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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL DEAN OVERSTREET,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 41A05-0902-CV-060

APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Cynthia S. Emkes, Judge
Cause No. 41D02-9711-CF-158

July 17, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Michael Dean Overstreet (“Overstreet”) is a death row inmate. Overstreet filed a motion for return of personal property in Johnson Superior Court. The trial court denied his motion pursuant to Indiana Code section 35-33-5-5. Overstreet appeals and argues that the property should be returned because the property was not used as evidence at trial and is not relevant to any future legal proceedings. Concluding that the trial court properly denied Overstreet’s motion, we affirm.

Facts and Procedural History

Overstreet is a death row inmate awaiting execution in the Indiana Department of Correction. On December 18, 2008, Overstreet filed his Fourth Motion for Return of Personal Property alleging that, at the time of his arrest, law enforcement personnel confiscated numerous items of his personal property, which were not used as evidence during his trial. Overstreet attached a list of the property he seeks, which includes several firearms and knives, computer equipment, and a van.

On December 31, 2008, the trial court denied Overstreet’s motion and entered the following findings of fact and conclusions of law:

1. On December 18, 2008, Petitioner filed a motion asking for the return of personal property items seized in connection with cause number 41D02-9711-CF-00158.
2. Indiana Code § 35-33-5-5 governs the disposition of seized items and provides in relevant part as follows: “(c) Following the final disposition of the cause at trial level or any other final disposition the following shall be done . . .” []
3. As the post-conviction portion of Petitioner’s case is currently on appeal and, depending on the disposition, evidence seized may be needed at a later date, the court denies Petitioner’s request.

Appellant’s App. p. 49. Overstreet now appeals.

Discussion and Decision

First, we address the State's argument that Overstreet failed to timely file his notice of appeal. The trial court issued its judgment on December 31, 2008. Overstreet's notice of appeal is file stamped "February 2, 2009." However, the certificate of service attached to Overstreet's notice of appeal states that copies of the notice of appeal were served on January 26, 2009, by deposit in the United States mail. Our court's docket in this case notes that the Clerk received a "service copy of the notice of appeal" from Overstreet on January 28, 2009. Therefore, it appears that Overstreet attempted to file his notice of appeal within thirty-days of the trial court's judgment. See Ind. Appellate Rule 9(A)(1).

Moreover, under the "prison mailbox rule," *pro se* filings from an incarcerated litigant are deemed filed when they are delivered to prison officials for mailing. Dowell v. State, No. 32A01-0810-PC-508, Slip op. at 6 (Ind. Ct. App. June 30, 2009) (citing McGill v. Ind. Dep't of Corr., 636 N.E.2d 199, 202 (Ind. Ct. App. 1994) (citing Houston v. Lack, 487 U.S. 266 (1988))). Because the record suggests that Overstreet mailed his notice of appeal within thirty days of the trial court's judgment, we will consider his appeal as timely filed and address his claim on its merits.

On the merits, Overstreet argues that the trial court erred when it denied his motion for return of personal property because the property was not used at trial and is not relevant to any future legal proceedings.¹ When we review a trial court's denial of a

¹ Overstreet waived the constitutional claims raised in his Appellant's Brief because he failed to present those arguments to the trial court. See Appellant's App. pp. 51-54; State v. Serowiecki, 892 N.E.2d 194, 204 (Ind. Ct. App. 2008).

motion for return of property, we will not reverse unless the decision is clearly erroneous and cannot be sustained upon any legal theory supported by the evidence. Merlington v. State, 839 N.E.2d 260, 262 (Ind. Ct. App. 2005).

Indiana Code section 35-33-5-5 (2004 & Supp. 2008) provides in pertinent part:

(a) All items of property seized by any law enforcement agency as a result of an arrest, search warrant, or warrantless search, shall be securely held by the law enforcement agency under the order of the court trying the cause, except as provided in this section.

(c) Following the final disposition of the cause at trial level or any other final disposition the following shall be done:

(1) Property which may be lawfully possessed shall be returned to its rightful owner, if known. . . .

“The court, once its need for the property has terminated, has both the jurisdiction and the duty to return seized property.” Sinn v. State, 693 N.E.2d 78, 81 (Ind. Ct. App. 1998) (citing Conn v. State, 496 N.E.2d 604, 608 (Ind. Ct. App. 1986), trans. denied)).

Overstreet’s murder conviction and death sentence were affirmed on direct appeal. See Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003). The denial of Overstreet’s petition for post-conviction relief was also affirmed on appeal. See Overstreet v. State, 877 N.E.2d 144 (Ind. 2007). Overstreet is now challenging his conviction and sentence via a petition for writ of habeas corpus filed in the United States District Court, Northern District of Indiana. Because Overstreet continues to challenge his conviction and sentence, we agree with the trial court that there is not yet a “final disposition” in this case. Accordingly, we affirm the trial court’s denial of Overstreet’s motion for return of personal property.

Affirmed.

RILEY, J., and KIRSCH, J., concur.