

MEMORANDUM DECISION

ON REHEARING

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.

July 27, 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 Nos.
54C01-0004-CF-51
23C01-2004-CB-132

Brown, Judge.

[1] On March 15, 2021, Wertz filed a notice of appeal of the trial court’s January 10, 2021 order denying his motion for sentence modification. In a memorandum decision, we concluded that Wertz forfeited his right to appeal and dismissed the appeal. *Wertz v. State*, No. 21A-CR-456, slip op. at 5-6 (Ind. Ct. App. April 29, 2022). Wertz seeks rehearing. We grant Wertz’s petition for rehearing.

Facts and Procedural History

[2] On April 19, 2000, the State charged Wertz with dealing in cocaine as a class A felony under cause number 54C01-0004-CF-51 (“Cause No. 51”). 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-396 (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. The order states:

Hearing is held on Defendant’s two pending petitions for modification, both of which are the same as to relief requested.

The Court admits into evidence by agreement of the parties, the DOC report filed herein on September 24, 2020.

Court finds that prior to serving the sentence in this matter, Defendant served a sentence in Cause Number 54C01-0004-C[F]-50.^[1] Defendant began serving the sentence in this cause sometime in the fall of 2019. The previous sentence was for a similar offense occurring within four days of the commission of this offense.

Defendant began serving the sentence in that cause on July 23, 2002.

Defendant's sentence in this cause is for fifty (50) years, with forty-five (45) and five (5) suspended. As the Defendant points out, if the Defendant had been sentenced under the revised criminal code his sentence would have been less but given the consecutive sentences ordered, not as low as the Defendant argues. The Court must also consider the conduct of the Defendant since sentencing and during incarceration. Per the DOC report, the Defendant, while incarcerated, has had four major conduct incidents since May 2018 including rioting and threatening. Overall, DOC reports that Defendant, while incarcerated has had at least 36 incident reports, of which numerous were of a violent nature and also what the Court would consider major incidents prior to May 2018 although not indicated as the same on the report. The Court having considered the underlying sentence and the evidence herein, denies Defendant's motion for modification.

Appellant's Appendix Volume III at 173.

[4] On March 15, 2021, Wertz filed a notice of appeal, which lists his address as the Wabash Valley Correctional Facility. Wertz attached an Affidavit in

¹ In July 2001, the trial court sentenced Wertz under cause number 54C01-0004-CF-50 to forty years in the Department of Correction with five years suspended to a direct commitment to community corrections.

Support of Motion to Proceed on Appeal in Forma Pauperis to his March 15, 2021 notice of appeal. The affidavit contains Wertz's signature and the date "Jan / 26th / 2021." Appellant's Appendix Volume II at 16. A certificate of service at the end of the motion asserts that Wertz certified that a true and accurate copy of the motion had been served upon opposing counsel by "U.S. mail service first class postage affixed this 26th day of January 2021." *Id.* at 18. The certificate of service also contains the signature of Heather L. Mills and contains a public notary seal related to Mills. On August 2, 2021, he filed an amended notice of appeal.

Discussion

[5] Upon further reflection with respect to the timeliness of Wertz's appeal, we note that dismissal of an untimely appeal is not inevitable. *See In re Adoption of O.R.*, 16 N.E.3d 965 (Ind. 2014). We do not lack jurisdiction over Wertz's appeal, and "we believe that the 'extraordin[arily] compelling reasons' for non-forfeiture recognized by our Indiana Supreme Court is not determined solely from the perspective of the litigant." *Morales v. State*, 19 N.E.3d 292, 296 (Ind. Ct. App. 2014), *trans. denied*. This Court has an interest in judicial economy and bringing finality to proceedings by post-conviction petitioners. *Id.* In light of the slight delay and the preference of this Court to address the merits of claims, we conclude that Wertz has not forfeited his right to appeal, and we elect to address the merits of his contentions.

[6] Generally, we review a trial court's decision to modify a sentence only for abuse of discretion. *Gardiner v. State*, 928 N.E.2d 194, 196 (Ind. 2010). We review de

novo matters of statutory interpretation because they present pure questions of law. *Id.*

[7] As for the State’s assertion that Wertz failed to seek the consent of the prosecuting attorney before filing his sentence modification twice within a 365-day period, Ind. Code § 35-38-1-17(j) provides in part:

A convicted person who is not a violent criminal may file a petition for sentence modification under this section:

(1) not more than one (1) time in any three hundred sixty-five (365) day period; and

(2) a maximum of two (2) times during any consecutive period of incarceration;

without the consent of the prosecuting attorney.

[8] The record reveals that Wertz filed a Motion for Modification of Sentence on November 27, 2019. On April 23, 2020, he filed a similar Motion for Modification of Sentence. The trial court did not rule on either of Wertz’s motions until its January 11, 2021 order which stated that a hearing was held on his “two pending petitions for modification, both of which are the same as to relief requested.” Appellant’s Appendix Volume III at 173. Under these circumstances, we cannot say that Ind. Code § 35-38-1-17(j) requires reversal.

[9] To the extent the trial court found in its January 11, 2021 order that Wertz was ordered to serve consecutive sentences, we note that the court’s July 23, 2002 sentencing order under Cause No. 51, the underlying cause number from which the present appeal arises, found that “the sentence should be served concurrent

to the Montgomery County case in cause number 54C01-0004-C[F]-00050” (“Cause No. 50”). Appellant’s Appendix Volume II at 225. Thus, the trial court erred in finding that Wertz had been ordered to serve consecutive sentences when it stated: “As the Defendant points out, if the Defendant had been sentenced under the revised criminal code his sentence would have been less but given the consecutive sentences ordered, not as low as the Defendant argues.”² Appellant’s Appendix Volume III at 173.

[10] As for the trial court’s reliance in its January 11, 2021 order that Wertz had committed rioting while incarcerated, we note the Department of Correction report referenced by the court listed conduct of rioting by Wertz on September 12, 2018, under case number “BTC 18090143.” *Id.* at 159. The United States District Court for the Southern District of Indiana entered an order on October 27, 2020, which granted Wertz’s petition for a writ of habeas corpus challenging the prison disciplinary sanction related to the allegation of rioting in disciplinary case number BTC 18-09-0143. *Wertz v. Brown*, No. 219CV00615JRSDLP, 2020 WL 6292708, at *2 (S.D. Ind. Oct. 27, 2020). The court concluded that there was a total absence of evidence showing a disturbance to facility order or that one or more persons participated in a disturbance to facility order caused by a group of two or more offenders. *Id.* at *4. It also found that Wertz’s conduct did not fit the Department of

² The State acknowledges that “[t]he trial court did mistakenly write in its order that Wertz’s sentence in this case was served consecutively to a term in another case.” Appellee’s Brief at 12 n.2.

Correction's own definition of rioting. *Id.* The court granted Wertz's petition and ordered that the warden file a notice of compliance affirming that he vacated the disciplinary conviction and restored Wertz's credit time within ten days of the court's order. *Id.* at *5.

[11] In light of the trial court's errors with respect to its finding that the sentences under Cause Nos. 51 and 50 were ordered consecutively and its reliance on a disciplinary report of rioting, which was vacated by the United States District Court for the Southern District of Indiana, we reverse the trial court and remand for the trial court to hold another hearing to determine the merits of Wertz's petition for modification of sentence.

[12] For the foregoing reasons, we grant Wertz's petition for rehearing, vacate our decision of April 29, 2022, and remand for the trial court to hold another hearing to determine the merits of his petition for modification of sentence.

[13] Reversed and remanded.

Mathias, J. concurs.

Molter, J., dissents with opinion.

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Molter, Judge, dissenting.

Because I do not believe Wertz has demonstrated rehearing is warranted or that extraordinarily compelling reasons warrant restoring his forfeited appeal, I respectfully dissent. *See Cooper’s Hawk Indianapolis, LLC v. Ray*, 162 N.E.3d 1097, 1098 (Ind. 2021) (per curiam) (“To reinstate a forfeited appeal, an appellant must show that there are ‘extraordinarily compelling reasons why this forfeited right should be restored.’” (quoting *In re Adoption of O.R.*, 16 N.E.3d 965, 970 (Ind. 2014))).