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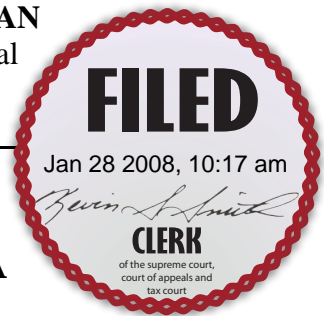
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**IN THE
COURT OF APPEALS OF INDIANA**

FREEMAN IRBY,)

Appellant-Petitioner,)

vs.)

No. 71A04-0611-PC-651

STATE OF INDIANA,)

Appellee-Respondent.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jenny Pitts Manier, Judge
Cause No. 71D05-0503-PC-50
71D05-9109-CF-810

January 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Freeman Irby appeals the post-conviction court's denial of his motion for relief from judgment. On appeal, Freeman raises one issue, which we restate as whether the post-conviction court properly denied Freeman relief. We affirm, concluding that the post-conviction court's denial was proper.

Facts and Procedural History

On September 3, 1991, the State charged Irby with robbery, a Class B felony, and also sought sentence enhancement based on Irby's alleged status as a habitual offender. The jury found Irby guilty of burglary and also found he was a habitual offender. The trial court sentenced Irby to ten years for robbery and enhanced his sentence by twenty years based on the jury's habitual offender finding, resulting in an aggregate sentence of thirty years. On direct appeal, this court affirmed Irby's conviction and sentence. Irby v. State, No. 71A05-9204-CR-00116, slip op. at 5 (Ind. Ct. App., Nov. 24, 1992), trans. denied.

On March 15, 2003, following two unsuccessful petitions for post-conviction relief, the post-conviction court permitted Irby to file a third petition, which he filed on the same day. The post-conviction court conducted hearings on January 11 and May 26, 2006, during which it heard testimony from Irby. On June 23, 2006, the post-conviction court entered an order denying relief.

On September 20, 2006, Irby filed a motion for relief from judgment pursuant to Indiana Trial Rule 60(B)(1). The motion stated Irby's "Counsel failed to file a timely Notice of Appeal on the post-conviction judgment" and sought as relief vacation and reentry of the

post-conviction court's June 23, 2006, order "contemporaneous with the granting of this motion" so Irby could pursue a timely appeal. Appellant's Appendix at 22. On September 21, 2006, the post-conviction court entered an order denying Irby's motion. Among other reasons, the post-conviction court based its denial on the grounds that "[t]he excusable neglect that serves as a basis for relief under T.R. 60(B)(1) is excusable neglect that led to the entry of the final order in question, not excusable neglect that led to the failure to pursue an appeal." Id. at 17. On October 6, 2006, Irby filed a motion to correct errors claiming four errors related to the post-conviction court's September 21, 2006, order. On October 13, 2006, the post-conviction court denied Irby's motion and reiterated that "the excusable neglect that serves as a basis for relief under T.R. 60(B)(1) is excusable neglect that led to the entry of the final order in question (in this case the Order denying Petitioner's Amended Petition for Post-Conviction Relief), not excusable neglect that led to the failure to pursue an appeal." Id. at 11. Irby now appeals.

Discussion and Decision

Irby argues the post-conviction court improperly denied his motion for relief from judgment. This court reviews the trial court's denial of a motion for relief from judgment for an abuse of discretion. State v. Willits, 773 N.E.2d 808, 811 (Ind. 2002). "An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law." Id.

Indiana Trial Rule 60(B) states in pertinent part:

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final

judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect;

...

(8) . . . A movant filing a motion for reason[] (1) . . . must allege a meritorious claim or defense. . . .

The entirety of Irby's arguments concern the post-conviction court's conclusions that Irby had neither established excusable neglect nor alleged a meritorious defense. See Appellant's Brief at 6 ("The post-conviction Court erred in finding that [Irby] lacked a showing of excusable neglect."); id. at 8 ("The post-conviction Court's finding that [Irby] must also set forth a meritorious defense or claim to support relief from judgment is equally perplexing.").

These arguments overlook the principle reason the post-conviction court denied Irby relief from judgment; namely, that "[t]he excusable neglect that serves as a basis for relief under T.R. 60(B)(1) is excusable neglect that led to the entry of the final order in question, not excusable neglect that led to the failure to pursue an appeal." Appellant's App. at 17; see also id. at 11 (denying Irby's motion to correct errors and reiterating that "the excusable neglect that serves as a basis for relief under T.R. 60(B)(1) is excusable neglect that led to the entry of the final order in question (in this case the Order denying Petitioner's Amended Petition for Post-Conviction Relief), not excusable neglect that led to the failure to pursue an appeal"). This court has stated that "T.R. 60(B) is not a substitute for a belated appeal, nor can it be used to revive an expired attempt to appeal." Bolden v. State, 736 N.E.2d 1260, 1261 (Ind. Ct. App. 2000) (quoting Masterson v. State, 511 N.E.2d 499, 500 (Ind. Ct. App. 1987)). Thus, because Irby's motion seeks relief in the form of reentry of the post-conviction court's June 23, 2006, order to allow him to file a timely appeal, it follows that the post-

conviction court was within its discretion when it concluded Trial Rule 60(B)(1) does not permit such relief.

Conclusion

The post-conviction court properly denied Irby's motion for relief from judgment.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.