

MEMORANDUM DECISION

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

Ricky L. Brochin II,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 2, 2022

Court of Appeals Case No.
22A-CR-157

Appeal from the
Knox Circuit Court

The Honorable
Sherry B. Gregg Gilmore, Judge

Trial Court Cause No.
42C01-1812-F2-11

Vaidik, Judge.

Case Summary

- [1] Ricky L. Brochin II appeals his conviction for Level 2 felony robbery and finding that he is a habitual offender. He argues the trial court erred in denying his motion to file a belated notice of alibi and excluding his alibi evidence. We affirm.

Facts and Procedural History

- [2] In December 2018, the State charged Brochin with Level 2 felony robbery based on an incident that occurred in Vincennes on December 4. The State also alleged Brochin is a habitual offender. In January 2019, the trial court appointed Attorney Brian Johnson to represent Brochin and set the omnibus date for February 22.¹ According to statute, Brochin had to file a notice of alibi no later than twenty days before the omnibus date, or February 2. *See* Ind. Code § 35-36-4-1. The February 2 deadline passed without a notice of alibi being filed. Four days later, on February 6, Attorney Johnson moved to withdraw his appearance. The trial court granted the motion and appointed Attorney Thomas Dysert.
- [3] Attorney Dysert represented Brochin until December 2020, when he moved to withdraw his appearance. During his time on the case, Attorney Dysert did not

¹ Brochin says the omnibus date was February 25, 2019. However, the trial court's January 9, 2019 CCS entry says the omnibus date was February 22, 2019. *See* Appellant's App. Vol. II p. 10.

file a notice of alibi either. The trial court granted Attorney Dysert’s motion to withdraw and appointed Attorney John Sievers. Jury trial was set for November 2, 2021. On November 1, the day before trial, Attorney Sievers moved to file a belated notice of alibi:

Counsel for the Defendant (his third) was not counsel at the time contemplated for the filing of notice of alibi pursuant to statute, and counsel was unaware of the witnesses expected to establish the alibi until the last few days. The Defendant seeks to establish through witnesses Penny Brochin, Carol Helderman, Denton Phillippe and Dustin Phillippe that he was present at 1120 Ridgway Ave., Vincennes, or Ivy Lane Apartments, Hart St. Rd., Vincennes, at the time the crime was alleged to occur.

Appellant’s App. Vol. II p. 124.

- [4] Before trial started on November 2, the trial court addressed Brochin’s motion. Attorney Sievers reiterated that he “just bec[a]me aware in the last week or so” that Brochin was at “his aunt’s house on the day of the incident.” Supp. Tr. p. 7. He didn’t explain why a notice of alibi couldn’t have been filed earlier. The State argued Brochin had not established good cause because the alibi—Brochin’s own aunt—was within Brochin’s personal knowledge. The court denied Brochin’s motion.
- [5] After the State rested, Brochin asked the trial court to reconsider its ruling. The court declined to do so. Brochin was convicted as charged, and the court sentenced him to an aggregate term of twenty-eight years.
- [6] Brochin now appeals.

Discussion and Decision

- [7] Brochin contends the trial court erred in denying his motion to file a belated notice of alibi and excluding his alibi evidence. A defendant in a felony case must file “a written statement of his intention to offer [an alibi] defense” no later than twenty days before the omnibus date. I.C. § 35-36-4-1. If the defendant fails to meet the time limit and “does not show good cause for his failure, then the court shall exclude evidence offered by the defendant to establish an alibi.” I.C. § 35-36-4-3(b). “The determination of whether a defendant has established good cause is left to the discretion of the trial court.” *Washington v. State*, 840 N.E.2d 873, 880 (Ind. Ct. App. 2006), *trans. denied*.
- [8] Under Section 35-36-4-1, Brochin had to file his notice of alibi no later than February 2, 2019. But he didn’t file it until November 1, 2021, nearly three years later. Brochin argues he established good cause for the late filing because trial counsels’ failure was “likely the result of the 2019 novel coronavirus,” which made it “difficult for attorneys to investigate cases.” Appellant’s Br. p. 9.
- [9] There are at least two problems with Brochin’s argument. First, as the State points out, Brochin did not mention the COVID-19 pandemic or an inability to investigate the alleged alibi in the trial court. In fact, Attorney Sievers claimed he had just found out about the possible alibi in the week before trial and didn’t explain why a notice of alibi couldn’t have been filed earlier. “A party may not add to or change his grounds for objections in the reviewing court.” *Treadway v. State*, 924 N.E.2d 621, 631 (Ind. 2010). “Any ground not raised at trial is not

available on appeal.” *Id.* Because Brochin’s argument on appeal is substantially different from the one he made below, this issue was not properly preserved for review.²

[10] But even if Brochin had not waived this argument, he has failed to establish good cause. The statutory deadline to file the notice of alibi was February 2, 2019—more than a year before Indiana declared a public-health emergency due to COVID-19 on March 6, 2020. Brochin does not explain why his notice of alibi—which was based on him being at his own aunt’s house—could not have been filed sometime during those thirteen months. Nor does Brochin explain what more his trial counsels might have done to “investigate” his alibi between March 2020 and November 2021 but for COVID-19. The trial court did not abuse its discretion in denying Brochin’s motion to file a belated notice of alibi and excluding his alibi evidence.³

[11] Affirmed.

Riley, J., and Bailey, J., concur.

² Brochin did not file a reply brief to respond to the State’s argument that he waived review of this issue.

³ The last sentence of Brochin’s brief cites a case discussing a defendant’s Sixth Amendment right to present a defense. *See* Appellant’s Br. p. 11. But Brochin does not develop a Sixth Amendment argument and has therefore waived it.