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IN THE
COURT OF APPEALS OF INDIANA

TERRY G. SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0907-PC-635
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable David W. Hopper, Judge
Cause No. 48E01-0805-PC-191

November 2, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Terry Smith, pro se, appeals the post-conviction court's denial of his petition for post-conviction relief. Smith presents one issue for our review: did the post-conviction court err in concluding that Smith's trial counsel was not ineffective for failing to seek dismissal of the charges against Smith based upon a violation of Ind. Crim. Rule 4(C)?

Appeal dismissed.

Smith was arrested on February 20, 2000, in Madison County.[1] After his release, Smith was subsequently arrested in Delaware County on unrelated charges. Smith failed to appear at his pre-trial hearing in Madison Superior Court on May 23, 2000, and a warrant was issued for his arrest. Unbeknownst to the Madison Superior Court, Smith remained incarcerated in Delaware County.

On September 12, 2001, Smith's attorney filed a motion for trial setting with the Madison Superior Court. On March 5, 2002, Smith pleaded guilty pursuant to a plea agreement and was sentenced to thirty-six months, with six months executed and thirty months suspended to probation.[2] In September of 2007, while Smith was serving his probation in the Madison County case, he admitted to violating his probation. The Madison Superior Court revoked Smith's probation and ordered him to serve fifteen months of his previously suspended sentence with no return to probation.[3] On September 30, 2008, Smith, pro se, filed an amended verified petition for post-conviction relief alleging that his trial

[1] It is unclear from the record before us for what crime or crimes Smith was arrested.

[2] It appears that the sentence imposed by the Madison Superior Court was to be served consecutive to a sentence imposed in Delaware County.

[3] The record suggests that Smith would serve the fifteen-month sentence after he completed his sentence in Delaware County that he was scheduled to "finish up" in 2010. *Transcript* at 10.

counsel was ineffective for failing to file a motion for discharge based upon the State's failure to bring Smith to trial within one year as required by Crim. R. 4(C). On December 28, 2008, the State filed a motion for leave to file a belated answer along with its response to Smith's amended petition. The court granted the State's motion thereby allowing the State's belated filing of its response.

On January 7, 2009, the post-conviction court held an evidentiary hearing. At the hearing, Smith offered his own testimony but did not offer any other witnesses or move to admit the trial record or any other exhibits or documents to support his claim. On February 2, 2009, the post-conviction court entered its findings of fact and conclusions of law thereon denying Smith his requested relief. Specifically, the post-conviction court concluded that there was no Crim. R. 4(C) violation, and therefore, Smith's trial counsel did not render ineffective assistance by failing to move for discharge pursuant thereto. On February 20, 2009, Smith filed a motion for appointment of appellate counsel, which the trial court denied.

On March 20, 2009, Smith filed his pro se motion to reconsider. The post-conviction court denied the motion three days later. On March 30, 2009, Smith filed an addendum to his motion to reconsider. Smith filed the instant appeal on April 9, 2009.

On appeal, Smith argues that the post-conviction court erred in denying him relief on the ground that his trial counsel was ineffective for failing to object to or pursue dismissal of the charge(s) against him based on a violation of Crim. R. 4(C). In response, the State argues that Smith has forfeited his right to challenge the post-conviction court's order because he failed to timely file his notice of appeal. We agree with the State.

Ind. Appellate Rule 9, governing the initiation of an appeal, provides:

> 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. 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 . . . .

The courts of this state have repeatedly held that the timely filing of a notice of appeal (formerly, the praecipe) is jurisdictional and that an appeal is subject to dismissal if no notice was timely filed.[4] *See, e.g.*, *Davis v. State*, 771 N.E.2d 647 (Ind. 2002); *Greer v. State*, 685 N.E.2d 700 (Ind. 1997); *Hancock v. State*, 786 N.E.2d 1142 (Ind. Ct. App. 2003); *Glover v. State*, 684 N.E.2d 542 (Ind. Ct. App. 1997). Here, the post-conviction court entered its order denying Smith his requested relief on February 2, 2009. Smith did not file a notice of appeal until April 9, 2009, well after the thirty-day deadline had passed.[5] Because Smith failed to timely file a notice of appeal, he has forfeited his right to appeal.

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[4] The State notes that this issue is currently under review by our Supreme Court and draws our attention to *Cooper v. State*, 49S02-0904-CR-135. Our Supreme Court granted Appellee's petition for transfer from this court's decision in *Cooper v. State*, 894 N.E.2d 993 (Ind. Ct. App. 2008) (*Cooper I*). The Supreme Court heard oral argument in the matter on May 14, 2009. The majority in *Cooper I* rejected the State's argument that the defendant was barred from challenging his probation revocation because he failed to timely appeal the order. The majority found that this court has "'inherent discretionary power to entertain an appeal after the time allowed has expired'" in rare and exceptional cases, such as cases involving matters of great public interest. *Cooper I*, 894 N.E.2d at 995 (quoting *Lugar v. State ex. Rel. Lee*, 270 Ind. 45, 46-47, 383 N.E.2d 287, 289 (1978)) (Vaidik, J., concurring in result) (noting that the court should decide the merits of the defendant's appeal pursuant to P-C.R. 2 and not the exception relied upon by the majority for exercising the court's inherent power to entertain appeals that are procedurally time-barred in rare and exceptional circumstances). The majority held that revocation of probation without a hearing provided for due process purposes was a matter of great public interest.

Here, we do not find Smith's appeal to present a matter of great public interest and therefore, we decline to invoke this court's inherent discretionary power to entertain his belated appeal. *Cooper I* is therefore inapposite. Further, as explained in footnote 5, *infra*, P-C.R. 2 is not available to Smith as this is an appeal from the denial of post-conviction relief, not a direct appeal.

[5] App. R. 9(E) further provides. "Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by [Post-Conviction Rule] 2." In *Davis v. State*, 771 N.E.2d at 648, our Supreme Court noted that P-C.R. 2 is a "'vehicle for belated direct appeals alone.'" (quoting *Howard v. State*, 653 N.E.2d 1389, 1390 (Ind. 1995)). The Court concluded that P-C.R. 2 was therefore not applicable to an appeal

We summarily reject Smith's claim that his motion to the trial court requesting the appointment of appellate counsel (filed February 17) was sufficient notice to the court and the State of his intent to appeal the post-conviction court's adverse ruling and an adequate substitute for timely filing a notice of appeal. Smith cites no authority that directly supports his position.

Appeal dismissed.

BAKER, C.J., and RILEY, J., concur.

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from the denial of a motion to correct erroneous sentence as such motion is considered a petition for post-conviction relief. The Court thus held that the court of appeals was without authority to hear the defendant's belated appeal from the denial of his motion to correct erroneous sentence. Here, because Smith is seeking to appeal the denial of his petition for post-conviction relief in which he argued that he received ineffective assistance of counsel, a belated appeal pursuant to P-C.R. 2 is not available to him.