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IN THE
COURT OF APPEALS OF INDIANA

ROBBIE J. MEANS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0612-CR-750
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Scott Devries, Commissioner
Cause No. 49G14-0607-FD-139515

November 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Robbie J. Means appeals his conviction of and sentence for possession of cocaine, a Class D felony.[1] Means raises two issues, only one of which we may address in this direct appeal. Because the sentence violates neither Ind. Code § 35-50-2-2 nor the plea agreement, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 27, 2006, an Indianapolis police officer saw Means put crack cocaine into a pipe. Means was arrested and charged with possession of cocaine and possession of paraphernalia, a Class A misdemeanor.[2] Means agreed to plead guilty to possession of cocaine if the State would dismiss the paraphernalia charge and a charge under a separate cause number. The agreement included the following provision regarding sentencing:

> 5. At the time of the taking of the guilty plea, and again at the time of the defendant's sentencing, the State reserves the right to question witnesses and comment on any evidence presented upon which the Court may rely to determine the sentence to be imposed; to present testimony or statements from the victim(s) or victim representatives(s) [sic]; and at the time of sentencing will make the following recommendation(s) as to the sentence to impose:
>
> a. Judgment of Conviction as a Class D felony, with the defendant to be eligible for alternative misdemeanor sentencing upon the successful completion of any probation imposed by the Court.
>
> b. That any term of imprisonment by the Court be suspended, except for any time the defendant has served pending resolution of this case. A cap of one hundred eighty (180) days probation, with all other aspects of the defendant's sentence to be determined by the Court, after argument of the parties.

(Appellant's App. at 25.) The court accepted the plea, entered a conviction of possession

[1] Ind. Code § 35-48-4-6.
[2] Ind. Code § 35-48-4-8.3(b).

of cocaine as a Class D felony, and pronounced the following sentence:

> I'll sentence the Defendant to 545 days. I'll suspend . . . 445 days, there's a 100 days executed, credit for 50 days spent incarcerated prior to sentencing plus 50 days good time credit. There is 180 days probation during which abide by their standard terms and conditions . . . . When you get out today report to probation tomorrow. There is a motion to dismiss remaining count and remaining case. If there's no objection I show the motion to be granted . . . . Mr. Means also gets [Alternative Misdemeanor Sentencing] upon successful completion of probation . . . .

(Tr. at 18.)

DISCUSSION AND DECISION

Means challenges whether his plea was entered voluntarily and whether his sentence is erroneous.

> A person who pleads guilty cannot challenge the conviction by means of direct appeal but only through a petition for post-conviction relief; one of the things a person gives up by pleading guilty is the right to a direct appeal. *Tumulty v. State*, 666 N.E.2d 394 (Ind. 1996). But if, in a guilty plea situation, there is no agreement between the defendant and the State as to the sentence to be imposed – called an "*open plea*," *i.e.*, one where the judge has discretion as to the sentence to be imposed, the sentence can, indeed must, be challenged (if at all) by means of a direct appeal. *Collins v. State*, 817 N.E.2d 230 (Ind. 2004).

Kling v. State, 837 N.E.2d 502, 504 (Ind. 2005). Accordingly, we may not address whether Means knowingly, intelligently, and voluntarily entered his plea. However, we will address the validity of his sentence.

The court suspended 445 days of Means' sentence and ordered him to serve 180 days on probation. Means asserts those terms violate Ind. Code § 35-50-2-2(c), which provides:

> Except as provided in subsection (e) [regarding sex offenders], whenever the court suspends a sentence for a felony, it shall place the person on

> probation under IC 35-38-2 for a fixed period to end not later than the date that the maximum sentence that may be imposed for the felony will expire.

We see no conflict between Means' sentence and that statute. Means was placed on probation for a period less than the suspended portion of his advisory sentence, and therefore his probation would end well before "the date that the maximum sentence" for a D felony would have expired.

Neither is the sentence invalid under the plea agreement. The maximum executed sentence was the 50 days he had already served, provided his probation was not revoked. Although the agreement capped the time on probation at 180 days, neither the length of the total sentence nor the length of the suspended sentence was capped.

Nor is Means' sentence invalid because he and his appellate counsel are uncertain what will happen when his 180-day probation is completed. (*See* Appellant's Br. at 11) ("When Defendant completes 180 days of probation will the remaining 265 days of his suspended sentence result in a further period of probation?"). If Means successfully completes his 180 days of probation,[3] he will have served the maximum executed days and probation days permitted by his plea agreement, and the court cannot order him to serve more. Moreover, at that time, his plea agreement would entitle him to alternative misdemeanor sentencing, so he may petition the court to modify his conviction to a Class A misdemeanor, *see* Ind. Code § 35-50-2-7(b), and to re-sentence him accordingly.

[3] If Means does not successfully complete his 180 days of probation, then on revocation of probation the court could order Means to serve as many as 445 days.

For all these reasons, we affirm Means' sentence.

Affirmed.

CRONE, J., and DARDEN, J., concur.