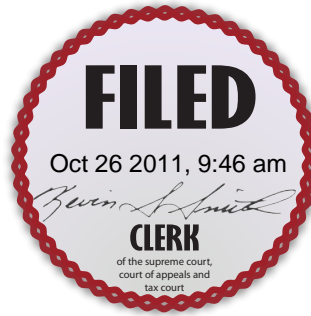


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

EARL LEE RUSSELBURG,)
)
Appellant-Defendant,)
)
vs.) No. 82A01-1103-CR-156
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
The Honorable Kelli E. Fink, Magistrate
Cause No. 5220

October 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Earl Lee Russelburg, pro se, appeals the trial court's denial of his motion to correct erroneous sentence. We affirm.

Facts and Procedural History

In December 1985, Russelburg ingested alcoholic beverages and drugs at his brothers' homes in Henderson County, Kentucky. He unsuccessfully attempted to commit suicide and then drove his truck to Evansville, Indiana, where he fired shots from a .22 caliber rifle at two motorists. He then robbed a liquor store and shot the clerk in the chest. After Russelburg drove away from the liquor store, he stopped his truck and shot a pursuing police officer in the cheek. He drove off and later was boxed in by two police vehicles. Russelburg pointed his rifle at the officers, who shot him in the thigh and abdomen and took him into custody. A jury convicted him on five counts: count I, class C felony criminal recklessness; counts II, III, and IV, class A felony attempted murder; and count V, class A felony robbery. In July 1986, the trial court sentenced him to six years on count I, consecutive to the other counts; forty years on count II, consecutive to the other counts; fifty years on count III, concurrent with count V and consecutive to the other counts; fifty years on count IV, consecutive to the other counts; and forty years on count V, concurrent with count III and consecutive to the other counts, for an aggregate sentence of 146 years.

On direct appeal, Russelburg challenged both his convictions and his sentence, contending in pertinent part that the trial court erroneously considered uncharged crimes as an aggravating circumstance at sentencing and also that his sentence was manifestly

unreasonable. In 1988, the Indiana Supreme Court affirmed his convictions and sentence. *Russelburg v. State*, 529 N.E.2d 1193 (Ind. 1988).

Subsequently, Russelburg filed a petition for post-conviction relief, which was denied. Russelburg appealed that ruling, and in October 1995 another panel of this Court determined that Russelburg's class A felony robbery conviction must be reduced to a class C felony conviction and remanded to the trial court for resentencing. *Russelburg v. State*, No. 82A01-9502-PC-35 (Oct. 26, 1995), *trans. denied* (1996).¹ On March 11, 1996, the trial court vacated the class A felony robbery conviction, entered judgment for class C felony robbery, and imposed a five-year sentence on that count, to run concurrent with the remaining counts. As such, Russelburg's 146-year aggregate sentence remained unchanged.

In June 2002, Russelburg filed a pro-se motion to correct erroneous sentence, which the trial court denied.² Russelburg filed a notice of appeal, but on his motion, the appeal was dismissed with prejudice.

On January 11, 2011, Russelburg filed a second pro-se motion to correct erroneous sentence pursuant to Indiana Code Section 35-38-1-15³ in which he asserted that he was

¹ Neither Russelburg's petition nor this Court's unpublished memorandum decision appears in the record before us.

² Neither Russelburg's motion nor the trial court's ruling appears in the record before us.

³ Indiana Code Section 35-38-1-15 says,

If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

entitled to “new sentencing” based on Indiana Code Section 35-50-1-2. *Id.* at 13. Russelburg asserted that this statute “[p]rohibited the trial court from resentencing [him] to consecutive sentences for the three (3) counts of attempted murder, and criminal recklessness.” *Id.* The State filed a response to Russelburg’s motion.

On February 16, 2011, the trial court issued an order denying Russelburg’s motion that reads in pertinent part as follows:

Petitioner’s Motion to Correct Erroneous Sentence filed January 11, 2011 is nearly identical to his Motion to Correct Erroneous Sentence filed June 20, 2002, which was denied on July 3, 2002. Petitioner originally pursued an appeal of this decision, but then dismissed the appeal.

Even so, this Court finds that defendant’s challenge fails. Petitioner’s only argument is that the 1995 amendment to Indiana Code 35-50-1-2 should apply to the sentences he received in Counts I, II, III and IV because the Court re-sentenced him on March 11, 1996 after the amendment became effective. However, the re-sentencing on March 11, 1996 only changed the conviction and sentence in Count V and not the Counts challenged by Petitioner. The 1995 amendment does not apply to the original sentencing on Counts I, II, III and IV, and Petitioner has not made any other arguments under Indiana Code 35-50-1-2 as it applied at the time of the offenses or the original sentencing.

Id. at 34.

Discussion and Decision

Russelburg now appeals the denial of his motion to correct erroneous sentence. The State suggests, and we agree, that we may affirm that ruling on any of several grounds. We address only two.

First, our supreme court has stated that

a motion to correct sentence may only be used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of the statutory authority. Claims that require consideration of the proceedings

before, during, or after trial may not be presented by way of a motion to correct sentence.

Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). Indiana Code Section 35-50-1-2 governs the circumstances under which a trial court may impose consecutive terms at sentencing, as well as the length of such terms. It is undisputed that when Russelburg was sentenced in 1986, his 146-year aggregate sentence did not violate Indiana Code Section 35-50-1-2 as it was then written. Russelburg’s claim that his aggregate sentence must be reduced pursuant to the 1995 amendment to Indiana Code Section 35-50-1-2, based on his 1996 resentencing on the single class A felony robbery count, requires consideration of matters outside the face of the sentencing judgment and therefore may not be presented by way of a motion to correct erroneous sentence pursuant to Indiana Code Section 35-38-1-15.⁴

Second, it is undisputed that Russelburg raised a “nearly identical” challenge to his sentence via a motion to correct erroneous sentence in 2002, which was denied. On Russelburg’s motion, his appeal from that ruling was dismissed with prejudice. “[A] dismissal with prejudice is conclusive of the rights of the parties and is res judicata as to any questions that might have been litigated.” *Money Store Inv. Corp. v. Summers*, 909 N.E.2d 450, 460 (Ind. Ct. App. 2009). In other words, Russelburg may not take a second bite at the resentencing apple. For the reasons stated above, we affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.

⁴ Because Russelburg’s claim requires consideration of matters outside the face of the sentencing judgment, we need not trace the legislative history of Indiana Code Section 35-50-1-2.