MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

John Andrew Goodridge
Evansville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Michael Damien Howell,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

April 10, 2023

Court of Appeals Case No. 22A-PC-1659

Appeal from the Vanderburgh Superior Court

The Honorable Robert J. Pigman, Judge

Trial Court Cause No. 82D03-1809-PC-5431

Memorandum Decision by Judge Weissmann
Judges Bailey and Brown concur.

Weissmann, Judge.

[1] Michael Howell belatedly appeals the denial of his petition for post-conviction relief (PCR), claiming the PCR court erred in finding he did not receive ineffective assistance of trial counsel. Specifically, Howell contends his trial counsel's failure to object to an erroneous jury instruction limited Howell to arguing fundamental error in his first appeal. Though Howell forfeited his right to bring the current appeal by missing a critical deadline, we reinstate that right and address the issue on the merits. Having previously found that the erroneous instruction was not reversible error, let alone fundamental error, we find Howell has not shown that his trial counsel's error prejudiced him.

Facts

[2] In 2017, Howell was convicted of Level 2 felony voluntary manslaughter as a lesser-included offense of murder. On direct appeal, he argued that the trial court erred in instructing the jury on voluntary manslaughter. But because his counsel did not object to the instruction at trial, Howell was required to show that it constituted fundamental error.

[3] Another panel of this Court found that the challenged instruction misstated the law but "the instructions taken as a whole did not mislead the jury." *Howell v. State*, 97 N.E.3d 253, 263 (Ind. Ct. App. 2018). Concluding the erroneous instruction "did not result in reversible error, let alone fundamental error," this Court affirmed Howell's conviction. *Id.*

[4] In 2018, Howell filed a PCR petition, claiming his trial counsel was ineffective in failing to object to the erroneous jury instruction on voluntary manslaughter. On March 2, 2022, the PCR court denied Howell's petition, finding the lack of reversible error had already been determined on appeal.

[5] On April 1, 2022, the deadline for filing a motion to correct, Howell attempted to file such a motion, but his counsel mistakenly submitted the wrong document to the PCR court. Realizing the error just four days later, Howell petitioned the court for permission to file a belated motion to correct error. The court granted Howell's request but denied his motion on the merits on June 15, 2022. In doing so, the court advised Howell that it would grant a petition for permission to file a belated notice of appeal if Howell chose to file one. Howell filed his petition that same day, and with the PCR court's permission, he filed his belated notice of appeal on July 13, 2022.

Discussion and Decision

[6] Howell argues that the PCR court erred in concluding that his trial counsel was not ineffective in failing to object to the erroneous jury instruction on voluntary manslaughter. On cross-appeal, the State argues that Howell forfeited his right to appeal the PCR court's judgment by failing to timely file a notice of appeal. Though we agree with the State, we opt to reinstate Howell's right to appeal and decide the case on the merits.

A. Reinstated Right to Appeal

[7] Indiana Appellate Rule 9(A)(5) provides: "Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2." Howell does not contend that his notice of appeal was timely. He brought this appeal pursuant to Post-Conviction Rule 2(1), which provides: "An eligible defendant[1] convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence" under certain circumstances.

[8] Though the PCR court granted Howell permission to file his belated notice of appeal under Post-Conviction Rule 2(1), it was without authority to do so. "[Our] Supreme Court has held that Post-Conviction Rule 2(1) does not apply to post-conviction proceedings and that it is a 'vehicle for belated direct appeals alone.'" *Core v. State*, 122 N.E.3d 974, 978 (Ind. Ct. App. 2019) (quoting *Howard v. State*, 653 N.E.2d 1389, 1390 (Ind. 1995)); *accord Hill v. State*, 960 N.E.2d 141, 148 (Ind. 2012) ("P-C.R. 2 . . . does not apply to appeals of collateral or post-judgment rulings.").[2]

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[1] The rule defines "eligible defendant" as "a defendant who, but for the defendant's failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal." P-C.R.2.

[2] The PCR court also lacked authority to grant Howell's belated motion to correct errors. Post-Conviction Rule 2(2) provides, "An eligible defendant convicted after a trial or plea of guilty may petition the court of conviction for permission to file a belated motion to correct error addressing the conviction or sentence" under certain circumstances." But "[P-C.R. 2(2)] is not applicable to belated motions to correct errors relating to matters at the post-conviction stage." *Sceifers v. State*, 663 N.E.2d 1191, 1192 (Ind. Ct. App. 1996).

[9] Because Post-Conviction Rule 2(1) was inapplicable, Howell forfeited his right to appeal the PCR court's judgment by failing to file a timely notice of appeal. *See* App. R. 9(a)(5). However, we may restore a forfeited right to appeal if there are "extraordinarily compelling reasons" to do so. *In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014). We find such reasons here.

[10] But for his attorney's inadvertent mistake, Howell would have timely filed a motion to correct error, thereby extending the deadline for filing his notice of appeal. *See* App. R. 9(A)(1). As Howell is not to blame for the four-day tardiness of his motion to correct error and considering our "preference for deciding cases on their merits," we opt to address Howell's ineffective assistance of counsel claim. *Miller v. Dobbs*, 991 N.E.2d 562, 565 (Ind. 2013).

B. No Ineffective Assistance of Counsel

[11] Howell argues that his trial counsel was ineffective in failing to object to the erroneous instruction on voluntary manslaughter.

> [A] claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant so much that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

[12] *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

[13] Although the performance and prejudice prongs of an ineffective assistance of counsel claim are separate inquiries, "[f]ailure to satisfy either prong will cause the claim to fail." *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). If we can easily dismiss a claim based upon the prejudice prong, we may do so without addressing the performance prong. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). "Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *French*, 778 N.E.2d at 824.

[14] Howell tries to satisfy the prejudice prong by pointing to the more stringent standard of review—fundamental error—which he faced in challenging the erroneous jury instruction in his first appeal. But Howell overlooks a critical fact. Though he raised the issue as one of fundamental error, the Court reviewed the error more liberally. *Howell v. State*, 97 N.E.3d 253, 263 (Ind. Ct. App. 2018) (concluding the erroneous instruction "did not result in reversible error, let alone fundamental error"). Because Howell did not really face a more stringent standard of review on appeal, he has failed to demonstrate that, but for his trial counsel's error in failing to object to the voluntary manslaughter instruction, the outcome of his case would have been different.

[15] Finding no error in the PCR court's denial of Howell's PCR petition, we affirm.

Bailey, J., and Brown, J., concur.