MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

William O. Herman,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 28, 2023

Court of Appeals Case No. 22A-CR-2356

Appeal from the Elkhart Superior Court

The Honorable Kristine A. Osterday, Judge

Trial Court Cause No. 20D01-1006-MR-1

Memorandum Decision by Judge Mathias
Judges Crone and Brown concur.

Mathias, Judge.

[1] William O. Herman appeals the trial court's denial of his petition to file a belated notice of direct appeal. In his petition, Herman sought to challenge via direct appeal his sentence following his guilty plea. However, in various post-conviction petitions across four decades following his guilty plea, Herman presented multiple challenges to his sentence. We therefore conclude that Herman's petition did not state on its face an issue that was currently available to him, and we affirm the trial court's denial of his petition.

Facts and Procedural History

[2] In 1974, Herman pleaded guilty across two cause numbers to two counts of second-degree murder. Herman's plea agreement left sentencing in the trial court's discretion, and, in January 1975, the court sentenced Herman to concurrent terms of life in prison. There is no dispute in the instant appeal that neither the trial court nor Herman's counsel advised Herman of his right to appeal his sentence via direct appeal, and Herman did not pursue a direct appeal.

[3] Instead, over the next forty years, Herman filed three separate petitions for post-conviction relief. Herman's first petition for post-conviction relief sought, among other things, to challenge the trial court's exercise of discretion in sentencing him. On transfer, our Supreme Court held that the post-conviction court did not err when it declined to grant Herman relief on that and his other claims. *See* *Herman v. State*, 395 N.E.2d 249, 252-53 (Ind. 1979) (*Herman I*). On appeal from the denial of his second petition, our Supreme Court held, among other things, that Herman had failed to carry his burden to show that he had

not voluntarily and intelligently entered into his plea agreement based on the trial court's failure to advise him properly. *See Herman v. State*, 526 N.E.2d 1183, 1184-85 (Ind. 1988) (*Herman II*). And, on appeal from the denial of his third petition, we held that the post-conviction court did not err in denying Herman sentencing relief on his theory that two murders were an episode of criminal conduct or on his other sentencing arguments. *See Herman v. State*, No. 20A03-0509-PC-428, 2006 WL 3437807, at *2 (Ind. Ct. App. Nov. 30, 2006), *trans. denied* (*Herman III*).

[4] In August 2022, Herman filed his petition with the trial court to file a belated direct appeal of his sentence. In his verified petition, Herman stated that he had only "recently" learned that he had the right to a direct appeal to challenge his sentence and that he "had no prior knowledge" of that right. Appellant's App. Vol. 2, pp. 33-34. Fifteen days later, the trial court denied Herman's petition on the ground that he "has not been diligent" in seeking a direct appeal. *Id.* at 40. The court added that it read Herman's petition to seek to challenge the effectiveness of his trial counsel and whether his guilty plea had been entered into knowingly and voluntarily, issues which Herman had had adjudicated across his three petitions for post-conviction relief. This appeal ensued.

Standard of Review

[5] Where, as here, the trial court did not conduct a hearing on a petition to file a belated notice of appeal, we review the trial court's decision to deny the petition de novo. *Bosley v. State*, 871 N.E.2d 999, 1002 (Ind. Ct. App. 2007). Further,

because the trial court denied Herman's petition prior to the State being able to respond to it, the only assertions or evidence presented to the trial court were Herman's own verified statements in his petition. Thus, the posture of the instant appeal is analogous to an appeal from the dismissal of a complaint under Indiana Trial Rule 12(B)(6). A Trial Rule 12(B)(6) motion tests the legal sufficiency of the plaintiff's claim, not the facts supporting it. *Payne-Elliott v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 193 N.E.3d 1009, 1013 (Ind. 2022). Dismissal under Trial Rule 12(B)(6) is not proper "unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief." *Id.* (quotation marks omitted).

Herman's petition sought to challenge his sentence, which he has already challenged across multiple petitions for post-conviction relief.

[6] Herman's petition to file a belated notice of appeal sought relief under Indiana Post-Conviction Rule 2(1)(a), which provides:

> An eligible defendant 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 if[:]
>
> (1) the defendant failed to file a timely notice of appeal;
>
> (2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

> (3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

[7] We agree with the State that Herman's attempt to challenge his sentence on direct appeal is precluded by the issues he raised in his petitions for post-conviction relief.[1] Res judicata precludes a party from raising in a subsequent proceeding an issue that was raised or could have been raised in a prior proceeding. *See Ford v. State*, 755 N.E.2d 1138, 1145 (Ind. Ct. App. 2001), *trans. denied*. As we have repeatedly noted:

> The purpose of the post-conviction relief process is to raise issues not known at the time of the original trial and appeal or for some reason not available to the defendant at that time. Our rules of post-conviction procedure require all grounds for relief available to a petitioner be raised in the original petition. The rationales underlying the rule are apparent: controversies must eventually cease (the principle of finality), and judicial resources, being scarce, must not be squandered. From these two requirements arise the legal concepts of waiver and res judicata.

Id. (quotations omitted). Thus:

> Issues previously decided adversely to a petitioner's position are res judicata and not subject to further examination. It is imperative to an orderly judicial system that, at some point, controversies end. Additionally, in a normal civil action, the claim preclusion branch of res judicata bars the relitigation of

[1] Herman is correct that the trial court misstated the issues Herman sought to raise in his petition to file a belated notice of appeal. But the trial court's misstatements are not relevant under our de novo standard of review.

> both those issues raised and those which should have been raised. Post-conviction actions, of course, are not normal civil actions, but nevertheless a petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error.

Id. (quotations omitted).

[8] Herman has already challenged his sentence across multiple post-conviction petitions. In *Herman I*, he challenged the trial court's exercise of discretion in sentencing him, but our Supreme Court affirmed the post-conviction court's denial of that challenge. 395 N.E.2d at 252-53. Similarly, in *Herman III*, he challenged his sentence as contrary to law, but we also affirmed the post-conviction court's denial of relief on those issues. 2006 WL 3437807, at *2. Further, in *Herman II*, Herman challenged the trial court's failure to advise him properly, which is also within the merits of his petition to file a belated notice of appeal. *See* 526 N.E.2d at 1184-85.

[9] Thus, we conclude that Herman's petition to file a belated notice of appeal simply seeks to once again challenge issues that he has already challenged and lost on. We agree with the trial court that Herman is not permitted to do so by way of a belated notice of direct appeal, and we therefore affirm the trial court's denial of his petition.

[10] Affirmed.

Crone, J., and Brown, J., concur.