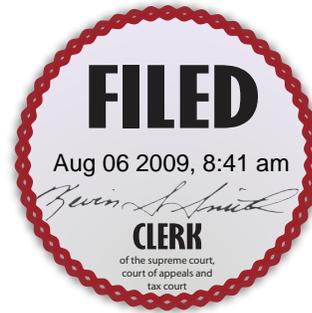


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

SUSAN K. CARPENTER
Public Defender of Indiana

STEPHEN T. OWENS
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

VERNELL BROCK,)
)
Appellant-Petitioner,)
)
vs.) No. 71A03-0903-CR-132
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-9809-CF-411

August 6, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Vernell Brock (Brock) appeals the trial court's refusal to grant him permission to file a belated notice of appeal.

We reverse and remand with instructions.

ISSUES

Brock raises two issues for our review, which we restate as:

- (1) Whether the trial court erred by denying Brock's request for permission to file a belated notice of appeal without holding a hearing; and
- (2) Whether Brock was at fault for not timely filing a notice of appeal and has been diligent in requesting permission to file a belated notice of appeal.

FACTS AND PROCEDURAL HISTORY

On December 20, 2005, Brock pled guilty to child molesting, as a Class A felony, Ind. Code § 35-42-4-3. At the plea hearing, the trial court informed Brock:

When a person pleads guilty, they give up all those rights I just said. But you still do retain a limited right to appeal the sentence itself as being unconstitutional, illegal, or even inappropriate. And you could have an attorney for that at no cost. So you still retain that limited right.

(Appellant's App. p. 20). On June 13, 2006, the trial court held a sentencing hearing wherein it acknowledged that Brock's plea agreement had been amended to reduce the charge to child molesting as a Class B felony. After hearing evidence, the trial court sentenced Brock to twenty years with ten of those years suspended to probation. Additionally, the trial court ordered that Brock spend a period of five years in the Department of Correction as a

condition of probation. The trial court did not mention Brock's right to appeal his sentence at his sentencing hearing, but discussed possibilities for seeking modification of his sentence.

Brock engaged in a series of *pro se* attempts to have his sentence reduced or suspended. On June 4, 2007, Brock filed a petition for reduction or suspension of his sentence. The trial court denied this petition.¹ On June 27, 2007, Brock filed a motion for reconsideration, which the trial court denied.² On September 17, 2007, Brock filed a notice of appeal of the trial court's order.³ On September 26, 2007, the trial court entered a ruling that the notice of appeal is "wholly without effect." (Appellant's App. p. 74). On October 8, 2007, Brock filed a motion for relief from judgment, which the trial court denied on October 12, 2007. On October 31, 2007, Brock filed a petition to file a belated notice of appeal,⁴ which the trial court denied on April 3, 2008.

On April 8, 2008, Brock filed a *pro se* petition for post-conviction relief, which was referred to the State Public Defender's Office. On November 20, 2008, Brock, now represented by counsel, filed another petition seeking permission to file a belated notice of appeal, this time seeking direct appeal of the trial court's sentencing order. The petition

¹ The record does not contain the trial court's order denying this petition or reveal the date when it was denied. However, from Brock's subsequent filings and references in other documents, we are able to infer that it was denied prior to June 27, 2007.

² Likewise, the record does not contain the order from the trial court denying this motion or reveal the date on which the trial court denied this motion.

³ This order is not contained in the record on appeal; however, from comments made by the trial court in its February 10, 2009, order denying Brock permission to file a belated direct appeal, we assume that this notice of appeal was directed at either the trial court's order denying Brock's petition for reduction or suspension of sentence or his motion for reconsideration.

⁴ Again, this petition to file belated direct appeal is not contained in the record on appeal, but we assume from the trial court's February 10, 2009, order that it is directed at Brock's *pro se* attempts to have his sentence reduced or suspended.

alleged that Brock was never informed that he was required to file a notice of appeal within thirty days from the sentencing date. Attached to the petition were the transcripts from Brock's plea and sentencing hearings, an affidavit from Brock wherein he swore that he was never advised by the trial court or his trial counsel that he was required to file a notice of appeal within thirty days of sentencing, and an affidavit from his trial counsel stating, "I do not recall at any time advising Mr. Brock that he had thirty (30) days from the date of his sentencing to initiate a timely direct appeal." (Appellant's App. p. 68). The trial court concluded that Brock was at fault for failing to file a timely notice of appeal, and, therefore, denied him permission to file a belated notice of appeal.

Brock now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Brock contends that he "was entitled to a hearing on his request for permission to file a belated notice of appeal." (Appellant's Br. p. 6). Specifically, Brock contends that his request for permission raised a question of fact, and, therefore, a hearing was necessary pursuant to Indiana Post-Conviction Rule 1(4)(g).

Post-Conviction Rule 2 provides a defendant an opportunity to petition the trial court for permission to file a belated notice of appeal when the "failure to file a timely notice of appeal was not due to the fault of the defendant [and] the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule." P-C.R. 2(1)(a)(2) and (3). Post-Conviction Rule 2 provides, in respect to hearings: "If a hearing is held on a petition for permission to file a belated notice of appeal, it shall be conducted according to

Ind. Post-Conviction Rule 1(5).” Post-Conviction Rule 1(5) provides no insight as to when a hearing is required, but rather instructs as to the proceedings of such a hearing if held. Brock cites to Post-Conviction Rule 1(4)(g) for the proposition that “an evidentiary hearing is required when the Petition raises an issue of material fact.” Specifically, Rule 1(4)(g) provides:

The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court may ask for oral argument on the legal issue raised. *If an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible.*

(Emphasis added). Although Post-Conviction Rule 2 does not articulate this standard, we have stated when reviewing an appeal governed by that rule that a hearing “should be held where the petition raises a genuine factual dispute concerning the existence of grounds for relief.” *Boyle v. State*, 851 N.E.2d 996, 1003 (Ind. Ct. App. 2006), *overruled on other grounds*, 868 N.E.2d 435 (Ind. 2007). That being said, the appropriate remedy where the trial court has not conducted a hearing is for us to review the request for permission to file a belated direct appeal *de novo*. *Id.*; *see also Atwood v. State*, 905 N.E.2d 479, 482 (Ind. Ct. App. 2009) (“[W]here . . . the trial court does not hold a hearing . . . the only basis for its decision is the paper record attached to the petition. [] Because we review this same information upon appeal, we owe no deference to the trial court’s decision and our review is *de novo*.”). If the record is insufficient to facilitate such a *de novo* review because of the trial court’s failure to conduct a hearing, we are at liberty to remand to the trial court for further

proceedings. See *Ricks v. State*, 898 N.E.2d 1277, 1280 (Ind. Ct. App. 2009) and *Jackson v. State*, 853 N.E.2d 138, 140-141 (Ind. Ct. App. 2006). However, we conclude that the record is sufficient to facilitate our *de novo* review.

Moving on to our *de novo* review, Brock contends that he was not at fault for his failure to timely file a notice of appeal of his sentence, and has been diligent in requesting permission to belatedly appeal his sentence. The defendant carries the burden to prove by a preponderance of the evidence that the failure to timely file a notice of appeal was not his fault and that he has been diligent. *Mead v. State*, 875 N.E.2d 304, 308 (Ind. Ct. App. 2007). “There are no set standards of fault or diligence and each case turns on its own facts.” *Moshenek v. State*, 868 N.E.2d 419, 423 (Ind. 2007), *reh’g denied*. Several factors are relevant to the defendant’s diligence and lack of fault in the delay of filing, including: the defendant’s 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.*

We know from the transcript of proceedings at Brock’s guilty plea hearing that the trial court did not instruct Brock of the requirement to file a notice of appeal within thirty days after sentencing. In Brock’s affidavit, he explained:

I did not know from any source that I had to start an appeal of my sentence thirty (30) days from my sentencing date. [] At the sentencing hearing the Court indicated that he would be willing to modify my sentence if I made a request to do so. [] I was advised by my trial counsel that if I did not file a petition for the reduction or modification of my sentence within one (1) year of my sentence date the court would lose jurisdiction to reduce my sentence.

(Appellant's App. pp. 65-66). The State has presented no evidence which would controvert Brock's claim that he did not know he had to file a notice of appeal within thirty days, at least until long after his opportunity to file a timely notice of appeal had expired, and, therefore, we must accept Brock's statement as true. *See Jewell v. State*, 624 N.E.2d 38, 42 (Ind. Ct. App. 1993) (noting that, where a defendant has properly filed an affidavit to bring facts outside the record to the attention of the trial court and the Court of Appeals, "[i]f such an affidavit is uncontradicted, the appellate court must accept its contents as true.>").

The State contends, and the trial court concluded below, that Brock should have been able to discern without legal training that certain advisements by the trial court to him during his *pro se* attempts to have his sentence reduced or suspended would also apply to his opportunity to bring a belated direct appeal of his sentence. Specifically, the trial court explained as follows:

It is to be noted that this court on September 26, 2007 filed its Ruling that [Brock's] September 17, 2007 Notice of Appeal (from refusal to Modify the sentence) was wholly without effect—and specifically noted the requirement in Appellate Rule 9 that a notice of appeal from a judgment order must be filed within thirty days of the filing of that order. Moreover, within thirteen days (13) days of this ruling by the court [Brock] filed a Motion for Relief from Judgment—which this court denied four days after receiving it—and [Brock]—nineteen days after the court's filing of this denial—then on October 31, 2007 filed a Petition to file a Belated Notice of Appeal from this latest denial. On April 3, 2008, this court denied [Brock]'s Petition to file the Belated Notice of Appeal from denial of sentencing modification, and in that denial specifically discussed the 30 day requirement following a judgment order for the filing of a Notice of Appeal. Indeed, in that April 3 denial this court noted that Defendant as early as June 27, 2007, was arguing that an earlier Motion to Reconsider was a Motion to Correct Error, and [Brock] was citing to [Indiana Trial Rule] 53.3(A), noting that this rule provides that [when] a court fails to rule on a motion to correct error within 45 days after its filing, the motion is deemed denied. This court in its April 3, 2008 ruling

pointed out that the same rule cited by Brock specified that notice of appeal must be filed within 30 days of such denial.

[] Finally, the State in its December 8, 2008 Response to this Petition to File Belated Notice of Appeal of the Sentence points out that the State Public Defender on January 18, 2008 specifically informed [Brock] of his right to file a PCR Petition and [Brock] waited almost three more months—to April 8, 2008—to do so.

(Appellant’s App. p. 82) (formatting changed and bold removed). Contrary to the trial court’s interpretation, we view this procedural history as evidence that Brock was being diligent in attempting to challenge his sentence, albeit somewhat misguided. In *Salazar v. State*, 854 N.E.2d 1180, 1186 n.6 (Ind. Ct. App. 2006), we noted that Salazar began to seek post-conviction relief just nine months after sentencing and we considered this evidence of diligence. *See also Jackson*, 853 N.E.2d at 142 (Barnes, J., dissenting) (stating he would find diligence and lack of fault if defendant had, among other things, “filed, within a reasonable time after sentencing, a PCR petition seeking to challenge his sentence.”).

We conclude that Brock was not at fault for failing to timely file his notice of appeal in light of the trial court’s failure to advise him of the requirement to file a notice of appeal within thirty days. Furthermore, we conclude that Brock was diligent in challenging his sentence, and, thereafter, diligent in seeking permission to file a belated direct appeal. Therefore, we reverse and remand with instructions for the trial court to grant Brock permission to file a belated notice of appeal of his sentence.

CONCLUSION

Based on the foregoing, we conclude that Brock was not at fault for failing to timely file a notice of appeal and was diligent in seeking to file a belated direct appeal. Therefore,

we reverse and remand for the trial court to grant permission to Brock to file a notice of appeal.

Reversed and remanded with instructions.

KIRSCH, J., and MATHIAS, J., concur.