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**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS MORGAN, JR.,)
)
Appellant-Defendant,)
)
vs.) No. 29A02-0705-CR-371
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. 29C01-0204-FA-23

November 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Thomas Morgan, Jr., appeals the trial court's denial of his motion to correct erroneous sentence. Morgan raises one issue, which we restate as whether the trial court erred by denying his motion to correct erroneous sentence. We affirm.

The relevant facts follow. On January 10, 2001, the State charged Morgan in Marion County with unlawful possession of a firearm by a serious violent felon as a class B felony, two counts of possession of cocaine as class C felonies, and one count of possession of marijuana as a class A misdemeanor. On April 19, 2002, while released on bond for the Marion County charges, the State charged Morgan with two counts of dealing in cocaine as class A felonies in Hamilton County.

On December 4, 2002, pursuant to a plea agreement, the Marion County trial court sentenced Morgan to serve six years in the Indiana Department of Correction for unlawful possession of a firearm by a serious violent felon as a class B felony. On September 23, 2003, pursuant to another plea agreement, the Hamilton County trial court sentenced Morgan to an enhanced sentence of fifteen years in the Indiana Department of Correction for possession of cocaine as a class B felony to be served consecutive to his Marion County sentence.

On March 13, 2007, Morgan filed a motion to correct erroneous sentence regarding his Hamilton County sentence. Morgan alleged that the Hamilton County trial court did not have the statutory authority to both enhance his sentence beyond the advisory term and order consecutive sentences. The trial court denied Morgan's motion to correct erroneous sentence.

The issue is whether the trial court erred by denying Morgan’s motion to correct erroneous sentence. We review a trial court’s decision on a motion to correct erroneous sentence “only for abuse of discretion.” Mitchell v. State, 726 N.E.2d 1228, 1243 (Ind. 2000), reh’g denied, overruled on other grounds by Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). An abuse of discretion occurs when the trial court’s decision is against the logic and effect of the facts and circumstances before it. Myers v. State, 718 N.E.2d 783, 789 (Ind. Ct. App. 1999).

In Robinson, the Indiana Supreme Court clarified that “a motion to correct sentence is available only to correct sentencing errors clear from the face of the judgment.” Robinson, 805 N.E.2d at 794. Thus, a motion to correct sentence can be used to correct errors such as “illegal sentences in violation of express statutory authority or an erroneous interpretation of a penalty provision of a statute,” but will not be available for claims raising “constitutional issues or issues concerning how the trial court weighed factors in imposing sentence.” Id. at 786.

Here, Morgan argues that his sentence violated express statutory authority. According to Morgan, the Hamilton County trial court lacked the authority to both enhance his sentence and order consecutive sentences pursuant to the version of Ind. Code § 35-50-2-1.3 enacted on April 25, 2005.¹ Morgan requests that we reduce his

¹ Following the April 25, 2005, amendments, Ind. Code § 35-50-2-1.3 provided:

- (a) For purposes of sections 3 through 7 of this chapter, “advisory sentence” means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.

sentence to the advisory sentence of ten years. Morgan’s argument fails for at least two reasons.

- (b) Except as provided in subsection (c), a court is not required to use an advisory sentence.
- (c) In imposing:
 - (1) consecutive sentences in accordance with IC 35-50-1-2;
 - (2) an additional fixed term to an habitual offender under section 8 of this chapter; or
 - (3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;

a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

The statute was also amended on July 1, 2007. The current version provides:

- (a) For purposes of sections 3 through 7 of this chapter, “advisory sentence” means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.
- (b) Except as provided in subsection (c), a court is not required to use an advisory sentence.
- (c) In imposing:
 - (1) consecutive sentences for felony convictions that are not crimes of violence (as defined in IC 35-50-1-2(a)) arising out of an episode of criminal conduct, in accordance with IC 35-50-1-2;
 - (2) an additional fixed term to an habitual offender under section 8 of this chapter; or
 - (3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;

a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

- (d) This section does not require a court to use an advisory sentence in imposing consecutive sentences for felony convictions that do not arise out of an episode of criminal conduct.

First, in support of his interpretation of the April 25, 2005, version of Ind. Code § 35-50-2-1.3, Morgan relies upon Robertson v. State, 860 N.E.2d 621, 625 (Ind. Ct. App. 2007), trans. granted, where this court held that the statute imposed “a separate and distinct limitation on a trial court’s ability to deviate from the advisory sentence for any sentence running consecutively.” The Indiana Supreme Court recently rejected that interpretation and held that Ind. Code § 35-50-2-1.3 does not require the imposition of an advisory sentence when also sentencing a defendant to a consecutive term. Robertson v. State, 871 N.E.2d 280, 285-286 (Ind. 2007).

Second, even if Morgan’s interpretation were correct, he was sentenced long before the April 25, 2005, amendments to Ind. Code § 35-50-2-1.3 went into effect. “As a general rule, a court must sentence a defendant under the statute in effect on the date the defendant committed the offense.” Biddinger v. State, 868 N.E.2d 407, 414 (Ind. 2007). “However, when the Legislature enacts an ameliorative amendment without including a specific savings clause, the new statute will apply to all defendants sentenced after its effective date.” Id. Morgan contends that he is entitled to the benefit of an ameliorative amendment, but Morgan was not sentenced after the amendment’s effective date. Morgan was sentenced on September 23, 2003, and the amendment was effective on April 25, 2005.

For the foregoing reasons, we conclude that the trial court did not abuse its discretion by denying Morgan’s motion to correct erroneous sentence.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur