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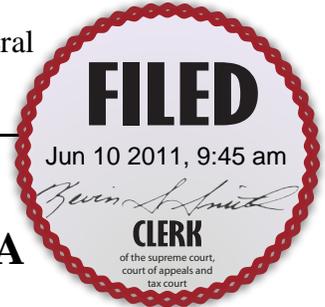
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**IN THE  
COURT OF APPEALS OF INDIANA**

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MATTHEW FEARNOW,  
Appellant- Defendant,

vs.

STATE OF INDIANA,  
Appellee- Plaintiff,

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No. 20A03-1010-CR-552

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable Charles Carter Wicks, Judge  
Cause No. 20D05-0607-CM-459

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**June 10, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Chief Judge**

## Case Summary and Issue

Following a bench trial in 2006, Matthew Fearnow was convicted of one count of harassment, a Class B misdemeanor. In 2009, Fearnow began pursuing post-conviction relief of his conviction. In 2010, Fearnow requested permission to file a belated notice of appeal from his harassment conviction. Fearnow appeals the trial court's denial of his request, raising one issue for our review: whether the trial court abused its discretion in denying him permission to file a belated notice of appeal. Concluding the trial court abused its discretion in denying Fearnow's petition, we reverse and remand.

## Facts and Procedural History

In July 2006, Fearnow was charged with two counts of harassment, both Class B misdemeanors, for making harassing phone calls to Wendy Haddock. Fearnow appeared for an initial hearing on August 18, 2006, at which the trial court generally advised a group of defendants of their right to hire an attorney or to have one appointed for them; the right to a speedy, public trial; and the right not to testify against themselves. See Transcript at 2-3. In addition, the trial court indicated that each defendant had been provided with a rights advisement form which was at least two pages in length. See id. at 2 (“On the form that you have in your hand, on the back side, you tell the court what your future intentions are.”).

The trial court then addressed the defendants individually. In addressing Fearnow, the trial court indicated Fearnow had completed the rights advisement form and confirmed he had read and understood it before signing it. The trial court read the charges to Fearnow and noted that Fearnow indicated on his rights advisement form “that you do not intend to hire an attorney but you are entering a plea of not guilty, correct?”

Id. at 4. Fearnow indicated that yes, he wanted to take the case to trial. The trial court set trial for October 6, 2006. The record contains an “Advisement of Rights and Penalties” form consisting of a single page stating, in pertinent part:

1. If you do not understand your rights after reading this paper, tell the Judge.

SIGN THIS PAPER. On the back of this paper are three (3) signature lines. If you understand your legal rights, sign your name on the first line. On the second line, check whether or not you wish to have an attorney and sign it. On the third line, check whether you wish to plead guilty or not guilty and sign it.

2. YOU HAVE A RIGHT:

- a. To be represented by an attorney
- b. To a speedy and public trial by jury (for misdemeanors defendant must request a jury trial at least ten (10) days before the trial)
- c. To be presumed innocent, the state must prove guilt beyond a reasonable doubt
- d. To see, hear and question (confront and cross-examine) all witnesses called against you
- e. To subpoena witnesses to testify in your behalf
- f. To remain silent, this is your right against self-incrimination
- g. If you are found guilty you have the right to appeal the decision

\* \* \*

Appendix to Brief of Petitioner-Appellant at 13.

Fearnow appeared for a bench trial on October 6, 2006, without counsel. The trial court, without acknowledging that Fearnow was appearing pro se or otherwise commenting on his status, heard evidence from three State’s witnesses, at the conclusion of which Fearnow asked for a dismissal of the case and the trial court granted his motion as to one count of harassment, but proceeded on the other count. Fearnow called one witness in his defense. After Fearnow rested his case, the trial court found him guilty of the remaining count of harassment and proceeded immediately to sentencing, imposing a

fine of \$100.00 plus court costs, a suspended sentence of ninety days in the Elkhart County Jail with a period of six months of supervised probation, and an order that he have no contact with either the victim and one of the State's other witnesses. Fearnow informed the trial court that he was on work release until the middle of December and would therefore have trouble getting to probation meetings. The trial court then made the term of probation non-reporting. The trial court did not advise Fearnow of his right to appeal his conviction or sentence.

On February 2, 2007, a violation of probation petition was filed against Fearnow alleging he had been charged with new crimes and failed to make any payments toward his fine and court costs. Fearnow appeared at an initial probation violation hearing on February 12, 2007, at which the trial court generally advised a group of probationers as follows:

Each of you is entitled to a hearing before the Court on the question of whether you violated the terms of your suspended sentence. At all times up to and through that hearing, you have the right to be represented by a lawyer, including appointed counsel if you're indigent. At the hearing, the State must prove by a preponderance of the evidence that you violated at least one term of your suspended sentence before any action may be taken against you. If the State meets that burden or you admit the violation, then you could be required to serve the balance of your original sentence. . . .

Now I indicated you have a right to be represented by a lawyer. If you need some time to hire counsel, let me know that. I can set the matter over to give you a chance to hire counsel of your choice. If you believe you are indigent and need to have counsel appointed, let me know that. I'll take evidence and if I'm satisfied you're indigent, I'll appoint the Public Defender as your lawyer. . . . If you wish to waive the assistance of counsel and represent yourself, you're free to do that. If you wish to represent yourself and go forward today, fine. If you wish to represent yourself but come back on another day after you've had a chance to read what's been said about you, equally fine. Just let me know, and if you have any questions about any of these rights when you come up, please feel free to ask.

Tr. at 45-46. When Fearnow’s case was called, the trial court read to him the allegations of the probation violation petition and then asked, “Did you hear me go over the right to be represented by a lawyer?” Id. at 47. Fearnow acknowledged he had. The trial court then asked what Fearnow wished to do regarding legal representation, and Fearnow responded, “I don’t need any. I, I just want to go forward today.” Id. The probation violation hearing then proceeded as follows:

THE COURT: Do you admit or deny that you violated as alleged here?

MR. FEARNOW: I admit.

THE COURT: State prepared to discuss sanctions?

[STATE]: Yes, Your Honor.

Id. After hearing comments from Fearnow regarding his new offenses – including that a public defender had been appointed to represent him in that case – and a recommendation from the State, the trial court accepted Fearnow’s admission, revoked his probation, and ordered Fearnow to serve the previously-suspended ninety-day sentence consecutive to a sentence he was already serving. The trial court did not advise Fearnow of his right to appeal.

On January 20, 2009, Fearnow filed the first in a series of motions intended to challenge his conviction and sentence, culminating in a pro se petition for post-conviction relief on January 27, 2010. In the petition, Fearnow acknowledged he did not appeal the judgment of conviction. Among other things, Fearnow alleged as a ground for relief that he had not been advised of his right to counsel. Fearnow also filed an affidavit of indigency. The Public Defender of Indiana entered an appearance for Fearnow after having been forwarded a copy of his post-conviction petition for review in February 2010. On August 3, 2010, Fearnow filed a Verified Petition for Permission to File a

Belated Notice of Appeal and to Appoint Appellate Counsel, alleging he had not pursued a direct appeal of his conviction or sentence because the trial court had failed to advise him at trial of his right to appeal, his right to appointed appellate counsel, or the steps necessary to perfect an appeal. He further alleged he was unaware of his appellate rights until he consulted with post-conviction counsel on June 14, 2010. The trial court entered the following order denying Fearnow's petition to file a belated notice of appeal:

Court finds [Fearnow] has not been diligent in filing a belated Notice of Appeal when he was sentenced on 10/6/06 and has filed a Petition for Post-Conviction Relief on 1/27/10 and acknowledged in said petition the right to appeal but he had not appealed the judgment.

App. at 92. Fearnow appeals the trial court's denial of his petition to file a belated notice of appeal.

### Discussion and Decision

#### I. Standard of Review

Indiana Post-Conviction Rule 2(1)(a) provides:

An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;

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

The decision whether to grant permission to file a belated notice of appeal is within the sound discretion of the trial court. Moshenek v. State, 868 N.E.2d 419, 422 (Ind. 2007).

The defendant bears the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing a timely notice of appeal and was diligent in

pursuing permission to file a belated notice of appeal. Id. at 423. There are no set standards of fault or diligence; each case turns on its own facts. Id.

Because diligence and fault are fact-sensitive, we give substantial deference to the trial court's ruling and will affirm unless it was based on an error of law or a clearly erroneous factual determination. Id. at 423-24. Ordinarily the trial court is in a better position to weigh evidence, assess the credibility of witnesses, and draw inferences, but where, as here, the trial court does not hold a hearing before ruling on a defendant's petition, we owe no deference to the trial court's factual determinations because they were based on the same paper record we have before us. Id.

## II. Belated Notice of Appeal

### A. Evidence of Absence of Fault

Although the trial court's order, and Fearnow's brief, focus on the diligence prong of Post-Conviction Rule 2(1)(a), we address first the State's contention that Fearnow was at fault for failing to file a timely notice of appeal. As noted above, the determination of whether a defendant was without fault is fact-sensitive. Moshenek, 868 N.E.2d at 422. Factors relevant to this determination include the defendant's degree of awareness of his procedural remedy; his age, education, and familiarity with the legal system; whether he was informed of appellate rights; and whether he committed an act or omission contributing to the delay. Welches v. State, 844 N.E.2d 559, 561 (Ind. Ct. App. 2006).

The State contends Fearnow was informed of his right to appeal through the "Advisement of Rights and Penalties" form he was provided at his initial hearing and that because he affirmatively indicated he had read the form and understood it, he was aware from the outset of his right to appeal. Aside from that one-line written advisement in a

page-long form, Fearnow was never told by the trial court of his right to appeal his conviction or sentence. Following his trial and sentencing, the trial court did not give him either a written or oral advisement of his right to appointed appellate counsel or of the time limits for pursuing an appeal. See Ind. Criminal Rule 11 (stating “the judge shall immediately advise the defendant” of certain things following sentencing after a trial, including the right to take an appeal, the requirement that a Notice of Appeal be filed within thirty days, and the right to be appointed counsel for the purpose of taking an appeal). The trial court did not ask him if he wanted to appeal, advise him to consult with an attorney regarding an appeal, or inquire whether he had sufficient funds to hire an appellate attorney. See id. (also stating that the court shall ask whether the defendant wishes to appeal, direct trial counsel to consult with defendant on the action to be taken, and determine whether the defendant should be appointed counsel).

Other than a brief comment during the mass advisement at the initial hearing that if defendants did not hire an attorney within twenty days if charged with a felony or ten days if charged with a misdemeanor “you may lose the opportunity to raise certain legal issues or special defenses[,]” tr. at 2, Fearnow was never advised of the dangers and disadvantages of self-representation. See Castel v. State, 876 N.E.2d 768, 771 (Ind. Ct. App. 2007) (“A court need not provide an exhaustive list of the dangers of pro se representation, but must impress upon the defendant the disadvantages of self-representation.”) (quotation omitted). Although we are not here concerned with whether Fearnow knowingly and intelligently waived his right to counsel, we do note that lack of counsel – and lack of advisement regarding the importance of counsel to protect trial and appellate rights – weighs in Fearnow’s favor. We also acknowledge that Fearnow

apparently had at least one earlier contact with the criminal justice system in that he was on work release at the time of his trial in this matter. However, we do not know the procedural circumstances of that case, nor do we know if it was his only prior contact with the courts.<sup>1</sup> Under these circumstances, we are convinced Fearnow has established by a preponderance of the evidence that he was not at fault for failing to file a timely notice of appeal.

### B. Evidence of Diligence

As for the diligence prong, it, too, is a fact-sensitive determination, and relevant factors to be considered include the overall passage of time, the extent to which the defendant was aware of the relevant facts, and the degree to which the delay is attributable to other parties. Moshenek, 868 N.E.2d at 424.

In its order denying Fearnow's petition for permission to file a belated notice of appeal for lack of diligence, the trial court found that Fearnow had, in his January 27, 2010, petition for post-conviction relief, "acknowledged . . . the right to appeal but he had not appealed the judgment." App. at 92. What Fearnow acknowledged in his petition for post-conviction relief, however, was simply that he had not appealed the judgment of conviction. See id. at 50 (form petition for post-conviction relief asking "Did you appeal the judgment of conviction?" in response to which Fearnow checked "No.>"). He did not acknowledge that he was aware he had that right, let alone when he became aware of it. Therefore, the acknowledgement that he did not appeal his conviction does not indicate lack of diligence in now seeking a direct appeal.

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<sup>1</sup> Because the trial court proceeded to sentencing immediately upon finding Fearnow guilty in the present matter, no pre-sentence investigation report was prepared that would shed more light on his history of contact with the criminal justice system.

The State also points to the fact that at Fearnow's probation revocation hearing in February 2007, at which he was alleged to have violated his probation in this case by being charged with new offenses, he indicated he had a public defender in the new case. The State argues this supports the inference that he knew as early as February 2007 of his right to appeal. We disagree with the State on this point. Fearnow did indicate in February 2007 that he had been appointed a public defender, but also indicated that he had not yet met with counsel. We do not know the outcome of the other case, or even if Fearnow ever met with his appointed counsel in that case. It is therefore unreasonable to infer that Fearnow necessarily knew of his right to appeal in this case based upon having counsel in another case, and even if we did infer he learned of his right to appeal in this manner, it is unreasonable to infer he so learned significantly prior to the time he began seeking relief in this case.

Fearnow first notes that because the time spent by the State Public Defender investigating a claim does not count against the defendant when the issue of diligence is considered, Kling v. State, 837 N.E.2d 502, 508 (Ind. 2005), the delay between his sentencing and his filing of a petition seeking permission to file a belated notice of appeal is approximately three years and four months. He cites several cases in which a defendant who waited a similar (or longer) period of time to request permission to file a belated notice of appeal was considered diligent. See Johnson v. State, 898 N.E.2d 290, 292 (Ind. 2008) (three years); Mead v. State, 875 N.E.2d 304, 308 (Ind. Ct. App. 2007) (four years); Perry v. State, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006) (eight years);

Baysinger v. State, 835 N.E.2d 223, 226 (Ind. Ct. App. 2005) (four years).<sup>2</sup> Because each case is fact-sensitive, however, these cases are instructive but not determinative.

Fearnow was sentenced in this case in October 2006 to a suspended sentence and non-supervised probation. On February 12, 2007, his probation was revoked and he was ordered to serve the previously-suspended ninety days consecutive to his three-year sentence in a different case.<sup>3</sup> Apparently, on May 30, 2007, he was sentenced in the case which caused the probation revocation in this case to eleven years, consecutive to his existing sentences.

Fearnow began seeking relief from his sentence in this case on January 20, 2009, when he filed a verified petition for order lifting detainer/hold. He filed several additional motions regarding his sentence throughout 2009 until he filed a petition for post-conviction relief on January 27, 2010, which triggered the State Public Defender's involvement. Slightly over two years elapsed from the time Fearnow was sentenced until he began seeking some form of relief. He filed an affidavit in conjunction with his petition for permission to file a belated notice of appeal in which he averred he did not learn of his right to appeal his conviction and sentence until he met with his post-conviction counsel on June 14, 2010. He sought permission to file a belated notice of appeal within two months of that date. Although there is evidence in the record that

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<sup>2</sup> In each of these cases, the defendant was seeking to file a belated notice of appeal to appeal a sentence entered after an open guilty plea, a procedural posture different from that of Fearnow's case. The timing of the Indiana Supreme Court's decision in Collins v. State, 817 N.E.2d 230 (Ind. 2004), clarifying the proper procedure for challenging a sentence following a guilty plea when the defendant alleges he or she was not informed of the right to appeal the sentence and the steps each defendant had taken pre-Collins to challenge his sentence figured prominently in each decision.

<sup>3</sup> We have mentioned the probation revocation proceedings herein only to address the possibility that statements made during those proceedings reflect on Fearnow's awareness of his appellate rights. Belated appeals from orders revoking probation are not available pursuant to Post-Conviction Rule 2, Dawson v. State, 943 N.E.2d 1281, 1281 (Ind. 2011), and therefore an appeal perfected pursuant to our decision herein can only properly address issues arising from Fearnow's original conviction and sentence.

Fearnow had other criminal cases, there is no evidence that during the approximately three and one-half year delay, he was aware of his right to appeal – or had appealed – in any of his cases, including this one.

Given that we owe no deference to the trial court's findings as there was no hearing on Fearnow's petition, we conclude that Fearnow has shown by a preponderance of the evidence that he was diligent in pursuing relief. Accordingly, we hold the trial court abused its discretion in denying Fearnow permission to file a belated notice of appeal.

#### Conclusion

Fearnow established by a preponderance of the evidence that he was without fault in failing to file a timely notice of appeal and that he was diligent in seeking to do so. The trial court's order denying his petition for permission to file a belated notice of appeal is reversed and this case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

NAJAM, J., and CRONE, J., concur.