

Marvin Mallett appeals the denial of his motion for misdemeanor treatment. Mallett raises one issue, which we restate as whether the trial court erred in denying his motion. We affirm.

The relevant facts follow. On April 20, 2004, Mallett pled guilty pursuant to an agreement to one count of criminal recklessness as a class D felony, and in exchange the State dismissed two other counts against him.¹ The plea agreement provided in part that “[t]he parties agree that they are free to fully argue their respective positions as to the sentence to be imposed by the Court” and that “[t]he parties agree that if the defendant successfully completes his sentence, then the Court shall enter judgment as a Class A Misdemeanor” Appellant’s Appendix at 26.

On May 25, 2004, the trial court entered a sentencing order which stated in part that Mallett “is now ordered committed to the custody of the Lake County Community Corrections Day Reporting Program for a period of eighteen (18) months” and that “[p]ursuant to the plea agreement, if [Mallett] successfully completes his sentence, the Court will enter judgment as a Class A Misdemeanor.” *Id.* at 31.

On December 7, 2010, Mallett filed a motion for misdemeanor treatment in which he stated that he “has completed all terms of his sentence of Day Reporting, has paid all fines and costs involved in this cause and has otherwise successfully completed all terms of his sentence” and “now moves for Misdemeanor Treatment pursuant to [the] plea agreement.” *Id.* at 35.

¹ The other charges included a second count of criminal recklessness as a class D felony and a count of battery as a class A misdemeanor.

On January 11, 2011, the court held a hearing on Mallett's motion. At the hearing, Mallett's counsel stated that "[t]he sentence included a[] Community Corrections Day Reporting Program and we have confirmation that [] Mallett did complete that program as of November 30, 2010, he paid the remainder of his Program fees. He has completed all the terms of the sentence." Transcript at 38. Mallett's counsel further stated that Mallett "was arrested last week for a possession charge" and that "however, I don't think the subsequent arrest modifies the terms" of the plea agreement and that the agreement "says that if [Mallett] completes . . . all of the conditions of his sentence, he's entitled to misdemeanor treatment." Id. at 39. The prosecutor stated that he "would raise the question as to in effect, when the sentence was supposed to be completed," that an indictment against Mallett "was filed on December 15, [he] was arrested on November 20, the sole count being that of a felon in possession of a firearm," that Mallett "raced in here, paid his monies or whatever and was deemed to have successfully completed his sentence then days later, on November 30," and that Mallett had not "in any way, shape or form, successfully complete[] his sentence entitling him to the benefit of a misdemeanor." Id. at 39-40.

The court noted that Mallett was sentenced on May 25, 2004 to eighteen months at the Lake County Community Corrections Day Reporting Program and was given credit time of thirty days. The court stated: "That approximate[] time period, call it even early 2006, [Mallett] essentially did nothing to successfully complete the sentence, part of which would be paying the fees." Id. The court further found that "[g]enerally speaking, when these provisions are in plea agreements, during that time period and now, a hearing

date is set and a discussion is had relative to his Motion for Misdemeanor treatment” and that “[p]aying his fees some four years[] later while in technical terms is a successful completion of . . . his sentence[,] one would argue, the timing of it is, in this Court’s view, is only to avoid any future legal troubles in the Federal system and he did not complete his sentence in a timely manner.” Id. at 41-42. The court denied Mallett’s motion for misdemeanor treatment.

The issue is whether the court erred in denying Mallett’s motion. Mallett argues that “[t]he plea agreement did not stipulate a time in which the sentence must be completed to receive misdemeanor treatment,” that the “contract was not ambiguous on its face,” and that “Mallett has performed under the plea agreement, and the State should be held to its terms.” Appellant’s Brief at 4-5. Mallett asserts that “the court had the opportunity to include time limitations and it did not” and that “[e]ven if the agreement were to be construed as ambiguous, agreements are construed against the party who drafts them, which in this case is the State.” Id. at 6. In addition, Mallett cites to Ind. Code § 35-38-1-1.5 and “respectfully suggests that the 3 year limitation period is essentially a statute of limitations” and that the State “waived the 3 year time limitation by failing to assert it” Id. at 7.

The State argues that “[a]n eighteen-month sentence imposed in May 2004 should have been completed by November 2005,” that “[Mallett] did not pay the fees he owed to the Day Reporting Program by the completion of that eighteen-month term or at any point thereafter during the next five years,” and that Mallett “only paid his outstanding fees on November 30, 2010, ten days after being arrested on a new felon in possession of

a gun charge.” Appellee’s Brief at 5. The State further asserts that a court has only limited authority to modify a conviction and that under Ind. Code § 35-38-1-1.5 a court may convert a class D felony conviction to a class A misdemeanor conviction only within three years of the entry of the conviction.

We review a trial court’s decision to modify a sentence 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. Ind. Code § 35-38-1-1.5 states in part:

- (a) A court may enter judgment of conviction as a Class D felony with the express provision that the conviction will be converted to a conviction as a Class A misdemeanor within three (3) years if the person fulfills certain conditions. A court may enter a judgment of conviction as a Class D felony with the express provision that the conviction will be converted to a conviction as a Class A misdemeanor only if the person pleads guilty to a Class D felony that qualifies for consideration as a Class A misdemeanor under IC 35-50-2-7,^[2] and the following conditions are met:
 - (1) The prosecuting attorney consents.
 - (2) The person agrees to the conditions set by the court.
- (b) For a judgment of conviction to be entered under subsection (a), the court, the prosecuting attorney, and the person must all agree to the conditions set by the court under subsection (a).
- (c) The court is not required to convert a judgment of conviction entered as a Class D felony to a Class A misdemeanor if, after a hearing, the court finds:

² Ind. Code § 35-50-2-7 states in relevant part that a trial court may enter a judgment of conviction for a Class D felony as a Class A misdemeanor unless the defendant has committed a prior, unrelated felony for which judgment was entered as a conviction of a Class A misdemeanor or the offense is domestic battery or possession of child pornography. Ind. Code § 35-50-2-7(b).

- (1) the person has violated a condition set by the court under subsection (a); or
- (2) the period that the conditions set by the court under subsection (a) are in effect expires before the person successfully completes each condition.

However, the court may not convert a judgment of conviction entered as a Class D felony to a Class A misdemeanor if the person commits a new offense before the conditions set by the court under subsection (a) expire.

- (d) The court shall enter judgment of conviction as a Class A misdemeanor if the person fulfills the conditions set by the court under subsection (a).

In State v. Boyle, the defendant pled guilty to a class D felony in 1999, the defendant requested that his class D conviction be converted to a class A misdemeanor in 2008, and the trial court granted the defendant's request. 947 N.E.2d 912, 912-913 (Ind. 2011). The Indiana Supreme Court noted that pursuant to Ind. Code § 35-38-1-1.5 a trial court could enter a conviction as a misdemeanor but that "it must be entered within three years of the entry of judgment" Id. at 914. The Court then found that "even if [the defendant] would have been availed of Indiana Code section 35-38-1-1.5, the trial court would have to modify the conviction within three years."³ Id. The Court in Boyle also stated:

As we held in State v. Fulkrod, 753 N.E.2d 630, 633 (Ind. 2001), 'the fact that the sentencing judge particularly reserved . . . the right to modify this sentence, [pursuant to Indiana Code section 35-38-1-17] is of no moment,' because the sentencing court was seeking to use power it was not granted. 'A sentencing judge cannot circumvent the plain provisions in the sentence

³ Ind. Code § 35-38-1-1.5 was enacted under P.L. 98-2003, after the defendant in Boyle was sentenced. Boyle, 947 N.E.2d at 913-914.

modification statute simply by declaring that he or she reserves the right to change the sentence at any future time.”⁴

Id. (citing Fulkrod, 753 N.E.2d at 633). The Court held that it was “in violation of statutory authority to modify the conviction under the circumstances of this case.” Id. at 912. See also Brunner v. State, 947 N.E.2d 411, 417 (Ind. 2011) (noting that “the trial court could enter a conviction as a misdemeanor, but it must be entered within three years of the entry of judgment” and that “if the trial court’s ruling [modifying the defendant’s conviction] were allowed to stand, or any weight given to Indiana Code section 35-38-1-1.5, [the defendant] would receive a benefit he would not be allowed to receive under Indiana Code section 35-38-1-1.5 because the three-year window for modification has long closed”), reh’g denied.

In the present case, under Ind. Code § 35-38-1-1.5 and as stated in Boyle, in order to modify Mallett’s conviction, the trial court would have needed to do so within three years. Mallett pled guilty to criminal recklessness as a class D felony in April 2004. Mallett filed his motion for misdemeanor treatment on December 7, 2010, and the trial court ruled on the motion on January 11, 2011. Based upon the record, we conclude that the trial court did not have the authority to grant Mallett’s December 2010 motion for misdemeanor treatment, and we find that the court did not err or abuse its discretion in denying Mallett’s motion.

For the foregoing reasons, we affirm the denial of Mallett’s motion for misdemeanor treatment.

⁴ Brackets in original.

Affirmed.

BAKER, J., and KIRSCH, J., concur.