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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROBERT McFARLAND,  
Appellant-Petitioner,

vs.

STATE OF INDIANA,  
Appellee-Respondent.

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No. 49A02-0609-PC-768

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Amy J. Barbar, Magistrate  
Cause No. 49G02-9406-CF-76263

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**March 7, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Robert McFarland, pro se, appeals the dismissal of his motion to correct erroneous sentence, challenging that ruling as the sole issue on appeal.

We affirm.

The relevant facts are that on June 17, 1994, McFarland was convicted of robbery causing serious bodily injury and two counts of attempted murder. The incident upon which those convictions were based involved McFarland and a confederate, Andre Roland. The two entered the home of Glenda Carson while Carson was there with an acquaintance, Terry Henton. McFarland was armed with an assault rifle; Roland had a sawed-off shotgun. At gunpoint, McFarland and Rowland forced Henton upstairs, where Carson was located. McFarland asked Carson about some money, and then ordered Henton and Carson to take off their clothes and lie down. McFarland took a ring and two necklaces from Carson. McFarland shot Carson two times in the chest and then instructed Rowland to shoot Henton. McFarland threatened to shoot Rowland if Rowland did not shoot Henton. Rowland then shot Henton in the thigh. McFarland and Rowland fled. McFarland was convicted as set out above and sentenced to 45 years for each charge (two counts of attempted murder and one count of robbery, all class A felonies), to be served concurrently.

McFarland's convictions and sentence were affirmed on direct appeal by this court. *See McFarland v. State*, Cause No. 49A04-9506-CR-233 (Feb. 2, 1996 Ind. Ct. App.).<sup>1</sup> In 1997, McFarland filed a *pro se* petition for post-conviction relief (PCR). In

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<sup>1</sup> We direct McFarland's attention to Ind. Appellate Rule 46(A)(10), which requires an appellant's brief to "include any written opinion, memorandum of decision or findings of fact and conclusions thereon

that petition he brought five claims, including that his convictions for both attempted murder and robbery as a class A felony violated double jeopardy principles. The post-conviction court<sup>2</sup> denied McFarland's petition following a hearing at which McFarland was represented by counsel. The denial of McFarland's PCR petition was affirmed by this court in an unpublished decision. *See McFarland v. State*, No. 49A02-9906-PC-388 (Ind. Ct. App. Aug. 10, 2000).

In 2001, McFarland sought permission to file a successive PCR petition. His request was denied. On July 28, 2006, McFarland filed a motion to correct erroneous sentence, in which he presented two claims. First, he contended that his sentence violated the Sixth-Amendment right to jury fact-finding, as enunciated in *Blakely v. Washington*, 542 U.S. 296 (2004). Second, he claimed that his convictions for attempted murder and class A felony robbery violated double jeopardy principles. The trial court reviewed his petition and entered an order finding that the petition should be treated as a successive PCR petition. The State filed a motion to dismiss the petition on grounds that McFarland had already received post-conviction review of his conviction, and that he had not received permission to file a successive PCR petition before filing his motion. The court granted the State's motion and dismissed McFarland's PCR petition.

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relating to the issues raised on appeal.” *Walker v. State*, 843 N.E.2d 50, 53 n.1 (Ind. Ct. App. 2006), *trans. denied, cert. denied*. McFarland failed to include a copy of our February 1996 opinion in this appeal.

<sup>2</sup> As will be explained below, the Marion Superior Court correctly determine that McFarland's claims in the instant case should have been presented in the form of a successive PCR pleading

McFarland's appeal challenges the dismissal of his motion, claiming as an initial matter that the post-conviction court erred in designating his motion for relief from judgment as a successive PCR petition. In support of this argument, he contends that the grounds upon which he seeks a correction of his sentence, as set forth above, bring his petition within the ambit of the rule permitting sentencing challenges via motion to correct erroneous sentence so long as the alleged error is apparent on the face of the judgment. *See Robinson v. State*, 805 N.E.2d 783 (Ind. 2004). According to McFarland, the two bases identified above (i.e., a *Blakely* violation and a double jeopardy violation) qualify as errors apparent on the face of the judgment. Although that view is fatally flawed in several respects, we will confine our discussion to the reasoning behind our conclusions that neither ground constitutes error apparent on the ground constitutes error apparent on the face of the judgment.

We begin with the *Blakely* challenge. Our Supreme Court has made it clear that retroactive *Blakely* challenges are permitted only for cases that were pending on direct review at the time *Blakely* was decided. *See Smylie v. State* 823 N.E.2d 679 (Ind. 2005), *cert. denied*. McFarland's direct appeal was decided in February 1996, and McFarland did not seek transfer. This was long before *Blakely* was handed down in June 2004. *Cf. id.* at 689 n.16 (“[t]he fundamental error doctrine will not ... be available to attempt retroactive application of *Blakely* through post-conviction relief”). Thus, McFarland is not entitled to relief on *Blakely* grounds. *Walker v. State*, 843 N.E.2d 50.

We turn now to whether his double jeopardy principles may be asserted in a motion to correct sentence. In *Robinson v. State*, 805 N.E.2d 783, our Supreme Court

discussed three means by which a person may appeal sentences imposed for criminal conviction. Noting “it is in the best interests of all concerned that [sentencing errors] be immediately discovered and corrected”, *id.* at 786, the court observed the quickest way would be to file “an immediate motion to correct sentence.” *Id.* Beyond that, the defendant could assert such a claim via a motion to correct error under Trial Rule 59, a direct appeal, or seek recourse under Indiana Post-Conviction Rule 1, § 1(a)(3) by claiming “the sentence exceeds the maximum authorized by law, or is otherwise erroneous.” Finally, the court noted, “we have recognized the statutory motion to correct sentence as an alternate remedy.” *Robinson v. State*, 805 N.E.2d at 786.

In the instant case, the time for “an immediate motion to correct sentence” has long since lapsed, as has the time to file a motion to correct error. In McFarland’s direct appeal, he did not challenge the conviction or sentence on double jeopardy grounds. In his post-conviction action he did raise that issue, but was not successful. We note here to observe that the “doctrine of res judicata bars later suit when earlier suit resulted in final judgment on merits, was based on proper jurisdiction, and involved the same cause of action and same parties or privies as the later suit.” *Annes v. State*, 789 N.E.2d 953, 954 (Ind. 2003) (quoting *Indiana Dep’t. of Env’tl. Mgmt. v. Conard*, 614 N.E.2d 916, 923 (Ind. 1993)). Thus, res judicata principles prevent us from revisiting that issue. McFarland nonetheless argues that he may present the issue again because he is entitled to retroactive application of a change that has occurred in the law since his PCR action (*see Richardson v. State*, 717 N.E.2d 32 (Ind. 1999)). He is incorrect. *Richardson*’s double jeopardy analysis does not apply to cases that were final before *Richardson* was decided.

*See Taylor v. State*, 717 N.E.2d 90, 95 (Ind. 1999) (*Richardson's* double jeopardy “formulation constitutes a new constitutional rule of criminal procedure, and thus is not available for retroactive application in post-conviction proceedings”). Leaving aside the fact that his double jeopardy claim is barred by *res judicata*, we turn now to the lone remaining avenue of appeal, i.e., a motion to correct erroneous sentence under Ind. Code Ann. § 35-38-1-15 (West, PREMISE through 2006 Second Regular Session).

McFarland contends that *Robinson* authorizes the otherwise late filing of a challenge to his sentence under I.C. § 35-38-1-15. In fact, it does the opposite. In *Robinson*, the Supreme Court undertook an extensive review of the development of the law pertaining to motions to correct erroneous sentences. The court noted that it is indeed available as an alternate remedy, but cautioned that it is appropriate only when the sentence is erroneous on its face. In discussing the meaning of “erroneous on its face” in this context, the court acknowledged that “some of our decisions may not have rigorously applied the “erroneous on its face” standard.” *Robinson v. State*, 805 N.E.2d at 786. The court then cited three cases in which it had addressed sentencing challenges presented in a motion to correct erroneous sentence under I.C. § 35-38-1-15, i.e., *Mitchell v. State*, 726 N.E.2d 1228 (Ind. 2000); *Reffett v. State*, 571 N.E.2d 1227 (Ind. 1991); and *Jones v. State*, 544 N.E.2d 492 (Ind. 1989). The court prefaced its synopsis of *Jones*, and clearly the others as well, with, “[i]n apparent contradiction to the facial invalidity limitation, however ...”, *Robinson v. State*, 805 N.E.2d at 786. The court then provided a thumbnail sketch of each case, focusing primarily upon the nature of the claimed error

that qualified for review under I.C. § 35-38-1-15. *Mitchell* in particular, is relevant to the instant case.

In *Mitchell*, the Supreme Court “addressed a double jeopardy claim presented by way of a motion to correct sentence, likewise summarily concluding that “[i]f a sentence violating express statutory authority is facially erroneous, a sentence violating double jeopardy is also facially erroneous.” *Robinson v. State*, 805 N.E.2d at 786 (quoting *Mitchell v. State*, 726 N.E.2d at 1243). It appears, however, that in *Robinson*, the court announced a more restrictive definition of “facial error” in this context, and indicated that if the facts in *Mitchell* came before it again, the new standard for what constitutes “facial error” would not be met, viz.:

Use of the statutory motion to correct sentence should thus be narrowly confined to claims apparent from the face of the sentencing judgment, and the “facially erroneous” prerequisite should henceforth be strictly applied, notwithstanding *Jones*, *Reffett*, and *Mitchell*. We therefore hold 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.

*Robinson v. State*, 805 N.E.2d at 787. In other words, the claim that sentencing McFarland for two counts of attempted murder and robbery causing serious bodily injury violates double jeopardy principles does not involve a facial error within the meaning of I.C. § 35-38-1-15. “As to sentencing claims not facially apparent, the motion to correct sentence is an improper remedy. Such claims may be raised only on direct appeal and, where appropriate, by post-conviction proceedings.” *Robinson v. State*, 805 N.E.2d at 787.

In the instant case, McFarland's time for filing a direct appeal had long since lapsed, and he already filed a PCR petition. Thus, his only mean of presenting the challenge was via a successive PCR petition. McFarland failed to follow the proper procedures for filing such an action, and therefore the trial court properly granted the State's motion to dismiss. The post-conviction court did not err in dismissing McFarland's motion to correct erroneous sentence.

Judgment affirmed.

KIRSCH, C.J., and RILEY, J., concur.