

James Griffith, pro se, appeals the denial of his petition for post-conviction relief.

Griffith presents two issues for our review, which we restate as:

1. Is Griffith's sentence erroneous?
2. Was Griffith denied effective assistance of counsel?

On cross-appeal, the State argues that this appeal should be dismissed because Griffith failed to timely file his appellant's brief.

We affirm.

On June 9, 2006, Griffith and James Worthington broke into a Stor-A-Way storage facility in Huntington with the intent to steal property or to use the storage units to retain or dispose of stolen property. Griffith subsequently admitted to police that he broke into several units at the Stor-A-Way facility and two storage units at the Huntington Mini Warehouse and took personal property belonging to others without their permission and that he stored the stolen property in another unit at the Stor-A-Way facility. Griffith also admitted that between May 25 and June 9, 2006, he broke into three additional storage units located in Huntington County and stole property and other personal effects without permission or authority of the unit renters.

On June 26, 2006, under Cause No. 35C01-606-FC-00029, the State charged Griffith with two counts of class C felony burglary. On August 1, 2006, under Cause No. 35C01-0608-FC-00037, the State charged Griffith with three counts of class C felony burglary and alleged Griffith to be a habitual offender. On February 2, 2007, pursuant to a plea agreement, Griffith pleaded guilty but mentally ill to all charges under both cause numbers and admitted to being a habitual offender. Under the terms of the plea agreement, the State

agreed to concurrent sentencing on all five counts of burglary and to a cap of six years executed time on each of the burglary convictions and to a cap of four years executed time on the enhancement for the habitual offender determination. On March 5, 2007, the trial court accepted Griffith's guilty plea and sentenced him to concurrent six-year terms for each of the five class C felony burglaries. The trial court enhanced the sentence by four years based upon Griffith's status as a habitual offender, for a total executed sentence of ten years incarceration. The trial court gave Griffith credit for 205 days served in pre-sentence confinement.

On January 25, 2008, Griffith, pro se, filed a motion for modification of sentence, which the trial court denied. On August 5, 2008, Griffith filed a second motion for modification of his sentence, and again, the trial court denied his requested relief. On February 18, 2009, Griffith filed a petition for modification of his sentence from direct incarceration to community corrections. The trial court denied this motion as well.

On September 25, 2009, Griffith filed a pro se petition for post-conviction relief presenting as allegations of error that his sentence was "manifestly unreasonable" and that he received ineffective assistance of trial counsel.¹ *Appellant's Appendix* at 57. The State filed its answer on October 26, 2009. Griffith subsequently filed a pro se motion to submit the case by affidavit, which the post-conviction court granted. After the parties submitted affidavits and exhibits, the post-conviction court denied Griffith's petition for post-conviction relief in an order dated March 16, 2010.

¹ Griffith filed an addendum to his petition for post-conviction relief on January 25, 2010.

Griffith timely filed his notice of appeal on March 29, 2010. The notice of completion of clerk's record was filed with this court on April 20, 2010. On May 27, 2010, Griffith filed a motion to compel completion of clerk's record. On June 16, 2010, this court entered an order finding that the clerk's record had been filed on April 20 and thus concluding that Griffith's motion was moot. Griffith filed his brief of appellant and accompanying appendix on July 1, 2010, with service by mail on the Indiana Attorney General.

We first address the issue raised by the State. Indiana Appellate Rule 45(B)(1)(a) provides that the appellant's brief shall be filed no later than thirty days after the date the trial court clerk issues its notice of completion of the Clerk's Record. Failure to timely file the appellant's brief "may subject the appeal to summary dismissal." App. R. 45(D).

Here, the notice of completion of Clerk's Record was filed on April 20, 2010. Thus, Griffith's appellant's brief was due to be filed by May 20, 2010. *See* App. R. 45(B)(1)(a). Griffith, however, did not file his brief on or before that date. Rather, on May 27, 2010, Griffith filed a motion to compel completion of the Clerk's Record. In this court's order denying Griffith's motion to compel, it was noted that the notice was in fact filed with this court on April 20. In his reply brief, Griffith asserts that he never received service of the notice of completion of clerk's record and that he became aware that such had been filed upon receiving this court's order denying his motion to compel.

We first note that the notice of completion of Clerk's Record indicates that it was served upon all parties of record, one of whom was Griffith. If service was successful, Griffith's brief was due on or before May 20, i.e., thirty days from the filing of the notice of completion of Clerk's Record. *See* App. R. 45(B)(1)(a). Griffith did not file his appellant's

brief until July 1, 2010. Under these circumstances, Griffith's failure to file an appellant's brief subjects his appeal to dismissal.

If, however, the notice of completion of Clerk's Record was not properly served upon Griffith, the still appeal remains subject to dismissal. Ind. Appellate Rule 10(F) provides:

If the trial court clerk fails to issue, file, and serve a timely Notice of Completion of Clerk's Record, the appellant shall seek an order from the Court on Appeal compelling the trial court clerk . . . to complete the Clerk's Record and issue, file, and serve its Notice of Completion.

The Rule continues:

Failure of appellant to seek such an order not later than fifteen (15) days after the Notice of Completion of Clerk's Record was due to have been issued, filed, and served shall subject the appeal to dismissal.

App. R. 10(F).

Griffith properly noted in his motion to compel that the notice of completion of Clerk's Record was due to be filed on or before April 28, 2010. When, as Griffith claims, he did not receive the notice of completion of clerk's record by April 28, it was incumbent upon Griffith to seek an order from this court compelling the trial court clerk to complete the notice and issue, file, and serve its notice of completion. Pursuant to App. R. 10(F) Griffith had fifteen days from April 28 (i.e., until May 13, 2010) to file such request. Griffith, however, did not seek an order from this court until May 27, 2010. The State is therefore correct in asserting that Griffith's appellant's brief was untimely filed. Nevertheless, because we prefer to decide cases on their merits and because the State has not been prejudiced by the late filing, we choose to exercise our discretion and address the merits of Griffith's arguments. *See Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95 (Ind. Ct. App. 1995),

trans. denied.

1.

Griffith argues his sentence is “manifestly unreasonable” for several reasons. *Appellant’s Brief* at 1. As his first claim of error, Griffith asserts that the trial court failed to consider his mental illness as an aggravating factor and that his sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender. As his second claim of error, Griffith asserts that the court improperly considered dismissed charges when finding his criminal history to be a mitigating factor. As his third claim of error, Griffith maintains that the trial court failed to grant him credit-time for time spent in Tennessee on Tennessee charges while the Indiana hold on him was in effect. Finally, Griffith argues that the court erred in failing to grant him credit for pre-sentence incarceration in Tennessee (after the Tennessee charges were dropped) while extradition to Indiana was pending.

It is well settled that a defendant who enters into a plea agreement may only appeal the sentence imposed by direct appeal. *See Childress v. State*, 848 N.E.2d 1073 (Ind. 2006); *Collins v. State*, 817 N.E.2d 230 (Ind. 2004). Moreover, where the claim of sentencing error is known and available for review on direct appeal, a defendant is precluded from presenting the issue in a petition for post-conviction relief. *Collins v. State*, 817 N.E.2d 230. Here, Griffith makes no claim that the issues he presents were not available on direct appeal. Griffith has not directly appealed the sentence imposed upon him, nor has he sought permission to file a belated appeal pursuant to Post-Conviction Rule 2. Griffith is therefore precluded from raising his claims of sentencing error.

2.

Griffith argues that his counsel was ineffective because counsel failed to object when the trial court allegedly failed to grant him proper jail-time credit for the time he spent in jail in Tennessee. We have set out the standard for reviewing claims of ineffective assistance of counsel as follows:

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Failure to satisfy either prong will cause the claim to fail.

Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)) (internal citations omitted), *trans. denied*. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, and a defendant must present "strong and convincing" evidence to overcome this presumption. *Carr v. State*, 728 N.E.2d 125, 132 (Ind. 2000).

During the sentencing hearing, Griffith's counsel informed the court that Griffith should receive credit for 205 days of pre-sentence incarceration. As noted above, in its oral sentencing statement, the trial court expressly awarded Griffith credit for 205 days, that being for time served from August 11, 2006, the day the arrest warrants under each cause number were served on Griffith, through March 5, 2007, the date of sentencing. Griffith has failed to establish that this amount of time was improper or that his counsel misstated the amount of

credit time he was due. Griffith has not established that his counsel rendered deficient performance in this respect. We therefore conclude that Griffith has not met his burden of establishing that he received ineffective assistance of counsel.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.