

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

David Pannell,
Appellant-Plaintiff,

v.

Bessie E. Leonard, et al.,
Appellees-Defendants.

November 13, 2023

Court of Appeals Case No.
22A-PL-922

Appeal from the
LaPorte Circuit Court

The Honorable
Thomas J. Alevizos, Special Judge

Trial Court Cause No.
46D01-1703-PL-425

Memorandum Decision by Judge Foley
Chief Judge Altice and Judge May concur.

Foley, Judge.

[1] David Pannell (“Pannell”) appeals the trial court’s dismissal of his complaint under Trial Rule 41(E). However, we find that we have no jurisdiction to review Pannell’s appeal because it is untimely, and therefore, we dismiss.

Facts and Procedural History

[2] In 2017, Pannell filed a complaint alleging federal and state law claims while he was incarcerated in the Indiana State Prison. The case was removed to federal court. The federal district court dismissed the federal claims because Pannell was a restricted filer and remanded the remaining state law claims to the trial court. Eventually, on April 9, 2019, the Honorable Thomas Alevizos was appointed special judge under Trial Rule 53.1. *See Appellee’s App. Vol. II pp. 65–66.* A status conference was conducted on May 6, 2019, but no other pleadings or matters were conducted until Defendants filed their motion to dismiss under Trial Rule 41(E) on March 5, 2021. Pannell filed an objection to the motion to dismiss.

[3] A hearing on the motion to dismiss was conducted on November 18, 2021, and Pannell did not appear. The trial court entered an order of dismissal on December 2, 2021 (“the December 2021 Order”), signed by Senior Judge Michael Bergerson. Pannell filed his motion correct error (“the First Motion”) on December 29, 2021. Pannell’s First Motion alleged two grounds for relief: (1) Senior Judge Bergerson did not have jurisdiction to issue the order; and (2) the trial court’s failure to ensure Pannell could attend the November 18 hearing by video. The trial court then issued another order of dismissal on January 31, 2022 (“the January 2022 Order”). The January 2022 Order was signed by

Special Judge Alevizos, but was otherwise identical to the December 2021 Order.

- [4] Pannell claims that he did not receive service of the January 2022 Order until March 8, 2022.¹ On April 1, 2022, Pannell filed another motion to correct error (“the Second Motion”), raising the trial court’s failure to ensure Pannell could attend the November 18 hearing by video as his sole grounds for relief. The Second Motion was dated March 1, 2022, but was not filed with the trial court until April 1, 2022. Pannell then filed his Notice of Appeal on April 20, 2022.

Discussion and Decision

- [5] Pannell, who appeals *pro se*, “is held to the same rules of procedure as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented.” *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). Pannell contends that the trial court erred by conducting the hearing in his absence. However, we decline to reach the merits of Pannell’s appeal because Pannell failed to comply with the controlling appellate and trial rules to perfect his appeal.²

¹ In his Reply Brief, Pannell asserts he was served with the January 2022 Order on February 24, 2022, but claims he was served on March 8, 2022, in his Motion to Reconsider, filed with the Court of Appeals on August 2, 2022. *See* Appellant’s Reply Br. p. 6. We grant Pannell the greatest leeway and consider his service date to be March 8.

² Although the motions panel granted Pannell’s motion to reconsider and reinstated his appeal, “this court retains the inherent authority to revisit decisions of the motions panel, and we choose to do so in this case.” *Baker v. Pickering*, 178 N.E.3d 347, 350 (Ind. Ct. App. 2021), *trans. denied*.

[6] From our review of Pannell’s briefs, it is unclear what Pannell is appealing.³

Indiana Appellate Rule 9(A) provides:

(1) Appeals from Final Judgments. 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 [CCS]. 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 [CCS] or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

. . . .

(5) Forfeiture of Appeal. Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited....

Indiana Trial Rule 53.3(A) provides:

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 . . . 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.

³ In his Notice of Appeal, Pannell indicated that he is appealing a final judgment from March 18, 2022. However, there is no such order on the CCS nor is the order attached to his Notice of Appeal. Pannell also failed to: (1) attach the motion to correct error referenced in his Notice of Appeal; and (2) properly request the transcript from the trial court.

[7] The trial court dismissed the cause with prejudice in its December 2021 Order. “[A] dismissal with prejudice is a final judgment.” *In re Estate of Hurwich*, 103 N.E.3d 1135, 1139 (Ind. Ct. App. 2018) (quoting *In re Scott David Hurwich 1986 Irrevocable Tr.*, 59 N.E.3d 977, 980 (Ind. Ct. App. 2016)), *aff’d on reh’g*. As to the December 2021 Order, Pannell timely filed his First Motion. In response, the trial court addressed some—but not all—of Pannell’s allegations of error and issued the January 2022 Order. Indiana Trial Rule 59 provides:

(F) Motion to Correct Error Granted. Any modification or setting aside of a final judgment or an appealable final order following the filing of a Motion to Correct Error shall be an appealable final judgment or order.

When the trial court issued the January 2022 Order, Pannell was required to file his Notice of Appeal within thirty days after receiving service on March 8, 2022, i.e., no later than April 7, 2022. *See* Ind. Appellate Rule 9(A)(1). Pannell filed his Notice of Appeal on April 20, 2022. Pannell failed to meet the appellate deadline, and thus, he forfeited his right to appeal. *See, e.g., Peters v. Perry*, 873 N.E.2d 676, 678 (Ind. Ct. App. 2007) (“Timeliness of filing a [N]otice of [A]ppeal is of the utmost importance.”); *see also* Ind. Appellate Rule 9(A)(5).⁴

⁴ We interpret the January 2022 Order as the trial court’s ruling on Pannell’s First Motion, as it addressed Pannell’s allegation of error concerning Special Judge Alevizos’s jurisdiction. However, we recognize that the order fails to reference the First Motion and is silent as to Pannell’s other grounds for relief.

[8] Pannell’s Second Motion was substantively a motion to reconsider or a repetitive motion because it raised the same grounds for relief as his First Motion. Indiana Trial Rule 53.4(A), which applies to repetitive motions and motions to reconsider a ruling on a motion, provides: “Such a motion by any party or the court or such action to reconsider by the court shall not delay the trial or any proceedings in the case, or extend the time for any further required or permitted action, motion, or proceedings under these rules.” Moreover, such a motion is deemed denied unless “ruled upon within five (5) days.” Ind. Tr. Rule 53.4(B). Therefore, Pannell’s Second Motion was deemed denied as of April 6, 2022, and it did not extend his time to appeal the January 2022 Order. *See Peters*, 873 N.E.2d at 678–79 (Ind. Ct. App. 2007) (construing Trial Rule 53.4(A) and determining that a second motion to correct error did not affect the deadline for filing a notice of appeal), *modified on other grounds on reh’g*, 877 N.E.2d 498 (Ind. Ct. App. 2007).⁵

[9] Because Pannell failed to comply with the controlling appellate and trial rules, we lack jurisdiction to review his appeal. We therefore dismiss.

[10] Dismissed.

Altice, C.J., and May, J., concur.

⁵ To the extent Pannell argues that he is appealing the trial court's ruling on his Second Motion, his Notice of Appeal is premature because it was filed before the trial court issued a ruling and before his Second Motion was deemed denied. *See* Ind. Trial Rule 53.3(A).