

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

John Russell Pryor,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff/Cross-Appellant.

April 27, 2022

Court of Appeals Case No.
21A-CR-625

Appeal from the Shelby Superior
Court

The Honorable R. Kent Apsley,
Judge

Trial Court Cause No.
73D01-2002-F5-17

Weissmann, Judge.

[1] John Pryor appeals his convictions for Level 5 felony burglary, Level 6 felony theft, and Class B misdemeanor unauthorized entry of a motor vehicle. He argues that the evidence adduced at trial was insufficient to support his convictions and that his sentence is inappropriate under Indiana Appellate Rule 7(B). The State cross-appeals, arguing that Pryor's appeal should be dismissed as untimely under Indiana Appellate Rule 9(A) and that Pryor failed to follow the requirements for a belated notice of appeal under Indiana Post-Conviction Rule 2. We agree with the State and dismiss without prejudice.

Facts

[2] A jury convicted Pryor of Level 5 felony burglary, Class A misdemeanor theft, and Class B misdemeanor unauthorized entry of a motor vehicle, after which the trial court sentenced him to a total of four years imprisonment and one year probation. Three days later, on December 10, 2020, Pryor submitted a pro se request to overturn the jury verdict and to correct errors. The trial court deemed this request to be a motion to correct error and entered it as such in the chronological case summary. There was never a hearing on the motion.

[3] On March 11, 2021, Pryor, now represented by counsel, filed a motion to withdraw his motion to correct error that the trial court granted. Then, on April 12, 2021, Pryor filed his notice of appeal. The State filed a motion to dismiss, which this court's motions panel denied. On appeal, Pryor argues that the evidence at trial was insufficient to sustain his conviction and that his sentence is inappropriate under Indiana Appellate Rule 7(B). The State, on cross-appeal,

argues that Pryor’s appeal should be dismissed as untimely because he failed to comply with the requirements for a belated appeal. Post-Conviction Rule 2.

Discussion and Decision

[4] We find the State’s cross-appeal dispositive. Indiana Appellate Rule 9(A)(1) governs appeals from final judgments, stating:

[I]f 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.

App. R. 9(A)(1). A motion to correct error is deemed denied when “a court fails for forty-five (45) days to set a Motion to Correct Error for hearing” after the motion was filed. Trial Rule 53.3(A).

[5] Here, the trial court entered Pryor’s motion to correct error in the chronological case summary on December 10, 2020. The trial court did not conduct a hearing on Pryor’s motion within forty-five days, so it was deemed denied as a matter of law on January 24, 2021. Pryor’s notice of appeal was due thirty days later, on February 23. Instead, Pryor filed his notice of appeal seventy-eight days later, on April 12, which is untimely.

[6] Pryor seems to suggest that the thirty-day countdown under Appellate Rule 9(A)(1) began running on March 11, when the trial court granted Pryor’s motion to withdraw his motion to correct error. But Pryor points us to no legal

authority to support his argument and does not explain how this argument accounts for Rule 9(A)(1)'s clear requirement that "a Notice of Appeal must be filed . . . thirty (30) days after the motion [to correct errors] is deemed denied under Trial Rule 53.3." App. R. 9(A)(1). A criminal defendant's untimely notice of appeal typically results in the forfeiture of the right to appeal unless the defendant complies with Post-Conviction Rule 2. App. R. 9(A)(5) ("Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited excepted as provided by P.C.R. 2").

- [7] Eligible criminal defendants wishing to pursue a belated appeal must utilize Post-Conviction Rule 2 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.

- [8] Pryor does not address the requirements of Post-Conviction Rule 2, and he has not requested the trial court's permission to file a belated notice of appeal under its provisions. Though Pryor filed his motion to correct error pro se, "[p]ro se litigants without legal training are held to the same standard as trained counsel." *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004). Even after

acquiring counsel, Pryor never requested permission to file a belated notice of appeal pursuant to Post-Conviction Rule 2. Because Pryor failed to use the proper legal mechanism to file his belated notice of appeal, we agree with the State that this appeal should be dismissed.

[9] In reaching this conclusion, we recognize that we are reconsidering the motions panel’s order permitting Pryor’s appeal to proceed. “It is well established that we may reconsider a ruling by the motions panel.” *Core v. State*, 122 N.E.3d 974, 976-77 (Ind. Ct. App. 2019) (quoting *Treacy v. State*, 953 N.E.2d 634, 636 n.2 (Ind. Ct. App. 2011)). Although we are hesitant to overrule orders decided by our motions panel, we have “inherent authority to reconsider any [motions panel] decision” while an appeal remains pending. *Id.*¹

[10] In sum, because Pryor’s notice of appeal is untimely and he failed to follow the requirements for filing a belated notice of appeal under Post-Conviction Rule 2, his appeal is dismissed without prejudice.²

Najam, J., and Vaidik, J., concur.

¹ Our motions panel relied on *In re Adoption of O.R.*, 16 N.E.3d 965 (Ind. 2014), in allowing Pryor’s untimely appeal. But that case does not apply to untimely criminal appeals which are governed by Post-Conviction Rule 2. See *Sanford v. State*, 54 N.E.3d 373, 378 (Ind. Ct. App. 2016).

² Because dismissal without prejudice is appropriate for failing to timely file a notice of appeal, we decline to address Pryor’s arguments regarding the sufficiency of the evidence and the appropriateness of his sentence under Indiana Appellate Rule 7(B).