

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**

JASON FOSTER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 03A01-0708-CR-387

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause Nos. 03D01-0704-FD-747 & 03D01-0701-FC-117

April 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After Jason M. Foster pled guilty under separate plea agreements to strangulation and domestic battery of his ex-wife and to domestic battery of his fiancé, the trial court sentenced him to consecutive sentences resulting in an aggregate sentence of four-and-one-half years with two-and-one-half years suspended. Foster now challenges his convictions and sentence. The State cross-appeals, contending that Foster's notice of appeal was untimely filed and that he has therefore waived his right to appeal. Because Foster filed his notice of appeal more than thirty days after the trial court issued its final judgment and because Foster did not seek or receive permission to file a belated notice of appeal, we lack jurisdiction to entertain this appeal. We therefore dismiss this case.

Facts and Procedural History

In January 2007, Foster and Kealy Duncan had a child together and lived together. On January 17, 2007, Foster punched Duncan in the ribs, threatened her with a knife, and strangled her into unconsciousness. Police arrested Foster, and the State charged him with two counts of Class C felony intimidation,¹ one count of Class D felony strangulation,² and two counts of Class A misdemeanor domestic battery³ under cause number 03D01-0701-FC-117 ("117").

On April 13, 2007, Foster and his ex-wife, Brandy Foster, argued at his residence. Foster squeezed Brandy's neck, shoved her, took her car keys and told her that she could

¹ Ind. Code § 35-45-2-1(b)(2).

² Ind. Code § 35-42-2-9(b).

³ Ind. Code § 35-42-2-1.3(a).

not leave, and prevented her from using her cellular phone to call the police. Brandy managed to escape the house and ran approximately a half-mile to a gas station, where she called for help. After police arrested Foster, the State charged him with Class D felony criminal confinement,⁴ Class D felony domestic battery,⁵ Class A misdemeanor domestic battery,⁶ and Class A misdemeanor interference with the reporting of a crime⁷ under cause number 03D01-0704-FD-747 (“747”).

On May 14, 2007, Foster pled guilty, pursuant to a plea agreement, to one count of Class D felony strangulation and one count of Class A misdemeanor domestic battery under cause number 117 and one count of domestic battery under cause number 747. Appellant’s App. p. 17. Pursuant to the plea agreement, the State dismissed all remaining charges under both cause numbers. *Id.* at 16. The plea agreement also provided that the sentences under 117 and 747 would be served consecutively. *Id.*

The trial court accepted the plea agreement and entered judgment of conviction accordingly. On July 10, 2007, the trial court held a sentencing hearing. At the conclusion of the hearing, the court sentenced Foster to consecutive terms totaling four and one-half years with two-and-one-half years suspended to community corrections placement. On the same day, the court issued its written sentencing order. *Id.* at 41-44. Foster filed a notice of appeal on August 10, 2007. *Id.* at 48; Appellant’s Br. p. 2, 4.

⁴ Ind. Code § 35-42-3-3(a).

⁵ I.C. § 35-42-2-1.3(b)(2). This charge was elevated to a Class D felony because the alleged battery occurred in the presence of Foster’s and Brandy’s two children, who were ages five and three.

⁶ I.C. § 35-42-2-1.3(a).

⁷ Ind. Code § 35-45-2-5.

Discussion and Decision

Foster now challenges his convictions and sentence. Specifically, he argues that the trial court erred in imposing consecutive sentences and that two of his convictions subject him to double jeopardy. The State cross-appeals, contending that Foster's notice of appeal was untimely filed and that he has therefore waived his right to appeal. We find this latter issue dispositive.

Indiana Appellate Rule 9 governs the initiation of an appeal. It 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." Ind. Appellate Rule 9(A)(1). "Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by [Post-Conviction Rule] 2." App. R. 9(A)(5). "This court lacks subject matter jurisdiction over cases that are not timely initiated." *Marlett v. State*, 878 N.E.2d 860, 864 (Ind. Ct. App. 2007) (citing *Davis v. State*, 771 N.E.2d 647, 648 (Ind. 2002)), *trans. denied*.

Here, the trial court issued its sentencing order—the final judgment—on July 10, 2007. Appellant's App. p. 41-44. Pursuant to Indiana Appellate Rule 9, Foster had thirty days during which to file a notice of appeal. In other words, his notice of appeal was due by August 9, 2007, provided August 9 was a business day. Ind. Appellate Rule 25(B). August 9, 2007, was a business day. Foster filed his notice of appeal on August 10, 2007, thirty-one days after the trial court entered final judgment. *Id.* at 48. He acknowledges this filing date in his appellate brief, Appellant's Br. p. 2, 4, and does not respond to the State's contention in this regard in a reply brief. His right to appeal is therefore forfeited,

unless a petition for permission to file a belated notice of appeal made under Indiana Post-Conviction Rule 2 salvages it. *Davis*, 771 N.E.2d at 649. Foster did not, however, file such a petition. Therefore, we lack subject matter jurisdiction to hear this appeal.

Dismissed.

SHARPNACK, J., and BARNES, J., concur.

IN THE
COURT OF APPEALS OF INDIANA



JASON FOSTER,)
)
 Appellant,)
)
 vs.) CAUSE NO. 03A01-0708-CR-387
)
 STATE OF INDIANA,)
)
 Appellee.)

ORDER

This Court, on its own motion, and having reviewed the matter, now FINDS AND ORDERS AS FOLLOWS:

1. The Memorandum Decision/Not for Publication in this appeal that was issued on April 21, 2008, and certified on June 5, 2008, contains a scrivener’s error on page 2 of the slip opinion. The third sentence under the heading “Facts and Procedural History” states: “Police arrested Duncan,” The sentence should read: “Police arrested Foster,”

2. On the same date as this order, a corrected version of the Memorandum Decision/Not for Publication in this appeal has been transmitted to the Clerk of this

Court. Henceforth, this order shall become an addendum to the Memorandum Decision/Not for Publication in this appeal.

3. The Clerk of this Court is directed to replace the previously issued Memorandum Decision/Not for Publication with the corrected version of the decision, including this order appended to the decision. This order, in its entirety, shall be placed on the Clerk's docket.

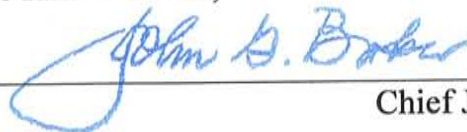
4. In all other respects, the Memorandum Decision/Not for Publication in this appeal remains unchanged. Therefore, the correction of the single word on page 2 of the slip opinion affects no substantive or procedural aspect of this appeal. Further, the date of the Memorandum Decision/Not for Publication in this appeal remains unchanged.

5. The Clerk of this Court is directed to send copies of the corrected Memorandum Decision/Not for Publication together with this order to the parties, all counsel of record, the Honorable Chris D. Monroe, Bartholomew Superior Court, the Bartholomew Circuit and Superior Courts Clerk, West/Thomson/Reuters, Lexis, and all other sources to which decisions/opinions of this Court are sent.

6. The Bartholomew Circuit and Superior Courts Clerk is DIRECTED to file a copy of this order under Lower Cause Numbers 03D01-0704-FD-747 and 03D01-0701-FC-117, and, pursuant to Indiana Trial Rule 77(D), the Clerk shall place the contents of this order in the Record of Judgments and Orders.

ORDERED this 12 day of February, 2010.

FOR THE COURT,



Chief Judge