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**IN THE
COURT OF APPEALS OF INDIANA**

CHARLIE HERBST,)
)
Appellant-Petitioner,)
)
vs.) No. 04A03-0603-PC-96
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE BENTON CIRCUIT COURT
The Honorable Rex Kepner, Judge
Cause No. 04C01-0108-PC-403

October 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Charlie Herbst brings a *pro se* appeal of the trial court's order denying his motion to amend his petition for post-conviction relief.

We dismiss.

ISSUE

Whether we have jurisdiction to consider Herbst's appeal of the trial court's January 20, 2006 order that Herbst would not be allowed to amend his August 23, 2001 petition for post-conviction relief.

FACTS

On August 23, 2001, Herbst filed a *pro se* petition for post-conviction relief. Therein, Herbst stated that he had been sentenced in May of 2000 after being convicted by a jury of arson, forgery, burglary, receiving stolen property, auto theft, and obstruction of justice. Herbst asserted as his grounds for post-conviction relief: (1) "misrepresentation of trial counsel"; (2) "illegal trial procedure by prosecutor"; and (3) "illegal search of vehicle." (App. 3). As facts to support these grounds,¹ Herbst stated that counsel was ineffective in cross-examining witnesses and allowing the admission of evidence; that evidence not admitted by the trial court was displayed to the jury; and, that Herbst had not consented to a search of his vehicle. On August 27, 2001, the trial court dismissed the petition. Its order stated that it had reviewed Herbst's petition, that post-conviction relief is "not a substitute for a direct appeal pursuant to Rule PC 1 Section 1," and that "all available steps should be taken to perfect such an appeal, including those

¹ The petition recites that these are "the facts which support each of the grounds set forth." (App. 3).

under Rule PC 2.” (State’s App. 1). The order then stated “that PC 1 has not been followed and therefore the Petition now filed is dismissed.” Id.

On November 16, 2004, Herbst sought to “amend his previously filed *pro se* Petition for Post-Conviction Relief.” (App. 15). Herbst’s proposed amended petition would not claim new grounds for post-conviction relief but would add purported facts to support the grounds in the previously filed petition. The amended petition’s purported facts would be Herbst’s rhetorical and legal arguments as to: (1) errors in identification evidence, (2) trial counsel ineffectiveness in that regard, (3) challenges to witness credibility, and (4) defective jury instructions. The trial court granted his request to amend.

On January 27, 2005, Herbst again sought leave to file an amended petition, which would add another item as grounds for post-conviction relief -- with accompanying rhetorical and legal argument of purported facts in support -- regarding the amount he was ordered to pay in restitution. The trial court also granted this request to amend.

Finally, on January 20, 2006, Herbst filed another motion for leave to amend his petition for post-conviction relief. In the proposed amended petition, Herbst would not add any additional grounds for post-conviction relief but would add to his statement of purported facts supporting the grounds. The additional purported facts would add legal and rhetorical arguments to those already presented, and also “call attention to the

Blakely² ruling,” present his legal analysis of its holding and application, and seek review of his sentence based on Blakely. (App. 47).

The trial court noted that Herbst was seeking to amend his petition for post-conviction relief which had been “previously dismissed August 27, 2001,” at which time “judgment was entered on the Petition.” (State’s App. 2). “Therefore,” the trial court ordered that the current “request to Amend the Petition and any previously granted requests to Amend the Petition after August 27, 2001” be “denied and/or set aside.” Id. Herbst appeals this order.

DECISION

Herbst summarizes his argument as to why the trial court’s order must be reversed as follows:

Despite the fact Judge Kepner made numerous rulings since the original filing date of September 25, 2001³, the trial court denied the appellant’s PC stating it was dismissed August 23, 2001 [sic]. The Court neither gave the appellant a hearing nor issued a finding of fact as required under the rules for post-conviction relief. Appellant was denied a fair trial when the prosecutor was allowed to show the jury six items, a gas can, sock cap, sunglasses, a sweater, a flashlight, and screwdriver to the jury as well as allowed numerous witnesses to testify using these items as their reference without the items being introduced to the record. Appellant was denied effective assistance of counsel when his attorney allowed the above-mentioned actions to occur without objecting. Appellant was given a restitution order to pay restitution without there being actual proof of loss. Appellant’s sentence was aggravated without proof of any criminal history, and with the use of other aggravating factors not proven by a jury pursuant to the Blakely ruling.

² Blakely v. Washington, 124 S. Ct. 2531 (2004).

³ As the State notes, Herbst’s petition is file-stamped September 25, 2001, but the CCS reflects the filing of the petition on August 23, 2001.

Herbst's Br. at i.

The State argues that we lack jurisdiction over Herbst's appeal because the post-conviction court's denial of Herbst's motion to amend his petition for post-conviction relief was not an appealable order, and the post-conviction court's earlier dismissal of Herbst's petition for post-conviction relief was a final judgment which can no longer be appealed. We must agree with the State.

The Indiana Court of Appeals has jurisdiction in all appeals from final judgments. Ind. App. R. 5(A). A "final judgment" is one which "disposes of all claims as to all parties." App. R. 2(H)(1); see also Georgos v. Jackson, 790 N.E.2d 448, 451 (Ind. 2003). An order denying a petition to amend a previously filed pleading would not have disposed of the claims raised is, therefore, not a final judgment. Because it is not a final judgment, it is not an appealable order pursuant to Appellate Rule 5.

The Indiana Court of Appeals also has jurisdiction "over appeals of interlocutory orders under Rule 14." App. R. 5(B). Appellate Rule 14 states that certain interlocutory orders may be appealed "as a matter of right." App. R. 14(A). An order denying a motion to amend a previously filed pleading is not enumerated as such a right. Id. Appeals may also be taken from an interlocutory order "if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal." App. R. 14(B). Such certification and acceptance did not occur here.

On August 23, 2001, the trial court dismissed Herbst's petition for post-conviction relief. This is the "previously filed *pro se* Petition for Post-Conviction Relief" that Herbst has been pursuing with his various attempts to amend since November 16, 2004.

The August 27, 2001 dismissal of the original petition for post-conviction relief was an appealable final judgment. See Trueblood v. State, 715 N.E.2d 1242, 1261 (Ind. 1999). Herbst did not appeal the August 27, 2001 final judgment by filing a notice of appeal with the trial court clerk within thirty days. See App. R. 9(A). Filing a timely notice of appeal is a jurisdictional prerequisite to any appeal, and the failure to commence an appeal accordingly deprives us of jurisdiction over the appeal and mandates dismissal. Carter v. Jones, 751 N.E.2d 344, 347 (Ind. Ct. App. 2001). Herbst did not pursue an appeal of the August 27, 2001 judgment that dismissed his previously filed petition for post-conviction relief. Therefore, we are without jurisdiction to consider an appeal of the trial court's denial of his motion to amend that petition.

Dismissed.

NAJAM, J., and FRIEDLANDER, J., concur.