

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Steven R. Kennedy,
Appellant / Cross-Appellee-Defendant,

v.

State of Indiana,
Appellee / Cross-Appellant-Plaintiff.

December 21, 2023

Court of Appeals Case No.
23A-CR-565

Appeal from the Tippecanoe
Superior Court

The Honorable Randy J. Williams,
Judge

Trial Court Cause No.
79D01-2103-F4-10

Memorandum Decision by Judge Tavitas
Judge Foley concurs.
Judge Pyle dissents with a separate opinion.

Tavitas, Judge.

Case Summary

- [1] Steven Kennedy pleaded guilty to unlawful possession of a firearm by a serious violent felon (“SVF”), a Level 4 felony, and operating a vehicle while intoxicated endangering a person, a Class A misdemeanor. Kennedy also admitted to being an habitual offender. The trial court sentenced Kennedy to an aggregate term of sixteen years. Thereafter, Kennedy filed a motion asking the trial court to appoint Kennedy appellate counsel, which the trial court granted ninety-nine days after the motion was filed. Kennedy’s appellate counsel then filed a notice of appeal four days after being appointed but 114 days after the entry of final judgment. On appeal, Kennedy claims that his sentence is inappropriate. The State cross-appeals and argues that Kennedy’s appeal is untimely. We agree with the State and, accordingly, dismiss.

Issue

- [2] We find one issue to be dispositive: whether Kennedy timely filed his notice of appeal.

Facts

- [3] In the early morning hours of January 4, 2021, Kennedy was driving his vehicle on I-65 in Tippecanoe County with Andrea Diggs in the passenger seat. Tippecanoe County Sheriff’s Deputy Conner Lefever observed Kennedy change lanes without signaling and clocked Kennedy’s vehicle at 95 mph in a 65-mph zone. Deputy Lefever stopped Kennedy’s car and approached the vehicle to speak with Kennedy. Kennedy admitted that his license was suspended, and

Deputy Lefever smelled the odor of marijuana emanating from the vehicle. When Kennedy opened the glove compartment to retrieve his insurance card, Deputy Lefever saw a handgun in the compartment. Deputy Lefever confirmed that neither Kennedy nor Diggs had a permit to carry the handgun. Deputy Lefever also confirmed that Kennedy's driver's license was suspended. Deputy Lefever searched the car and found an open bottle of cognac in the passenger side of the front seat. Kennedy admitted that he had smoked marijuana and drunk cognac earlier in the night. A subsequent blood test revealed that Kennedy had an ACE of .113 and had THC¹ and MDMA² in his blood. When Kennedy was searched at the jail, the police found a bag of marijuana on his person.

[4] On March 19, 2021, the State charged Kennedy as follows: Count I: possession of a firearm by an SVF, a Level 4 felony; Count II: operating a vehicle while intoxicated endangering a person, a Class A misdemeanor; Count III: operating a vehicle with an ACE of .08 or greater but less than .15, a Class A misdemeanor; Count IV: carrying a handgun without a license, a Class A misdemeanor; Count V: possession of marijuana, a Class B misdemeanor; Count VI: driving while suspended, a Class A misdemeanor; Count VII: unlawful possession of a firearm by a domestic batterer, a Class A

¹ Tetrahydrocannabinol, commonly abbreviated as THC, is the main active chemical in marijuana. *Medina v. State*, 188 N.E.3d 897, 900 (Ind. Ct. App. 2022).

² MDMA (methylenedioxymethamphetamine), also known as "Molly" and "Ecstasy," is "chemically similar to both stimulants and hallucinogens." <https://perma.cc/H6ND-T4N7> (last visited November 13, 2023). MDMA is classified as a Schedule I controlled substance. *Hyche v. State*, 934 N.E.2d 1176, 1177 (Ind. Ct. App. 2010) (citing Ind. Code § 35-48-2-4(d)(13)), *trans. denied*.

misdemeanor; Count VIII: carrying a handgun without a license with a prior felony conviction, a Level 5 felony; and Count IX: possession of marijuana with a prior drug offense, a Class A misdemeanor. The State also alleged that Kennedy was an habitual offender.

[5] Kennedy eventually entered into a plea agreement with the State in which he agreed to plead guilty to Count I: possession of a firearm by a serious violent felon, a Level 4 Felony, Count II: operating while intoxicated, a Class A Misdemeanor, and admitted to being an habitual offender. In exchange, the State agreed to dismiss all other charges. Sentencing was left to the discretion of the trial court. The trial court accepted the guilty plea on October 29, 2021. At a sentencing hearing held on November 20, 2022,³ the trial court sentenced Kennedy to nine years on Count I, which the trial court enhanced by six years for the habitual offender finding, and a consecutive term of one year on Count II, for an aggregate sentence of sixteen years. The trial court also ordered the final three years of the sentence to be served on community corrections. Kennedy's trial counsel subsequently withdrew his appearance.

[6] On December 1, 2022, Kennedy filed a pro se motion to appeal his sentencing order, in which he requested that the trial court appoint counsel to represent him on appeal. The trial court did not rule on this motion until March 10, 2023, when it entered an order concluding that Kennedy timely filed his

³ The delay in sentencing Kennedy was caused, at least in part, by his subsequent request to withdraw the plea, which the trial court denied. Kennedy does not challenge the denial of his motion to withdraw his guilty plea on appeal.

“motion to appeal,” and appointed Kennedy pauper counsel. Appellant’s App. Vol. II p. 100. Kennedy’s appellate counsel then filed a notice of appeal on March 14, 2023.

Discussion and Decision

- [7] Kennedy presents one issue on appeal: whether his sixteen-year sentence is inappropriate. The State cross-appeals and argues that Kennedy’s appeal is untimely. We agree with the State.
- [8] Indiana Appellate Rule 9(A)(1) provides: “A party initiates an appeal by filing a Notice of Appeal with the Clerk (as defined in Rule 2(D)) within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary.” Appellate Rule 9(A)(5) also provides that “[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by [Post-Conviction Rule] 2.”
- [9] Here, Kennedy did not file a notice of appeal within thirty days of the entry of final judgment in the Chronological Case Summary (“CCS”) on November 20, 2022. Instead, on December 1, 2022, he filed a pro se “motion to appeal sentencing order,” in which he asked the trial court to appoint counsel for purposes of appeal. Appellant’s App. Vol. II p. 148. For whatever reason, the trial court did not grant this motion until March 10, 2023, ninety-nine days after the motion was filed. Kennedy’s appointed appellate counsel then filed a notice of appeal on March 14, 2023—only four days after being appointed, but 114 days after the entry of final judgment (the sentencing order) had been entered in

the CCS. Thus, Kennedy did not timely file his notice of appeal. Pursuant to Appellate Rule 9(A)(1), Kennedy forfeited his right to appeal.

[10] Appellate Rule 9(A)(5) provides the right to appeal is forfeited unless the notice of appeal has been timely filed, “except as provided by [Post-Conviction Rule] 2.” Post-Conviction Rule 2 “allows a defendant who fails to timely file a notice of appeal to ‘petition the trial court for permission to file a belated notice of appeal.’”⁴ *Norton v. State*, 210 N.E.3d 886, 888 (Ind. Ct. App. 2023) (quoting P-C R. 2(1)). A petition to file a belated notice of appeal may be granted if: (1) the defendant was without fault for failing to timely file the notice of appeal and (2) the defendant has been diligent in requesting permission to file the belated notice of appeal. *Id.* (citing P-C R. 2(2)-(3)). Here, however, Kennedy has not availed himself of the provisions of Post-Conviction Rule 2.

Conclusion

[11] Kennedy did not timely file a notice of appeal. He, therefore, forfeited his right to appeal, subject to the provisions of Post-Conviction Rule 2 regarding belated

⁴ We acknowledge that our Supreme Court has held that, although “the failure to file a timely notice of appeal does not deprive this court of jurisdiction, it will result in the forfeiture of the right to appeal unless ‘there are extraordinarily compelling reasons why this forfeited right should be restored.’” *Beasley v. State*, 192 N.E.3d 1026, 1029 (Ind. Ct. App. 2022) (quoting *In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014)), *trans. denied*. Kennedy does not claim that there are any extraordinarily compelling reasons to restore his right to appeal. We note, however, that we have also held that the “extraordinarily compelling reasons” exception does not apply to untimely criminal appeals that are governed by Post-Conviction Rule 2. *Pryor v. State*, 189 N.E.3d 167, 169 n.1 (Ind. Ct. App. 2022) (citing *Sanford v. State*, 54 N.E.3d 373, 378 (Ind. Ct. App. 2016), *trans. granted, summarily aff’d in relevant part*, 51 N.E.3d 1182, 1183 (Ind. 2016)).

appeals, of which Kennedy has not availed himself. Accordingly, we dismiss this appeal.

[12] Dismissed.

Foley, J., concurs.

Pyle, J., dissents with a separate opinion.

Pyle, Judge dissenting.

[13] I respectfully dissent from my colleagues' decision to dismiss Kennedy's appeal as untimely. Because the reason for Kennedy's untimely appeal lies with the trial court's untimely appointment of Kennedy's appellate counsel, it seems unjust to penalize Kennedy by dismissing his appeal. Indiana's appellate courts have a preference for deciding cases on their merits rather than dismissing them on procedural grounds. *In re Adoption of O.R.*, 16 N.E.3d 965, 972 (Ind. 2014). Further, despite the seemingly mandatory language of Indiana Appellate Rule 9(A)(5) requiring dismissal after an untimely filed Notice of Appeal, our appellate rules allow for deviation from these rules. *See* APP. R. 1; *In re O.R.*, 16 N.E.3d at 972. As a result, when extraordinary circumstances exist, we have restored an appellant's appeal. *Id.* I believe those circumstances exist here and would decide Kennedy's appeal on its merits.