MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Terrance Mitchem,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

March 26, 2024

Court of Appeals Case No.
23A-CR-2862

Appeal from the St. Joseph Superior Court

The Honorable Stephanie E. Steele, Judge

Trial Court Cause No.
71D01-9506-CF-260

Memorandum Decision by Judge Brown
Judges Riley and Foley concur.

Brown, Judge.

[1] Terrance Mitchem appeals from the trial court's denial of his petition to modify his sentence. We affirm.

Facts and Procedural History

[2] The relevant facts as discussed in Mitchem's direct appeal from his convictions follow:

> On June 12, 1995,[1] [Mitchem] and two codefendants, Michael Greer and Dorian Lee, armed with weapons, entered a home occupied by four adults. [Mitchem] raped the two female occupants. [Mitchem] then told the four occupants to line up against the wall with their backs towards [him], Greer and Lee. [Mitchem] then changed his mind and told the occupants to turn around to face [him] and to kneel. Greer, Lee, and [Mitchem] opened fire on all four occupants. One victim died and the other three survived.

Mitchem v. State, 685 N.E.2d 671, 674 (Ind. 1997). Mitchem was found guilty of murder, three counts of attempted murder, two counts of rape, and one count of criminal deviate conduct. *Id*.

[3] The trial court sentenced Mitchem to a total prison term of ninety years. *Id*. "The trial court enhanced the sentence with respect to each of [Mitchem's] convictions to the maximum sentence permissible due to aggravating

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[1] Mitchem was born on April 24, 1978.

circumstances; ordered the sentence for one of the attempted murder sentences to run consecutive to the murder sentence; and ordered the remaining sentences to run concurrent with the murder sentence." *Id*. at 678. On direct appeal, the Indiana Supreme Court affirmed Mitchem's convictions and sentence, stating:

> Because of the nature and circumstances of the crimes committed and because there were four separate victims, we find aggravating circumstances sufficient to justify the enhanced and consecutive sentences imposed. The nature and circumstances of a crime may be considered an aggravating factor. The nature of these crimes justify enhanced and consecutive sentences for several reasons: (1) the number of times the victims were shot; (2) the victims were asked to helplessly kneel before defendant and face defendant while he deliberately executed the victims; and (3) the female victims were repeatedly raped and forced to perform deviate sexual acts. We find that it is appropriate under these circumstances for the defendant to serve the enhanced and consecutive sentences imposed.

Id. at 680 (citations and footnotes omitted).

[4] On August 17, 2023, Mitchem filed a "Petition for Sentence Modification Pursuant to Section (n) of 35-38-1-17." Appellant's Appendix Volume II at 14 (capitalization omitted). He argued he "has been incarcerated for more than twenty-seven (27) years of actually served time," he has completed his sentence for murder, he had been confined since 1995, and his time in the Indiana Department of Correction ("DOC") has been beneficial to his development. *Id*. at 15. He stated the Indiana State Prison Deputy Warden for Reentry and the Indiana State Prison Recreation Coordinator wrote letters in support of him and a number of other officers and work supervisors gave him glowing

recommendations for reentry. He stated he completed numerous seminars, life skill classes, and educational classes, received numerous certificates of achievement, and obtained his GED. in 1999, his associate's degree from Grace College in 2003, and his bachelor's degree from Grace College in 2005. He stated he "completed an apprenticeship in Electrician (Maintenance) and Hazardous-Waste Material Technician in 2008 and 2012, respectively," both apprenticeships "were completed under the United States Department of Labor Office of Apprenticeship," he completed various individual development courses and courses in emergency management, and he completed all three phases of the Substance Abuse Program in 1999, the PLUS Program in 2008, and the PLUS Graduate Program in 2016. *Id*. at 16.

[5] He further stated he became a Suicide Companion in 2007, received special training with the Suicide Companion Program in 2008, and completed the QPR Suicide Prevention Gatekeeper Program in 2015. He stated he has worked as an electrician in the electric and electronics shops, as a clerk in the education department, and as an instructor with the Grace College PACER program teaching "classes in US History, Master Student, New Testament and Spiritual Devotion classes." *Id*. at 17. He stated he acts as a mentor for a Residential Treatment Unit for patients with mental health issues and provides his services as a Suicide Companion. He stated "[h]e has served good time with only several issues of alleged misconduct years ago." *Id*. He asserted he has "an overwhelming desire to make meaningful contributions to society on the 'outside,' carrying on his significant contributions he has made on the 'inside.'"

Id. He argued he "was a juvenile at the time he committed these acts," "[t]he legislative intent behind Section (n) warrants that this court make due consideration of this request to modify," and "[s]cheduling a hearing will more fully allow the court to meet [him] and understand the man he is today in contrast to the juvenile he was in court in 1996." *Id*.

[6] On August 18, 2023, the court entered an "Order Setting Deadline for State's Response and Order for Progress" stating:

> [Mitchem] filed a Petition for Sentence Modification Pursuant to Section (n) of I.C. 35-38-1-17. The State shall file its Response by September 19, 2023.
>
> It is ordered that the [DOC] shall file an Offender Evaluation and Performance Report regarding [Mitchem's] conduct while imprisoned, including any programing in which [he] has participated.

Id. at 26 (capitalization omitted).

[7] On August 23, 2023, the prosecuting attorney filed "State's Objection to [Mitchem's] Motion for Modification of Sentence" stating that "IC 35-38-1-17(n) allows a defendant who was under the age of 18 years at the time of the offense an opportunity to file an additional petition for sentence modification without the consent of the prosecuting attorney," "[i]n this matter, [Mitchem] was under the age of 18 years at the time of the offense," Mitchem "can therefore file a modification request without the prosecutor's approval," and "[h]owever, notwithstanding [Mitchem's] RIGHT to file petition for modification, the State strongly objects to this court granting the petition." *Id*.

at 27. The prosecuting attorney argued "[t]he facts and circumstances of the offenses make a modification inappropriate," "[s]pecifically, [Mitchem] committed the crimes of murder and he attempted to kill 3 other individuals (and therefore [was] convicted of 3 counts of attempted murder)," he also "committed and was convicted of the reprehensible crimes of Rape and Criminal Deviate Conduct," and, "[w]hile the defense maintains that his actions while incarcerated should warrant modification, the State maintains that the crimes committed (and for which he was convicted) make it clear that no modification should be granted." *Id*. at 28. Mitchem filed a reply stating in part: "To be true to the spirit, intent and meaning of I.C. 35-38-1-17 Section (n), the court should order a progress report and schedule a hearing so to more fully explore [his] request." *Id*. at 29.

[8] On August 24, 2023, the court issued an "Order Withholding Ruling Pending Receipt of Progress Report" stating:

> [Mitchem] filed a Reply to the State's Objection to Modification. Therein, Counsel suggests that the Court should order a Progress Report and schedule a hearing. The Court notes that a Progress Report from the [DOC] was ordered on August 18, 2023. The Court withholds ruling on whether to hold [a] hearing or issue a decision on the Petition to Modify Sentence pending the receipt of the Report.

Id. at 31.

[9] On September 11, 2023, the DOC submitted a progress report. The report provided that Mitchem received an evaluation from the PLUS Program Director giving him a rating of "outstanding" and indicating he was an

excellent role model to the unit. *Id*. at 55. It provided that he earned his GED, associate's degree, and bachelor's degree, completed all three phases of the substance abuse program, completed a suicide mentor program and a thirty-two-book self-help program, has always received positive job evaluations from his supervisors, and "never had any conduct for a violent assault of any kind." *Id*. at 57. The report also listed incident dates between 1996 and 2018 consisting of three incidents of possession of drug paraphernalia, two incidents of unauthorized possession of property, four incidents of violating a facility rule, two incidents of unauthorized area, two incidents of interfering with count, an incident of refusing an order, an incident of possession of electronic device, two incidents of use/possession of cell phone/wireless device, and an incident of trafficking.

[10] On September 22, 2023, the court entered an "Order Denying [Mitchem's] Request for Modification" stating:

> [Mitchem], by Counsel, filed a Motion for Modification of Sentence and the State filed Response objecting. The Court has reviewed the filings as well as the record. Pursuant to I.C. 35-38-1-17(h), the Court now DENIES the Motion, without hearing.

Id. at 11. Mitchem filed a motion to reconsider, which the court denied.

Discussion

[11] Mitchem, pro se, asserts the trial court abused its discretion in denying his petition to modify his sentence. While he is proceeding *pro se*, Mitchem is held to the same standard as trained counsel. *Evans v. State*, 809 N.E.2d 338, 344

(Ind. Ct. App. 2004), *trans. denied*. 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). We review de novo matters of statutory interpretation because they present pure questions of law. *Id*.

[12] Ind. Code § 35-38-1-17 addresses the reduction or suspension of a sentence and provides:

> (f) If the court sets a hearing on a petition under this section, the court must give notice to the prosecuting attorney and the prosecuting attorney must give notice to the victim . . . of the crime for which the convicted person is serving the sentence.
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> * * * * *
>
> (h) The court may deny a request to suspend or reduce a sentence under this section without making written findings and conclusions.
>
> (i) The court is not required to conduct a hearing before reducing or suspending a sentence under this section if:
>
> (1) the prosecuting attorney has filed with the court an agreement of the reduction or suspension of the sentence; and
>
> (2) the convicted person has filed with the court a waiver of the right to be present when the order to reduce or suspend the sentence is considered.
>
> * * * * *
>
> (n) A person sentenced in a criminal court having jurisdiction over an offense committed when the person was less than eighteen (18) years of age may file an additional petition for sentence

> modification under this section without the consent of the prosecuting attorney if the person has served at least:
>
> (1) fifteen (15) years of the person's sentence, if the person is not serving a sentence for murder; or
>
> (2) twenty (20) years of the person's sentence, if the person is serving a sentence for murder.
>
> The time periods described in this subsection are computed on the basis of time actually served and do not include any reduction applied for good time credit or educational credit time.

[13] Mitchem contends the trial court abused its discretion "when it allowed the prosecuting attorney to object to sentence modification where there was no consent needed." Appellant's Brief at 8. He argues "Indiana law does not require the trial court to hold a hearing or give notice to the prosecutor of motion to modify a sentence under Ind. Code 35-38-1-17 where consent from [the] prosecutor is not needed" and states "[t]he requirements for notice [to the prosecuting attorney] and hearing of petition for reduction or suspension of sentence [under Ind. Code § 35-3 8-1-17] are imposed only when the trial court has made a preliminary determination to suspend or reduce the sentence." *Id*. at 9 (citing *Robinett v. State*, 798 N.E.2d 537 (Ind. Ct. App. 2003), *trans. denied*, and *Reichard v. State*, 510 N.E.2d 163 (Ind. App. Ct. 1987)). He contends "[o]ne of the legislator [sic] intent for amending this statue, was to give the trial judge full discretion to make a decision independently from any influence of the prosecutor" and "[b]y the trial judge allowing the prosecutor to respond and object to said modification[,] it undermined and circumvented the intent of why section (n) was implemented." *Id*. He argues, "[f]or the [S]tate to say that they

do not consent, could have led the trial judge to believe that consent was required." *Id*. at 10. He argues "it can also be said that by the trial judge giving notice to the prosecutor of said modification along with ordering a D.O.C. progress report, it indicated pursuant to 35-38-1-17(f) that the trial court made a preliminary determination to reduce or suspend the sentence when neither was required by law." *Id*. (citing *Merkel v. State*, 160 N.E.3d 1139 (Ind. Ct. App. 2020)). He also argues the court abused its discretion "by citing Ind. Code 35-38-1-17(h) as reason for not giving a written conclusion." *Id*. He "points to the Modification filed by counsel where there was never a request for the trial judge to reduce or suspend the petitioner sentence modification" and argues the "only request counsel made in the Modification, was for the court to schedule hearing," "the statute governing 35-38-1-17(h) is very ambiguous in how and when section (h) is suppose[d] to be applied," and "[a] reason why the trial court denied said petition should have been giving [sic] in this case." *Id*. at 11-12. He also asserts the court abused its discretion "when it denied modification of sentence without truly analyzing the amended statue 35-38-1-17(n) and its intent." *Id*. at 12. He requests remand to the trial court for a hearing.

[14] The State maintains the court did not abuse its discretion by providing the prosecutor an opportunity to respond to Mitchem's petition. It argues Ind. Code § 35-38-1-17 did not prohibit the court from considering the prosecuting attorney's opinion when a petition is filed under subsection (n) and there is no indication that the court believed it was prohibited from granting a modification. It further contends the court was not required to conduct a

hearing. Citing Ind. Code § 35-38-1-17(i), it argues the statute only requires a hearing under certain circumstances, none of which apply here. It argues "[a] hearing is not required by statute in this circumstance." Appellee's Brief at 12 (citing *Merkel*, 160 N.E.3d at 1141). It also argues "[t]hat Mitchem has made some rehabilitative progress while in the DOC does not compel a reduction in his sentence, especially considering the evidence that he has had eighteen conduct violations over the course of his incarceration which include possession of drug paraphernalia and trafficking." *Id*. at 13. It asserts "[t]he shocking nature of his offenses including murdering and attempting to murder his victims after raping them, as well as his conduct violations while incarcerated, support[] the trial court's determination." *Id*.

[15] To the extent we must interpret Ind. Code § 35-38-1-17, we note that, in construing a statute, our primary goal is to determine the legislature's intent. *D.P. v. State*, 151 N.E.3d 1210, 1216 (Ind. 2020). To ascertain that intent, we look to the statute's language. *Id.* If the language is clear and unambiguous, we give effect to its plain and ordinary meaning. *Id*.

[16] With respect to the August 23, 2023 objection filed by the State, we note that, while Ind. Code § 35-38-1-17(n) provides that a person sentenced for an offense committed when the person was less than eighteen years of age may file an additional petition for sentence modification "without the consent of the prosecuting attorney," the subsection does not preclude the trial court from considering the prosecuting attorney's opinion or input or from requesting the State to file a response to a petition filed under the subsection. To the extent

Mitchem argues the prosecuting attorney's objection may have misled the trial court, Ind. Code § 35-38-1-17(n) provides that a petition under subsection does not require the consent of the prosecuting attorney, and we "presume the trial judge is aware of and knows the law." *Conley v. State*, 972 N.E.2d 864, 873 (Ind. 2012), *reh'g denied*. Further, the State's objection clearly noted that Mitchem was able to file his petition for modification without the prosecuting attorney's approval.

[17] With respect to a hearing, Ind. Code § 35-38-1-17(n) did not require the court to hold a hearing, and subsection (f) required only that, *if* the court sets a hearing, it must give notice to the prosecuting attorney. Mitchem and the State cite *Merkel*, in which this Court held: "The statute does not require a trial court to hold a hearing in all cases; it only requires the trial court to conduct a hearing if the court has made a preliminary decision that it is going to modify the sentence." 160 N.E.3d at 1141-1142 (citing *Robinett*, 798 N.E.2d at 539 (citing *Reichard*, 510 N.E.2d at 167)). To the extent Mitchem argues the court made a preliminary decision that it was going to modify his sentence by giving notice to the prosecutor of his petition and ordering a progress report, we note that the court's August 24, 2023 order specifically stated that the court "withholds ruling on whether to hold [a] hearing or issue a decision on the Petition to Modify Sentence pending the receipt of the Report." Appellant's Appendix Volume II at 31. The record does not show that the trial court had made a preliminary decision or indicated its intention to modify Mitchem's sentence, and thus a hearing for that reason was not required. *See Mance v. State*, 163

N.E.3d 367, 370 (Ind. Ct. App. 2021) (finding the trial court did not indicate its intention to modify the petitioner's sentence and thus was not required to hold a hearing). Also, we do not find Mitchem's argument that the court abused its discretion without issuing findings to be persuasive in light of Ind. Code § 35-38-1-17(h), which provides the court "may deny a request to suspend or reduce a sentence under this section without making written findings and conclusions."

[18] The trial court was able to consider the letters of support by Mitchem's supervisors and prison officials, the education and certificates which he earned while incarcerated including his bachelor's degree and his apprenticeships, his work as an electrician, clerk, and instructor, and his training and work in the mental health treatment and the suicide prevention programs. It was able to consider the nature, number, and timing of his conduct incidents while incarcerated. The court was also able to consider Mitchem's age when he committed the offenses, the time he has served so far, and the nature of his crimes, including the murder or attempted murder of the four victims, that he had the victims kneel before him while he shot them, and that he raped the female victims. We cannot say the trial court abused its discretion in denying Mitchem's petition to modify his sentence.

[19] For the foregoing reasons, we affirm the trial court.

[20] Affirmed.

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

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