



Warren Graham appeals the trial court's denial of his petition for permission to file a belated notice of appeal under Ind. Post-Conviction Rule 2(1). Graham raises one issue, which we revise and restate as whether the trial court abused its discretion by denying Graham's petition for permission to file a belated notice of appeal. We reverse.

The relevant facts follow. On June 11, 2008, Graham entered a plea of guilty as an "open plea," meaning that the trial court had discretion in deciding on Graham's sentence. Graham was sentenced to eight years in the Department of Corrections after having pled guilty to one count of forgery as a class C felony. The trial court advised Graham at the sentencing hearing of his right to appeal by filing a written notice of appeal within thirty days of his sentence.

On July 10, 2008, within the thirty-day period, Graham mailed a letter to the trial court stating that he wished to appeal his sentence. On August 28, 2008, the trial court entered an order finding Graham's letter to be a timely notice of intent to appeal. The trial court also ordered a public defender to be appointed to review the case and determine whether a direct appeal of the sentence was possible, and if so to file written notice and perfect the appeal.

On September 12, 2008 a public defender was appointed. On September 16, 2008, the public defender filed a notice of appeal "without really reading the docket." December 4, 2008 Hearing Transcript at 3. On September 30, 2008, this court ordered Graham to show cause why his appeal should not be dismissed because it appeared that his notice of appeal was untimely. Graham responded, and on October 17, 2008, this

court dismissed Graham's appeal without prejudice to his right to file a petition for permission to file a belated appeal in the trial court.

On October 27, 2008, the public defender filed a petition for permission to file a belated notice of appeal, and a hearing was held on December 4, 2008. At the hearing, the trial court stated, "The issue for me is he didn't indicate he wished to appeal in a timely fashion . . . ." Id. at 5. The trial court found that Graham was not diligent because a perfected notice of appeal was not filed within thirty days of his sentence and denied Graham's petition.

The sole issue is whether the trial court abused its discretion by denying Graham's petition for permission to file a belated notice of appeal. In cases such as the case at bar, where the trial court hears a defendant's argument on whether to grant the petition, we review the trial court's ruling for an abuse of discretion. Williams v. State, 873 N.E.2d 144, 146 (Ind. Ct. App. 2007). We may find an abuse of discretion where the trial court's ruling was based on an error of law or a clearly erroneous factual determination. Sholes v. State, 878 N.E.2d 1232, 1236 (Ind. 2008) (citing Moshenek v. State, 868 N.E.2d 419, 423-424 (Ind. 2007), reh'g denied).

Ind. Post-Conviction Rule 2(1) provides a defendant an opportunity to petition the trial court for permission to file a belated notice of appeal. Moshenek, 868 N.E.2d at 422. Ind. Post-Conviction Rule 2 provides that:

An eligible defendant<sup>[1]</sup> convicted after a trial or plea of guilty may petition the court of conviction 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 Indiana Supreme Court, in construing the rule, has decided that it is the defendant's "burden of proving by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated motion to appeal. There are no set standards of fault or diligence, and each case turns on its own facts." Moshenek, 868 N.E.2d at 422-423. Factors relevant in evaluating fault and diligence include "the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether the defendant was informed of his appellate rights, and whether he committed an act or omission which contributed to the delay." Id. (quoting Land v. State, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994), reh'g denied, trans. denied). Further, it is proper for this court to account for "the overall passage of time; the extent to which the defendant was aware of relevant facts; and the degree to which delays are attributable to other parties . . ." in reviewing whether or not a defendant was diligent. Id. at 424.

---

<sup>1</sup> An "eligible defendant" is defined under the rule as "a defendant who, but for the defendant's failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal" Ind. Post-Conviction Rule 2.

Graham argues that he informed the trial court of his wish to appeal his sentence within the thirty days, and that “[t]he subsequent delay in the trial court’s appointment of a public defender and the public defender’s delay in filing a Petition to File a Belated Appeal are not matters attributable to Mr. Graham.” Appellant’s Brief at 5. Graham points out that the trial court’s rulings were confusing because “[a]lthough the trial court initially acknowledged that Mr. Graham filed a timely notice of his intent to appeal, the court then denied his ultimate request for permission to file a belated appeal.” Id. at 4.

The State points out that Graham had prior exposure to the criminal justice system. The State also argues that Graham was made aware of the fact that a notice of appeal had to have been filed within thirty days of sentencing, but that:

Graham . . . waited until the very last day to mail the letter to the court. Consequently, the trial court did not receive the letter until July 16, 2008, after the thirty days ran out. These facts alone establish that Graham was less than diligent in seeking an appeal, and that his failure to act within the requisite time limit contributed to the untimely attempt to appeal. Thus, the trial court properly determined that Graham was at fault and was not diligent in seeking his appeal.

Appellee’s Brief at 5-6. The State admits, however, that (1) the trial court found Graham’s letter was timely and treated it as a notice of intent to appeal; and (2) the public defender erred in filing a notice of appeal rather than a petition for permission to file a belated notice of appeal.

The record reveals that Graham mailed the letter within thirty days of his sentence, and the trial court found that the letter was a timely notice of intent to appeal. The public defender was not appointed until September 12, 2008, two months after the notice of

appeal was due. It is undisputed that the only intervening event was an error by the public defender in filing a notice of appeal with this court, rather than petitioning for permission to file a belated notice of appeal as the trial court had intended him to do. Due to this error, Graham's notice of appeal was filed about three months past due.

We do not find the State's arguments persuasive. While it is true that Graham had been exposed to the criminal justice system before, and that the trial court informed Graham of his right to appeal within thirty days, whatever weight that might be attached to these factors is outweighed by the fact that the trial court certified Graham's letter as a timely filing of a notice of intent to appeal. Again, the fact that the trial court found Graham's letter as a timely notice of intent to appeal speaks to Graham's diligence, not his lack thereof. Under these circumstances, we conclude that Graham was not at fault for failing to file the notice of appeal in a timely fashion and was diligent in requesting permission to file a belated notice of appeal. Accordingly, we conclude that the trial court abused its discretion by denying Graham's petition for permission to file a belated appeal.<sup>2</sup> See Williams, 873 N.E.2d at 147 (holding that the petitioner was not at fault and was diligent in requesting permission to file the belated notice of appeal because the petitioner "requested the appointment of appellate counsel in a timely matter – which the trial court immediately granted . . . ."); cf. Moshenek, 868 N.E.2d at 424 (holding that it

---

<sup>2</sup> The State cites Ricks v. State, 898 N.E.2d 1277 (Ind. Ct. App. 2009). In Ricks, the petitioner sent a letter to the trial court two months after sentencing, but suggested also that he had sent an earlier letter to the trial court. Id. at 1279. We held that the trial court erred in summarily granting Ricks permission to petition to file a belated notice of appeal, and remanded so that the trial court could hold a hearing to determine whether Ricks was at fault for the failure to file a timely notice of appeal. Id. at 1280. Here, unlike in Ricks, Graham sent a letter to the trial court within thirty days of sentencing.

was not clearly erroneous for the trial court to find a lack of diligence when the defendant waited eleven years to raise a post-conviction claim challenging his sentence).

For the foregoing reasons, we reverse the trial court's denial of Graham's petition for permission to file a belated notice of appeal under Ind. Post-Conviction Rule 2(1).

Reversed.

CRONE, J. and BRADFORD, J. concur.