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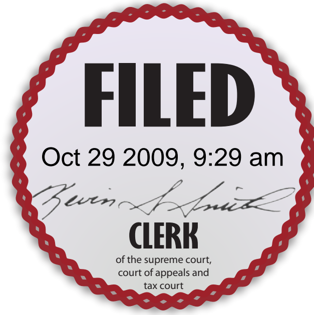

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IN THE
COURT OF APPEALS OF INDIANA

JEFFERY D. PENNYCUFF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 40A01-0904-PC-157
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0901-PC-1

October 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jeffery Pennycuff, *pro se*, appeals the post-conviction court's denial of his petition for post-conviction relief. Pennycuff raises one issue, which we revise and restate as whether the post-conviction court erred when it failed to award Pennycuff eighty-seven days of credit time for time served at the Richmond State Hospital. The State raises one issue, which we restate as whether Pennycuff's appeal is timely. We affirm.[1]

The relevant facts follow. On February 15, 2006, the trial court sentenced Pennycuff to thirteen years in the Department of Correction, with three years suspended, for manufacturing methamphetamine, a class B felony. On March 28, 2006, Pennycuff was transported to Richmond State Hospital. On June 22, 2006, Pennycuff was transported to the Jennings County Jail. On October 16, 2006, the trial court modified Pennycuff's sentence and awarded Pennycuff 498 days of actual credit.

On December 1, 2008, Pennycuff filed a motion for credit time spent incarcerated prior to trial and sentencing. Pennycuff argued that the trial court "failed to calculate the time from the issuance of the Supplemental Order of Sentence, which was 87 days." Appellee's Appendix at 2. On December 8, 2008, the trial court denied Pennycuff's motion for credit time. The trial court's order stated that Pennycuff did not receive credit

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[1] We remind Pennycuff that Ind. Appellate Rule 46(A)(6) provides that "The facts shall be supported by page references to the Record on Appeal or Appendix in accordance with Rule 22(C)."

We also note that Pennycuff included a copy of the chronological case summary for his post-conviction action, which begins with his petition for post-conviction relief that he filed on January 26, 2009. However, Pennycuff did not include the chronological case summary for the underlying charges.

for his days at the Richmond State Hospital because Pennycuff "did not successfully complete the Richmond program." Appellant's Appendix at 20.

On January 26, 2009, Pennycuff filed a petition for post-conviction relief and argued that he was denied the correct jail time credit. Specifically, it appears that Pennycuff requested credit time for his stay at Richmond State Hospital. Pennycuff argued that he "believe[d] he has 'learned' how to handle and deal with his substance abuse, although he did not successfully complete the Richard [sic] State Hospital." Id. at 4. Pennycuff also stated that "[s]ubsequent to the original sentencing, [Pennycuff] cooperated with law enforcement in locating explosives, firearms, and precursors at his residence." Id.

On February 2, 2009, Pennycuff filed a petition for production of guilty plea and sentencing transcripts at public expense. On February 3, 2009, the trial court issued an order stating that "[t]he essence of [Pennycuff's petition for post-conviction relief] is a claim he was not given the proper days credit," and "[t]his is an issue the Court can resolve without preparing transcripts." Id. at 13.

On February 5, 2009, the post-conviction court denied Pennycuff's petition for post-conviction relief. The post-conviction court's order stated:

> On January 26, 2009, [Pennycuff], pro se, filed a Petition for Post Conviction Relief. The issue of Mr. Pennycuff's Petition is that this Court improperly calculated his credit time. This Court has again gone back to the underlying criminal file to verify the number of days Mr. Pennycuff was due. The Court now finds as follows:

a. [Pennycuff] was arrested on March 9, 2005 at 10:00 p.m. [Pennycuff] was first sentenced on February 15, 2006. Total number of days was three hundred forty-two (342.)

b. [Pennycuff] was transported to Richmond State Hospital on March 28, 2006. Total number of days was forty-one (41).

c. [Pennycuff] returned to Jennings County Jail from Richmond State Hospital on June 23, 2006. Total number of days was eighty-seven (87).

d. [Pennycuff]'s sentence was modified on October 16, 2006. Total number of days was one hundred fifteen (115)

When the court re-sentenced Mr. Pennycuff on October 16, 2006, it gave him four hundred ninety-eight (498) **ACTUAL** days credit (342+42+115=498). Mr. Pennycuff claims he has the eighty-seven (87) days coming he spent at Richmond State Hospital. Mr. Pennycuff spent eighty-seven (87) days at Richmond State Hospital and did not complete the program. This Court will not allow Mr. Pennycuff to benefit from his failure to complete Richmond State Hospital. Mr. Pennycuff well knows when he was originally sentenced, that completing Richmond State Hospital would be to his benefit and he did not do so.

The Petition for Post Conviction Relief is **denied**.

Id. at 17-18.

Pennycuff's notice of appeal states that he "served a true and complete copy of the Notice of Appeal on the Clerk of the Jennings Circuit Court, by placing same in the U.S. Mail, first class postage pre-paid, at Henryville, IN" on February 25, 2009. Appellee's Appendix at 5. Pennycuff's notice of appeal is file stamped March 23, 2009.

We first address the State's argument that Pennycuff's appeal is untimely because, if it has merit, it would be dispositive. The State argues that Pennycuff has failed to

establish that this court has jurisdiction over his appeal. Ind. App. Rule 9(A)(1) provides that "[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. App. Rule 9(A)(5) provides that "[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2." Pennycuff's notice of appeal is file stamped March 23, 2009, which was forty-six days after the post-conviction court denied Pennycuff's petition for post-conviction relief on February 5, 2009.

Pennycuff's notice of appeal, filed while he was incarcerated, implicates the "prison mailbox rule." Under the "prison mailbox rule," recognized by the United States Supreme Court in Houston v. Lack, the date a *pro se* prisoner delivers notice to prison authorities for mailing should be considered the date of filing, not the date of receipt. McGill v. Ind. Dep't of Correction, 636 N.E.2d 199, 202 (Ind. Ct. App. 1994) (citing Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379 (1988)), reh'g denied.

In Houston, the Court addressed "whether under Federal Rule of Appellate Procedure 4(a)(1) such notices are to be considered filed at the moment of delivery to prison authorities for forwarding or at some later point in time." 487 U.S. at 268, 108 S. Ct. at 2381. At that time, Federal Rule of Appellate Procedure 4(a)(1) provided:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . .

Id. at 272, 108 S. Ct. at 2383. This language is similar to Ind. App. Rule 9(A)(1), which provides that "[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."

The Court held:

> The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30-day deadline. Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the *pro se* prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service (or a private express carrier); and they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it. *Pro se* prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them. Worse, the *pro se* prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the *pro se* prisoner delivers his notice to the prison authorities, he can never be sure that it will ultimately get stamped "filed" on time. And if there is a delay the prisoner suspects is attributable to the prison authorities, he is unlikely to have any means of proving it, for his confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the notice on the date received. Unskilled in law, unaided by counsel, and unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access – the prison authorities – and the only information he will likely have is the date he delivered the

> notice to those prison authorities and the date ultimately stamped on his notice.

487 U.S. at 270-272, 108 S. Ct. at 2382-2383.

We also find Baker v. State, 505 N.E.2d 498 (Ind. Ct. App. 1987), instructive. In that case, the court examined then Indiana Trial Rule 5(E)(2) (now Indiana Trial Rule 5(F)(3)) and held:

> Since [the pro se prisoner litigant] was unable due to his incarceration to personally take his motion to correct errors to a post office, he 'deposited' his motion in the institutional mail pouch in the Westville Correctional Center's law library on February 8, 1985. This deposit conformed with the requirements of T.R. 5(E)(2) as construed by this Court in Seastrom [Inc. v. Amick Constr. Co., Inc., 159 Ind. App. 266, 306 N.E.2d 125, 127 (1974)] because Baker, as best as he was able, mailed his motion four days prior to the filing deadline. The denial of Baker's motion to correct errors because it was postmarked late due to no fault of his own is inconsistent with the Seventh Circuit's holding in Childs v. Duckworth (7th Cir. 1983), 705 F.2d 915, 922, that it is the duty of the trial court to insure that the claims of a pro se litigant are given a fair and meaningful consideration. The denial of Baker's motion to correct errors here was also contrary to this Court's policy of preferring to decide cases on their merits rather than dismiss them because of harmless timing failures. See, Sekerez v. Gehring (1981), Ind. App., 419 N.E.2d 1004, 1008. Because his motion was put in the mail prior to the filing deadline, Baker's motion to correct errors was erroneously denied by the trial court.

505 N.E.2d at 499-500.

This court recently held that given Baker and Houston, "the prison mailbox rule is applicable to state post-conviction matters." Dowell v. State, 908 N.E.2d 643, 648 (Ind. Ct. App. 2009), trans. pending. We conclude that Pennycuff's notice of appeal, which contains a certificate of service stating that Pennycuff placed the notice of appeal in the

mail within thirty days, was timely filed. Thus, we will address the merits of Pennycuff's arguments.

Before discussing Pennycuff's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

The State argues that "Pennycuff has not provided this Court with sufficient evidence from which it can conclude that the PCR court's decision was clearly erroneous." Appellee's Brief at 7. We agree. Pennycuff does not dispute that he did not

successfully complete the program at Richmond State Hospital. Further, Pennycuff did not provide any documentation regarding the time that he spent in Richmond State Hospital. While Pennycuff stated in his petition for post-conviction relief that he cooperated with law enforcement in locating explosives, firearms, and precursors at his residence subsequent to his original sentencing, Pennycuff did not present any evidence in support of this statement or develop an argument regarding any effect such cooperation would have had on his credit time. We cannot say that the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court.

For the foregoing reasons, we affirm the post-conviction court's denial of Pennycuff's petition for post-conviction relief.

Affirmed.

CRONE, J., and MAY, J., concur.