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ATTORNEY FOR APPELLANT:

MICHAEL B. TROEMEL
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

HENRY A. FLORES, JR.
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOSEPH LANIE, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0904-CR-362
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0206-FA-11

August 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Joseph Lanie, Jr. appeals the trial court's revocation of his probation. We affirm.

Issues

Lanie raises one issue, which we restate as whether the trial court abused its discretion in ordering him to serve the remainder of his twenty-year suspended sentence. On cross-appeal, the State asserts that the trial court erred in granting Lanie permission to initiate a belated appeal.

Facts

On May 9, 2002, Lanie was charged with six felonies, three misdemeanors, and being a habitual substance offender. On January 6, 2004, Lanie pled guilty to Class B felony dealing in cocaine, Class C felony possession of a schedule II controlled substance, and Class A misdemeanor possession of marijuana. He also admitted to being a habitual substance offender. Pursuant to a plea agreement, the remaining six counts were dismissed, and on March 22, 2004, the trial court sentenced Lanie to a twenty-year sentence with twelve years executed and eight years suspended to probation.

On August 15, 2005, the trial court entered an agreed order modifying Lanie's sentence. The modification provided that Lanie serve the final four years of his executed sentence in community corrections. Lanie was immediately placed in community corrections after the order was entered. In January 2007, Lanie completed community corrections and was released to probation. As part of his probation, Lanie was to maintain good and lawful behavior and to abstain from consuming alcohol and drugs.

While on probation, Lanie was charged with Class A misdemeanor operating while intoxicated, Class A misdemeanor operating while intoxicated with a controlled substance, and being a habitual substance offender. On April 22, 2007, at the time of the arrest, Lanie tested at .06 BAC on a Datamaster machine. Lanie also tested positive for cannabinoids, methadone, and opiates after submitting to a subsequent blood test. On December 10, 2007, the State filed a petition to revoke Lanie's probation. During the probation revocation hearing, Lanie admitted to violating the conditions of his probation by committing said offenses. On August 8, 2008, the trial court revoked Lanie's probation and ordered him to serve the remainder of his twenty-year sentence.

On December 11, 2008, Lanie filed a verified motion requesting permission to file a belated appeal. The trial court granted Lanie's request without holding a hearing. Lanie now appeals the trial court's revocation of his probation, and the State cross-appeals the trial court's grant of Lanie's request to file the belated notice of appeal.

Analysis

I. Cross Appeal

We first address the State's cross-appeal. The State argues that the trial court abused its discretion in granting Lanie permission to file a belated notice of appeal. A defendant may seek permission to file a belated notice of appeal pursuant to Indiana Post-Conviction Rule 2, which provides in part:

> 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:

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

Ind. Post-Conviction Rule 2(1). "In construing this rule, this court has determined that the defendant must prove both of the above requirements by a preponderance of the evidence." Williams v. State, 873 N.E.2d 144, 146 (Ind. Ct. App. 2007). The decision to grant or deny a motion for permission to file a belated notice of appeal rests within the trial court's sound discretion and will be reversed only for an abuse of discretion or where the decision is contrary to law. Id. "An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances." Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). When a trial court does not hold a hearing on the petition, this court reviews the trial court's decision de novo. Williams, 873 N.E.2d at 146.

The State contends that this appeal should be dismissed because Lanie failed to prove that he pursued his appeal with due diligence. Specifically, the State asserts that Lanie's verified motion to file a belated appeal "only addresses whether he was at fault" and "contains no mention of when he learned of his right to appeal and his diligence in pursing [sic] that right. . . ." Appellee's Br. p. 8. We disagree.

Lanie's verified motion specifically states that "counsel was appointed to represent the defendant on appeal at his request at the sentencing hearing." Appellant's App. p.

160. Consistent with Lanie's motion, the record reflects that after being notified of his right to appeal, Lanie, by trial counsel, immediately requested appointment of appellate counsel, which the trial court granted. We have held that such a timely request for counsel is evidence of due diligence. See Williams, 873 N.E.2d at 147 (concluding that "because Williams requested the appointment of appellate counsel in a timely manner-which the trial court immediately granted-we further find that Williams was diligent in requesting permission to file the belated notice of appeal."). Like the defendant's motion in Williams, Lanie's verified motion specifically states that appellate counsel was appointed at his request.

In Moshenek v. State, our supreme court discussed several factors to consider when determining whether a defendant has established the requisite diligence. 868 N.E.2d 419, 424 (Ind. 2007). Those factors include "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. . . ." Id. Here, only four months passed between when Lanie was sentenced to when he filed his verified motion requesting permission to file a belated appeal. Thus, the risk of problems associated with a significant lapse of time is not present. See Id. With respect Lanie's awareness of relevant facts, the record reflects that after being informed of the thirty-day time limit to file a notice of appeal, Lanie, without delay, immediately requested appointment of appellate counsel. Moreover, the record reveals that the delay in filing the notice of appeal is not attributable to Lanie, but,

rather, his attorney. We, therefore, conclude that there was sufficient evidence of due diligence.[1]

The State also argues that the trial court erred because it did not "affirmatively find" that Lanie was diligent in his request. Appellee's Br. p. 9. We first note that P-C.R. 2, unlike P-C.R. 1, places no requirement on the trial court to make specific findings of fact and conclusions of law. Compare P-C.R. 1(6) with P-C.R. 2. It is within the trial court's discretion to grant or deny a request seeking permission to file a belated notice of appeal, and the trial court's decision will be affirmed so long as there is sufficient evidence in the record supporting its decision. See Williams, 873 N.E.2d at 147. Because Lanie's motion stated that he requested appointment of appellate counsel, and because the record reflects that Lanie did so in a timely manner, there was evidence supporting the trial court's order granting Lanie permission to file a belated notice of appeal. See Williams, 873 N.E.2d at 147. Thus, we conclude that the trial court did not abuse its discretion in granting Lanie permission to file his belated appeal and deny the State's request that this appeal be dismissed.

II. Probation Revocation

Turning to the issue on appeal, Lanie contends that the trial court abused its discretion in ordering him to serve the remainder of his twenty-year sentence. Our supreme court has held that the standard set forth in Indiana Appellate Rule 7(B) is not the correct standard to apply when reviewing a sentence imposed for a probation

[1] The State does not contend that the failure to file a timely notice of appeal was Lanie's fault.

violation. Prewitt, 878 N.E.2d at 187-88. Accordingly, we review "a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion." Sanders v. State, 825 N.E.2d 952, 957 (Ind. Ct. App. 2005), trans. denied. "An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances." Prewitt, 878 N.E.2d at 188. "If there is any evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation." Cox v. State, 706 N.E.2d 547, 551 (Ind. 1999). "If the trial court finds the person violated a condition of probation, it may order execution of any part of the sentence that was suspended. . . ." Rosa v. State, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005); Ind. Code § 35-38-2-3(g).

Although acknowledging that Rule 7(B) is not the proper standard to apply, Lanie suggests that this court should consider the elements in Rule 7(B) as a starting point for its analysis and argues that "long-term incarceration for non-violent substance offenders is in itself illogical." Appellant's Br. p. 14. This is a mischaracterization of the applicable standard of review. In determining whether the trial court abused its discretion, we consider whether there is evidence of probative value supporting the trial court's decision. Cox, 706 N.E.2d at 551. Here, because Lanie admitted to violating the conditions of his probation, we cannot say that it was improper for the trial court to revoke his probation. See Id. Moreover, it was within the trial court's discretion to order execution of any part of the sentence upon finding that Lanie violated the conditions of his probation. Rosa, 832 N.E.2d at 1121. As for whether it is "logical" to allow long-

term incarceration for non-violent substance offenses, that is a matter for the legislature to decide when setting sentencing ranges for such offenses.

Lanie further argues that the trial court's decision ordering him to serve the remainder of his twenty-year sentence was "to alleviate the frustration felt by the court. . . ." Appellant's Br. p. 14. Lanie asserts that "such frustration was evident . . . , in that the State and court recounted failed attempts at drug rehab." Id. The trial court referenced Lanie's failed attempts, however, as evidence of Lanie's inability to reform under community corrections programs, which formed the basis of its ruling that such programs were no longer the appropriate sanctions. We cannot say that the trial court abused its discretion in ordering Lanie to serve the remainder of his twenty-year sentence. Rosa, 832 N.E.2d at 1121.

Conclusion

The trial court properly granted Lanie permission to initiate a belated appeal, but the trial court did not abuse its discretion in ordering Lanie to serve the remainder of his twenty-year sentence. We affirm.

Affirmed.

BAKER, C.J., and MAY, J., concur.