

## 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.



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## IN THE COURT OF APPEALS OF INDIANA

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Victor L. Jordan,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

November 5, 2021

Court of Appeals Case No.  
21A-CR-112

Appeal from the LaPorte Superior  
Court

The Honorable Michael Bergerson,  
Judge

Trial Court Cause No.  
46D01-1905-F3-635

**Bailey, Judge.**

## Case Summary

- [1] Victor Lee Jordan (“Jordan”) attempts to perfect a belated direct appeal to challenge the aggregate seven and one-half year sentence imposed upon his convictions of Possession of Cocaine, as a Level 5 felony,<sup>1</sup> and Resisting Law Enforcement, as a Level 6 felony.<sup>2</sup> The State urges dismissal of the attempted appeal, arguing that Jordan forfeited his right to a direct appeal and can proceed only under Indiana Post-Conviction Rule 2. Jordan concedes that his appeal is untimely but claims that there are extraordinarily compelling reasons to reinstate the forfeited right to appeal. We dismiss the purported appeal.

## Facts and Procedural History

- [2] On May 18, 2019, LaPorte County Sheriff’s Department Captain Andrew Hynek (“Captain Hynek”) observed Jordan’s vehicle traveling across the center line of the roadway and initiated a traffic stop. Captain Hynek approached the vehicle and obtained identification; he then instructed Jordan to remain in the vehicle while a warning ticket was being issued.
- [3] As Captain Hynek was writing the warning ticket, he observed Jordan pull away at an excessive rate of speed. With his lights and siren activated, Captain Hynek pursued Jordan’s vehicle until it came to a stop in a shopping center

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<sup>1</sup> Ind. Code § 35-48-4-6(b).

<sup>2</sup> I.C. § 35-44.1-3-1(a)(3).

parking lot. Jordan and his passenger fled the vehicle, going in opposite directions. However, as Captain Hynek approached him, Jordan laid down on the pavement. A pat-down search conducted upon Jordan yielded 2.9 grams of cocaine. During an inventory search of Jordan's vehicle, three digital scales and a box of sandwich bags were recovered.

[4] On May 20, 2019, Jordan was charged with Dealing in Cocaine and Resisting Law Enforcement. On September 1, 2020, a jury found Jordan guilty of the lesser charge of Possession of Cocaine and guilty of Resisting Law Enforcement, as charged. Jordan admitted to having a prior conviction for Possession of Cocaine, elevating his current possession offense to a Level 5 felony.

[5] On October 8, 2020, the trial court conducted a sentencing hearing. Jordan argued that he deserved a mitigated sentence or placement in community corrections because he had attempted to plead guilty to Resisting Law Enforcement and the lesser charge of Possession of Cocaine, he had admitted to the prior possession conviction, he had expressed remorse, and he had a history of substance abuse.

[6] In its written sentencing order of the same date, the trial court found Jordan's admission to the prior possession offense to be a mitigating circumstance but found in aggravation that Jordan had a criminal history (consisting of two prior

felonies and eight prior misdemeanors), he was at a high risk<sup>3</sup> of re-offending, and he had failed to comply with the rules of probation on eight previous occasions.<sup>4</sup> Jordan received a sentence of five and one-half years of imprisonment in the Indiana Department of Correction (“the DOC”) for his conviction of Possession of Cocaine. He received a consecutive sentence of two years in the LaPorte County Jail for his conviction of Resisting Law Enforcement. The trial court recommended to the DOC that Jordan be placed in a Recovery While Incarcerated program. The trial court also stated that Jordan was permitted to file a petition for modification upon successful completion of that program or after having served four years of his sentence without a violation.

[7] On October 29, 2020, Jordan filed a motion to correct error. On November 12, 2020, Jordan filed motions seeking to amend his motion to correct error, set aside his sentence, and obtain a new sentencing hearing. On November 12, 2020, the trial court denied Jordan relief, and a corresponding entry was made into the Chronological Case Summary on November 13, 2020. On January 18, 2021, he filed his Notice of Appeal.

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<sup>3</sup> Although the trial court’s sentencing order states that Jordan “is likely to reoffend and is considered HIGH risk,” Appealed Order at 2, this is inconsistent with the Presentence Investigation Report overall assessment that Jordan is at moderate risk to reoffend.

<sup>4</sup> The order did not specifically address Jordan’s pending charges of Escape and Dealing in a Lookalike Substance.

## Discussion and Decision

[8] Indiana Rule of Appellate Procedure 9(A)(1) provides in relevant part:

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. 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 is noted in the Chronological Case Summary[.]

Appellate Rule 9(A)(5) provides: “Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2.”

[9] Post-Conviction Rule 2(a) provides:

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.

[10] Jordan concedes that his Notice of Appeal, filed sixty-six days after the denial of his motion to correct error was entered into the Chronological Case

Summary, is untimely. And he admittedly has not pursued a belated appeal under Post-Conviction Rule 2. However, Jordan argues that there exist extraordinarily compelling reasons to permit the appeal to proceed.

[11] Our Indiana Supreme Court recognized that failure to timely file a Notice of Appeal is not a jurisdictional defect, and that there may exist “extraordinarily compelling reasons why [a forfeited right to appeal] should be restored.” *In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014). There, a parent sought to appeal the third-party adoption of his child, but his request for court-appointed counsel was granted only after his Notice of Appeal could have been timely filed. The Court did not define “extraordinarily compelling reasons” but rather explained why the Court decided to address the particular appeal on its merits: “in light of Appellate Rule 1,<sup>5</sup> Father’s attempt to perfect a timely appeal, and the constitutional dimensions of the parent-child relationship, we conclude that Father’s otherwise forfeited appeal deserves a determination on the merits.” *Id.* at 972.

[12] Subsequently, a panel of this Court addressed the merits of an appeal from the denial of post-conviction relief where the Notice of Appeal was filed one day late and “the prison mailbox rule was implicated.” *Morales v. State*, 19 N.E.3d 292, 296 (Ind. Ct. App. 2014). That rule, announced in *Houston v. Lack*, 487 U.S. 266 (1988), provides that the date a pro se prisoner delivers a notice to

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<sup>5</sup> In pertinent part, Appellate Rule of Procedure 1 provides: “The Court may, upon the motion of a party or the Court’ own motion, permit deviation from these Rules.”

prison authorities for mailing, as opposed to the date of receipt, should be considered the date of filing. *See id.*

[13] Jordan asserts that his current counsel attempted to contact prior counsel to question why the Notice of Appeal was untimely, without receiving a response. Purportedly, current counsel has come to believe that the Notice of Appeal was “likely due to be filed during a timeframe that [prior counsel] was having medical issues.” Reply Brief at 7. Jordan argues that he is not personally at fault for his prior counsel’s shortcomings, and he claims to have diligently communicated with his current counsel. However, he has not explained why he did not avail himself of Post-Conviction Rule 2, which provides criminal defendants with a means whereby an untimely appeal may be restored. Under the procedure afforded by Post-Conviction Rule 2, a defendant may develop a record to show his claimed lack of fault and diligence. We will not simply substitute the recognition of proffered “extraordinarily compelling reasons” in place of the post-conviction remedy available to an eligible defendant.

## Conclusion

[14] We find no extraordinarily compelling reasons to restore Jordan’s forfeited right to appeal.

[15] Dismissed.

Crone, J., and Pyle, J., concur.