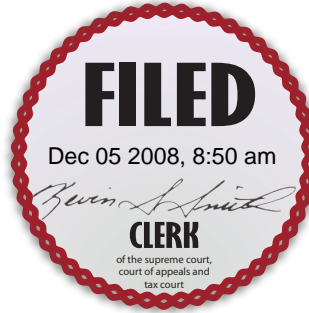


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID L. HOWARD,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 46A03-0803-CR-141

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0511-MR-148

December 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

David Howard appeals his conviction and sentence for murder.¹ Howard raises two issues, which we revise and restate as:

- I. Whether the evidence is sufficient to sustain Howard's conviction for murder; and
- II. Whether Howard's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We dismiss.

The relevant facts follow. On November 1, 2005, the State charged Howard with murder. After a jury trial, Howard was found guilty as charged. On September 13, 2007, the trial court sentenced Howard to sixty-five years in the Indiana Department of Correction with five years suspended to probation. On October 11, 2007, Howard filed a motion to correct error. On March 7, 2008, the trial court denied the motion. On March 26, 2008, Howard filed his notice of appeal.

We sua sponte address whether Howard timely filed his notice of appeal. Ind. App. Rule 9(A)(1) 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. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court's ruling on such motion, or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

¹ Ind. Code § 35-42-1-1 (2004) (subsequently amended by Pub. L. No. 151-2006, § 16 (eff. July 1, 2006); Pub. L. No. 173-2006, § 51 (eff. July 1, 2006); Pub. L. No. 1-2007, § 230 (eff. March 30, 2007)).

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.” Ind. Trial Rule 53.3 governs the time limitation for ruling on a motion to correct error and provides, in part:

In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the notice of appeal under Appellate Rule 9(A) within thirty (30) days after the Motion to Correct Error is deemed denied.

Here, on October 11, 2007, Howard filed a motion to correct error. The trial court did not set a hearing or rule on the motion within forty-five days. Under Ind. Trial Rule 53.3, Howard’s motion to correct error was deemed denied by operation of law on November 26, 2007, forty-five days after the motion was filed. See Ballard v. State, 715 N.E.2d 1276, 1278-1279 (Ind. Ct. App. 1999) (holding that after thirty days had passed from the date of a hearing on a motion to correct error with no decision, it was proper for the defendant to assume that the motion to correct error was deemed denied and to proceed in initiating his appeal by filing his praecipe in a timely manner). Howard did not file a notice of appeal within thirty days of November 26, 2007. Instead, months later on March 7, 2008, the trial court denied the motion to correct error. On March 26, 2008, Howard then filed his notice of appeal. Because Howard did not file his notice of appeal until March 26, 2008, Howard forfeited his appeal, unless it is salvaged by Ind. Post-Conviction Rule 2. See Davis v. State, 771 N.E.2d 647, 648-649 (Ind. 2002) (holding

that the defendant forfeited his appeal by failing to file a notice of appeal within thirty days of the final judgment unless Post-Conviction Rule 2(1) salvaged his appeal); see also Cavinder Elevators, Inc. v. Hall, 726 N.E.2d 285, 289 (Ind. 2000) (holding that “if the plaintiff, as the party filing the motion to correct error, had failed to commence a timely appeal following the deemed denial pursuant to Trial Rule 53.3(A), such failure would have waived the claims and precluded the plaintiff from raising them as cross-errors on appeal”).

Ind. Post-Conviction Rule 2 permits a defendant to seek permission to file a belated notice of appeal and provides:

Eligible defendant defined. An “eligible defendant” for purposes of this Rule is a defendant who, but for the defendant’s failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal.

Appellate court jurisdiction. Jurisdiction of an appeal under this Rule is determined pursuant to Rules 4 and 5 of the Indiana Rules of Appellate Procedure by reference to the sentence imposed as a result of the challenged conviction or sentence.

Section 1. Belated Notice of Appeal

- (a) Required Showings. An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;
 - (1) the defendant failed to file a timely notice of appeal;
 - (2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

(3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

* * * * *

(c) Factors in granting or denying permission. If the trial court finds that the requirements of Section 1(a) are met, it shall permit the defendant to file the belated notice of appeal. Otherwise, it shall deny permission.

* * * * *

“The trial court is to permit a belated appeal only if it concludes that the failure was not ‘due to the fault of the defendant’ and the defendant was ‘diligent’ in requesting to file permission to file a belated notice of appeal.” Gutermuth v. State, 868 N.E.2d 427, 429 (Ind. 2007).

Here, Howard did not petition to file a belated notice of appeal. Because Howard did not petition to file a belated notice of appeal, he did not satisfy the requirements of Ind. Post-Conviction Rule 2. Thus, we dismiss Howard’s appeal. See Witt v. State, 867 N.E.2d 1279, 1281 (Ind. 2007) (dismissing the appeal where the defendant failed to satisfy the requirements of Post-Conviction Rule 2(1)); Townsend v. State, 843 N.E.2d 972, 975 (Ind. Ct. App. 2006) (dismissing the defendant’s case and holding that the trial court erred when it granted defendant’s petition to file a belated notice of appeal), trans. denied; Davis, 771 N.E.2d at 648-649 (holding that a defendant forfeited his right to

appeal, when he filed his Notice of Appeal after the thirty-day deadline and did not seek relief under Post-Conviction Rule 2).

For the foregoing reasons, we dismiss Howard's appeal.

Dismissed.

BAKER, C. J. and MATHIAS, J. concur