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**IN THE
COURT OF APPEALS OF INDIANA**

AARON ISBY,)
)
 Appellant-Petitioner,)
)
 vs.) No. 77A01-0806-CV-281
)
 ALAN FINNAN, SUPT.,)
)
 Appellee-Respondent.)

APPEAL FROM THE SULLIVAN SUPERIOR COURT
The Honorable Thomas E. Johnson, Judge
The Honorable Ann Smith Mischler, Magistrate
Cause No. 77D01-0711-MI-377

May 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Aaron (Israel) Isby appeals the denial of his Trial Rule 60(B) motion for relief from judgment. We affirm.

FACTS AND PROCEDURAL HISTORY

On November 27, 2007, Isby filed a petition for writ of habeas corpus asserting he was entitled to release because, as of August 16, 2003, he finished serving his thirty-year sentence imposed in Cause No. 02D04-8808-CF-404 for Class A felony aiding, inducing or causing robbery. Isby attached thereto only the original abstract of judgment indicating the length of his sentence. (*See App.* at 43-46.)

On December 6, 2007, the court dismissed his petition with prejudice under Ind. Code § 34-58-1-1¹ after finding the claim had no arguable basis in law:

The Court has examined Petitioner’s Complaint in accordance with I.C. 34-58-1-1, and has determined that the claim is frivolous in that it does not have an arguable basis in the law and does not state a claim upon which relief may be granted for the following reason:

1. The Petitioner having filed a VERIFIED PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM, and the Court having reviewed the same and the Offender Data as evidenced on the Indiana Department Of Correction website, now finds that Petitioner’s pleading only references that he is serving a sentence under Cause No. 02D04-8804-CF-404 which should have expired as of August 16, 2003. However, according to the Offender Data report, the Petitioner fails to mention in his pleadings that he is serving a sentence for charges of Attempted Murder and Battery under Cause No. 48C01-9011-CF-139 with a projected release date of 02/25/2029. A copy of the Offender Data report

¹ “Upon receipt of a complaint or petition filed by an offender, the court shall docket the case and take no further action until the court has conducted the review required by section 2 of this chapter.” Ind. Code § 34-58-1-1. Under section 2, the court is to review an offender’s petition to determine whether the claim may proceed. A claim may not proceed if it is frivolous, “is not a claim upon which relief may be granted,” or seeks damages from an immune defendant. Ind. Code § 34-58-1-2(a). A frivolous claim is one “made primarily to harass a person,” or lacking “an arguable basis either in” fact or law. Ind. Code § 34-58-1-2(b).

is attached to this Order.

Based on the following, the Petitioner is not entitled to immediate release from custody, and as such, the filing of a Petition For Writ Of Habeas Corpus failing to advise the Court of his current reason for confinement is not only frivolous but a waste of judicial economy.

The matter is dismissed with prejudice pursuant to I.C. 34-58-1-1.

(Id. at 41.)

On December 13, 2007, Isby moved pursuant to Trial Rule 59 for the court to alter, amend, or vacate its order. Isby alleged the court had no authority to undertake its own investigation into the underlying facts of the case and erroneously dismissed his case with prejudice without permitting him an opportunity to amend his petition. The court denied that motion five days later. On March 14, 2008, the court entered an order nearly identical to the order of December 6, 2007, in which it again dismissed Isby's motion with prejudice.

On May 17, 2008, Isby moved pursuant to Trial Rule 60(B)(8) for the court to vacate its judgments of December 6, 2007, and March 14, 2008. He also requested the court consider his amended writ of habeas corpus to avoid a "fundamental miscarriage of Justice." *(Id. at 35.)* On May 21, 2008, the trial court denied that motion:

The Final Order in this cause was issued on December 6, 2007; and no appeal was taken within thirty (30) days of said Order. In the interest of judicial economy, this matter remains removed from the active docket. The Clerk of this Court will accept no further pleadings due to this cause having been removed from the active docket.

(Id. at 6.)

On May 29, 2008, Isby filed notice he was appealing the denial of his petition for writ of habeas corpus. However, his attached documents indicated the final judgment as to the writ was entered December 6, 2007. Accordingly, on July 10, 2008, we ordered Isby to show cause why his appeal should not be dismissed as untimely. Order, Cause No. 77A01-0806-CV-281 (Ind. Ct. App. July 10, 2008). Isby explained he was appealing the trial court's denial of his Trial Rule 60(B) motion to set aside the court's judgment of December 6, 2007. We ordered Isby's appeal could proceed "limited solely to the question of whether the trial court erred when [it] denied Appellant's May 19, 2008 Motion to Vacate Order and/or Judgment." Order at 2, Cause No. 77A01-0806-CV-281 (Ind. Ct. App. Aug. 6, 2008).

DISCUSSION AND DECISION

Before addressing whether the trial court abused its discretion in denying Isby's Trial Rule 60(B) motion for relief from judgment, we address two procedural matters Isby raises.

First, Isby asserts our order limiting the issues he could raise on appeal violated his constitutional right to petition for habeas corpus relief. *See* Ind. Const. Art. 1, § 27 ("The privilege of the writ of Habeas Corpus shall not be suspended, except in case of rebellion or invasion; and then, only if the public safety demand it."); U.S. Const. Art. 1 § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). The order did not violate these provisions.

In *Shoemaker v. Dowd*, 232 Ind. 602, 612, 115 N.E.2d 443, 448 (1953), our Indiana Supreme Court held: “[W]e do not believe that the right conferred under [Art. 1, § 27] . . . carries with it an unlimited permit to abuse the right, nor does it extend so far as to force an abandonment of all respect for final judgments and consideration for legal and orderly procedure.”

Isby did not file a Notice of Appeal from the trial court’s judgment of December 6, 2007. “Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2.” Ind. Appellate Rule 9(A)(5). Accordingly, it was not our ruling, but Isby’s failure to bring a timely appeal that denied him the right to challenge directly the dismissal of his first petition for writ of habeas corpus.

Isby’s brief also argues the trial court erred when it denied his amended petition for writ of habeas corpus, which he filed the same day as his T.R. 60(B) motion. Our order informed Isby that we would address only the denial of his T.R. 60(B) motion for relief from judgment, and we decline to modify our earlier decision. Isby need not be permitted to litigate simultaneously multiple petitions requesting the same relief. *See Shoemaker*, 232 Ind. at 612, 115 N.E.2d at 448.

Having resolved those procedural issues, we turn to Isby’s arguments regarding the denial of his motion for relief from judgment.²

² Isby asserts the court should not have denied his T.R. 60(B) motion without first holding the hearing provided by Trial Rule 60(D). “In passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule.” Trial Rule 60(D). We have held a trial court “should have set” a motion for hearing where “triable issues of

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:

* * * * *

(8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or for fraud upon the court.

T.R. 60(B).

Whether to grant or deny a T.R. 60(B) motion is left to the equitable discretion of the trial court. *Levin v. Levin*, 645 N.E.2d 601, 604 (Ind. 1994). Thus, we review the trial court's decision only for an abuse of discretion. *Id.* As we conduct our review, we may not reweigh the evidence. *Id.* Isby had the burden to show he was entitled to relief from the judgment. *See id.* ("The burden is on the movant to demonstrate that relief is both necessary and just."). When a motion is based on sub-paragraph 8 of that rule, relief may be granted "only in exceptional circumstances." *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 558 (Ind. Ct. App. 1999), *trans. denied* 726 N.E.2d 310 (Ind. 1999), *cert. denied* 529 U.S. 1021 (2000).

In his motion for relief from judgment, Isby raised five cogent arguments: (1) The statute under which the court dismissed his pro se writ of habeas corpus, Ind. Code § 34-

fact and a redressable claim were raised" by a petition for relief. *In re Paternity of R.C.*, 587 N.E.2d 153, 156 (Ind. Ct. App. 1992). Accordingly, Isby's right to a hearing depends on whether his petition raised issues of fact that might justify relief from the trial court's initial denial of his writ for habeas corpus.

58-1-1, “was not created by the Indiana legislature to apply to writ of Habeas Corpus,” (Appellant’s App. at 35); (2) The trial court had jurisdiction to hear his writ “challenging arbitrary denial of good-time credits, resulting in an arbitrary lengthening of his period of imprisonment,” (Id. at 36); (3) If the court had allowed Isby to produce more evidence, he would have demonstrated he was entitled to immediate release; (4) The court relied on unauthenticated and uncertified documents, which violates I.C. § 34-37-1-8; and (5) The court could not dismiss his writ without accepting additional evidence.

All of Isby’s grounds for relief could and should have been raised on direct appeal from either the denial of his petition for writ of habeas corpus or from the denial of his timely motion to correct error. “T.R. 60(B) is not a substitute for a belated appeal, nor can it be used to revive an expired attempt to appeal.” *Bolden v. State*, 736 N.E.2d 1260, 1261 (Ind. Ct. App. 2000) (quoting *Masterson v. State*, 511 N.E.2d 499, 500 (Ind. Ct. App. 1987)). Neither should we allow T.R. 60(B) to create “avenues of escape” from our “overriding policy that judgments must become final at a fixed, visible, and predictable point.” *Masterson*, 511 N.E.2d at 500. Isby has not alleged any exceptional or extraordinary circumstances that justify application of T.R. 60(B)(8). Accordingly, the trial court did not abuse its discretion when it denied Isby’s motion. *See Bolden*, 736 N.E.2d at 1261 (holding State’s motion for relief should have been denied where issues could have been appealed in a timely manner and State alleged no exceptional circumstances).

Affirmed.

NAJAM, J., and ROBB, J., concur.