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ATTORNEY FOR APPELLANT:

JEFFREY L. SANFORD
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

PABLO G. MADRIGAL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 71A05-0903-CR-131
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Respondent.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0502-FA-12

November 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue[1]

Pablo Madrigal appeals the trial court's decision revoking his suspended sentence and placement in community corrections and ordering him to serve the remainder of his twenty-year sentence with the Department of Correction. For our review, Madrigal raises a single issue, whether the trial court abused its discretion when it ordered him to serve the remainder of his sentence with the Department of Correction. Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

In 2005, Madrigal pled guilty to one count of possession of over three grams of cocaine with the intent to deliver, a Class A felony.[2] On August 1, 2006, the trial court sentenced Madrigal to twenty years with fifteen years suspended and five years served on home detention followed by two years of probation. St. Joseph County Community Corrections ("SJCCC") monitored Madrigal's home detention.

On March 28, 2007, SJCCC, on behalf of Madrigal, petitioned the trial court to modify Madrigal's placement because he had accumulated sufficient points under SJCCC's system to be moved to a less-restricted level of supervision. SJCCC informed the trial court that Madrigal "has had no behavior problems in more than a year under our supervision. He is employed full-time and is current on his fees." Appellant's Appendix at 60. The trial court granted the petition on April 13, 2007, authorizing SJCCC to modify Madrigal's placement as it deemed appropriate. On November 5, 2007,

[1] We heard oral arguments in this case at Valparaiso High School on October 30, 2009. We extend our appreciation to Valparaiso High School for its hospitality and thank both counsel for their advocacy.

[2] The arrest report regarding Madrigal's underlying offense indicates he was found in possession of cocaine weighing 550 grams including packaging material.

Madrigal's SJCCC case manager sent a letter to the trial court seeking review of Madrigal's sentence for possible early termination. The letter informed the trial court that Madrigal "has shown excellent behavior … has maintained suitable, full-time employment, remained drug-free and has not been the subject of any misconduct reports throughout his entire time under our supervision." Id. at 56. The trial court responded to the letter stating it was not inclined to modify Madrigal's sentence because he had served only sixteen months for a Class A felony.

On April 21, 2008, an SJCCC home detention officer conducting field site checks visited Madrigal's home. After ringing the doorbell, the officer noticed a pile of 9mm shell casings near the front door of Madrigal's home. The officer questioned Madrigal about the shell casings, and Madrigal replied that his children had picked them up from the street. The next day, SJCCC home detention officers with the assistance of the South Bend Police Department conducted a search of Madrigal's home. The officers found a 9mm handgun in a box located on the top of a curio cabinet in Madrigal's bedroom. Madrigal explained he was holding the gun for a friend who had returned to Mexico and could not take the gun across the border.

On the basis of the search, the State filed a petition to revoke Madrigal's suspended sentence and placement. Madrigal subsequently admitted violation of the terms of his placement, and the trial court held a sentencing hearing on January 12, 2009. Following the hearing, the trial court ordered Madrigal to serve the remainder of his twenty-year sentence with the Department of Correction.

On February 3, 2009, Madrigal appeared in person before the trial court and expressed his desire to appeal the trial court's January 12th order. Madrigal also requested the appointment of a public defender to assist him with his appeal. Immediately following the hearing, the trial court issued an order appointing the public defender's office to represent Madrigal in his appeal. Due to an apparent oversight in the system, the case was not assigned to Madrigal's appellate counsel until February 12, 2009, the day Madrigal's notice of appeal was due. On February 13, 2009, Madrigal's counsel filed a petition to file a belated appeal pursuant to Post-Conviction Rule 2(1). The trial court granted Madrigal's petition and this appeal ensued.

Discussion and Decision

I. Subject Matter Jurisdiction

Just prior to oral arguments in this case, the State filed a notice of additional authority claiming this court lacks subject matter jurisdiction over Madrigal's appeal based on Madrigal's failure to timely file his notice of appeal. The State argues Post-Conviction Rule 2(1) applies only to a direct appeal of a conviction and not to other post-judgment petitions.

Appellate Rule 9(A)(5) provides "[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2." Post-Conviction Rule 2(1) allows a "defendant convicted after a trial or plea of guilty" to "petition the trial

court for permission to file a belated notice of appeal of the conviction or sentence" under certain conditions.[3]

In Davis v. State, 771 N.E.2d 647 (Ind. 2002), the defendant filed a petition to file a belated notice of appeal of the trial court's denial of his motion to correct sentence over two months after the trial court's order. Our supreme court held Post-Conviction Rule 2(1) is a "vehicle for belated direct appeals alone." Id. at 649 (citations omitted). As such, the rule "does not permit belated consideration of appeals of other post-judgment petitions." Id. Therefore, this court lacks subject matter jurisdiction over appeals other than direct appeals, unless such appeals or petitions are timely brought. Id.; see also Greer v. State, 685 N.E.2d 700, 702 (Ind. 1997) (this court lacked subject matter jurisdiction over belated appeal filed nearly three months after trial court denied defendant's motion for credit time); Glover v. State, 684 N.E.2d 542, 543 (Ind. Ct. App. 1997) (this court lacked subject matter jurisdiction over belated appeal filed over two months after trial court's order revoking defendant's probation and ordering execution of original sentence).

This case is factually distinguishable from those cited above because Madrigal timely informed the trial court of his desire to appeal its revocation decision and requested the appointment of a public defender to perfect his appeal. The trial court issued its order appointing the public defenders office to represent Madrigal that same day. Thus, Madrigal's notice of appeal missed the deadline through no fault of his own, but only because the public defenders office was lax in acting on the trial court's order

[3] The conditions are: "(1) the defendant failed to file a timely notice of appeal; (2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and (3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule." P-C.R. 2(1)(a).

appointing counsel for Madrigal. In that respect, this case is similar to this court's line of cases involving the prison mailbox rule, whereby pro se filings from an incarcerated litigant are deemed filed when they are delivered to prison officials for mailing. See Dowell v. State, 908 N.E.2d 643, 646-47 (Ind. Ct. App. 2009), trans. pending. Once Madrigal informed the trial court of his desire to appeal its order and the trial court appointed the public defenders office to represent him, the mechanics of filing the notice of appeal and complying with the applicable appellate rules were out of his control. Therefore, it would work an unfair prejudice to Madrigal for this court to dismiss his appeal based on the ineffectiveness of his appointed counsel when he had timely notified the trial court of his desire for an appeal.

In addition, were we to dismiss this appeal based on counsel's failure to comply with the notice of appeal deadline, Madrigal would have a simple post-conviction relief claim for ineffective assistance of counsel, the result of which would be to reinstate the instant appeal. Because the issue before this court has been fully briefed by both parties and no new information is likely to be gained by additional proceedings, the policy of judicial economy favors deciding the case on its merits at this stage rather than awaiting further judicial procedures which will merely result in the return of the case to this court. See Price v. State, 619 N.E.2d 582, 583 (Ind. 1993) (court chose to decide case on its merits in the interest of judicial economy despite procedural default where defendant notified trial court of his desire to appeal judgment but appointed counsel did not timely file notice of appeal); George v. State, 862 N.E.2d 260, 265 (Ind. Ct. App. 2006) (court chose to decide case on its merits in the interest of judicial economy where defendant

filed a timely notice of appeal but did not perfect it and later sought to file a belated notice of appeal pursuant to Post-Conviction Rule 2. We therefore consider the merits of Madrigal's appeal.

II. Revocation of Direct Placement

A. Standard of Review

Madrigal does not challenge the basis for the trial court's revocation of his direct placement in community corrections; in fact, he admitted possession of the handgun violated the terms of his direct placement. Rather, Madrigal argues the trial court abused its discretion by requiring him to serve the remainder of his twenty-year sentence with the Department of Correction rather than imposing a less severe penalty. Initially, we note the standard of review of an appeal from the revocation of direct placement in community corrections mirrors that for revocation of probation. Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999). We review a trial court's sentencing decisions for violations of the terms of direct placement using the abuse of discretion standard. Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). "An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances." Id.

B. Sentence Following Revocation of Direct Placement

Indiana Code section 35-38-2.6-5 states:

> If a person who is placed [in community corrections] violates the terms of the placement, the court may, after a hearing, do any of the following:
> (1) Change the terms of the placement.
> (2) Continue the placement.
> (3) Revoke the placement and commit the person to the department of correction for the remainder of the person's sentence.

Placement in community corrections is a "matter of grace" and a "conditional liberty that is a favor, not a right." Toomey v. State, 887 N.E.2d 122, 124 (Ind. Ct. App. 2008) (quoting Million v. State, 646 N.E.2d 998, 1001 (Ind. Ct. App. 1995)).

Madrigal argues the trial court abused its discretion by requiring him to serve the remainder of his twenty-year sentence with the Department of Correction. After his guilty plea and conviction, the trial court showed Madrigal great leniency by imposing the minimum sentence for a Class A felony, see Ind. Code § 35-50-2-4, suspending fifteen years of the twenty-year sentence, and allowing Madrigal to serve the remaining five years in community corrections. In spite of this, Madrigal made the decision to engage in dangerous activity by possessing a firearm. Despite Madrigal's explanation that he was merely holding the gun for a friend, the presence of 9mm shell casings outside Madrigal's home leads to an inference the gun had been used. In addition, due to his prior felony conviction, Madrigal's possession of the firearm was a criminal act. See Ind. Code § 35-47-4-5.

Madrigal asserts, however, the trial court should have simply changed the terms of his placement because of his exemplary behavior prior to this violation, as evidenced by the letters written to the trial court by his case manager. Madrigal essentially argues that we should weigh his previous good behavior against this single, although serious, violation. Although we generally have the authority to review a sentence based on the nature of the offense and the character of the offender pursuant to Indiana Appellate Rule 7(B), this authority does not extend to our review of a sentence imposed for violation of the terms of direct placement. See Prewitt, 878 N.E.2d at 187-88 (discussing impropriety

of Rule 7(B) review of sentence imposed following a probation violation). Indiana Code section 35-38-2.6-5 clearly grants the trial court unfettered discretion to choose a remedy for a violation of the terms of direct placement. In its sentencing statement, the trial court remarked, "I cannot ignore the link between guns and drugs, and I can't dismiss this as a mistake …. what you did was certainly as serious as if you had been charged with a crime." Transcript at 17-18. Given the discretion granted to the trial court in making this decision and the seriousness of Madrigal's violation, we see no abuse of the trial court's discretion in ordering Madrigal to serve the remainder of his sentence with the Department of Correction.

Conclusion

The trial court did not abuse its discretion when it ordered Madrigal to serve the remainder of his sentence with the Department of Correction.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.