

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

APPELLANT PRO SE:

WENBO HA
Xi' an, People's Republic of China

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

WENBO HA,)
)
 Appellant-Petitioner,)
)
 vs.) No. 79A04-0608-CR-415
)
 STATE OF INDIANA,)
)
 Appellee-Respondent.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0209-FC-74

April 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Wenbo Ha appeals the denial of his petition for permission to file a belated notice of appeal.¹ We affirm.

Issue

Ha raises one issue, which we restate as whether the trial court erred in denying his petition for permission to file a belated notice of appeal.

Facts and Procedural History²

On October 1, 2002, the State charged Ha with class C felony stalking,³ class B misdemeanor invasion of privacy,⁴ and class B misdemeanor harassment.⁵ Appellant's App. at 13-15. The same day, the trial court appointed a public defender to represent Ha. On October 4, 2002, Timothy Broden filed an appearance on behalf of Ha. On March 12, 2003, the trial court received a letter from Ha.⁶ On March 28, 2003, following a hearing, the trial

¹ We note that Ha's motion is titled "Belated Notice of Appeal." Appellant's App. at 18. However, the content of the "Belated Notice of Appeal" and the parties' treatment of it are consistent with a petition for permission to file a belated notice of appeal, required pursuant to Indiana Post-Conviction Rule 2(1), and we refer to it as such in this opinion.

² We express our appreciation to the State for including a certified copy of the chronological case summary in its appellee's appendix. Ha submitted a copy of the docket that he downloaded from the Internet. Appellant's App. at 4-12. Indiana Appellate Rule 50 (B) provides that the appellant's appendix shall contain "the Clerk's Record, including the chronological case summary." Ha's downloaded docket is not in compliance with our rules, and we may not rely on it.

³ Ind. Code § 35-45-10-5.

⁴ Ind. Code § 35-46-1-15.1.

⁵ Ind. Code § 35-45-2-2(a)(4).

⁶ In his appellant's brief, Ha asserts that this letter requested permission to discharge counsel. However, we are unable to verify his claim because the letter is not included in the record before us. Given that the trial court held a hearing on such a request shortly after it received this letter, we may reasonably infer that Ha did, at some point, request permission to discharge counsel.

court denied Ha's request. Appellee's App. at 4. On April 11, 2003, Ha indicated to the trial court that he would represent himself at trial, and the trial court appointed Broden to act as standby counsel at trial and pre-trial hearings. *Id.* Ultimately, however, Ha felt uncomfortable representing himself at trial, and Broden acted as Ha's counsel at trial. Appellant's Br. at 4. An interpreter was also present to assist Ha.

On April 30, 2003, a jury found Ha guilty as charged. Appellee's App. at 4. On May 7, 2003, Ha sent the trial court a letter, in which he moved, pro se, for a mistrial. Appellant's App. at 17; Appellee's App. at 4. The trial court took no action on the letter.

On May 12, 2003, a sentencing hearing was held. Appellee's App. at 4. Ha was represented by Broden, and an interpreter was provided. On May 28, 2003, the trial court entered judgment of conviction for class C felony stalking and sentenced Ha to three years, with one year suspended. *Id.* at 3. The trial court found that Ha was entitled to a credit of 230 days. The trial court declined to enter judgment of conviction as to the invasion of privacy and harassment charges.

On September 6, 2003, Ha filed a pro se motion for credit time spent incarcerated prior to trial and sentencing. *Id.* On October 1, 2003, the trial court granted Ha's motion for credit time, found he was entitled to 243 days credit, and amended its sentencing order accordingly. *Id.* Ha was deported to China after serving his sentence. Appellant's Br. at 4.

On November 21, 2005, Ha filed a petition for post-conviction relief. *Id.* ; Appellee's Br. at 2.⁷ On March 15, 2006, the trial court dismissed Ha's petition based on Ha's failure to

⁷ This filing is not reported in the certified copy of the chronological case summary. However, the State concedes that Ha filed this petition and that it was dismissed. Appellee's Br. at 2.

appeal his conviction. Appellant's App. at 24.

On April 10, 2006, Ha filed an unverified, pro se petition for permission to file a belated notice of appeal. *Id.* at 18-19. Ha's petition included the following assertions:

[Ha] is not a U.S. citizen who has no U.S. legal system related education background and he also has certain language difficulties to understand some descriptions or definitions.

Following the conviction the defendant has not been informed or explained properly about the right to appeal through a translator.

Because [Ha] is unfamiliar with the legal system and was not aware of his procedural remedy the filing of the notice of appeal was delayed.

[Ha] has been diligent in requesting permission to file a belated notice of appeal. Since [Ha] was deported back to China in 2003 he can not have direct contact with any U.S. or Indiana lawyers. [Ha] has spend [sic] lots of time studying related legal rules through internet. [Ha] filed a Petition for Post Conviction Relief in 2005 and promptly filed this belated notice of appeal when he learned of this right.

[Ha's] failure to file a timely notice of appeal was not due to his own fault, and he diligently pursued permission to file a belated notice of appeal.

Id.

On April 17, 2006, Broden withdrew his appearance as counsel for Ha. Appellee's App. at 2. On June 21, 2006, the trial court, without holding a hearing, denied Ha's petition for permission to file a belated notice of appeal.⁸ *Id.* Ha now appeals.

⁸ On June 21, 2006, the trial court clerk received a letter from Ha. Appellee's App. at 2. Ha claims that this letter requested a copy of his May 7, 2003 letter. Appellant's Br. at 6. Ha also claims that on July 6, 2006, the clerk sent him an email, indicating that a copy of the letter was not in his case file. *Id.* Although Ha cites to exhibits, we are unable to verify Ha's claims as neither the letter nor the email is included in the record before us. However, on July 13, 2006, the clerk sent a copy of the May 7, 2003, letter to Ha. Appellee's App. at 2.

Discussion and Decision

Ha appeals the denial of his petition for permission to file a belated notice of appeal. Ha failed to file a timely notice of appeal, and therefore he was required to challenge his conviction through the post-conviction rules. *See* Ind. Appellate Rule 9(A)(5) (providing that if a defendant fails to file a notice of appeal within thirty days as required, the right to appeal is forfeited except as provided by Post-Conviction Rule 2). Indiana Post-Conviction Rule 2(1) provides in relevant 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:

(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.

The trial court shall consider the above factors in ruling on the petition.... If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period.

Post-Conviction Rule 2 “does not require the court to conduct a hearing, but we have determined that one should be held where the petition raises a genuine factual dispute concerning the existence of grounds for relief.” *Green v. State*, 593 N.E.2d 1237, 1238 (Ind. Ct. App. 1992), *trans. denied*. Generally, we review a trial court’s determination regarding a petition for permission to file a belated notice of appeal for an abuse of discretion. *Beaudry v. State*, 763 N.E.2d 487, 490 (Ind. Ct. App. 2002). However, when the trial court does not conduct a hearing before ruling on a petition to file a belated notice of appeal, and the allegations contained in the petition itself are the sole basis in support of a petition, we

review the trial court's decision de novo. *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005).

A petitioner must demonstrate by a preponderance of the evidence that he is entitled to the relief sought. *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), *trans. denied*. Accordingly, the petitioner must present evidence that he is not at fault and that he has been diligent in pursuing the appeal. *Id.* at 975. There are no set standards defining delay, and each case must be decided on its own facts. *Baysinger*, 835 N.E.2d at 224. In making this determination, our considerations 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.*

In *Townsend*, the petitioner failed to allege both that he was without fault and that he was diligent in pursuing the appeal in his petition for permission to file a belated notice of appeal. Neither did he submit any evidence to support his petition. We held that “[w]ithout any evidence regarding the two elements of [Post-Conviction Rule 2(1)], a petitioner cannot have met his burden of proof.” *Id.* We concluded that the trial court had erred in granting the petition, and we dismissed it for lack of jurisdiction.

Here, Ha's petition alleged that his translator had not properly informed him of his right to appeal, that he was not aware of the procedural remedy available to him, that he was diligent in pursuing his appeal, and that the failure to file a timely notice of appeal was not

due to any fault on his part.⁹ Appellant's App. at 18-19. However, Ha filed an unverified petition; that is, his petition lacked any oath or affirmation that the statements contained therein were made under the penalties for perjury. While Post-Conviction Rule 2(1) does not explicitly require the petition to be verified, without verification, the contents of a pleading do not constitute admissible evidence because the statements were not made under oath. *State v. Carter*, 658 N.E.2d 618, 622 n.3 (Ind. Ct. App. 1995). Because Ha's petition was not verified, his allegations may not be considered as evidence in support of his petition. Additionally, Ha failed to submit any other evidence to support the allegations in his petition.

We note that Ha concedes that he was "assisted by Indiana Pro Se and the Self-Service Legal project in preparing this appeal process." Appellant's Reply Br. at 3, 6. Further, in *Owen v. State*, 269 Ind. 513, 518, 381 N.E.2d 1235, 1239 (1978), our supreme court noted that a pro se appellant proceeds at the same risk as any other party, and that when an individual elects to represent himself, there is no reason for us to indulge in any benevolent presumption on his behalf, or waive any rule for the orderly and proper conduct of his appeal. We therefore conclude that, having presented no evidence regarding the two elements of Post-Conviction Rule 2(1), Ha cannot have met his burden of proof. *See Townsend*, 843 N.E.2d at 975.

Moreover, the substance of Ha's argument on appeal does not relate to the allegation

⁹ The record indicates that Ha was represented by counsel at trial and at sentencing, and he concedes that he was provided with an interpreter at both proceedings. Appellant's Br. at 6, 10. We note that on appeal, Ha does not argue that the trial court failed to inform him of his right to appeal or that his interpreter failed to properly translate the trial court's advisement. Ha does not in any way suggest that his interpreter was inadequate. Rather, he asserts that his lack of understanding was due to unfamiliarity with our legal system and language difficulties. Additionally, as will be discussed later, Ha blames the delay in filing for

in his petition that he was not properly informed of his right to appeal. Rather, Ha insists that the “direct cause for the failure to file a timely notice of appeal” is the trial court’s failure to rule on his pro se motion for mistrial contained in his May 7, 2003, letter. Appellant’s Br. at 8. We note the conspicuous absence of this allegation from his petition. An argument presented for the first time on appeal is typically waived. *Pinkins v. State*, 799 N.E.2d 1079, 1089 (Ind. Ct. App. 2003), *trans. denied* (2004). However, even if we were to assume that his letter constituted a proper motion for mistrial and that the trial court was required to rule on his pro se motion,¹⁰ Ha has not established by a preponderance of the evidence that he is entitled to the relief sought.

Ha has not successfully explained why he did not pursue the trial court’s failure to rule on his motion for mistrial during his incarceration in the United States. We find his argument that he has no legal education, a low level of awareness as to his procedural remedy, and language difficulties unavailing for the following reasons. He had an attorney who continued to represent him until April 17, 2006. Ha had access to a law library and legal assistance during his incarceration, and he utilized these resources to successfully move for additional credit time. His May 7, 2003, letter demonstrates that his ability to communicate in the English language, while not perfect, was more than adequate. Appellant’s App. at 17.

appeal on the trial court’s failure to act on his May 7, 2003 letter. Consequently, we do not consider this case to be one in which the defendant was not informed of his right to appeal.

¹⁰ Ha concedes that he abandoned his pro se defense before his trial and reasserted his right to counsel. Appellant’s Br. at 4. Thereafter, Ha spoke to the trial court through counsel, and the trial court was not required to respond to his motion. *See Underwood v. State*, 722 N.E.2d 828, 832 (Ind. 2000) (“To require the trial court to respond to both Defendant and counsel would effectively create a hybrid representation to which Defendant is not entitled.”).

The record reveals that Ha sent the trial court eight additional letters,¹¹ yet he made no effort to pursue his motion for mistrial by writing to the trial court. He did not make an effort to inquire as to the May 7, 2003, letter until June 21, 2006. Finally, Ha did not attempt any challenge to his conviction until he filed a petition for post-conviction relief on November 21, 2005, two and a half years after his sentencing. For all these reasons, we conclude that the trial court did not err in denying his petition for permission to file belated notice of appeal.¹²

Affirmed.

SHARPNACK, J., concurs.

SULLIVAN, J., dissents with opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

¹¹ Ha sent letters to the trial court on February 28, 2003, March 12, 2003, April 2, 2003, May 12, 2003, May 30, 2003, July 18, 2003, September 10, 2003, September 24, 2003, and June 21, 2006. Appellee's App. at 2-5.

¹² In affirming the denial of Ha's petition, we note that this is not a case where the defendant is asserting that he is without fault in the delay of filing the appeal because he was not informed of his right to appeal. For this reason, cases such as *Jackson v. State*, 853 N.E.2d 138 (Ind. Ct. App. 2006), *Welches v. State*, 844 N.E.2d 559 (Ind. Ct. App. 2006), and *Hull v. State*, 839 N.E.2d 1250 (Ind. Ct. App. 2005), are distinguishable. Other facts distinguish these cases as well. In *Jackson*, there was some evidence in the record to support the defendant's assertion that he was misinformed that he could not appeal his sentence. 853 N.E.2d at 140. In *Welches*, there was some evidence in the record to support the defendant's claim that he was not informed that he had a right to challenge his sentence. 844 N.E.2d at 562. In *Hull*, the State did not contest the fact that the defendant was not advised of his right to appeal his sentence, and, therefore, we concluded that the trial court did not abuse its discretion in granting the defendant's petition for permission to file belated notice of appeal. 839 N.E.2d at 1254. Additionally, the defendants pled guilty in *Jackson*, *Welches*, and *Hull*, whereas Ha was found guilty pursuant to a jury trial.

WENBO HA,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 79A04-0608-CR-415
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

SULLIVAN, Judge, dissenting

The post-conviction court, without a hearing, denied Ha’s Petition for Leave to File a Belated Appeal. It was therefore not within Ha’s ability to submit evidence in support of his claim of diligence and lack of fault in pursuing a timely direct appeal. Furthermore, unlike the situation in Townsend, Ha did make the requisite allegations that he was without fault and exercised due diligence.

Under the totality of the peculiar circumstances present here, it is my view that the post-conviction court erred in denying Ha’s Petition for Leave to File a Belated Appeal. I would reverse and remand.