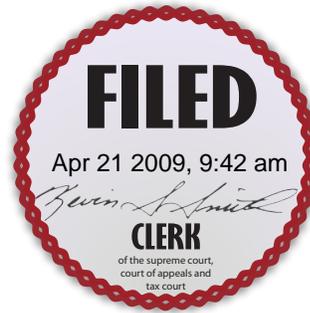


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

FRANK J. GUAJARDO,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 79A02-0809-CR-799

APPEAL FROM THE TIPPECANOE SUPERIOR COURT NO. 2
The Honorable R. Perry Shipman, Senior Judge
Cause No. 79D02-0703-FB-14

April 21, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Frank J. Guajardo (Guajardo), appeals his sentence for dealing in cocaine, as a Class B felony, Ind. Code § 35-48-4-1. The State cross-appeals the trial court's grant of permission to file a belated direct appeal to Guajardo.

We reverse and remand with instructions.

ISSUE

The State raises one issue, which we conclude is dispositive and restate as follows: Whether the trial court abused its discretion by granting Guajardo permission to file a belated direct appeal.

FACTS AND PROCEDURAL HISTORY

On March 7, 2007, the State filed an Information charging Guajardo with dealing in cocaine, as a Class B felony, I.C. § 35-48-4-1, and possession of cocaine, as a Class D felony, I.C. § 35-48-4-6. On November 30, 2007, Guajardo pled guilty pursuant to a plea agreement, to dealing in cocaine, as a Class B felony. The plea agreement capped Guajardo's sentence at ten years executed, but left to the trial court's discretion the option of sentencing him to a lesser sentence. On January 23, 2008, the trial court sentenced Guajardo to ten years in the Department of Correction. At this hearing, the trial court informed Guajardo that he had:

a right to appeal the sentence the [c]ourt has imposed. If you choose to appeal you'll need to file a notice of appeal or a motion to correct error within thirty days. If what you choose to []file is a motion to correct error . . . and that is denied[,] then you'll need to file a notice of appeal within thirty days of that denial or you'll forfeit your right to appeal. If you choose to appeal and you

cannot afford an attorney the [c]ourt is obligated to appoint one for you at no cost to you.

(Sentencing Transcript pp. 10-11).

On February 4, 2008, Guajardo requested copies of the transcript from the sentencing hearing and an abstract of his sentence. On April 9, 2008, Guajardo filed a petition for modification of his sentence, which the trial court denied on May 14, 2008. On May 28, 2008, Guajardo sent a letter to the trial court stating that he wanted to appeal his sentence and notifying the trial court that it had not informed him of his constitutional rights. That same day, the trial court made an entry on the docket stating that Guajardo's "letter filed May 28, 2008 is treated as a belated notice of appeal. Permission to file belated notice of appeal is granted." (Appellant's App. p. 3).

Guajardo now appeals and the State cross-appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

The State contends that the trial court erred when it granted Guajardo permission to file a belated appeal. Specifically, the State argues that the trial court erred because Guajardo did not prove that his failure to timely perfect an appeal was not his fault.

Post-Conviction Rule 2 provides a defendant an opportunity to petition the trial court for permission to file a belated notice of appeal when the "failure to file a timely notice of appeal was not due to the fault of the defendant [and] the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule." P-C.R. 2(1)(a)(2)

and (3). The defendant carries the burden to prove by a preponderance of the evidence that the failure to timely file a notice of appeal was not his fault and that he has been diligent. *Mead v. State*, 875 N.E.2d 304, 308 (Ind. Ct. App. 2007). A trial court's ruling on a petition for permission to seek relief under Post-Conviction Rule 2 should be affirmed unless it was based on an error of law or a clearly erroneous factual determination. *Moshenek v. State*, 868 N.E.2d 419, 420 (Ind. 2007), *reh'g denied*. However, where, as here, "the trial court does not hold a hearing on the petition, the only bases for the decision are the allegations set forth in the petition, and this court will review the decision *de novo* without according the trial court's findings any deference." *Williams v. State*, 873 N.E.2d 144, 146 (Ind. Ct. App. 2007).

Recently in *Ricks v. State*, 898 N.E.2d 1277, 1280 (Ind. Ct. App. 2009), we concluded that a letter from Ricks alone did not prove that he was without fault for the delay in filing a notice of appeal. We determined that it was appropriate to remand for the trial court to hold a hearing to determine whether Ricks was not at fault for failing to file a timely notice of appeal. *Id.*

Here, the trial court explicitly notified Guajardo of his right to appeal at the close of his sentencing hearing. Conceivably, there may be some explanation which would excuse Guajardo's failure to timely appeal in spite of the trial court's advisement. However, Guajardo's letter to the trial court, which it treated as a request for permission to file a belated direct appeal, contained no allegation that he was without fault for the delay in appealing his sentence. That being said, it is clear from our review of the letter that Guajardo

wrote it without the assistance of an attorney, and may not have been aware of the requirements for requesting permission to file a belated direct appeal. Guajardo did request to have the State Public Defender represent him. We deem that it is appropriate to remand to the trial court so that his letter may be forwarded to the State Public Defender's Office and reviewed to determine if he is eligible for assistance. If he is not eligible for assistance, Guajardo may proceed without counsel, but needs to make appropriate allegations that he is without fault for the delay in filing his notice of appeal and has been diligent in trying to appeal his sentence, and the trial court should hold a hearing if necessary.

CONCLUSION

Based on the foregoing, we conclude that the trial court inappropriately granted Guajardo permission to file a belated direct appeal.

Reversed and remanded with instructions.

KIRSCH, J., and MATHIAS, J., concur.