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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM G. McLAUGHLIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 85A02-1002-CR-260
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Thomas M. Hakes, Special Judge
Cause No. 85C01-9707-CF-46

AUGUST 3, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant William G. McLaughlin appeals the trial court's denial of his petition for permission to file a belated notice of appeal.

We affirm.

ISSUE

McLaughlin presents one issue which we restate as whether the denial of the petition for permission to file a belated notice of appeal was proper.

FACTS AND PROCEDURAL HISTORY

On August 28, 1997, McLaughlin pleaded guilty in an open plea to two counts of child molesting, both as Class B felonies. McLaughlin was sentenced on December 15, 1997 to concurrent twenty-year sentences for his convictions. On May 14, 2003, McLaughlin filed a motion for modification of sentence, which the trial court denied on May 20, 2003. Over five years later, McLaughlin filed a second motion for modification of sentence on November 20, 2008. The trial court denied this motion on December 9, 2008. One year later, on December 22, 2009, McLaughlin filed his petition for permission to file a belated notice of appeal with the trial court. The trial court denied McLaughlin's petition on January 13, 2010, and this appeal ensued.

DISCUSSION AND DECISION

The sole issue on appeal is whether the trial court's denial of McLaughlin's petition for permission to file a belated notice of appeal was proper. In general, 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). We defer to the trial court's discretion because, when the trial court holds a hearing, it is generally in a better position to weigh evidence and judge witness credibility. *Cruite v. State*, 853 N.E.2d 487, 489 (Ind. Ct. App. 2006), *trans. denied*. However, when the trial court does not conduct a hearing on the petition, the only basis for its decision is the paper record attached to or within the petition. *Id*. at 489-90. Therefore, because we are reviewing the same information that was available to the trial court, we owe no deference to its findings, and we review the decision *de novo*. *Id*. at 490. In the present case, the trial court did not hold a hearing on McLaughlin's petition; therefore, our review is *de novo*.

Pursuant to Ind. Post-Conviction Rule 2(1), a petition for permission to file a belated notice of appeal may be filed with the trial court where:

> (1) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
>
> (2) 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 or she was without fault in the delay of filing and was diligent in pursuing permission to file a belated motion to appeal. *Moshenek v. State*, 868 N.E.2d 419, 422-23 (Ind. 2007), *reh'g denied*. There are no set standards of fault or diligence; rather, it is a case-by-case factual determination. *Id*. at 423.

McLaughlin argues that he was entitled to file a belated notice of appeal under P-C.R. 2 and that the trial court improperly denied him permission to do so. He contends that his failure to file a timely notice of appeal was through no fault of his own because the trial court did not advise him of his right to appeal his sentence. He also claims that he was diligent in requesting permission to file a belated appeal.

Although it is not sufficient to point only to the fact that the trial court did not advise the defendant of the right to appeal a sentence after an open plea in order to fulfill the requirements of P-C.R. 2(1), the fact that the trial court did not advise a defendant about this right can establish that he was without fault in the delay of filing a timely appeal; however, in such a situation, a defendant must still establish diligence. *Moshenek*, 868 N.E.2d at 424.

Here, McLaughlin asserts that the trial court, as well as his attorney, failed to inform him that he could appeal his sentence after his open plea. We have not been provided with the transcripts of the plea and sentencing hearings in this case. However, the materials on appeal reveal that McLaughlin made this assertion in his verified petition. In its order denying McLaughlin's petition, the trial court does not address McLaughlin's fault but rather mentions only his lack of diligence. Finally, for its part, the State does not dispute McLaughlin's contention that the trial court failed to advise him, points to nothing that suggests otherwise, and responds in its appellate brief as if the contention is correct. The circumstances presented here lead us to conclude that the failure to file a timely notice of appeal was not due to the fault of McLaughlin.

Several factors are relevant to a diligence inquiry. Among them are 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. *Bosley v. State*, 871 N.E.2d 999, 1002 (Ind. Ct. App. 2007).

McLaughlin claims that he was diligent because he filed for two sentence modifications prior to requesting permission to file a belated appeal. His first request was filed more than five years after his sentencing because, allegedly, he followed the advice of fellow inmates who suggested that he would receive a more favorable result if he waited to file a sentence modification until he had served approximately half of his sentence. In addition, McLaughlin was released on parole in March 2005, but his parole was revoked in May 2009. He asserts that he began working in the prison law library in June 2009 and discovered his right to appeal his sentence.

The State counters that McLaughlin was familiar with the legal system and had access to legal materials prior to June 2009. Further, the State emphasizes that not only did McLaughlin wait twelve years to petition for permission to file a belated appeal, but also he did not file his petition until his parole was revoked. The State suggests this timeline shows that McLaughlin had no intention of appealing his sentence until his parole was revoked and he was returned to incarceration; otherwise, he would have attempted an appeal during his four years of parole. Finally, the State questions the soundness of McLaughlin's decision to rely on the advice of fellow inmates rather than consulting an attorney to challenge his sentence.

The materials on appeal show that McLaughlin was sentenced on December 15, 1997. Five years and five months later, he filed a motion for modification of his sentence on May 14, 2003. Following another five years and six months, McLaughlin filed a second motion for modification of sentence on November 20, 2008. Another full year later, on December 22, 2009, McLaughlin filed his petition for permission to file a belated notice of appeal with the trial court. In summary, McLaughlin waited over five years to assert any challenge to his sentence, and he waited twelve years to petition for permission to file a belated appeal. Additionally, McLaughlin had access to legal materials during his extended incarceration, and, in fact, he filed pro se a request for sentence modification with proposed orders, a motion for appointment of counsel, a motion to continue, his petition for permission to file a belated appeal, and his notice of appeal. Moreover, *Collins v. State* was decided in November 2004, making clear that the proper vehicle for raising a sentencing issue is a direct appeal rather than a post-conviction proceeding. 817 N.E.2d 230 (Ind. 2004). McLaughlin did not pursue a belated appeal until more than five years after *Collins* was decided.

McLaughlin has not met his burden of proof under P-C.R. 2. Based upon the facts of this case, the trial court's denial of McLaughlin's petition for permission to file a belated appeal was proper.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the trial court properly denied McLaughlin's petition for permission to file a belated appeal.

Affirmed.

BARNES, J., and VAIDIK, J. concur.