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IN THE
COURT OF APPEALS OF INDIANA

JEFFREY A. ARTHUR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0612-CR-1070
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven Nation, Judge
Cause No.29D01-0012-CF-78

February 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea in 1999, Jeffrey Arthur was convicted of three counts of child molesting as Class B felonies and one count of child molesting as a Class A felony and sentenced to a total of sixty years at the Department of Correction. In 2005, Arthur sought permission to file a belated notice of appeal. The trial court denied his petition. Several months later, Arthur filed a motion for relief from judgment that was also denied. Arthur now appeals, raising the issue of whether the trial court abused its discretion in denying his motion for relief from judgment. Concluding that the trial court did not abuse its discretion because Arthur was improperly attempting to revive his right to appeal via the motion for relief from judgment, we affirm.

Facts and Procedural History

Arthur was charged in 1998 with sixteen counts of child molesting, nine counts as Class B felonies and seven counts as Class A felonies, because of alleged acts of molestation with his live-in girlfriend's daughter beginning when she was five years old and continuing until she was seven. In 1999, Arthur and the State entered into a plea agreement pursuant to which he would plead guilty to three Class B felony counts and one Class A felony count of child molesting and the State would dismiss the remaining charges. In addition, the State would recommend that Arthur receive an executed sentence of no more than ninety years. Arthur entered his plea of guilty, the trial court accepted the plea agreement, and at the conclusion of the sentencing hearing, the trial court sentenced Arthur to ten years for each Class B felony conviction and thirty years for the Class A felony conviction, and ordered that

the sentences be served consecutively for a total sentence of sixty years.

In 2000, Arthur filed a pro se petition for post-conviction relief, alleging that his sentence was unconstitutional because the trial court considered improper aggravators, overlooked significant mitigators, and improperly ordered consecutive sentences. In 2004, the petition was withdrawn without prejudice.

On February 11, 2005, Arthur filed a pro se petition for permission to file a belated notice of appeal.[1] The petition alleged that at the time of his guilty plea, "he was misinformed by the Trial Court, about his choice to appeal. The Trial Court advised him that he was entitled to an appeal only if he went to trial." Appellant's Appendix at 71. The petition also alleged that the trial court used improper aggravating factors to support consecutive sentences. Arthur requested the appointment of counsel to perfect his appeal. Counsel was appointed on May 23, 2005. The State filed a response to Arthur's petition, contending that Arthur had not met the requirements of Post-Conviction Rule 2(1). Specifically, the State claimed Arthur did not allege that the failure to file a timely notice of appeal was not due to his fault or that he had been diligent in requesting permission to file a belated notice of appeal. A hearing, the transcript of which was not provided to this court, was held on Arthur's petition. Arthur was present in person and represented by counsel at this hearing. The trial court took the matter under advisement and subsequently entered an order denying him permission to file a belated notice of appeal. The trial court's order

[1] Although Arthur was charged and convicted in Hamilton Superior Court 2, and Arthur filed his petition for permission to file belated notice of appeal under the Superior 2 cause number, the petition was actually docketed in Hamilton Superior Court 1.

provided, in pertinent part:

> 5. That the defendant, pursuant to Indiana Appellate Rules of Procedure, Rule 9A(1), has failed to file a Notice of Appeal within thirty (30) days after the Final Judgment.
>
> 6. That the defendant is now attempting to proceed under Indiana Rules of Procedure for Post-Conviction Remedies, Rule P.C. 2, by filing such Petition approximately five (5) years and five (5) months after his sentence.
>
> 7. That the defendant has failed to present any evidence that anyone other than the defendant was at fault to file a timely notice of appeal and has therefore failed to comply with P.C. Rule 2 Section 1(a) by not showing that failure to file a timely notice of appeal was not due to his own fault. The defendant has also failed to present any evidence that he complied with P.C. Rule 2 Section 1(b) by showing diligence of requesting permission to file a belated notice of appeal.
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> 8. That in addition to the above-stated failure on the part of the defendant to comply with P.C. Rule 2, all of the defendant's contentions of error are not supported by the record.
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> * * *
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant's PETITION FOR PERMISSION TO FILE BELATED NOTICE OF APPEAL should be and is hereby DENIED.

Id. at 104-06 (citation omitted). The trial court's order shows service was made on the deputy prosecuting attorney and on Arthur's attorney. Id. at 106. The order is dated October 11, 2005.

On September 19, 2006, Arthur filed a pro se motion for relief from the trial court's October 11, 2005, order denying him permission to file a belated notice of appeal. Arthur alleged that the trial court notified his counsel of its ruling and counsel failed to notify him. He further alleged that he was unaware of any ruling on his petition for permission to file a belated notice of appeal until he received a copy of the chronological case summary ("CCS") for his case on August 16, 2006. He therefore asked that the October 11, 2005, order be

reversed and he be allowed to file a belated notice of appeal. The State responded, alleging that the CCS shows "Dist. to parties" and therefore denying Arthur's averment that he did not know about the October 11, 2005, order at the time it was entered. After reviewing Arthur's motion and the State's response thereto, the trial court entered the following order denying relief:

> 1. That on or about October 11, 2005, this Court entered an order finding, among other facts, that the petitioner/defendant failed to present any evidence that anyone other than the petitioner/defendant himself was at fault to file a timely notice of appeal; therefore, failed to comply with Indiana Rule [of] Procedure for Post-Conviction Remedies 2, Section 1(a) by not showing that failure to file a timely notice of appeal was not due to his own fault.
>
> 2. That the petitioner/defendant claims he is entitled to relief under Indiana Rule of Trial Procedure 60(B) due to his allegation his counsel "failed to notify the [p]etitioner;" however, the petitioner/defendant fails to alleged [sic] of what counsel neglected to notify the petitioner/defendant nor does he allege how he was prejudiced because his counsel "failed to notify the [p]etitioner;"
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> 3. That this Court does not find the allegation that counsel "failed to notify the [p]etitioner" credible as the chronological case summary in the above entitled cause reflects that "Dist. to parties," which indicates to this Court that petitioner/defendant pro se received notice of this Court's ORDER filed on October 11, 2005;
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> 4. That Indiana Rule of Trial Procedure 60(B) sets forth a number of situations in which a party may receive relief from an entry of default, final order, or final judgment, including a judgment by default; and
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> 5. That this Court made a thorough review of the petitioner/defendant's pro se Motion for Relief from Judgment as well as Indiana Rule of Trial Procedure 60(B) but could not find a basis upon which this Court may provide the relief requested by the petitioner/defendant.
>
> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the petitioner/defendant's pro se Motion for Relief From Judgment is hereby denied.

Id. at 4-5. Arthur now appeals.

Discussion and Decision

This court reviews the trial court's denial of a motion for relief from judgment for an abuse of discretion. State v. Willits, 773 N.E.2d 808, 811 (Ind. 2002). "An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law." Id.

Indiana Trial Rule 60(B) states in pertinent part:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:
>
> (1) mistake, surprise, or excusable neglect;
>
> * * *
>
> (8) . . . A movant filing a motion for reason[] (1) . . . must allege a meritorious claim or defense.

Arthur alleges excusable neglect because a breakdown in communication between himself and his attorney resulted in him not knowing about the denial of his petition for permission to file a belated notice of appeal in a timely fashion. Post-Conviction Rule 2(1) provides that an order granting or denying permission to file a belated notice of appeal is a final judgment that can be appealed pursuant to the Appellate Rules by filing a Notice of Appeal within thirty days. See Ind. Appellate Rule 9(A).

Arthur misunderstands the purpose of Trial Rule 60. The "excusable neglect" which would justify setting aside a judgment is excusable neglect that leads to the entry of that judgment. Here, Arthur is alleging excusable neglect that led to him failing to pursue an appeal of the judgment. This court has stated that Trial Rule 60(B) "is not a substitute for a belated appeal, nor can it be used to revive an expired attempt to appeal." Bolden v. State, 736 N.E.2d 1260, 1261 (Ind. Ct. App. 2000) (quoting Masterson v. State, 511 N.E.2d 499,

500 (Ind. Ct. App. 1987)). Thus, because Arthur is improperly attempting to revive his right to appeal via a Trial Rule 60(B) motion, the trial court did not abuse its discretion in denying the motion to set aside.[2]

Even if Arthur had filed a timely appeal of the trial court's denial of his petition for permission to file a belated notice of appeal, and assuming we would have concluded he should have been allowed to file his belated notice of appeal,[3] he would be entitled to no relief on the substantive merits of his sentencing claim. Arthur alleges that his sentence was

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[2] We do note, however, that part of the trial court's reason for denying the motion to set aside was that the record shows "the petitioner/defendant pro se received notice of [the order]." Appellant's App. at 5. The State in its appellate brief also contends that the record shows "Defendant, pro se, received a copy of the order." Brief of Appellee at 5. Although the CCS shows that the order was "Dist[ributed] to parties," contrary to the trial court's statement and the State's assertion, Arthur was not pro se at the time the order was entered. The order itself shows that distribution was made to the prosecuting attorney and to Arthur's counsel. Nonetheless, Arthur is using an improper procedural vehicle for seeking relief in this circumstance and the trial court's denial is not an abuse of discretion.

[3] Permission to file a belated notice of appeal can be granted only when the petitioner shows both that the failure to file a timely notice of appeal was not due to his own fault and that he has been diligent in requesting permission to file a belated notice of appeal. Ind. Post-Conviction Rule 2(1)(a); Bosley v. State, 871 N.E.2d 999, 1002 (Ind. Ct. App. 2007). Arthur has alleged that the trial court failed to advise him that he could appeal the sentence he received as a result of his open plea. Such an allegation may suffice to meet the lack of fault requirement. See Moshenek v. State, 868 N.E.2d 419, 424 (Ind. 2007) (noting that the right to appeal a sentence is not among the rights of which a trial court is required to inform a defendant before accepting a guilty plea, but "[t]he fact that a trial court did not advise a defendant about this right can establish that the defendant was without fault in the delay of filing a timely appeal.").

As for diligence, prior to our supreme court's decision in Collins v. State, 817 N.E.2d 230 (Ind. 2004), the proper vehicle for raising a sentencing issue following a guilty plea was not clear. Collins clarified that an individual who has pled guilty in an open plea may challenge his sentence by filing a direct appeal or, if the time for filing a direct appeal has run, filing a petition to file a belated notice of appeal under Post-Conviction Rule 2 rather than filing a petition for post-conviction relief under Post-Conviction Rule 1. Id. at 233. Subsequently, the court noted that a pre-Collins Post-Conviction Rule 1 challenge to a sentence may serve to establish diligence. Kling v. State, 837 N.E.2d 502, 508-09 (Ind. 2005).

Here, Arthur was sentenced pursuant to his guilty plea on October 14, 1999. He filed a petition for post-conviction relief alleging errors in his sentence in September of 2000. The State Public Defender became involved in investigating his claim and the petition was ultimately dismissed in April of 2004. Collins was decided on November 9, 2004 and Arthur filed his petition for permission to file belated notice of appeal on February 11, 2005. It is possible under the circumstances of this case that, had Arthur taken a proper appeal from the trial court's denial of his petition seeking permission to file a belated notice of appeal

imposed in violation of Blakely v. Washington, 542 U.S. 296 (2004). In Gutermuth v. State, 868 N.E.2d 427, 428 (Ind. 2007), our supreme court held that "belated appeals of sentences entered before [Blakely] are not subject to the holding in that case." Moreover, although Arthur was ordered to serve his sentences consecutively, the sentence for each conviction was the then-presumptive sentence. Neither presumptive nor consecutive sentences present a Blakely issue. Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005) (holding there is no constitutional problem with consecutive terms because they do not increase the sentence above the statutory maximum for each offense), cert. denied, 546 U.S. 976 (2005); Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004) (holding that because Blakely requires facts supporting an enhanced sentence to be admitted or found by a jury, no Blakely issue is presented by presumptive sentences (emphasis added)).

Arthur also indicates his intention to challenge the propriety of various aggravating factors found by the trial court. In sentencing Arthur, the trial court found the repeated nature of the molestation and the substantial period of time over which it occurred, Arthur's position of trust with the victim, that at least some of the acts occurred while he was on probation for other offenses, the risk that Arthur would re-offend, and Arthur's criminal history and previous violations of probation as aggravating factors. Each of these aggravating factors appears to be supported by the record.[4] The trial court found Arthur's acceptance of responsibility by pleading guilty and sparing the victim from participating in a

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and we were we reviewing the merits of Arthur's petition, Arthur could demonstrate both lack of fault and diligence.

[4] The record provided for this case includes the record of the guilty plea proceedings.

trial and his remorse as mitigating factors, but found that the aggravating factors outweighed the mitigating factors. Although imposition of consecutive sentences is generally within the discretion of the trial court, a trial court may not impose consecutive sentences unless it finds at least one aggravating circumstance. Plummer v. State, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006). As the consecutive sentences are supported by valid aggravating factors, there was no sentencing error here.

Conclusion

The trial court did not abuse its discretion in denying Arthur's motion for relief from judgment.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.