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

MESHACH BERRY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A02-1011-CR-1218
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah Pierson-Treacy, Judge
Cause No. 49F19-1005-CM-36885

July 15, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Meshach Berry ("Berry") was convicted of Class A misdemeanor possession of marijuana in Marion Superior Court. After he failed to file a timely notice of appeal, he requested permission to file a belated notice of appeal. The trial court denied his motion. Berry appeals the denial arguing that his failure to file a timely notice of appeal was not his fault, and that he has diligently requested permission to file a belated notice of appeal.

We reverse and remand for proceedings consistent with this opinion.

Facts and Procedural History

On August 9, 2010, Berry was convicted of Class A misdemeanor possession of marijuana and ordered to serve a sentence of 365 days in the Marion County Jail with 353 days suspended to probation. Because the trial court was unable to make a determination of whether Berry was indigent for the purpose of imposing a possible fine related to his conviction, the trial court scheduled an indigency hearing for August 24. During that hearing, Berry testified that he had lost his new job, and the trial court declared him indigent. Berry was not informed of his right to appeal his conviction and sentence at either the sentencing or indigency hearings.

On September 13, 2010, Berry filed a "Motion for Appeal and Appointment of Pauper Appellate Counsel." The trial court denied the motion as "not timely." Appellant's App. p. 29. On October 21, 2010, Berry filed a motion to file a belated notice of appeal. In the motion, Berry's counsel stated that Berry was not advised of his right to appeal and counsel mistook Berry's sentencing date for August 24, 2010, the date of the indigency hearing. An affidavit from Berry's trial counsel submitted with the motion contained a statement from Berry's trial counsel indicating that within thirty days

of his August 9, 2010 sentencing date, Berry told trial counsel that he desired to appeal his conviction. Appellant's App. p. 47. The trial court denied Berry's motion on the date it was filed. Berry now appeals.

Discussion and Decision

Berry argues that the trial court erred when the court denied his motion to file a belated notice of appeal. Generally, the decision whether to grant or deny a petition for permission to file a belated notice of appeal is a matter within the discretion of the trial court. George v. State, 862 N.E.2d 260, 264 (Ind. Ct. App. 2006). However, where, as here, the trial court does not hold a hearing before granting or denying the petition, the only basis for its decision is the paper record attached to the petition. See Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). Because we review this same information upon appeal, we owe no deference to the trial court's decision and our review is de novo. Id.

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 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. Moshenek v. State, 868 N.E.2d 419, 422 (Ind. 2007).

There are no set standards of fault or diligence; each case turns on its own facts. Id. But factors that are relevant to a party's lack of fault in failing to file a timely notice of appeal and his diligence in pursuing permission to file a belated notice of appeal 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. at 423 (citation omitted).

Nineteen-year-old Berry was not advised of his right to appeal his conviction at any time during the proceedings. Despite the lack of the advisement, Berry told his counsel that he desired to appeal his conviction, and did so within thirty days of the August 9, 2010 sentencing hearing. In his motion for appeal and appointment of appellate counsel, filed five days past thirty-day deadline, trial counsel mistakenly indicated that the August 24, 2010 indigency hearing was the date that Berry was sentenced. Five weeks after his motion was denied as untimely, Berry filed his motion seeking permission file a belated notice of appeal. Therefore, the passage of time between Berry's August 9, 2010 sentencing hearing and his October 21, 2010 motion to file a belated notice of appeal was minimal.

For all of these reasons, we conclude that Berry was without fault in failing to file a timely notice of appeal, and that he diligently pursued permission to file his belated

notice of appeal. The trial court erred when it denied Berry permission to file a belated notice of appeal.[1]

Reversed and remanded for proceedings consistent with this opinion.

KIRSCH, J., and VAIDIK, J., concur.

[1] The State concedes the trial court's error. See Appellee's Br. at 4-5.