

Case Summary

Pro-se Appellant-Defendant Bruce Haymaker (“Haymaker”) appeals the denial of his Petition to File a Belated Notice of Appeal in order to challenge the two-year sentence imposed in 1979 following his plea of guilty to Escape, a Class D felony.¹ We affirm.

Issue

Haymaker presents a single issue for review: whether the trial court erred in denying him permission to file a belated appeal.

Facts and Procedural History

On March 1, 1979, Haymaker pleaded guilty to Escape. On March 7, 1979, the trial court sentenced him to two years imprisonment, to be served consecutively to the sentence he was serving when he escaped from the Indiana State Farm.

On December 15, 2005, Haymaker filed a Verified Petition for Permission to File Belated Notice of Appeal. He alleged that the trial court abused its sentencing discretion because he was sentenced for a Class D felony rather than a Class A misdemeanor. On February 15, 2006, the trial court denied Haymaker’s petition. He now appeals.

Discussion and Decision

Indiana Post Conviction Rule 2(1) permits a defendant to seek permission to file a belated appeal, and provides in part:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

¹ Ind. Code § 35-44-3-5.

- (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

Where, as here, a trial court does not conduct a hearing on a petition for permission to file a belated notice of appeal, we review a trial court's decision regarding the petition de novo. Baysinger v. State, 835 N.E.2d 223, 224 (Ind.Ct.App.2005). There are no set standards for defining delay and each case must be decided on its own facts. Cruite v. State, 853 N.E.2d 487, 489 (Ind. Ct. App. 2006), trans. denied. Factors to consider in deciding whether a defendant was without fault in the delay of filing the notice of appeal include the defendant's level of awareness of his or her procedural remedy, age, education, familiarity with the legal system, whether he or she was informed of his or her appellate rights, and whether he or she committed an act or omission that contributed to the delay. Id.

Haymaker contends that he did not challenge his sentence on direct appeal because he was unaware of his right to do so until he read the decision of our Indiana Supreme Court in Collins v. State, 817 N.E.2d 230 (Ind. 2004). In that case, our Supreme Court clarified that a defendant who has pled guilty under an "open plea" must challenge a resulting sentence on direct appeal, if at all, and not by way of a petition for post-conviction relief. Id. at 233. The court further stated:

The fact that the trial court at a guilty plea hearing does not advise the defendant in an open plea situation that the defendant has the right to appeal the sentence to be imposed does not warrant an exception to the rule that sentencing claims must be raised on direct appeal. This is because Indiana Post-Conviction Rule 2 will generally be available to an individual in this situation. Post-Conviction Rule 2 permits an individual convicted after a trial or guilty plea who fails to file a timely notice of appeal to petition for

permission to file a belated notice of appeal where the failure to file a timely notice of appeal is not the fault of the individual; and the individual is diligent in requesting permission to file a belated notice of appeal.

Id. In Perry v. State, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006), trans. denied, we stressed that “not every motion to file a belated appeal should be automatically granted by trial courts simply because Collins has been decided, especially if there is no indication that the defendant had previously made attempts to collaterally attack a sentence imposed following a guilty plea. A defendant seeking to file a belated appeal still must follow the prerequisites of Post-Conviction Rule 2(1) regarding lack of fault and diligence.”

In this case, Haymaker first attempted to challenge his sentence through a belated direct appeal thirteen months after Collins was decided. He had made no previous attempts to collaterally attack his sentence. Almost certainly, Haymaker’s failure to collaterally attack his sentence stemmed from the fact that he was given a minimum sentence. At the time Haymaker was sentenced, Indiana Code Section 35-50-2-7 provided in relevant part: “A person that commits a Class D felony shall be imprisoned for a fixed term of two years with not more than two years added for aggravating circumstances.”

Haymaker pleaded guilty to committing Escape, a Class D felony, and agreed that he would receive a sentence ranging from a minimum sentence of two years up to a maximum sentence of four years. The plea agreement did not contemplate the entry of Haymaker’s conviction as a Class A misdemeanor rather than a Class D felony. The plea of guilty to a Class D felony was “open” in the sense that the trial court could have exercised its discretion to impose a greater sentence. However, the trial court did not exercise its discretion to

impose an aggravated sentence, but rather imposed the minimum statutory sentence.

In light of the foregoing, the trial court did not err in refusing Haymaker permission to belatedly appeal his 1979 sentence.

Affirmed.

SHARPNACK, J., and MAY, J., concur.