

MEMORANDUM DECISION

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.



APPELLANT PRO SE

Proctor Gray, III
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IN THE COURT OF APPEALS OF INDIANA

Proctor Gray, III,
Appellant,

v.

State of Indiana,
Appellee.

September 29, 2021

Court of Appeals Case No.
19A-CR-1752

Appeal from the Vigo Superior
Court

The Honorable John T. Roach,
Judge

Trial Court Cause No.
84D01-9004-CF-25

Brown, Judge.

[1] Proctor Gray, III, appeals the trial court’s June 5, 2019 order denying his Motion for Extension of Time. Finding that Gray’s request was not authorized by Ind. Post-Conviction Rule 2, we dismiss.

Facts and Procedural History

[2] In 1990, a jury found Gray guilty of burglary as a class A felony under Count I and murder under Count II. In November 1990, the trial court held a sentencing hearing at which it stated that it was sentencing Gray to twenty years for his burglary conviction and sixty years for his murder conviction to be served consecutively. On November 30, 1990, the trial court issued an order providing in part:

This matter having been set for sentencing this date after a jury found the defendant guilty of Count I, Burglary, Class A Felony, and Count II, Murder, a felony, now comes on for sentencing.

* * * * *

The court, having heard evidence, now orders judgment on Count I, Burglary, Class A Felony, reduced to Burglary, Class B Felony, because the “bodily injury” element which elevated same to a Class A Felony is the same injury to the same victim as the “killing” element in Count II, Murder.

* * * * *

THEREFORE, the court now sentences the defendant as follows; Count I, Burglary, Class B Felony, the court now sentences the defendant to the Indiana Department of Correction for a period of ten (10) years, and because of the aggravating circumstances hereinabove set forth, now enhances said sentence by an additional

ten (10) years, for a total sentence of twenty (20) executed years on Count I.

Count II, Murder, a Felony, the court now sentences the defendant to the Indiana Department of Correction for a period of forty (40) years, and because of the aggravating circumstances hereinabove set forth, now enhances said sentence by twenty (20) additional years, for a total executed sentence of sixty (60) years.

Because of the overwhelming number of aggravating factors, compared to the total absence of mitigating factors, the sentencing imposed in Count I shall run consecutive to the sentence imposed in Count II, for a total sentence of eighty (80) executed years.

Appellant's Appendix Volume II at 38, 40.¹ The Indiana Supreme Court affirmed. *Gray v. State*, 593 N.E.2d 1188, 1192 (Ind. 1992), *reh'g denied*.

[3] On April 1, 2019, Gray filed a "Motion for Relief from Judgment/Order,"² which cited Ind. Trial Rule 60(B) and argued in part "on November 30th, 1990, the court entered judgment of conviction on Count 1 (burglary) and sentenced him to 20 years," "the court did not enter judgment of conviction on Count 2 (murder)," "because the court did not enter judgment of conviction on all counts, no sentence for Count 2 (murder) is legally authorized," and "defendant has served 28 years as of the filing of this motion, which completes his sentence

¹ Further, the court's abstract of judgment indicates Gray was convicted of burglary as a class B felony under Count I and murder under Count II and sentenced to consecutive terms of twenty years under Count I and sixty years under Count II. The chronological case summary includes entries on November 30, 1990, which state "Judgment" with respect to "01. BURGLARY" and "02 MURDER." Appellant's Appendix Volume II at 44.

² The appellant's appendix does not include a copy of the motion. The motion is available through Indiana's Odyssey Case Management System.

of 20 years on Count 1 (burglary), warranting his immediate release.” April 1, 2019 Motion (capitalization omitted). The trial court issued an order dated April 3, 2019, denying Gray’s motion, and an entry in the chronological case summary (“CCS”) on that date states “Defendant’s TR 60(B) Motion for Relief from Judgment – Denied. . . . Order Signed: 04/03/2019.” Appellant’s Appendix Volume II at 49.

[4] Gray filed a Motion for Extension of Time which was stamped as filed with the trial court on June 5, 2019.³ In the motion, Gray stated that his motion for relief from judgment was denied on April 3, 2019, and that he did not receive the order until April 10, 2019, and he requested an extension of time to file a notice of appeal.

[5] On June 5, 2019, the trial court issued an order which provided:

Cause comes on Defendant’s Motion for Extension of Time to file a Notice of Appeal. On April 1, 2019, defendant filed a motion for TR 60(B) relief from a judgment entered on November 30, 1990. The motion was groundless, and it was denied by order dated April 3, 2019. Defendant’s motion for an extension of time to file a notice of appeal, filed this date, is hereby *Denied*.

June 5, 2019 Order. Gray subsequently filed a “Belated Notice of Appeal” with the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court (the

³ In his certificate of service, Gray states that he served the motion upon the trial court clerk by first class mail on May 17, 2019.

“Clerk”). The Belated Notice of Appeal is stamped as filed with the Clerk on July 18, 2019, it indicated that the date of the order being appealed was June 5, 2019, and Gray certified that he filed and served the Belated Notice of Appeal on July 5, 2019.⁴

Discussion

- [6] Gray appeals from the trial court’s June 5, 2019 order denying his Motion for Extension of Time. In his appellant’s brief, he argues pro se that the court “did not enter judgment of conviction on Count 2 (Murder) but still sentenced [him] to a fixed term of 60 years violating [his] fundamental due process rights.” Appellant’s Brief at 9. He requests this Court to “dismiss the invalid conviction and sentence and order his immediate release.” *Id.* at 15.
- [7] The State responds that Gray cannot belatedly appeal the denial of his Trial Rule 60(B) motion and therefore this appeal should be dismissed. It also argues the trial court correctly denied Gray’s Trial Rule 60(B) motion, the motion was untimely, and Gray’s claim does not have merit.
- [8] Ind. Appellate Rule 9 provides “[a] party initiates an appeal by filing a Notice of Appeal with the Clerk . . . within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary” and, “[u]nless the

⁴ Following the filing of the Belated Notice of Appeal, this Court issued an order in February 2021 stating that no appellant’s brief had been filed and dismissing the appeal, and an order in April 2021 reinstating the appeal after receiving Gray’s Motion to Reconsider Prior Decision Dismissing Appellant’s Appeal with Prejudice.

Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2.” Ind. Post-Conviction Rule 2 (“P.C.R. 2”) provides in part that “[a]n 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” P.C.R. 2 further provides:

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.

[9] Here, the trial court entered an order on April 3, 2019, denying Gray’s motion for relief from judgment, and Gray did not initiate an appeal within thirty days after the entry of the order was noted in the CCS. On May 17, 2019, he served a Motion for Extension of Time upon the trial court clerk by mail requesting an extension of time to file a notice of appeal, and the trial court denied his request on June 5, 2019. Gray’s request did not seek permission to file a belated appeal of “a conviction or sentence” as contemplated by P.C.R. 2.⁵ Rather, he sought an extension to file a belated appeal of the denial of his motion for relief pursuant to Ind. Trial Rule 60(B). Gray’s request for the extension was not authorized by P.C.R. 2. As such, the trial court properly declined to grant his request, we lack authority to hear the merits of his claim, and this appeal must

⁵ As noted, Gray appealed his convictions and sentence following his sentencing in November 1990, and the Indiana Supreme Court affirmed.

be dismissed. See *Wooten v. State*, 946 N.E.2d 616, 623-624 (Ind. Ct. App. 2011) (holding that the appellant’s request for a belated notice of appeal of the revocation of his probation was not authorized by P.C.R. 2 and that “[a]s such we lack jurisdiction to hear the merits of [the appellant’s] claims” and dismissing the appeal) (citing *Newton v. State*, 894 N.E.2d 192, 193 (Ind. 2008) (holding the trial court lacked authority to grant a request for a belated appeal where the case did not involve a direct appeal of a conviction or sentence after a trial or plea of guilty under P.C.R. 2 and dismissing the appeal)).

[10] We also observe that, even if Gray had timely appealed the denial of his motion for relief from judgment, he has not demonstrated that he is entitled to relief under Ind. Trial Rule 60(B). Ind. Trial Rule 60(B) provides, “[o]n motion and upon such terms as are just the court may relieve a party . . . from a judgment . . . for the following reasons: . . . (8) any reason justifying relief from the operation of the judgment.”⁶ The rule further provides, with respect to reason (8), that the motion shall be filed within a reasonable time and must allege a meritorious claim or defense, which requires a showing that “a different result would be reached if the case were retried on the merits and that it is unjust to allow the judgment to stand.” *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 73-74 (Ind. 2006) (citation omitted). The order from which Gray sought relief was issued in November 1990, and he filed his Trial Rule 60(B) motion over twenty-eight years later in April 2019. He did not file his motion

⁶ Gray did not cite a specific reason set forth in Trial Rule 60(B).

within a reasonable time as required by Trial Rule 60(B) and therefore his motion was untimely. Further, Gray has not shown that a different result would be reached on the merits of his motion. While the November 30, 1990 order included language that the court “now orders judgment on Count I” and did not include that express language with respect to Count II, *see* Appellant’s Appendix Volume II at 38, we note, and Gray does not dispute, that the jury found him guilty and the court sentenced him on both Counts I and II as reflected in the November 30, 1990 order and further reflected in the CCS and the abstract of judgment and as affirmed in the Indiana Supreme Court’s 1992 opinion. *See Martinez v. State*, 549 N.E.2d 1026, 1030 (Ind. 1990) (noting the appellant argued “the non-entry of judgment by the trial court upon the jury’s verdict of guilty left his case in a status of no final disposition” and “thus, the court had no authority to sentence him” and holding “that failure to enter judgment prior to sentencing does not constitute error provided the defendant is otherwise properly sentenced”).

[11] For the foregoing reasons, we dismiss this appeal.

[12] Dismissed.

Najam, J., and Riley, J., concur.