MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Jason S. Perry,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

February 12, 2024

Court of Appeals Case No.
23A-PC-1359

Appeal from the Gibson Circuit Court

The Honorable Donald R. Vowels, Special Judge

Trial Court Cause No.
26C01-1906-PC-000589

Memorandum Decision by Judge Felix
Judges Bailey and May concur.

Felix, Judge.

Statement of the Case

[1] In 2023, Jason Perry filed a petition with the trial court seeking to file a belated notice of appeal (the "Appeal Petition") concerning the trial court's 2021 denial of his petition for post-conviction relief (the "PCR Petition") and subsequent denial of his motion to correct error (the "Motion"). The trial court denied the Appeal Petition. Perry appeals and raises one issue for our review: Whether the trial court erred in denying the Appeal Petition.

[2] We affirm.

Facts and Procedural History

[3] In 2005, Perry pled guilty to battery resulting in serious bodily injury, a Class C felony ("2005 Battery Conviction"), and was sentenced to a total of five years, with four years in the Indiana Department of Correction and one year of supervised probation. Sometime thereafter, Perry was sentenced to 30 years in an unrelated criminal case. This 30-year sentence was based in part on his prior felony convictions, including his 2005 Battery Conviction.

[4] On June 19, 2019, Perry filed pro se the PCR Petition, arguing that he received ineffective assistance of counsel regarding his 2005 Battery Conviction. On July 23, 2019, the State Public Defender entered its appearance on Perry's behalf; on January 6, 2020, it withdrew this appearance at Perry's request. The State later filed a motion to proceed by affidavit, which the trial court granted.

On November 9, 2020, Perry filed an affidavit and designation of evidence in support of his petition for post-conviction relief. On February 18, 2021, the State filed a motion requesting the trial court deny Perry's petition for post-conviction relief along with its supporting affidavit. On July 7, 2021, attorney John Goodridge entered his appearance on Perry's behalf.

[5] On July 13, 2021, the trial court denied the PCR Petition. In denying the PCR Petition, the trial court concluded that Perry did not overcome the presumption that trial counsel provided effective assistance because Perry "failed to submit any affidavits, argument, additional details or other evidence in support of his claims. Nor has he submitted an affidavit from [trial counsel]." Appellant's App. Vol. II at 202. The trial court also concluded that Perry did "not establish[] he was prejudiced by any alleged errors by counsel for failing to" file a motion to suppress or raise a defense. *Id.* at 203.

[6] On August 12, 2021, Perry, by counsel Goodridge, filed the Motion. In the Motion, Perry argued that because Perry now had private counsel, the trial court "should allow the Petitioner to withdraw the [PCR] Petition prior to final judgment so that private counsel can investigate the case and litigate the case properly." Appellant's App. Vol. II at 204. On August 31, 2021, the State filed an objection to the Motion. On October 28, 2021, the trial court made the following entry on the Chronological Case Summary:

> Comes now the Court and finds the Petitioner's Motion to Correct Error was timely filed on August 12, 2021. The Petitioner's Notice of Hearing and Order to Appear on Motion to

> Correct Error was filed on October 22, 2021. *Pursuant to Rule 53.3 of the Indiana Rules of Trial Procedure, the Petitioner's Motion to Correct Error was denied on or about September 26, 2021 in that there was no ruling or extension by the Court on the Motion prior to the expiration of the forty-five (45) day period.* Copy of said minute to be provided to counsel. (Donald R. Vowels, Special Judge)

Id. at 8 (emphasis added). Therefore, any appeal from the trial court's denial of the Motion was due on or before October 26, 2021.

[7] Nearly six months later, on April 4, 2022, Goodridge filed a motion to withdraw his appearance, which the trial court granted two days later. Almost one year later, on March 24, 2023, attorney Matthew McGovern entered his limited appearance on behalf of Perry and filed the Appeal Petition along with Perry's supporting affidavit (the "Affidavit"). On May 5, 2023, the State filed an objection to the Appeal Petition. Appellant's App. Vol. II at 224. Paragraphs 8 and 9 below set forth the relevant facts as alleged in the Appeal Petition and Affidavit.

[8] Goodridge did not notify Perry that the Motion was denied until February 2022. Appellant's App. Vol. II at 218. Perry attempted to contact Goodridge about appealing the trial court's denial of the Motion, but he was unsuccessful. *Id.* at 219. Perry informed Goodridge's office that Goodridge should withdraw his appearance. *Id.* Perry then "immediately began looking for another attorney" and enlisted his mother's help. *Id.* Perry's mother did not contact McGovern until April 2022. *Id.* at 219, 212. "Further discussions about proceeding as [Perry]'s counsel continued through July 2022." *Id.* at 212. In

June 2022, Perry was transferred to Pendleton Correctional Facility and did not have access to his personal property for more than a month thereafter. *Id.* at 219. Perry did not speak directly with McGovern until July 2022. *Id.* at 219, 212–13.

[9] Perry and McGovern did not meet in person until September 2022. Appellant's App. Vol. II at 219–20, 213. It was not until after that meeting that McGovern began preparing the Appeal Petition and the Affidavit. *Id.* at 213. The Affidavit, in particular, took quite a while to prepare because pages got lost in the mail and Perry did not have the correct address for McGovern. *Id.* at 213–14. On March 10, 2023, Perry and McGovern met again, this time to review and finalize the Affidavit. *Id.* at 214.

[10] In the Appeal Petition, Perry cited both Post-Conviction Rule 2 and the common law as bases for why the trial court should allow him to file a belated notice of appeal. Appellant's App. Vol. II at 215. The State argued that Post-Conviction Rule 2 "cannot be used to salvage" belated appeals except for direct appeals from criminal convictions. *Id.* at 224. On May 19, 2023, the trial court denied the Appeal Petition without entering findings or conclusions. This appeal ensued.

Discussion and Decision

[11] Perry argues only that his right to appeal should be restored pursuant to our Supreme Court's decision in *In re Adoption of O.R.*, 16 N.E.3d 965 (Ind. 2014). He concedes that Post-Conviction Rule 2 ("PCR 2") is inapplicable here.

[12] "[A] party loses his or her right to appeal for failing to file timely a Notice of Appeal." *O.R.*, 16 N.E.3d at 971. As our Supreme Court explained in *O.R.*, this forfeiture is not a jurisdictional defect that deprives us of our authority to entertain the appeal. *Id.* In limited circumstances, a party can file a belated notice of appeal pursuant to PCR 2, but this rule does not permit a belated notice of appeal in the post-conviction context. *Id.* at 970 n.2 (citing *Davis v. State*, 771 N.E.2d 647, 649 (Ind. 2002)). When a party seeks to file a belated appeal that is not governed by PCR 2—as is the case here—a court must determine "whether there are extraordinarily compelling reasons why this forfeited right should be restored." *Id.* at 971. In making this determination, the court considers whether the party worked diligently to prosecute his appeal, *id.* at 972; the nature of the party's rights at stake, *id.*; whether there is a "unique confluence" of factors giving rise to a strong desire to decide the case on the merits, *id.*; and any obvious injustice, *Cannon v. Caldwell*, 74 N.E.3d 255, 258–59 (Ind. Ct. App. 2017).

[13] The State argues that "because [PCR] 2 does not apply to post-conviction proceedings and is a 'vehicle for belated direct appeals alone,' the failure to timely file a notice of appeal from a post-conviction motion permanently extinguishes a defendant's . . . right to appeal." Appellee's Br. at 7 (citing *Hill v. State*, 960 N.E.2d 141, 148 (Ind. 2012); *O.R.*, 16 N.E.3d at 970 n.2; *Core v. State*, 122 N.E.3d 974, 978 (Ind. Ct. App. 2019); *Beasley v. State*, 192 N.E.3d 1026, 1029 (Ind. Ct. App.), *trans. denied*, 197 N.E.3d 829 (Ind. 2022)). That is,

according to the State, a party cannot seek to file a belated notice of appeal in post-conviction proceedings. *See* Appellee's Br. at 7–9.

[14] In support of this argument, the State cites this court's decision in *Core v. State*, 122 N.E.3d at 978 n.7, for the proposition that "the exception allowing 'extraordinary circumstances' to restore one's right to appeal was limited and did not apply to a petitioner seeking to file a belated appeal from his post-conviction relief proceeding." Appellee's Br. at 8. In *Core*, the trial court denied Core's petition for post-conviction relief, and he did not timely appeal this denial. 122 N.E.3d at 976. To avoid the forfeiture of his right to appeal, Core petitioned the trial court to allow him to file a belated notice of appeal under PCR 2(1), which the trial court granted. *Id.* Another panel of this court held that the trial court erred in granting Core's PCR 2 petition because that rule is inapplicable to post-conviction proceedings. *Id.* at 978.[1] However, in a footnote, the *Core* court stated that even if Core had attempted to reinstate his

[1] The *Core* court also noted that our Supreme Court precedent is clear "that a post-conviction petitioner who fails to timely file a notice of appeal has *permanently extinguished* his opportunity to appeal and cannot invoke [PCR] 2(1) to file a belated notice of appeal." 122 N.E.3d at 978 (emphasis added). A recent panel of this court observed that "*Core* is plainly an outlier in this respect. Cases decided in the wake of *Core* have uniformly applied *O.R.* to defendants ineligible for [PCR] 2 relief." *Sevion v. State*, 223 N.E.3d 1154, 1156 (Ind. Ct. App. 2023) (citing *Beasley*, 192 N.E.3d at 1029–30; *Cummings*, 137 N.E.3d 255, 257 (Ind. Ct. App. 2019)), *trans. not sought*. "Because a defendant's eligibility for the procedural mechanisms of [PCR] 2 has little bearing, if any, on the existence of 'extraordinarily compelling reasons' to hear the merits of his claim, *O.R.* relief is still available to a post-conviction petitioner who fails to timely file a notice of appeal." *Id.* at 1156–57. However, our Supreme Court held in *Hill v.* State that "in the collateral review context, the failure to timely file a notice of appeal *permanently extinguishes* the opportunity to appeal." 960 N.E.2d 141, 148 (Ind. 2012) (emphasis added), *reh'g denied*. Although we agree that the *Core* decision is an outlier among our precedent, we do not believe that our Supreme Court has abrogated its decision in *Hill*, upon which the *Core* court relied. While we apply *O.R.* in this case, we in no way suggest that *Hill* is inapplicable to the issue presented here.

right to appeal using the common law instead of PCR 2(1), it did "not find any extraordinarily compelling reasons why Core's forfeited right should be restored." *Id.* at 978 n.7.

[15] In further support of its argument, the State cites our decision in *Beasley v. State*. The facts of *Beasley* are essentially the same as those in *Core*: the trial court denied Beasley's petition for post-conviction relief but granted his petition to file a belated notice of appeal based on PCR 2. 192 N.E.3d at 1028–29. After holding that it was error for the trial court to grant Beasley's petition to file a belated notice of appeal pursuant to PCR 2, *id.* at 1029, we then analyzed whether extraordinarily compelling reasons prohibited the forfeiture of Beasley's right to appeal the trial court's denial of his petition for post-conviction relief, *id.* at 1030–31. We ultimately held that "Beasley forfeited his right to appeal from the denial of his petition for post-conviction relief and that no extraordinarily compelling reasons exist sufficient to restore that right." *Id.* at 1031.

[16] Our decisions in *Core* and *Beasley* demonstrate that it is error in a post-conviction context for a trial court to grant a party's petition to file a belated notice of appeal based on PCR 2. *Core*, 122 N.E.3d at 977–78; *Beasley*, 192 N.E.3d at 1029. When a trial court is faced with such a petition and PCR 2 does not apply, an appropriate inquiry is whether the party seeking to file a belated notice of appeal can demonstrate there are extraordinarily compelling reasons why the forfeited right to appeal should be restored. *See O.R.*, 16 N.E.3d at 970; *Beasley*, 192 N.E.3d at 1030–31; *Sevion*, 223 N.E.3d at 1156–57.

In other words, the inapplicability of PCR 2 to post-conviction proceedings does not prevent a party from seeking to file a belated notice of appeal in such proceedings so long as the party demonstrates that "extraordinarily compelling reasons" exist to restore the party's right to appeal. *See O.R.*, 16 N.E.3d at 970; *Beasley*, 192 N.E.3d at 1029–31; *Sevion*, 223 N.E.3d at 1156–57.

[17] Here, Perry, who pled guilty to the 2005 Battery Conviction, filed the PCR Petition collaterally attacking that conviction by claiming his attorney was ineffective because he failed to file a motion to suppress or raise a defense. Instead of directly appealing the denial of his PCR Petition, he filed the Motion, which was deemed denied by operation of law on September 26, 2021. *See* Ind. Trial Rule 53.3(A). A timely notice of appeal should have been filed no later than 30 days thereafter. *Id.* Perry claims he did not learn the trial court denied the Motion until February 2022. Based on Perry's Affidavit, he claims he is not at fault for the failure to timely file a notice of appeal.

[18] However, the record reveals that Perry did not work diligently to prosecute his appeal. It took more than a year from the time Perry claims to have learned that Goodridge failed to file a timely notice of appeal—February 2022—to the time he filed the Appeal Petition—March 2023. Perry claims that his incarceration caused only some of the delays in filing the Appeal Petition. By Perry's own admission, he waited until July 2022, before instructing McGovern to file a petition seeking leave to file a belated notice of appeal. Appellant's App. Vol. II at 21. On this record, we do not believe Perry exercised diligence to prosecute his appeal, and this lack of diligence resulted in a substantial delay.

[19] Perry is currently serving a 30-year sentence on an unrelated criminal case, the sentence for which was enhanced based in part on his 2005 Battery Conviction. Perry has a fundamental (but not absolute) liberty interest in being free from physical restraint. *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989). This freedom "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Kansas*, 521 U.S. at 356 (quoting *Foucha*, 504 U.S. at 80). However, Perry's fundamental liberty interest is diminished because he voluntarily pled guilty. On these facts, we do not believe Perry's right to be free from physical restraint is sufficiently compelling to justify addressing his appeal on the merits despite his forfeiture.

[20] We next look to whether there is a unique confluence of a fundamental liberty interest and other factors in this case. In *O.R.*, for example, there was a "unique confluence" of the petitioner's fundamental liberty interest in parenting his child "along with 'one of the most valued relationships in our culture,'" which, in addition to his diligence in prosecuting his appeal, led the Supreme Court to restore the petitioner's right to appeal. 16 N.E.3d at 972. The Supreme Court specifically noted that Indiana's appellate courts often decide cases on the merits rather than dismissing them on procedural grounds when those cases involve a person's right to parent his or her child. *Id.* (citing *In re Adoption of T.L.*, 4 N.E.3d 658, 661 n.2 (Ind. 2014); *In re K.T.K.*, 989 N.E.2d 1225, 1229 (Ind. 2013); *In re D.L.*, 952 N.E.2d 209, 212–14 (Ind. Ct. App. 2011); *In re J.G.*

and C.G., 4 N.E.3d 814, 820 (Ind. Ct. App. 2014)). Here, given Perry's relatively weak liberty interest and lack of diligence in prosecuting his appeal, there is no unique confluence of a fundamental liberty interest and other factors that give rise to a desire to address his case on the merits.

[21] Additionally, there is no obvious injustice in not restoring Perry's forfeited right to appeal. In *Cannon v. Caldwell*, the appellant sought to file a belated notice of appeal concerning a child support modification order. 74 N.E.3d at 256. Because that order was "on its face in clear violation of the Child Support Guidelines," we concluded "that this obvious injustice is an extraordinarily compelling reason to restore [the appellant]'s forfeited right to appeal and decide the appeal on the merits." *Id.* at 258–59. Here, by contrast, the trial court denied the Motion, which sought leave only to withdraw the PCR Petition so that Goodridge could "litigate the case properly," Appellant's App. Vol. II at 204. The Motion did not substantively challenge the trial court's denial of the PCR Petition. Consequently, any arguments regarding the trial court's denial of the PCR Petition would be waived on appeal, *see Carmichael v. Separators, Inc.*, 148 N.E.3d 1048, 1058 (Ind. Ct. App. 2020) (quoting *Cavens v. Zaberdac*, 849 N.E.2d 526, 533 (Ind. 2006)), unless Perry could show fundamental error. Thus, not restoring Perry's forfeited right to appeal would not result in obvious injustice.

[22] Based on the foregoing, we conclude that Perry has not demonstrated there are extraordinarily compelling reasons to restore his otherwise forfeited appeal so

that it may be decided on the merits. We therefore hold that the trial court did not err in denying the Appeal Petition.

[23] Affirmed.

Bailey, J., and May, J., concur.

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