MEMORANDUM DECISION

APPELLANT PRO SE

Douglas Morris
Greencastle, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Douglas Morris,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

August 31, 2022

Court of Appeals Case No. 21A-PC-680

Appeal from the Scott Circuit Court

The Honorable Jason M. Mount, Judge

Trial Court Cause No. 72C01-2001-PC-2

Robb, Judge.

Case Summary and Issues

[1] In 2018, Douglas Morris pleaded guilty to dealing in methamphetamine, a Level 4 felony; theft, a Level 6 felony; and contributing to delinquency of a minor, a Class A misdemeanor. In 2020, Morris filed a petition for post-conviction relief, which the post-conviction court denied. Morris, pro se, now appeals the denial of his petition for post-conviction relief, raising multiple issues for our review, which we restate as: (1) whether the post-conviction court erred in determining that Morris' trial counsel was not ineffective; and (2) whether the post-conviction court was biased against Morris. The State of Indiana cross-appeals, alleging Morris' appeal was untimely and therefore Morris forfeited his right to appeal.

[2] We conclude that although Morris' appeal was untimely, Morris' right to appeal can and should be revived. On the merits, we conclude the post-conviction court did not err in finding Morris' trial counsel was not ineffective and Morris' argument that the post-conviction court was biased is waived. Accordingly, we affirm.

Facts and Procedural History

[3] In 2017, the Scottsburg Police Department received information from two sources that Morris was selling methamphetamine. One of those sources was a confidential informant and the other was a state law enforcement officer. As a result, police conducted a controlled buy of methamphetamine from Morris

with the help of the confidential informant. On July 20, 2017, the confidential informant went to Morris' home and purchased four grams of methamphetamine. In early August, a second controlled buy was performed by the informant. Both buys were audio recorded on recording equipment worn by the confidential informant.

[4] On August 21, Morris offered to sell the confidential informant multiple firearms. The firearms offered by Morris matched the description of guns recently reported as stolen and the police arranged for a controlled buy of the guns. On August 22, the informant went to Morris' home and the two discussed a potential purchase of the guns. Morris indicated that the guns were presently with two of his neighbors who had actually stolen them and that his juvenile son would act as a middleman to purchase the guns from the neighbors. Morris then sent his son to obtain the guns from the neighbors and shortly thereafter, Morris' son returned with the two guns and handed them over to the informant. The informant left with the guns and turned them over to police. After a search of multiple law enforcement databases, each gun was confirmed as having recently been reported stolen.

[5] Based on the information provided by the two sources and the controlled buys of methamphetamine, a probable cause affidavit to charge and arrest Morris for dealing in methamphetamine was filed by the police. The trial court determined that probable cause existed and as a result, an arrest warrant was issued and the State charged Morris with two counts of dealing in methamphetamine, each a Level 4 felony, in Cause Number 72C01-1708-F4-20

("Cause F4-20"). The State subsequently alleged Morris was an habitual offender.

[6] On August 25, while executing a search warrant on Morris' home, Morris was arrested. During the search, police found multiple items of drug paraphernalia inside Morris' home. In October, utilizing the information from the controlled buy of the guns and the search of Morris' home, police filed another probable cause affidavit for charging and arresting Morris. Again, the trial court determined that probable cause existed and an arrest warrant was issued.[1] As a result, the State charged Morris with two counts of theft, each a Level 6 felony; maintaining a common nuisance, a Level 6 felony; contributing to the delinquency of a minor, a Class A misdemeanor; and possession of paraphernalia, a Class C misdemeanor, in Cause Number 72C01-1710-F6-410 ("Cause F6-410"). In September 2018, Morris pleaded guilty to one count of dealing in methamphetamine in Cause F4-20 and one count of theft and contributing to the delinquency of a minor in Cause F6-410. The remaining charges were dismissed.

[7] Morris was then sentenced to twelve years for dealing in methamphetamine in Cause F4-20. In Cause F6-410, Morris was sentenced to 364 days each for theft and contributing to the delinquency of a minor to be served concurrently with each other and consecutive to his sentence in Cause F4-20.

---

[1] At the time, Morris remained incarcerated on Cause F4-20.

[8] In January 2020, Morris, pro-se, filed a petition for post-conviction relief in both causes. At a pre-trial conference, the post-conviction judge, Judge Mount, noted that Morris' petition made several observations regarding Judge Mount's prior involvement in Cause F4-20 and Cause F6-410, including issuing the arrest and search warrants in those cases, and his involvement in an unrelated case involving the alleged confidential informant. *See* Transcript, Volume 3 at 10. Judge Mount asked Morris whether he wanted him to recuse himself and if Morris had a problem with him proceeding with the case. Morris stated that he was simply stating facts about Judge Mount, did not have a problem proceeding, and he had "no problem with [Judge Mount] being on this case." *Id*. at 10-11.

[9] In October 2020, an evidentiary hearing on Morris' petition for post-conviction relief was held. Morris argued that he received ineffective assistance of trial counsel. Morris also testified that he knew the identity of the confidential informant, that a confidential informant could not have pending felony charges against him, and that he had legal authority which indicated that probable cause could not be supported by hearsay statements of an unreliable confidential informant. However, he also testified that his legal authority was specific to search warrants, not arrest warrants, and that he was challenging the probable cause for the arrest warrants. *See id*. at 48. Additionally, Morris told the court that he believed the probable cause affidavit for the search warrant was not deficient and that it "establishes probable cause." *Id*. at 50, 59.

[10] On January 21, 2021, the post-conviction court issued findings of fact and conclusions of law, denying Morris' petition for relief. Denial of Morris' petition for post-conviction relief was entered on the CCS on January 22, 2021. Notice of the denial was sent on March 15, 2021. Morris now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. State's Cross-Appeal: Forfeiture

[11] We first address the State's cross-appeal arguing that Morris' notice of appeal was untimely and as a result, Morris forfeited his right to appeal. Morris acknowledges that his appeal was late but argues that because he was not provided notice of the judgment until March 2021, and he has "proceeded with due diligence . . . to meet every deadline given [to] him by this court[,]" we should evaluate his appeal on the merits. Reply Brief of the Appellant at 3. Although we agree with the State that Morris' appeal was untimely and therefore, Morris forfeited his right to appeal, we find that sufficiently compelling reasons exist to revive his appeal.

[12] To initiate an appeal, a party must file a notice of appeal within thirty days after the entry of a final judgment is noted in the CCS. Ind. Appellate Rule 9(A)(1). Additionally, Appellate Rule 9(A)(5) provides that "[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by [Post-Conviction Rule 2]." App. R. 9(A)(5). However, Post-Conviction Rule 2 does not apply to post-conviction proceedings and is only appropriate

for direct appeals. *Core v. State*, 122 N.E.3d 974, 978 (Ind. Ct. App. 2019). Here, the entry of the post-conviction court's final judgment was noted on the CCS on January 22, 2021. Thus, Morris' notice of appeal needed to be filed with the Clerk of this court by February 22, 2021. However, Morris filed his notice of appeal on April 15, 2021, nearly two months after the deadline. Pursuant to Appellate Rule 9(A)(5), Morris' failure to timely file his notice of appeal resulted in his right to appeal being forfeited.[2]

[13] Although Morris has forfeited his right to appeal by failing to timely file his notice of appeal, our supreme court has indicated that the untimely filing of a notice of appeal is not a jurisdictional defect depriving the appellate courts of the ability to entertain an appeal. *In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014). Indeed, "[t]he Court may, upon the motion of a party or the Court's own motion, permit deviation from [the Appellate] Rules." Ind. Appellate Rule 1. If the right to appeal has been forfeited, the question is whether there are extraordinarily compelling reasons why this forfeited right should be restored. *O.R.*, 16 N.E.3d at 971. Although Morris agrees that his

---

[2] Pursuant to Indiana Trial Rule 72(E), a defendant may seek to extend the deadline for filing a notice of appeal due to lack of notice of a judgment. "When the service of a copy of the entry by the [trial court] Clerk is not evidenced by a note made by the Clerk upon the [CCS], the [trial] Court, upon application for good cause shown, may grant an extension of any time limitation within which to contest such ruling, order or judgment to any party who was without actual knowledge[.]" Ind. Trial Rule 72(E). Here, the first indication that a copy of the post-conviction court's denial of Morris' petition for relief was served does not appear on the CCS until March 15, 2021. Accordingly, Morris could have petitioned the post-conviction court for an extension of time to file his notice of appeal. However, Morris did not petition the trial court under Trial Rule 72(E) and therefore, his appeal remains untimely under Appellate Rule 9(A)(5). *See Phovemire v. State*, 960 N.E.2d 176, 178 (Ind. Ct. App. 2011) (reasoning that even if the CCS notation was insufficient to provide notice, the defendant's appeal was untimely because he was required to petition the trial court for an extension of time under Trial Rule 72(E) and failed to do so).

appeal was untimely, he contends that because the post-conviction court first provided him notice of its decision nearly two months after judgment was entered in the CCS and he "proceeded with due diligence" once he was provided proper notice, we should evaluate his appeal on the merits. Reply Br. of the Appellant at 3-4.

[14] The post-conviction court's denial of Morris' petition for post-conviction relief was entered on the CCS on January 22, 2021. On that date, the CCS indicates that the "Clerk to issue a copy [of the judgment] to all parties involved." Appellant's Amended Appendix, Volume 2 at 207.[3] But there is no notation on the CCS that the clerk did so. Rather, it appears that a copy of the judgment was not sent to Morris until after Morris, while he was incarcerated, wrote a letter to the post-conviction court in March 2021 requesting an update on the status of his petition. In response, on March 15, 2021, the post-conviction court ordered copies of the judgment issued to both parties. Morris filed his notice of appeal on April 15, 2021. Morris only knew of the denial of his petition for post-conviction relief because he was proactive and inquired of the post-conviction court. According to Trial Rule 72(D), "[i]mmediately upon the notation in the [CCS] of a ruling upon . . . an order or judgment, the clerk shall serve a copy of the entry . . . upon each party[.]" However, the clerk did not provide Morris with notice until March 15 and once given notice, Morris acted promptly to file a notice of appeal pro-se, which the State concedes. *See* Brief of

[3] Citations to the Appellant's Amended Appendix, Vol. 2 are to the .pdf pagination.

Appellee at 17-18. Accordingly, we believe sufficiently compelling reasons exist to revive Morris' appeal and therefore proceed to evaluate his appeal on the merits.

II. Morris' Appeal

A. Ineffective Assistance of Trial Counsel

[15] A petitioner for post-conviction relief must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who has been denied relief faces a "rigorous standard of review." *Wesley v. State*, 788 N.E.2d 1247, 1250 (Ind. 2003). To succeed on appeal, the petitioner must show the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id*. When reviewing the post-conviction court's order denying relief, we will "not defer to the post-conviction court's legal conclusions," and the "findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017) (citation omitted). The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Barber v. State*, 141 N.E.3d 35, 41 (Ind. Ct. App. 2020), *trans. denied*.

[16] Post-conviction proceedings are not an opportunity for a super-appeal. *Id*. at 40-41. Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert. denied*, 537 U.S.

839 (2002). If not raised on direct appeal, a claim of ineffective assistance of counsel is properly presented in a post-conviction proceeding. *Id*.

[17] When reviewing claims of ineffective assistance of counsel, we apply the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019). To prevail, a petitioner must first demonstrate that counsel's performance was deficient and second, that the petitioner was prejudiced by the deficient performance. *Barber*, 141 N.E.3d at 42. Deficient performance exists if counsel's performance falls below an objective standard of reasonableness based on prevailing professional norms. *Id*. Prejudice exists if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. Failure to prove either prong causes the petitioner's claim to fail. *Id*.

[18] Counsel is afforded considerable discretion in choosing strategy and tactics and on review, we will accord those decisions deference. *Jervis v. State*, 28 N.E.3d 361, 365 (Ind. Ct. App. 2015), *trans. denied*. As such, we will not speculate as to what may or may not have been advantageous trial strategy. *Id*. Ultimately, there is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*.

[19] Morris first argues that his trial counsel rendered ineffective assistance by failing to attack the probable cause affidavits for his arrest warrants. Specifically, he contends that his counsel should have challenged the probable cause affidavits because they contained "uncorroborated hearsay from a source whose credibility is itself unknown" which "standing alone, cannot support a finding of probable cause to issue a *search warrant*." Amended Brief of Appellant at 18 (emphasis added) (citing *Newby v. State*, 701 N.E.2d 593, 598 (Ind. Ct. App. 1998)). This is the same argument he made at the evidentiary hearing which the post-conviction court rejected, determining that Morris' legal authority is "misplaced, as it pertains to the issuance of SEARCH WARRANTS, . . . [and] does not provide an avenue of attack against a probable cause affidavit for ARREST[.]" Appellant's Amended App., Vol. 2 at 32. On appeal, Morris again provides no legal authority to support his contention that uncorroborated hearsay from a source whose credibility is unknown provides an avenue to attack a probable cause affidavit for arrest. Accordingly, he has failed to demonstrate his trial counsel's decision to not attack the probable cause in support of his arrests amounts to deficient performance.[4]

[4] To the extent that Morris also attempts to attack the probable cause affidavit for the search warrant of his house, his argument is waived. At the evidentiary hearing Morris testified that he was challenging the probable cause for the arrest warrants, not the search warrant of his home. *See* Tr., Vol. 3 at 48. Additionally, Morris told the court that he believed the probable cause affidavit for the search warrant was not deficient and that it "establishes probable cause." *Id*. at 50, 59. A party may not add to or change his ground for objections in the reviewing court. *Burton v. State*, 526 N.E.2d 1163, 1168 (Ind. 1988). Accordingly, we need not address his argument that probable cause for the search warrant does not exist.

[20] Moreover, even if Morris could show that the probable cause affidavits were insufficient due to the use of the confidential informant, it would only have led to his release from pretrial detention, not the dismissal of any charges. *See Scott v. State*, 404 N.E.2d 1190, 1192-93 (Ind. Ct. App. 1980) (indicating that probable cause is not a prerequisite to the filing of an information and does not affect the right of the State to try a case nor does lack of probable cause affect the judgment of conviction). Here, Morris makes no argument that his pretrial detention impacted the outcome of his case and therefore, fails to show he was prejudiced as a result. Thus, he has not shown that his trial counsel provided ineffective assistance by failing to attack the probable cause supporting his arrest warrants.

[21] Morris next argues that his trial counsel rendered ineffective assistance by failing to attack the credibility of the confidential informant. At the evidentiary hearing, he argued that the alleged confidential informant had pending felony charges against him. According to Morris, a confidential informant in such a position could not be used to gather information regarding Morris' criminal activity. *See* Tr., Vol. 3 at 77-78. On appeal, he appears to be making the same argument. *See* Amended Br. of Appellant at 17-19; *see also* Appellant's Amended App., Vol. 2 at 158-59, 161. However, he offers no legal authority to support his claim that a confidential informant cannot have pending felony charges against him. Moreover, Morris' argument is merely a self-serving statement that pending felony charges automatically render the confidential informant unreliable.

[22] The information provided by the confidential informant appears to have been reliable. In Cause F4-20, the confidential informant's information was corroborated by information provided by a law enforcement officer and supported by two controlled buys of methamphetamine and recordings of those controlled buys. In Cause F6-410, the confidential informant's information was supported by a controlled buy of stolen firearms and a recording of the controlled buy. Without legal authority to support Morris' argument, there is nothing to suggest that his trial counsel could have attacked the credibility of the confidential informant or that he was prejudiced by his trial counsel's performance.

[23] Morris also argues that his trial counsel failed to perform discovery, did not conduct a proper investigation, and put forth "absolutely no involvement into defending" him. *See* Amended Br. of Appellant at 22, 25-26. However, Morris does not provide any evidence of how his counsel specifically failed to perform these activities or how the alleged failure prejudiced him in any way. Rather, Morris merely cites to case law in support of what counsel is required to do. Accordingly, Morris is unable to show that his trial counsel was ineffective.

B. Bias

[24] Morris next argues that the post-conviction judge, Judge Mount, was biased against him. The law presumes that a judge is unbiased and unprejudiced. *Timberlake*, 753 N.E.2d at 610. A defendant asserting judicial bias must show the judge's actions and demeanor showed partiality and prejudiced the case. *Woods v. State*, 98 N.E.3d 656, 664 (Ind. Ct. App. 2018), *trans. denied*. However,

a defendant may not add to or change his ground for appeal in the reviewing court and to do so results in waiver. *Hunter v. State*, 72 N.E.3d 928, 932 (Ind. Ct. App. 2017), *trans. denied*.

[25] Here, in response to observations Morris made in his petition for post-conviction relief regarding Judge Mount's issuing of Morris' arrest and search warrants in Cause F4-20 and Cause F6-410 and involvement in a separate case involving the alleged informant, Judge Mount asked Morris whether he wanted him to recuse himself and if Morris believed there was a problem with Judge Mount proceeding in the case. Morris replied he was simply stating facts about Judge Mount, and he had "no problem with [Judge Mount] being on this case." Tr., Vol. 3 at 10-11. Morris had the option for Judge Mount to recuse himself for bias and he declined. Failure to raise an issue before the post-conviction court results in waiver on appeal. *Koons v. State*, 771 N.E.2d 685, 691-692 (Ind. Ct. App. 2002), *trans. denied*. Accordingly, any argument Morris now makes that Judge Mount should have been removed for bias is waived.

Conclusion

[26] We conclude that although Morris' notice of appeal was untimely, Morris' right to appeal can and should be revived. In considering the merits of his appeal, we conclude the post-conviction court did not err in determining Morris' trial counsel was not ineffective and his argument that the post-conviction court was biased is waived. Accordingly, we affirm.

[27] Affirmed.

Pyle, J., and Weissmann, J., concur.