial court’s decision to modify a sentence only for abuse of discretion. *Gardiner v. State*, 928 N.E.2d 194, 196 (Ind. 2010). Ind. Code § 35-38-1-17, which is titled “Reduction or suspension of sentence,” provides: “Except as provided in subsections (k) and (m), this section does not apply to a violent criminal.” Ind. Code § 35-38-1-17(c). Ind. Code § 35-38-1-17(d) defines a violent criminal as “a person convicted of . . . [a]ggravated battery” Ind. Code § 35-38-1-17(k) provides that, “[e]xcept as provided in subsection (n),^[2] a convicted person who is a violent criminal may, not later than three hundred sixty-five (365) days from the date of sentencing, file one (1) petition for sentence modification under this section without the consent of the prosecuting attorney” and “[a]fter the elapse of the three hundred sixty-five (365) day period, a violent criminal may not file a petition for sentence modification without the consent of the prosecuting attorney.”³ Given that Lacey is a violent criminal, more than 365 days elapsed since his sentencing, and the prosecuting attorney did not provide consent for the filing of his petition for sentence modification, we cannot say the trial court abused its discretion in denying his August 30, 2023 Motion for

² Ind. Code § 35-38-1-17(n) relates to persons who committed an offense when they were less than eighteen years of age, which is not applicable in the present case.

³ At the time of his arrest in June 2016, Ind. Code § 35-38-1-17(d) defined a violent criminal as a person convicted of aggravated battery, and Ind. Code § 35-38-1-17(k) provided in part that “[a] convicted person who is a violent criminal may, not later than three hundred sixty-five (365) days from the date of sentencing, file one (1) petition for sentence modification under this section without the consent of the prosecuting attorney” and that, “[a]fter the elapse of the three hundred sixty-five (365) day period, a violent criminal may not file a petition for sentence modification without the consent of the prosecuting attorney.”

Modification of Placement and Sentence. *See Newson v. State*, 86 N.E.3d 173, 174-175 (Ind. Ct. App. 2017) (holding that, as a violent criminal, the defendant was not entitled to file a petition for sentence modification more than 365 days after his sentencing hearing without the consent of the prosecuting attorney, and concluding that the trial court did not abuse its discretion in denying his motion for modification of sentence), *trans. denied*.

[16] With respect to Lacey's challenges in his appellate brief to his guilty plea, we note that his August 30, 2023 motion did not challenge his guilty plea. We further note that this Court has already addressed arguments that his guilty plea must be set aside. *See Lacey III*, 2022 WL 697872, at *3-4. To the extent Lacey raises new arguments regarding his guilty plea, we note that he has not sought or obtained authorization to file a successive petition for post-conviction relief. *See Ind. Post-Conviction Rule 1(12)*.

[17] For the foregoing reasons, we affirm the trial court's denial of Lacey's motion.

[18] Affirmed.

Riley, J., and Foley, J., concur.

APPELLANT PRO SE

John Jay Lacey
Pendleton, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

George P. Sherman
Supervising Deputy Attorney General
Indianapolis, Indiana