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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IN THE
COURT OF APPEALS OF INDIANA

Kurt Wertz,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 29, 2022

Court of Appeals Case No. 21A-CR-456

Appeal from the Montgomery Circuit Court

The Honorable Stephanie S. Campbell, Special Judge

Trial Court Cause No. 54C01-0004-CF-51
23C01-2004-CB-132

Brown, Judge.

[1] Kurt Wertz appeals the trial court's order denying his motion for modification of his sentence. We find one issue dispositive, which is whether Wertz's notice of appeal is timely. We dismiss.

Facts and Procedural History

[2] On April 19, 2000, the State charged Wertz with dealing in cocaine as a class A felony. A jury found Wertz guilty as charged. On July 23, 2002, the trial court sentenced Wertz to fifty years with five years suspended to probation. Wertz appealed his conviction, and this Court affirmed. *See Wertz v. State*, No. 54A01-0210-CR-496 (Ind. Ct. App. September 30, 2003).

[3] On November 27, 2019, Wertz filed a Motion for Modification of Sentence. On April 23, 2020, he filed another Motion for Modification of Sentence. A chronological case summary entry dated January 11, 2021, indicates that the court entered an order denying Wertz's Motion for Modification. On March 15, 2021, Wertz filed a notice of appeal. On August 2, 2021, he filed an amended notice of appeal.

Discussion

[4] We address the issue of whether Wertz's appeal was untimely. Ind. Appellate Rule 9(A)(1) provides:

> A party initiates an appeal by filing a Notice of Appeal with the Clerk (as defined in Rule 2(D)) within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days

> after the court's ruling on such motion is noted in the Chronological Case Summary or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

Ind. 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 P.C.R. 2."

[5] Wertz's notice of appeal, filed while he was incarcerated, implicates the "prison mailbox rule." Under the "prison mailbox rule," recognized by the United States Supreme Court in *Houston v. Lack*, the date a *pro se* prisoner delivers notice to prison authorities for mailing should be considered the date of filing, not the date of receipt. *McGill v. Ind. Dep't of Correction*, 636 N.E.2d 199, 202 (Ind. Ct. App. 1994) (citing *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379 (1988)), *reh'g denied*. In *Dowell v. State*, the Indiana Supreme Court stated, "regarding the *Houston* Court's observations about *pro se* prisoner filings as persuasive, this Court has regularly applied the prison mailbox rule in various orders" and made "explicit the rule as applied in [its] previous orders." 922 N.E.2d 605, 607 (Ind. 2010). The Court observed that its practice had "required a *pro se* prisoner to provide reasonable, legitimate, and verifiable documentation supporting a claim that a document was timely submitted to prison officials for mailing." *Id.* It noted that providing copies of a "Legal Mail Log," an affidavit from a person identifying himself as a "law librarian," and the prisoner's own affidavit taken as a whole created a presumption that the prisoner functionally filed his documents on time. *Id.* at 608 (citing *Johnson v.*

State, No. 02S05-0311-PC-582, order (Ind. Nov. 25, 2003)). It also observed that it took the same approach when an appellant tendered various proofs demonstrating that he had in fact submitted the record of proceedings to a prison employee for mailing on the due date for filing but that prison officials had not actually mailed the record until the next day including an affidavit from the prison employee verifying that the appellant presented the record to her on the date it was due but that she did not mail the record until the next day. *Id.* (citing *Scott v. State*, No. 36A04-9911-PC-485, order (Ind. Sept. 5, 2000)).

[6] The Court held that "[w]here a prisoner's proof is lacking, however, the opposite result obtains." *Id.* The Court observed that a claim that an institution in which an appellant was incarcerated was under lockdown without any documentary support was insufficient to allow the appeal to go forward. *Id.* (citing *Naquin v. State*, No. 27A02-0008-PC-557, order, 774 N.E.2d 505 (Ind. Jan. 9, 2002)). It also observed that a similar result occurred when an appellant sought to file a petition to transfer, supplied his own verified motion that he had delivered it to prison officials for mailing on the final day, but failed to enclose any documentation that tended to support the assertion. *Id.* (citing *Carney v. State*, No. 49A02-0802-CR-138, order (Ind. Jan. 15, 2009)).

[7] The State argues that Wertz's notice of appeal was untimely, he has forfeited his right to appeal, and we should dismiss. In his cross-appellee's brief, Wertz points to his Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis, which was attached to his March 15, 2021 notice of appeal. He contends that, in the certificate of service at the end of the affidavit, he certified

that he served the affidavit by first-class mail on January 26, 2021, and that his signature was notarized by Heather L. Mills, who also notarized his notice of appeal.

[8] The record reveals that the affidavit contains Wertz's signature above the date "Jan / 26th / 2021." Appellant's Appendix Volume II at 16. A certificate of service at the end of the motion asserts Wertz certified that "a true and accurate copy of the foregoing petition has been served upon opposing counsel listed below by U.S. mail service first class postage affixed this 26th day of January 2021." *Id.* at 18. No opposing counsel is listed below the certificate of service. Nor does the certificate of service include any assertion that the document was addressed to "the Clerk (as defined in Rule 2(D)) within thirty (30) days after the entry of a Final Judgment [was] noted in the Chronological Case Summary," Ind. Appellate Rule 9(A)(1), or timely submitted to prison officials for mailing. The certificate of service on the notice of appeal does not list any date when the notice of appeal was filed with the clerk or submitted to prison officials. *See* Appellant's Appendix Volume II at 10. While the notice of appeal and the affidavit both appear to contain a signature of Heather L. Mills and a notary public seal, neither indicate when the documents were notarized. In light of the record, we cannot say that Wertz has provided reasonable, legitimate, and verifiable documentation supporting a claim that his notice of appeal was timely submitted to prison officials for mailing. Accordingly, Wertz has forfeited his right to appeal.

[9] "Although it is never error for an appellate court to dismiss an untimely appeal, the forfeiture of the right to appeal on timeliness grounds does not deprive the appellate court of jurisdiction to hear the appeal." *Cooper's Hawk Indianapolis, LLC v. Ray*, 162 N.E.3d 1097, 1098 (Ind. 2021) (citing *In re D.J. v. Ind. Dep't of Child Servs.*, 68 N.E.3d 574, 579 (Ind. 2017); *In re Adoption of O.R.*, 16 N.E.3d 965, 970 (Ind. 2014)). To reinstate a forfeited appeal, an appellant must show that there are "extraordinarily compelling reasons why this forfeited right should be restored." *O.R.*, 16 N.E.3d at 971. Wertz does not allege that any extraordinarily compelling reasons exist as to why the forfeited right should be restored. *Cf. id.* at 972 (noting the "unique confluence of a fundamental liberty interest along with 'one of the most valued relationships in our culture'" in a case involving adoption, and finding extraordinarily compelling reasons to hear and determine a biological father's otherwise forfeited appeal (quoting *In re I.A.*, 934 N.E.2d 1127, 1132 (Ind. 2010))).

[10] For the foregoing reasons, we dismiss the appeal.

[11] Dismissed.

Mathias, J., and Molter, J, concur.