

## 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

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Gary Dawayne Amick,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

June 28, 2021

Court of Appeals Case No.  
20A-CR-2253

Appeal from the  
Bartholomew Superior Court

The Honorable  
James D. Worton, Judge

Trial Court Cause No.  
03D01-1512-F5-6062

### **Kirsch, Judge.**

After Gary Dawayne Amick (“Amick”) admitted he violated the terms of his probation, the trial court ordered Amick to serve the remainder of his sentence

in the Indiana Department of Correction (“DOC”). Amick initiated this appeal with a belated notice of appeal and raises two issues. However, the State raises the following dispositive issue on cross-appeal: whether Amick’s appeal should be dismissed because the trial court had no authority to let Amick initiate this appeal with a belated notice of appeal.

[1] We dismiss.

### **Facts and Procedural History**

[2] On December 20, 2013, Amick was arrested in Scott County for Class A felony dealing in methamphetamine, Class C felony dealing in a Schedule IV controlled substance, Class D felony dealing in marijuana, and Class D felony maintaining a common nuisance under cause number 72C01-1405-FA-7. *Appellant’s App. Vol. 2* at 33. According to the Odyssey case management system, on October 1, 2014, Amick was released on bond.

[3] On November 12, 2015, an officer from the Bartholomew County Sheriff’s Department stopped Amick’s vehicle after Amick disregarded a red light. *Appellant’s App. Vol. 2* at 23. While he was collecting Amick’s information, the officer learned that Amick’s passenger had an outstanding warrant for his arrest, so the officer asked for and obtained permission from Amick to search his car. *Appellant’s App. Vol. 3* at 23-24. The officer found a handgun in the panel beneath the steering wheel and, a few minutes later, was informed by dispatch that Amick did not have a permit to carry a handgun and that he had been convicted of a firearm offense. *Id.* That same day, the State charged

Amick with Level 5 felony carrying a handgun without a license. *Id.* at 21. On December 1, 2015, Amick was released on bond. *Id.* at 2.

[4] On December 10, 2015, just nine days after bonding out of the Bartholomew County jail, Amick was arrested in Scott County and charged with two counts of Level 5 felony intimidation, two counts of Level 6 felony pointing a firearm, and one count of Level 6 felony criminal recklessness under cause number 72C01-1512-F5-63. *Id.* at 24-25. On February 2, 2016, the State amended the charging information with several additional offenses, including Level 3 felony aggravated battery for allegedly shooting another person. *Id.* at 26-28.

[5] On August 15, 2016, Amick pleaded guilty to Class C felony dealing in a Schedule IV controlled substance and to Level 5 felony carrying a handgun without a license in Scott County. *Appellant's App. Vol. 2* at 33; *Appellant's App. Vol. 3* at 30-31. On September 12, 2016, the trial court sentenced Amick to DOC for four years each on each offense and ordered the sentences to be served consecutively. *Appellant's App. Vol. 2* at 33; *Appellant's App. Vol. 3* at 30.

[6] As to the Bartholomew County charge, on January 9, 2017, Amick agreed to plead guilty to Level 5 felony carrying a handgun without a license, and on February 21, 2017, the trial court accepted the plea agreement and sentenced Amick to four years in DOC. *Appellant's App. Vol. 2* at 25-28. The trial court ordered Amick to serve this sentence consecutively to his sentence for dealing in a controlled substance in Scott County, but the trial court's order was silent

as to whether the sentence should run consecutively or concurrently to his Scott County sentence for carrying a handgun without a license. *Id.*

[7] On January 18, 2020, Amick filed a motion to modify his Bartholomew County sentence. *Id.* at 37-45. The trial court initially granted the motion but placed a temporary hold on the modification order because of the coronavirus outbreak; on April 3, 2020, the trial court lifted the hold on its modification order and allowed Amick to participate in Bartholomew County Community Corrections for the remainder of his sentence. *Id.* at 56-57, 71-72.

[8] On July 24, 2020, Amick tested positive for fentanyl, and on August 7, 2020, the State filed a verified petition to revoke Amick's probation, citing, *inter alia*, the positive fentanyl test. *Appellant's App. Vol. 3* at 2. At a September 23, 2020 hearing, Amick admitted that he had violated the terms of his probation. *Tr. Vol. II* at 2, 6. Before imposing a sanction, the trial court asked the parties to submit briefs on Amick's credit time. *Id.* at 22. Because Amick's four-year sentence in this case had been ordered to be served consecutively to his four-year sentence for dealing in a controlled substance but not to his four-year sentence for carrying a handgun without a license, Amick argued that he had served the four-year sentence imposed in this case concurrently with his four-year sentence for carrying a handgun without a license. *Appellant's App. Vol. 3* at 35-37. The State disagreed and argued that Amick's sentence in this case was required to be served consecutively by operation of law because Amick committed the offenses in Scott County while he was released on bond. *Id.* at 16-17. On October 7, 2020, the trial court agreed with the State's argument and

revoked the balance of Amick's Bartholomew County sentence to DOC. *Tr. Vol. II* at 27-28.

- [9] On November 24, 2020, Amick filed a pro se motion for belated notice of appeal. *Appellant's App. Vol. 2* at 19. On November 25, 2020, the trial court granted Amick's motion, and according to the Odyssey case management system, Amick filed his belated notice of appeal on December 7, 2020. *Id.* Amick now appeals.

### **Discussion and Decision**

- [10] Amick argues the trial court abused its discretion in ordering him to serve the remainder of his sentence in DOC consecutively<sup>1</sup> to his Scott County sentences and that his sentence is inappropriate.<sup>2</sup> The State cross-appeals, arguing that belated appeals from an order revoking probation are not available under Post-Conviction Rule 2. Amick does not respond to the State's cross-appeal.

- [11] Post-Conviction Rule 2 provides:

*Eligible defendant defined.* An "eligible defendant" for purposes of this Rule is a defendant who, but for the defendant's failure to do so timely, would have the right to challenge on direct appeal a

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<sup>1</sup> Because Amick's second and third offenses were committed while he was released on bond, all of his sentences were required to be served consecutively as a matter of law. *See* Ind. Code § 35-50-1-2(e)(2)(B); *Jones v. State*, 775 N.E.2d 322, 332 (Ind. Ct. App. 2002).

<sup>2</sup> Sentencing decisions for probation violations are reviewed for an abuse of discretion, not whether the sentence is inappropriate under Indiana Appellate Rule 7(B). *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007).

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.

- [12] The sanction imposed when probation is revoked does not qualify as a “sentence” under Post-Conviction Rule 2. Specifically, in *Dawson v. State*, 943 N.E.2d 1281 (Ind. 2011), our Supreme Court explained:

The Court of Appeals correctly decided that belated appeals from orders revoking probation are not presently available pursuant to Post-Conviction Rule 2. We agree with the Court of Appeals’ analysis that the sanction imposed when probation is revoked does not qualify as a “sentence” under the Rule, and therefore Dawson is not an “eligible defendant.”

*Id.* at 1281. Amick, likewise, is appealing a sentence imposed after his probation was revoked, so he is not an “eligible defendant.” Because belated appeals from orders revoking probation are not available under Post-Conviction Rule 2, this matter is not properly before us because Amick’s notice of appeal was untimely.

- [13] Dismissed.

Altice, J., and Weissmann, J., concur.