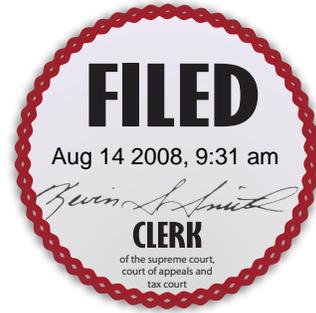


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

MATTHEW G. GRANTHAM
Bowers, Brewer, Garrett & Wiley, LLP
Huntington, Indiana

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

GARRY D. SHULER,)
)
Appellant-Defendant,)
)
vs.) No. 35A02-0802-CR-157
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35D01-0402-FA-20

August 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Garry Shuler appeals the trial court's denial of his petition for permission to file a belated notice of appeal.

We affirm.

ISSUE

Whether the trial court properly denied Shuler's petition for permission to file a belated notice of appeal.

FACTS

On February 4, 2004, the State charged Shuler with two counts of class A felony dealing in cocaine and one count of class B felony dealing in cocaine. On April 20, 2004, Shuler and the State entered into a plea agreement, whereby Shuler agreed to plead guilty to one count of class A felony dealing in cocaine, in exchange for which the State would dismiss the remaining counts. Pursuant to the plea agreement, the State "agreed to cap the executed portion of [Shuler's] sentence at twenty-five (25) years." (Apr. App. 78).¹ The trial court accepted the plea agreement and on May 25, 2004, sentenced Shuler to twenty-five years.

On November 4, 2004, Shuler, pro se, filed a petition for modification of sentence, requesting a modification of his sentence given his good behavior and obtainment of his GED. The trial court denied Shuler's petition for modification on November 5, 2004.

¹ Shuler provides this court with three appendices. We shall refer to the appendix bearing a file-stamp dated April 28, 2008, as the "Apr. App." The other two appendices contain the record from Shuler's underlying case.

On May 25, 2005, Shuler's counsel entered his appearance on Shuler's behalf. On July 28, 2006, Shuler, by counsel, filed a petition for post-conviction relief. Shuler alleged the following: 1) ineffective assistance of trial counsel "at the plea of guilty phase"; 2) his plea of guilty was not voluntarily or intelligently made; 3) "coercive tactics" were employed by the State, designed to limit Shuler's "right to confront witnesses against him . . . [and] to review all evidence"; and 4) "[t]here was a material flaw" in the charging information and affidavit of probable cause. (Apr. App. 64).

On January 22, 2007, Shuler filed a petition for permission to file a belated notice of appeal.² Shuler maintained that he "was not advised by the Court, by his defense counsel or any other process that he had a right to appeal the Court's discretionary sentence," and he "was under the mistaken belief that at the time of sentencing his penalty range included the possibility of being given probation." (Apr. App. 50, 51). Shuler asserted that he had been diligent in requesting permission to file a belated notice of appeal.

On February 15, 2007, the trial court found the following:

During the course of the proceedings for this case, the Defendant was represented by [three] separate attorneys. Attorney Steve Michael was appointed as the Defendant's Public Defender and entered his appearance on February 24, 2004 and withdrew on March 30, 2004 after the Defendant retained private counsel. Attorney, Richard Thonert, was hired by the Defendant and entered his appearance on March 23, 2004 and remained the Defendant's attorney throughout the investigatory stage, the plea of guilty, and the sentencing. Attorney Donald James entered his appearance for the Defendant on May 25, 2005 and remains the Defendant's attorney at this time. The Defendant despite having private counsel and having filed a

² According to the State's response to Shuler's petition, the hearing on Shuler's petition for post-conviction relief was to be held on January 22, 2007.

Petition for Post-Conviction Relief in the year 2006 did not file his petition for Permission to File a Belated Notice of Appeal until January 22, 2007.

(Apr. App. 43). Accordingly, the trial court determined that Shuler “did not exercise due diligence in the filing of the Petition for Permission to File a Belated Notice of Appeal.”

Id.

Shuler filed a notice of appeal on March 22, 2007. Apparently, however, Shuler failed to raise the issue of the denial of his petition for permission to file a belated notice of appeal and argued only “the merits of his sentencing claims in this appeal.” (Apr. App. 22). Finding “Shuler’s attempt to circumvent the trial court’s denial of his Petition for Permission to File a Belated Notice of Appeal” to be “unacceptable,” this court dismissed Shuler’s appeal on October 11, 2007. (Apr. App. 23).

Shuler filed a second petition for permission to file a belated notice of appeal on December 17, 2007. Shuler asserted the following:

2. . . . The failure to file a timely notice of appeal was not due to any fault of the Defendant.
3. The Defendant was not advised by the Court, by his defense counsel or any other process that he had a right to appeal the Court’s discretionary sentence. Pursuant to the terms of the plea agreement, the Court had discretionary authority to not impose the maximum sentence under the plea agreement of twenty-five (25) years.
4. The Defendant was under the mistaken belief that at the time of sentencing his penalty range included the possibility of being given probation.
5. The Defendant is diligently requesting permission to file this second belated notice of appeal of the sentencing hearing.
6. Trial counsel for the Defendant did not file notice of appeal within thirty (30) days of sentencing in this cause as required by Indiana Rule of

Appellate Procedure Rule 9, and private counsel previously entered an appearance for the purpose of pursuing a post-conviction relief remedy and in the process informed the Defendant of the rights infringement.

7. That on March 22, 2007, the Court appointed the Public Defender to perfect the appeal.

8. That the appeal was dismissed

9. That it was through no fault of the Defendant.

10. That the Court already denied the belated appeal.

11. Defendant is an “eligible defendant” under Indiana Rules of Court, Post Conviction Rule 2 in that all the alleged errors that will be presented on direct appeal of this cause were properly preserved for review during these proceedings.

(Apr. App. 20-21). According to the chronological case summary, the trial court denied Shuler’s second petition without a hearing on December 18, 2007, finding “that the argument(s) . . . are repetitive of previous argument(s) presented to th[e] court.” (Apr. App. 14).

DECISION

Shuler asserts the trial court erred in denying his second petition for permission to file a belated notice of appeal. We disagree.

Initially, we note that Shuler failed to raise the issue of whether the trial court properly denied his petition for permission to file a belated notice of appeal in his direct appeal to this court in 2007. “Issues presented, or available but not presented, at one stage in the proceedings are forfeited and cannot be brought in a subsequent stage.” *Hughes v. State*, 880 N.E.2d 1186, 1187 (Ind. 2008). Such claims are “barred by procedural default.” *Id.* Procedural default notwithstanding, we address Shuler’s claim

that the trial court erred in denying his second petition for permission to file a belated notice of appeal.

Indiana Post-Conviction Rule 2(1) permits a defendant to seek permission to file a belated appeal. It 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.

(Emphasis added). For purposes of Post-Conviction Rule 2, a defendant is an “eligible defendant” if, “but for the defendant’s failure to do so timely,” he would have had “the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty” Ind. Post-Conviction Rule 2.

Generally, whether a defendant is responsible for the delay is a matter within the trial court’s discretion. *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). We, however, owe no deference to the trial court’s decision to deny a petition where the trial court did not hold a hearing because we then must review the same information—the allegations contained in the petition—available to the trial court. *Id.* In such a case, like the one here, we review the denial de novo. *Id.*

A defendant who seeks to file a belated notice of appeal bears the burden of proving by a preponderance of evidence that he both 1) was without fault in the delay of filing the petition for permission to file the belated notice of appeal and 2) was diligent in

pursuing permission to file a belated notice of appeal. *Sholes v. State*, 878 N.E.2d 1232, 1235 (Ind. 2008). “There are no set standards of fault or diligence, and each case turns on its own facts.” *Id.* (citing *Moshenek v. State*, 868 N.E.2d 419, 423 (Ind. 2007)). Several factors are relevant to whether a defendant exercised due diligence, including “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. . . .” *Moshenek*, 868 N.E.2d at 424.

Here, the trial court sentenced Shuler on May 25, 2004. On November 9, 2004, the Indiana Supreme Court’s handed down *Collins v. State*, which held that the proper procedure for challenging sentences left to a trial court’s discretion pursuant to a plea agreement was to file a direct appeal. *See Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004). Shuler, however, failed to challenge his sentence, either through a belated direct appeal following *Collins* or a petition for post-conviction relief prior to *Collins*. *See Moshenek*, 868 N.E.2d at 424 (finding that “a pre-*Collins* Post-Conviction Rule 1 challenge to a sentence can serve to establish diligence”). While Shuler did file a petition for post-conviction relief in 2006 (subsequent to our Supreme Court’s decision in *Collins*), it was not filed until two years following his sentencing. Moreover, Shuler’s petition for post-conviction relief entirely failed to assert any challenges to his sentence.

It was not until January of 2007 that Shuler filed a petition for permission to file a belated notice of appeal, seeking to challenge his discretionary sentence. Upon denial of his petition, Shuler filed an appeal, which this court dismissed on October 11, 2007, due to Shuler’s failure to raise the issue of the denial of his petition for permission to file a

belated notice of appeal. Shuler then filed his second petition for permission to file a belated notice of appeal on December 17, 2007, the denial of which he now appeals.

The record establishes that more than two years elapsed from the date of Shuler's sentencing until the date he sought permission to file a belated notice of appeal and more than three years elapsed until he filed his second petition. Furthermore, after the trial court denied his first petition, Shuler failed to present his claim for filing a belated notice of appeal in his direct appeal. This failure does not satisfy the diligence requirement. *See Sholes*, 878 N.E.2d at 1238 ("The defendant's claimed assertion of sentencing issues in a proceeding dismissed due to his lack of prosecution does not satisfy the diligence requirement for bringing a belated appeal to challenge his term-of-years sentences."). Given the aforementioned facts, we cannot say that the trial court committed clear error in denying Shuler's petition for permission to file a belated notice of appeal.³

Affirmed.

NAJAM, J., and BROWN, J., concur.

³ We note that Shuler apparently raises ineffective assistance of appellate counsel in his second petition for permission to file a belated notice of appeal. *See* Shuler's Br. at 9 ("Although it's not entirely clear from his Second Petition, it would from the record as a whole appear that Shuler attempts to state a claim for ineffective assistance of appellate counsel."). This issue, however, is more appropriately raised in the context of a petition for post-conviction relief. *See Bahm v. State*, 794 N.E.2d 444, 445 (Ind. Ct. App. 2003) ("[I]ssues waived as free-standing arguments may be raised in post-conviction proceedings as arguments supporting a claim of ineffective assistance of trial or appellate counsel.").