Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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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

December 14, 2011

MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION

BROWN, Judge

Lawrence Ray Holley II, *pro se*, petitions for rehearing following our memorandum decision affirming the post-conviction court's denial of Holley's petition for post-conviction relief. Holley raises one issue which we revise and restate as whether this court erred in dismissing Holley's appeal. We grant rehearing to expand upon the mailbox rule and affirm our original decision.

In his petition for rehearing, Holley essentially argues that his appeal was timely. This court addressed this issue as follows:

> 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").

Holley v. State, No. 79A02-1005-PC-652, slip op. at 5 n.7 (Ind. Ct. App. August 30, 2011).

Holley attached a Notice of Compliance indicating that certain documents were presented to the prison librarian on April 16, 2010, which as indicated in footnote seven of the memorandum decision was the final day for Holley to file his motion to correct error. Holley also includes a Verification of Offender Legal Mail which indicates that "legal mail was mailed from this institution to the addresses on attached Legal Mail Log on the list date. (in compliance with 28 U.S.C. //S 1746)" and that "[l]egal mail for Lawrence Holley was deposited in the prison's internal mail system on April 16, 2010." Petition for Rehearing at 9. The document also indicates that "[f]irst class postage was prepaid on that date." Id.

As mentioned in the initial opinion, the document which Holley was attempting to file was a motion to correct error. The Indiana Supreme Court in Dowell held that timing for motions to correct error is different than a notice of appeal. Specifically, the Court in Dowell held:

> III. Timing for Motions to Correct Error Is Different
>
> The State's cross-appeal does not take issue with any of Dowell's filings governed by the appellate rules. Rather, the State argues that the appeal should be dismissed because Dowell's motion to correct error was untimely.
>
> The Indiana Rules of Trial Procedure require that a motion to correct error be filed within thirty days after the entry of a final judgment. Ind. Trial Rule 59(C). As the Attorney General points out, the trial rules define with some particularity what constitutes filing and when filings are deemed to have occurred, depending on the mode of delivery:

(F) Filing With the Court Defined. The filing of pleadings, motions, and other papers with the court as required by these rules shall be made by one of the following methods:

(1) Delivery to the clerk of the court;

(2) Sending by electronic transmission under the procedure adopted pursuant to Administrative Rule 12;

(3) Mailing to the clerk by registered, certified or express mail return receipt requested;

(4) Depositing with any third-party commercial carrier for delivery to the clerk within three (3) calendar days, cost prepaid, properly addressed;

(5) If the court so permits, filing with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk; or

(6) Electronic filing, as approved by the Division of State Court Administration pursuant to Administrative Rule 16.

Filing by registered or certified mail and by third-party commercial carrier shall be complete upon mailing or deposit[.]

Any party filing any paper by any method other than personal delivery to the clerk shall retain proof of filing.

T.R. 5(F).

The gist of this is that when a party transmits by an independently verifiable means (like registered mail or third-party carrier), the filing is deemed to have occurred upon mailing or deposit. When other means are used, filing occurs on the date the filing is in the hands of the clerk. Indianapolis Mach. Co. v. Bollman, 167 Ind.App. 596, 339 N.E.2d 612 (1976). The principle of the mailbox rule has been applied under 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. Cooper v. State, 714 N.E.2d 689 (Ind. Ct. App. 1999)[, trans. denied]; Baker v. State, 505 N.E.2d 498 (Ind. Ct. App. 1987).
>
> Dowell used regular mail, perhaps tendering it on the last possible day. The 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.
>
> When a motion to correct error is not timely filed, the right to appeal is not preserved. Goodman v. State, 581 N.E.2d 1259 (Ind. Ct. App. 1991) (appeal dismissed after trial court wrongly purported to grant an extension); Dixon v. State, 566 N.E.2d 594, 596 (Ind. Ct. App. 1991) ("if an appellant files a motion to correct error that is not mandatory under the rules, the motion must be filed within thirty (30) days after the judgment in order to preserve the appellant's right to an appeal of all issues")[, trans. denied]; Corkell v. Corkell, 653 N.E.2d 998 (Ind. Ct. App. 1995) (untimely motion to correct error forfeits opportunity for appeal of issues to which it is addressed).

Id. at 609-610.

The documents attached to Holley's petition do not indicate that he used certified mail or return receipt requested. Accordingly, we conclude that Dowell requires dismissal of Holley's appeal.

For the foregoing reasons, we grant rehearing and reaffirm our previous decision.

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