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IN THE
COURT OF APPEALS OF INDIANA

LAWRENCE RAY HOLLEY II,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-1005-PC-652
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0503-FA-6

August 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Lawrence Ray Holley II, *pro se*, appeals the post-conviction court's denial of his petition for post-conviction relief. Holley raises six issues.[1] We find one issue dispositive, which is whether Holley's appeal was untimely. We dismiss.

The relevant facts follow. In 2005, Holley was convicted of Count I, dealing in cocaine as a class A felony; Count II, possession of cocaine as a class A felony; Count III, possession of marijuana as a class A misdemeanor; and Count IV, possession of cocaine paraphernalia as a class A misdemeanor. Holley v. State, No. 79A02-0510-CR-966, slip op. at 4 (Ind. Ct. App. August 30, 2006). The trial court merged Count II, possession of cocaine, into Count I, dealing in cocaine, and sentenced Holley to forty years under Count I. Id. at 4-5. The court sentenced Holley to one year for each of his misdemeanor convictions, and ordered all sentences to be served concurrently. Id. at 5. On direct appeal, this court ordered that Holley's conviction for Count II, possession of cocaine, be vacated to avoid a double jeopardy violation and affirmed the remaining convictions. Id. at 6, 12.

On August 16, 2007, Holley filed a *pro se* verified petition for post-conviction relief. On October 1, 2007, a deputy public defender filed an appearance on behalf of Holley. On November 17, 2008, the deputy public defender filed a motion to withdraw,

[1] Specifically, Holley raises the following issues: (1) "[t]he trial court abused its discretion in not permitting the trial transcripts of record to be entered into evidence;" (2) "[t]he trial court abused its discretion in not granting Appellant a continuance, and denying Appellant Compulsory process;" (3) "[t]he trial court erred in denying Petitioner's ineffective assistance of trial and appellate counsel[];" (4) "[t]he trial court erred in denying Appellant's issue of newly discovered evidence;" (5) "[t]rial Court's Judgment is Erroneous;" and (6) "[t]he Trial Court Abused its Discretion in not admonishing the jury after 'opinion' evidence was entered at trial." Appellant's Brief at 1-2.

which the court granted on November 19, 2008. On November 19, 2008, Holley filed an amended petition for post-conviction relief.[2]

An entry in the chronological case summary ("CCS") dated October 26, 2009, states that the court "finds that [Holley] failed to meet his burden of proof and the Petition for Post Conviction Relief is denied." Appellant's Appendix at 6. On November 25, 2009, Holley filed a motion to correct errors.[3] That same day, the court ordered the State to respond to Holley's motion to correct errors within two weeks. After an enlargement of time, the State filed a response to Holley's motion. On January 19, 2010, the court granted Holley's motion in part and concluded that its failure to make findings of fact and conclusions of law was error. The court invited the parties to file proposed findings of fact and conclusions of law by March 8, 2010. On March 8, 2010, the State filed its proposed findings and conclusions.

On March 10, 2010, the court entered findings of fact and conclusions of law denying Holley's petition. On March 11, 2010, Holley filed a "Notice of Compliance, Petitioner's Verified Findings of Facts and Conclusions of Law, together with Motion for Leave to Amend Petition for Post-Conviction Relief." Appellant's Appendix at 4. On March 17, 2010, the court entered an order which stated: "[T]he Court does not agree with [Holley's] Verified Findings of Fact and Conclusions of Law and the Court

[2] The record does not contain a copy of Holley's original or amended petitions for post-conviction relief.

[3] The record does not contain a copy of Holley's motion to correct errors.

reaffirms the Findings of Fact and Conclusions of Law which were entered herein on March 10, 2010." Id. at B. The court also observed that Holley's motion for leave to amend his petition was unsigned and denied the motion. On April 21, 2010, Holley filed a motion to correct error.[4] On April 22, 2010, the court denied Holley's motion.[5] On May 20, 2010, Holley filed a notice of appeal alleging that he was appealing the "final judgment entered by the Tippecanoe Circuit Court, on April 22, 2010." Notice of Appeal.

The dispositive issue is whether Holley's appeal was untimely. The post-conviction court's March 10, 2010 order denying Holley's petition constituted a final judgment. See Post-Conviction Rule 1(6) ("The court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held. . . . This order is a final judgment."). "An appeal may be taken by the petitioner or the State from the final judgment in this proceeding, under rules applicable to civil actions." Ind. Post-Conviction Rule 1(7).

Indiana Trial Rule 59(C) and Ind. Appellate Rule 9(A)(1) required Holley to either file a motion to correct error or a notice of appeal within thirty days of the court's March 10, 2010 order.[6] Holley did not do so. Even if we were to assume that the order dated

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[4] The Appellant's Appendix does not contain a copy of this motion. However, we located the motion attached to the Appellant's Case Summary.

[5] A CCS entry dated April 22, 2010, indicates that Holley filed a motion to correct errors. The record does not contain a copy of any motion to correct errors filed on April 22, 2010.

[6] Ind. Trial Rule 59 provides that "[t]he motion to correct error, if any, shall be filed not later than

March 17, 2010, in which the court indicated that it did not agree with Holley's findings of fact and conclusions of law and reaffirmed the findings of fact and conclusions of law entered on March 10, 2010, constituted a final judgment, Holley's motion to correct error filed on April 21, 2010 was untimely.[7]

Ind. Appellate Rule 9(A)(5) provides that "[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by [Post-Conviction Rule 2]," which is not applicable in the present case. See Greer v. State, 685 N.E.2d 700, 702 (Ind. 1997) (holding that Post-Conviction Rule 2 was a vehicle for belated direct appeals

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thirty (30) days after the entry of a final judgment is noted in the Chronological Case Summary."

Ind. Appellate Rule 9(A)(1) provides in part: "A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary. However, if 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."

[7] Thirty days after March 17, 2010, is April 16, 2010. Holley's motion to correct error filed on April 21, 2010, contains the following statement: "I, Lawrence Ray Holley II, do hereby certify that the foregoing Motion and accompanying Affidavit have been mailed via the Mailbox Rule to CDPA Kristen McVey, 23rd Judicial District Courthouse; 301 Main Street, Lafayette, Indiana 57901 by First Class pre-paid United States Mail on this the 16th day of April, 2010." April 21, 2010 Motion to Correct Errors at 15. "The principle of the mailbox rule has been applied under [Ind. Trial] Rule 5 only when the court is satisfied that the prisoner had employed certified mail, return receipt requested, and deposited his mailing in the institutional mail pouch by or before the filing deadline, notwithstanding the fact that the postmark reflected a date after the deadline." Dowell v. State, 922 N.E.2d 605, 609 (Ind. 2010). Holley does not direct our attention to any evidence and Holley's motion to correct error does not allege that he transmitted his motion to correct error "by an independently verifiable means (like registered mail or third-party carrier)," which would have resulted in the filing being "deemed to have occurred upon mailing or deposit." Id.; see also Ind. Trial Rule 5(F). Because Holley merely alleged that he mailed his motion to correct error via "First Class pre-paid United States Mail" on April 16, 2010, we conclude that the trial court clerk appropriately date-stamped the motion on the day it arrived in the clerk's office, April 21, 2010, five days after the filing deadline. See id. (observing that the appellant "used regular mail, perhaps tendering it on the last possible day," concluding that "[t]he trial court clerk thus appropriately date-stamped it on the day when it arrived in the clerk's office, two days after the filing deadline," and dismissing the appellant's appeal because "[w]hen a motion to correct error is not timely filed, the right to appeal is not preserved").

alone and "provides a method for seeking permission for belated consideration of appeals addressing conviction, but does not permit belated consideration of appeals of other post-judgment petitions"); Taylor v. State, 939 N.E.2d 1132, 1135 (Ind. Ct. App. 2011) (holding that the petitioner could not use Post-Conviction Rule 2(1) "as a vehicle for filing a belated notice of appeal from his post-conviction relief proceeding"). Accordingly, we dismiss Holley's appeal. See Dowell v. State, 922 N.E.2d 605, 609-610 (Ind. 2010) (holding that "[w]hen a motion to correct error is not timely filed, the right to appeal is not preserved," and dismissing the appeal); Strowmatt v. State, 779 N.E.2d 971, 975 (Ind. Ct. App. 2002) (holding that the petitioner forfeited his right to appeal the denial of his petition of post-conviction relief where the notice of appeal was not filed within thirty days of the denial).

For the foregoing reasons, we dismiss Holley's appeal.

Dismissed.

FRIEDLANDER, J., and BAILEY, J., concur.