

## 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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### APPELLANT PRO SE

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## IN THE COURT OF APPEALS OF INDIANA

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Timothy D. Johnson,  
*Appellant-Petitioner,*

v.

State of Indiana,  
*Appellee-Respondent.*

April 15, 2021

Court of Appeals Case No.  
20A-PC-76

Appeal from the Elkhart Superior  
Court

The Honorable George W.  
Biddlecome, Senior Judge

Trial Court Cause No.  
20D03-1903-PC-9

**Sharpnack, Senior Judge.**

### Statement of the Case

- [1] Timothy D. Johnson appeals from the post conviction court's (PC Court) December 13, 2019 order denying him relief, contending that it upheld an

improper alteration of his sentence by order of March 16, 2017, and amended on April 22, 2017. Because Johnson's claim is procedurally defaulted, we affirm.

## Issue

- [2] The dispositive issue in this appeal follows: Is Johnson's challenge to the March 16, 2017 order amended on April 22, 2017 procedurally defaulted?

## Facts and Procedural History

- [3] Johnson was charged with Class A felony child molesting and pleaded guilty to the offense in December 2001. In accordance with the plea agreement, on February 21, 2002, Johnson was sentenced to fifty years in the Indiana Department of Correction with twenty years suspended to reporting probation. Johnson completed serving the executed portion of his sentence on July 25, 2013 and began probation after his release from the DOC. Next, on July 8, 2014, the court entered its order, later followed by its abstract of judgment, imposing the sanction of five years executed in the DOC with the balance of the suspended sentence to be served on ten years of reporting probation for Johnson's violation of probation. Yet another probation violation notice was filed, and he admitted to the violations on March 16, 2017, with the court ordering him to serve his remaining time of ten years in the DOC. On April 22, 2017, the court's amended abstract of judgment stated Johnson was to serve fifteen years executed at the DOC. Johnson's petition for post-conviction relief,

filed on March 18, 2019, nearly two years later, was denied on December 13, 2019 and he now appeals.

## Discussion and Decision

[4] Johnson appeals from the PC Court's denial, contending that it erroneously decided the merits of his petition. The State claims waiver from Johnson's failure to appeal the order of March 16, 2017 amended on April 22, 2017. The State was required to plead the affirmative defense of waiver and argue it at the evidentiary hearing for the issue to be preserved for appeal. *See Bunch v. State*, 778 N.E.2d 1285, 1288 (Ind. 2002). However, the record does not reveal that the State pleaded or raised the defense of waiver or argued it in the post-conviction relief hearing. However, a party is not precluded from suggesting to this Court that procedural default of a claim is a means of affirming a court's judgment. *Id.* at 1289. Therefore, while the record suggests the State is not entitled as a matter of right to the ruling that Johnson's argument is waived, we may find that Johnson's argument was forfeited by procedural fault. *See id.* at 1289.

[5] Here, Johnson did not file a motion to correct error, a direct appeal, or request for relief under Post-Conviction Rule 2 on the grounds he raises now, years later, as to the March 16, 2017 order amended on April 22, 2017. His claim is procedurally defaulted. The PC Court did not err by denying Johnson relief.

## Conclusion

[6] Because Johnson's claim is procedurally defaulted, we affirm the judgment of the PC Court.

[7] Affirmed.

Brown, J., and Altice, J., concur.