

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Emmanuel A. Winters,
Appellant / Cross-Appellee / Petitioner,

v.

State of Indiana,
Appellee / Cross-Appellant / Respondent.

May 11, 2023

Court of Appeals Case No.
22A-PC-2434

Appeal from the Tippecanoe
Superior Court

The Honorable Michael A.
Morrissey, Judge

Trial Court Cause No.
79D06-1902-PC-4

Memorandum Decision by Judge Riley.
Chief Judge Altice and Judge Pyle concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant/Cross-Appellee/Petitioner, Emmanuel Winters (Winters), appeals the denial of his petition for post-conviction relief, and Appellee/Cross-Appellant/Respondent, the State of Indiana (State), cross-appeals.

[2] We dismiss.

ISSUE

[3] Winters, pro se, presents this court with three issues. However, we find the issue raised by the State on cross-appeal to be dispositive. We restate that issue as: Whether Winters forfeited his right to appeal by failing to file a timely Notice of Appeal.

FACTS AND PROCEDURAL HISTORY

[4] On September 11, 2012, the State filed an Information, charging Winters with Class D felony strangulation and Class A misdemeanor domestic battery. On September 12, 2012, the trial court appointed Winters a public defender (Guilty Plea Counsel). On September 19, 2012, the parties filed a plea agreement with the trial court. On September 24, 2012, Winters pleaded guilty to Class D felony strangulation and was sentenced in accordance with the terms of his plea agreement to 545 days, with 455 days suspended to probation and credit for time already served.

[5] On February 1, 2019, Winters filed a petition for post-conviction relief which he amended on April 18, 2019, raising several claims of ineffective assistance of

Guilty Plea Counsel. On July 12, 2019, the Public Defender of Indiana appeared for Winters, and the hearing on Winter's petition for post-conviction relief was continued. On May 26, 2021, the post-conviction court granted the motion of the Public Defender of Indiana to withdraw its appearance. On January 4, 2022, Winters filed a request pursuant to Post-Conviction Rule 1(9)(b) to submit the case upon affidavits, and on February 1, 2022, the State filed its notice agreeing to proceed without an evidentiary hearing. The parties submitted their cases by affidavit, with the State filing the affidavit of Guilty Plea Counsel. On June 3, 2022, the post-conviction court issued its Order, denying Winters' petition for post-conviction relief. On June 7, 2022, Winters filed additional materials, and on the same day, the post-conviction court reaffirmed its denial of relief.

[6] On July 6, 2022, Winters filed a letter in the post-conviction proceedings in which he stated, "I want to notify the Courts that I'm seeking to appeal their decision in the Indiana Court of Appeal." (Appellant's App. Vol. II, p. 21) (sic throughout). On August 29, 2022, Winters filed a second letter in the post-conviction court in which he stated as follows:

I've notified the Courts that I'm appealing their decision on my PCR within 30 days of their decision and I'm yet to receive any documentation about my appeal. Could you please check into this matter for me cause I'm ready to file my appeal. Thank you.

(Appellant's App. Vol. II, p. 20). On August 29, 2022, the post-conviction court issued an order providing that Winters had notified the court that he

intended to appeal its judgment and informing Winters that a party initiates an appeal by filing a Notice of Appeal with the Clerk of the Court of Appeals. The post-conviction court's order further provided that a "notice of intent to file and appeal directly with the trial court does not initiate the appeal. The [c]ourt presumes [Winters] properly filed a notice of appeal with [the] Clerk of the Appellate Courts." (Appellant's App. Vol. II, p. 19).

[7] On September 2, 2022, the Clerk of Courts docketed a letter from Winters under Cause Number 22A-PC-2098 (PC-2098) in which Winters stated that he had notified the post-conviction court of his intention to appeal. On September 20, 2022, the motions panel of this court dismissed PC-2098 with prejudice for Winters' failure to file a timely Notice of Appeal as required by Indiana Appellate Rule 9(A). On October 5, 2022, Winters filed a Notice of Appeal with the Clerk of Courts which was docketed under the instant appellate cause number. On October 19, 2022, Winters filed unverified correspondence in PC-2098 in which he requested that this court reconsider its dismissal of his putative appeal. In support of this request, Winters stated, in relevant part, that his failure to initiate a timely appeal of the post-conviction court's June 3, 2022, Order was due to the fact that he had been transferred to another penal facility and had not received a copy of the post-conviction court's Order denying relief until approximately July 13, 2022. On November 4, 2022, the motions panel of this court treated Winters' October 19, 2022, letter as a motion to reinstate his appeal and entered an order accepting Winters' untimely Notice of Appeal, citing Appellate Rule 1 and our supreme court's decision in *In re Adoption of*

O.R., 16 N.E.3d 965 (Ind. 2014). Winters’ appeal in PC-2098 was consolidated with the instant appeal.

[8] Winters now appeals, and the State cross-appeals.

DISCUSSION AND DECISION

[9] On cross-appeal, the State argues that Winters’ appeal should be dismissed because he failed to file a timely Notice of Appeal from the post-conviction court’s June 3, 2022, denial of relief. The motions panel of this court reinstated Winters’ appeal. However, although we do not do so lightly, it is well-established that we retain the authority to reconsider rulings by the motions panel while an appeal remains pending. *Beasley v. State*, 192 N.E.3d 1026, 1029 (Ind. Ct. App. 2022), *trans. denied*.

[10] Indiana Appellate Rule 9(A)(1) provides that a “party initiates an appeal by filing a Notice of Appeal . . . within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary.” If a timely Notice of Appeal is not filed, “the right to appeal shall be forfeited except as provided by [Post-Conviction Rule] 2.” Ind. Appellate Rule 9(A)(5). Post-Conviction Rule 2 only applies to litigants seeking to file a belated appeal from a criminal conviction, and the Rule does not provide a vehicle for a belated appeal from the denial of post-conviction relief. *Beasley*, 192 N.E.3d at 1029; *Core v. State*, 122 N.E.3d 974, 977-78 (Ind. Ct. App. 2019).

[11] Here, the post-conviction court entered its Order denying relief on June 3, 2022. Winters was required to file his Notice of Appeal of that Order on or before

July 5, 2022. *See* App. R. 9(A)(1). On June 7, 2022, Winters filed additional materials in his post-conviction proceedings, and on the same day, the post-conviction court reaffirmed its denial of post-conviction relief. As a general matter, motions to reconsider do not toll the time to file a Notice of Appeal. *Nationwide Ins. Co. v. Parmer*, 958 N.E.2d 802, 805-06 (Ind. Ct. App. 2011) (citing Indiana Trial Rule 53.4). Even if Winters' filing of additional materials were construed as a motion to correct error which the post-conviction court denied on June 7, 2022, Winters only had until July 7, 2022, to file his Notice of Appeal. *See* App. R. 9(A)(1). Winters did not file his Notice of Appeal until October 5, 2022. Winters' July 6, 2022, and August 29, 2022, letters to the post-conviction court providing notice that he intended to appeal were not a substitute for a timely Notice of Appeal filed with the Clerk of Courts. *See Core*, 122 N.E.3d at 976 n.2 (observing that Core's filing of a Notice of Appeal with the post-conviction court within the thirty-day deadline did not timely initiate his appeal); *see also Lowrance v. State*, 64 N.E.3d 935, 938 (Ind. Ct. App. 2016) (observing that pro se litigants "are held to the same legal standards as licensed attorneys"), *trans. denied*. Winters' Notice of Appeal was not timely, and he has forfeited his right to appeal. App. R. 9(A)(5).

[12] *In re the Adoption of O.R.* does not save Winters' appeal. The *O.R.* court held that the failure to file a timely Notice of Appeal does not deprive an appellate court of jurisdiction but that it does result in the forfeiture of the right to appeal absent "extraordinarily compelling reasons[.]" *O.R.*, 16 N.E.3d at 971-72 (considering the father's especially established and valued fundamental liberty

interest in the care, custody, and control of his child in ultimately holding that the father's right to appeal an adoption order should be restored). The record before us does not present any such extraordinarily compelling reasons or circumstances that merit the restoration of Winters' appeal. Winters claimed in his unverified October 19, 2022, letter to this court that he had not received the post-conviction court's Order denying relief until approximately July 13, 2022. However, it is clear from the fact that Winters sent a letter to the post-conviction court on July 6, 2022, stating that he intended to appeal that Order that Winters did indeed have notice of the Order denying relief before July 13, 2022.

[13] On appeal, Winters argues that his appeal should be restored because he wishes to assert claims of ineffective assistance of Guilty Plea Counsel, the Sixth Amendment guarantees him the right to effective counsel, and "a fundamental liberty interest is at stake." (Cross-Appellee's Br. p. 4). We observe that this is not the same especially compelling liberty interest that was at stake in *O.R.* and that Winters' argument would be equally applicable whenever a litigant seeks to belatedly appeal the denial of post-conviction relief after raising ineffectiveness of trial or guilty plea counsel claims. Thus, it cannot be said that Winters' Sixth Amendment right to effective guilty plea counsel presents us with an extraordinarily compelling reason meriting the restoration of his right to appeal. *See Beasley*, 192 N.E.3d at 1030-31 (rejecting Beasley's argument that his invocation of his Sixth Amendment right to counsel presented a sufficient reason under *O.R.* to restore his forfeited appeal because it was a rationale "that

would always apply to belated appeals from the denial of post-conviction relief no matter what other circumstances were present in the particular case”).

[14] Winters also argues that he acted with “reasonable diligence” to perfect his appeal when he sent a letter to this court on September 2, 2022. (Cross-Appellee’s Br. p. 4). However, as the State correctly points out, [Appellate Rule 9](#) does not provide an exception for reasonable diligence, and Winters provides us with no legal authority in support of his implication that the exercise of reasonable diligence meets the *O.R.* standard of “extraordinarily compelling reasons” meriting the restoration of an untimely appeal. *O.R.*, 16 N.E.3d at 971.

CONCLUSION

[15] Based on the foregoing, we conclude that Winters forfeited his right to appeal when he failed to timely file his Notice of Appeal.

[16] Dismissed.

[17] Altice, C. J. and Pyle, J. concur