MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Jonathan D. Harwell
Harwell Legal Counsel LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Travis Nichols,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 31, 2023

Court of Appeals Case No. 22A-CR-3012

Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No. 79D01-1611-F2-36

Memorandum Decision by Judge Brown
Judges Bailey and Weissmann concur.

Brown, Judge.

[1] Travis Nichols appeals the trial court's denial of his petition for permission to file a belated notice of appeal. We affirm.

Facts and Procedural History

[2] On November 22, 2016, the State charged Nichols under cause number 79D01-1611-F2-36 ("Cause No. 36") with Count I, conspiracy to commit dealing in methamphetamine as a level 2 felony; Count II, dealing in methamphetamine as a level 2 felony; Count III, possession of methamphetamine as a level 4 felony; and Count IV, possession of methamphetamine as a level 3 felony. On November 17, 2017, the trial court entered an order stating it advised Nichols, who appeared in open court with counsel, of his jury trial scheduled for 8:30 a.m. on December 5, 2017. It also stated: "The Court is advised that [Nichols] has ask [sic] that an ambulance be called and is further advised [Nichols] left the courthouse in the ambulance." Appellant's Appendix Volume II at 41. On November 30, 2017, the court entered an order scheduling a status hearing for December 1, 2017, ordering Nichols to appear and submit to a drug screen, and stating that if Nichols failed to appear a warrant would be issued for his arrest. On December 1, 2017, Nichols failed to appear and a warrant was issued. In December 2017, the court held a jury trial in absentia. The jury found Nichols guilty of Counts I, II, and III, and the State dismissed Count IV.

[3] A December 11, 2017 entry in the chronological case summary states: "Warrant or Writ of Attmnt for the Body of a Person Served." *Id.* at 15. On December 12, 2017, Nichols, by counsel, filed a Motion to Release Defendant Pending Sentencing requesting that he be released on his own recognizance and

to appear at the sentencing hearing scheduled for January 5, 2018. On December 12, 2017, the court entered an Order Regarding Defendant's Medical Condition and Bond which ordered Nichols "released on recognizance for the duration of his medical treatment in Indianapolis and hospitalization," ordered IU Methodist Hospital to notify Captain Denise Saxton of the Tippecanoe County Jail "if/when [Nichols] is eligible for release from hospitalization," and stated that "[u]pon [Nichols's] release from hospitalization, the bond herein is reinstated and the Tippecanoe County Sheriff is ordered to collect and return [Nichols] from IU Methodist Hospital to the Tippecanoe County Jail, at which time the bond presently in place shall be re-instated." *Id.* at 48.

[4] In a letter dated December 31, 2017, and filed January 2, 2018, Sergeant Brandon Withers informed the trial court that Nichols "was temporarily released from the jail due to medical reasons and was supposed to be taken back to the jail after being medically cleared," "[t]his never occurred and now [Nichols] is out," and he believed Nichols was staying at a certain address "due to dealing with him there frequently, which included earlier in the night." January 2, 2018 Correspondence.

[5] On January 4, 2018, the court entered an order stating: "Due to failure to abide by the Court's Order, the Clerk is directed to issue a warrant for the arrest of [Nichols] for contempt of Court." January 4, 2018 Order. On January 11, 2018, Nichols appeared in the custody of the Sheriff of Tippecanoe County and by counsel, the court read the jury verdicts to Nichols, and it scheduled a sentencing hearing for February 2, 2018.

[6] On February 2, 2018, the court entered an order finding that Counts II and III merged into Count I and sentencing Nichols to eighteen years with seventeen years executed at the Department of Correction to include one year on Tippecanoe County Community Corrections and one year suspended to supervised probation.

[7] On March 5, 2018, Nichols, by Attorney Timothy Broden, filed a notice of appeal of the February 2, 2018 order under appellate cause number 18A-CR-577 ("Appellate Cause No. 577"). On August 8, 2018, Nichols, by Attorney Brooke N. Russell, filed a Motion to Dismiss which stated: "Pursuant to Indiana Appellate Rule 36, the Appellant is hereby filing a Motion to Voluntarily Dismiss his appeal. He has reviewed and discussed his options with Counsel, and he no longer wishes to pursue this direct appeal."[1] Appellant's Appendix Volume II at 147.

[8] On August 15, 2018, this Court entered an order stating that it would not grant Nichols's request to dismiss the appeal unless he demonstrated that: "(a) [Nichols] has been specifically advised that this is his only opportunity to directly appeal the trial court's judgment; and (b) after having been advised of the consequences of dismissal of this appeal, [Nichols] consents to dismissal." *Id.* at 149. The order also stated "[a] verified statement by counsel or an Affidavit signed by [Nichols] setting forth this information will suffice" and

[1] At the October 21, 2022 hearing, the court asked: "Who is Brooke Russell? Is she a private attorney that someone hired for you sir?" Transcript Volume II at 8. Nichols answered: "Yes, my wife." *Id.*

Nichols's "Motion to Dismiss is denied without prejudice to [Nichols's] right to file an amended motion to dismiss appeal that contains the information set forth above within thirty (30) days of the date of this order." *Id.* On October 29, 2018, this Court entered an order observing that no appellant's brief had been filed and dismissing the appeal with prejudice pursuant to Ind. Appellate Rule 45(D).

[9] On December 27, 2018, Nichols filed a *pro se* verified petition for post-conviction relief under cause number 79D01-1812-PC-42 ("Cause No. PC-42") alleging ineffective assistance of trial counsel and appellate counsel.[2] On November 6, 2022, Attorney Jonathan Harwell filed an appearance for Nichols and a Combined Motion to Hold in Abeyance and Status Update, which in part requested that "this matter be held in abeyance so he may file his Amended Petition for Post-Conviction Relief after the Court's ruling on the PC2 Petition in the underlying cause once Counsel has enough time to finish his review and investigation." November 6, 2022 Motion. On November 8, 2022, the court entered an Order Granting Motion to Hold in Abeyance ordering that "[t]his Cause shall be held in abeyance until the Amended Petition for Post-Conviction Relief is filed." November 8, 2022 Order.

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[2] On January 15, 2019, Attorney Lloyd E. Sally filed an appearance for Nichols. On April 24, 2020, Attorney Joseph Yeoman, Deputy State Public Defender, filed a Notice of Substitution of Counsel. On July 7, 2020, Attorney Adam Carter, a Deputy State Public Defender, filed a Notice of Substitution of Counsel. On May 27, 2021, Attorney Carter filed a Notice of Withdrawal of Appearance and Certification. On May 28, 2021, the court granted the notice of withdrawal.

[10] Meanwhile, on June 24, 2019, Nichols, by Attorney Luisa White, filed a Petition to Modify Sentence and for Early Release from the Department of Correction due to Terminal Illness in Cause No. 36. Nichols asserted that, "[o]n January 1, 2018[,] a Physician and other Health Care Professional diagnosed [him] with a terminal illness . . . ." Appellant's Appendix Volume II at 151. On November 14, 2019, the court held a hearing.[3] On December 31, 2019, the court denied Nichols's petition.

[11] On May 9, 2022, Nichols, by Attorney Harwell, filed a Verified Petition for Permission to File a Belated Notice of Appeal Pursuant to Post-Conviction Rule 2 under Cause No. 36 alleging that Nichols did not file a timely notice of appeal of the December 31, 2019 order because he was unaware he could take a direct appeal from a denial of a sentence modification and he had been diligent in requesting permission to file a belated notice of appeal. That same day, Nichols, by Attorney Harwell, tendered a Verified Motion to Pursue a Belated Appeal pursuant to Ind. Post-Conviction Rule 2(3) under Appellate Cause No. 577.[4] On May 23, 2022, this Court entered an order under Appellate Cause No. 577 ordering the Clerk of the Court to file Nichols's Verified Motion to Pursue a Belated Appeal received on May 9, 2022, and denying the motion.

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[3] The record does not contain a transcript of this hearing.

[4] The Verified Motion to Pursue a Belated Appeal under Appellate Cause No. 577 is stamped as received on May 9, 2022, and filed on May 23, 2022.

[12] On June 9, 2022, Nichols, by Attorney Harwell, filed a Renewed Verified Petition for Permission to File a Belated Notice of Appeal Pursuant to Post-Conviction Rule 2 under Cause No. 36. Nichols referenced his appellate counsel's failure to file a brief following this Court's August 15, 2018 order and this Court's May 23, 2022 order denying his motion to pursue a belated appeal. He stated he "is requesting to appeal both sets of matters together" and "[t]his Court previously ruled no further action needed [to be] taken as to the belated appeal as to the sentence modification, but the Petition for Belated Appeal as to the Sentence Modification was not a part of the request before the Indiana Court of Appeals." *Id.* at 173-174. On June 27, 2022, the State filed a response.

[13] On October 21, 2022, the court held a hearing. Nichols testified he was aware that he had a change of attorney after the initial appeal was filed. He stated Attorney Russell told him that withdrawing the appeal "would be the best move to do" and "the best route would be to skip it and go through the . . . modification." Transcript Volume II at 3. When asked if she advised him that would be his only opportunity for a direct appeal from that judgment, he answered: "I don't, I'm not going to lie to you, I'm not for sure. It was a while ago but, no, I don't think she said that was my only opportunity. I'm not for sure how, I'm not going to lie, I don't know sir." *Id.* When asked if she advised him about any of the consequences of the dismissal of that appeal, he answered: "No. No she did not. She said that was my best route would be go to modification." *Id.* Nichols indicated his modification request was ultimately

denied. Nichols's counsel asked: "And so, did you end up agreeing to withdraw that appeal?" *Id.* at 4. Nichols answered: "Um, I would, I would assume I did. I'm not for sure. I would assume I agreed because she told me to." *Id.* The following exchange then occurred:

> Q Okay. Did you understand that in failing to pursue that appeal that you weren't going to get another opportunity to appeal your sentence?
>
> A No I did not. I didn't understand it. She didn't explain that to me. No she did not.
>
> Q Did you understand that by withdrawing the appeal you wouldn't have another opportunity to appeal the actual conviction itself?
>
> A No. No. She told me I had some options. So . . .
>
> Q Did you understand that by withdrawing the appeal you wouldn't have another opportunity to appeal any of those objections or the issues that were preserved within that original record?
>
> A No I did not.
>
> Q And so did you understand that by withdrawing that appeal you would also be waiving any of those issues for future habeus [sic] corpus relief, if you chose to pursue those options.
>
> A No I did not.

Id.

[14] On cross-examination, the following exchange occurred:

> Q Is it possible . . . that your appellate counsel did in fact inform you about what would happen if you withdrew your petition?
>
> A No. No she didn't really.
>
> Q You also say you don't remember so, that also means it's possible that she did in fact inform you.
>
> A If she did, I mean uh, I don't think, the decisions that I made I don't think I would have made that decision. I mean, but I don't know. You're right, I don't know.
>
> Q The same goes for the modification, counsel for modification, it's possible she did tell you about your appellate rights.
>
> A No. I don't think . . . she wasn't anything to do with my appellate issue I don't think. She wasn't there for that. She was there for my modification. That's what we hired her for.
>
> Q [D]o you recall during your original trial having any discussions with you [sic] counsel during that case about the issues that you now wish to seek appeal for?
>
> A I, I don't know. I don't know.

Id. at 7.

[15] The court asked Nichols's counsel: "[A]re you trying to appeal the jury verdict, I would call that item A or 1, and then we also have a modification, which is almost, now almost 3 years old, 2 ½ when you filed your motion." *Id.* at 10. Nichols's counsel answered:

> So, in a perfect world we would like to appeal both now. We would like to essentially consolidate both; both would essentially have to be under different rules though. The original conviction would have to be under PC rule 2 but the modification would

> technically have to be under Appellate Rule 1. Since obviosity [sic] that doesn't qualify under PC Rule 2 under belated appeal. So those two technically have to be separate.

Id.

[16] Nichols's counsel stated: "I think we would all agree at the end of the day, it was counsel that acted improperly." *Id.* at 11. The court stated: "Well, then maybe counsel should have been here to testify, and questions should have been asked of that attorney. Maybe that would be the appropriate thing at a hearing on post-conviction as opposed to that which has occurred here. Three years. Three years." *Id.* at 12. The court stated:

> And to suggest that your client does not know how to use and abuse the system, I think is, abuse is the wrong term, use the system to his benefit, I think it incorrect. You are new to the case. Relatively new to the case and I hold that not against you in any way nor do I hold it against your client. I'm just saying, I lived this case. I know that which occurred from when we were trying to get this case set and where and all the things that have happened in the intervening time.

Id.

[17] On November 22, 2022, the court entered an Order Denying Permission to File Belated Notice of Appeal in Cause No. 36. The order stated: "Based upon the filing history in this cause, the filing history in the post-conviction cause, and the testimony proffered by [Nichols], this Court does not find [Nichols] is an 'eligible defendant.'" Appellant's Appendix Volume II at 182. It also stated:

> [Nichols] previously has had five (5) different attorneys as related to the conviction in this cause. Motions for appeal, modification, compassionate release, and post-conviction relief have all been filed on behalf of [Nichols]. Further, the testimony from [Nichols] on October 21, 2022, demonstrated he had sufficient knowledge, involvement, and acquiesce [sic] in all legal maneuverings on his behalf.

Id.

Discussion

[18] Nichols argues the post-conviction court erred in denying his permission to file a belated appeal of his initial conviction as well as the denial of his Petition to Modify Sentence and for Early Release from the Department of Correction. Generally, where a post-conviction court holds a hearing on the motion to file a belated notice of appeal, "[t]he decision whether to grant permission to file a belated notice of appeal is left to 'the sound discretion of the trial court,' and therefore faces abuse of discretion review." *Leshore v. State*, 203 N.E.3d 474, 477 (Ind. 2023) (quoting *Moshenek v. State*, 868 N.E.2d 419, 422 (Ind. 2007), *reh'g denied*).

[19] 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 Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by" Ind. Post-Conviction Rule 2. Ind. Post-Conviction Rule 2 "allows

belated appeals in certain criminal cases." *Dawson v. State*, 943 N.E.2d 1281, 1281 (Ind. 2011).

[20] Ind. Post-Conviction Rule 2 provides that an "eligible defendant" for purposes of the 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." Ind. Post-Conviction Rule 2(1)(a) establishes the requisites for filing a belated notice of appeal:

> 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.

[21] "Under this Rule, '[t]he defendant bears the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing' and was 'diligent in pursuing permission to file a belated motion to appeal.'" *Leshore*, 203 N.E.3d at 477 (quoting *Moshenek*, 868 N.E.2d at 422-423). "These inquiries are fact-sensitive because '[t]here is substantial room for debate as to what constitutes diligence and lack of fault on the part of the defendant.'" *Id.* (quoting *Moshenek*, 868 N.E.2d at 424). "And since each case is shaped by its

own circumstances, there are no assigned 'standards of fault or diligence.'" *Id.* (quoting *Moshenek*, 868 N.E.2d at 423). "Instead, courts examine a range of factors, including 'the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether the defendant was informed of his appellate rights, and whether he committed an act or omission which contributed to the delay.'" *Id.* (quoting *Moshenek*, 868 N.E.2d at 423 (quoting *Land v. State*, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994), *reh'g denied*, *trans. denied*)).

[22] To the extent Nichols attempted to file a belated appeal of the February 2, 2018 order under Cause No. 36, we note that Nichols filed a notice of appeal of that order on March 5, 2018. Accordingly, he is not an eligible defendant under Ind. Post-Conviction Rule 2(1). *See George v. State*, 862 N.E.2d 260, 264 (Ind. Ct. App. 2006) (observing that "the plain language of Indiana Post-Conviction Rule 2, Section 1 indicates that it applies only to defendants who have 'fail[ed] to file a timely notice of appeal' and provides a means for those defendants to seek permission to file a belated notice of appeal," holding that, "[b]ecause George filed a timely notice of appeal, he was not entitled to use Indiana Post-Conviction Rule 2, Section 1 as a means to get a second bite at the apple and file an additional notice of appeal," and concluding that the trial court erred by granting George's petition for permission to file a belated notice of appeal).

[23] In *George*, we held that "our decision to reverse the trial court's grant of permission to file a belated notice of appeal does not mean that George loses his right to appeal his sentence," and "[b]ecause George had previously filed a

timely notice of appeal, the proper course of action in this case would have been for him to pursue a belated appeal under Post-Conviction Rule 2, Section 3." 862 N.E.2d at 264. Ind. Post-Conviction Rule 2(3) provides:

> An eligible defendant convicted after a trial or plea of guilty may petition the appellate tribunal for permission to pursue a belated appeal of the conviction or sentence if:
>
> (a) the defendant filed a timely notice of appeal;
>
> (b) no appeal was perfected for the defendant or the appeal was dismissed for failing to take a necessary step to pursue the appeal;
>
> (c) the failure to perfect the appeal or take the necessary step was not due to the fault of the defendant; and
>
> (d) the defendant has been diligent in requesting permission to pursue a belated appeal.

[24] As noted, Nichols, by Attorney Harwell, tendered a Verified Motion to Pursue a Belated Appeal pursuant to Ind. Post-Conviction Rule 2(3) under Appellate Cause No. 577 on May 9, 2022, and this Court entered an order on May 23, 2022, denying the motion. Nichols did not seek reconsideration of that ruling.

[25] To the extent Nichols is attempting to file a belated notice of appeal of the December 31, 2019 order denying his Petition to Modify Sentence and for Early Release from the Department of Correction due to Terminal Illness in Cause No. 36, we note that the Indiana Supreme Court has stated that Ind. Post-Conviction Rule 2 "applies to direct appeals of convictions or sentences" and "does not apply to appeals of collateral or post-judgment rulings." *Hill v. State*,

960 N.E.2d 141, 148 (Ind. 2012), *reh'g denied*. *See also Davis v. State*, 771 N.E.2d 647, 649 (Ind. 2002) (holding that Post-Conviction Rule 2(1) is a vehicle for belated direct appeals alone and "[i]t provides petitioners with a method to seek permission for belated consideration of appeals addressing conviction, but does not permit belated consideration of appeals of other post-judgment petitions").[5]

[26] The record reveals that, after Nichols was charged, he failed to appear as ordered, a warrant was issued for his arrest, and the court held a jury trial in absentia. After being released for medical treatment and not being returned to custody, the court issued another arrest warrant. At the October 21, 2022 hearing, when asked if Attorney Russell advised him that would be his only opportunity for a direct appeal from that judgment, Nichols responded that he didn't know. Further, Nichols did not present any testimony from Attorney Broden, who filed a notice of appeal of the February 2, 2018 sentencing order, or Attorney Russell, who filed the August 8, 2018 motion to dismiss the appeal, which asserted that Nichols had "reviewed and discussed his options with

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[5] Nichols cites *In re Adoption of O.R.*, 16 N.E.3d 965 (Ind. 2014), and asserts the Indiana Supreme Court found that Ind. Appellate Rule 1 lets the Court deviate from its own rules and provides a mechanism for an appellate court to resurrect an otherwise forfeited appeal. In *In re Adoption of O.R.*, the Indiana Supreme Court discussed whether the timely filing of a notice of appeal is a matter of jurisdiction and noted:

> *Davis* involved an attempted belated appeal of the denial of a criminal defendant's motion to correct erroneous sentence. We noted that our cases had consistently held that Post-Conviction Rule 2 applies only to direct appeals of criminal convictions and could not be used to salvage Davis' late appeal of the denial of his motion. *Davis*, 771 N.E.2d at 649. As explained in more detail above our language in *Davis* regarding the Court of Appeals' "jurisdiction" and "authority" over Davis' appeal is problematic. However, the ultimate conclusion in that case is correct.

16 N.E.3d at 970 n.2 (Ind. 2014).

Counsel, and he no longer wishes to pursue this direct appeal." Appellant's Appendix Volume II at 147. Generally, "[w]here trial counsel is not presented in support, the post-conviction court may infer that trial counsel would not have corroborated appellant's allegations." *Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989). The court was entitled to infer that Nichols's appellate counsel would not have corroborated his allegations. Under the circumstances, we cannot say that reversal is warranted.[6]

[27] For the foregoing reasons, we affirm the trial court's order.

[28] Affirmed.

Bailey, J., and Weissmann, J., concur.

[6] We note that Nichols filed a petition for post-conviction relief under Cause No. PC-42, which was held in abeyance by the post-conviction court's November 8, 2022 order.