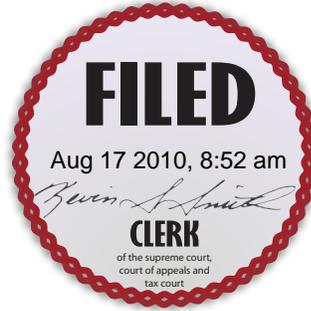


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

EARL LEE RUSSELBURG,

)

Appellant-Defendant,

)

vs.

)

No. 82A01-1002-CR-113

)

STATE OF INDIANA,

)

Appellee-Plaintiff.

)

)

)

APPEAL FROM THE VANDERBURGH CIRCUIT COURT

The Honorable Kelli E. Fink, Magistrate

Cause No. 5220

August 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Earl Lee Russelburg appeals from the trial court's denial of his petition for leave to file a belated notice of appeal. He presents a single dispositive issue for our review, namely, whether the trial court abused its discretion when it denied his petition.

We affirm.

STATEMENT OF THE CASE

In 1986, Russelburg was convicted of criminal recklessness, three counts of attempted murder, and robbery, as a Class A felony, following a jury trial, and the trial court sentenced him to an aggregate term of 146 years. In 1991, Russelburg filed a pro se petition for post-conviction relief, which the post-conviction court denied in 1994.¹ On appeal, this court vacated Russelburg's robbery conviction as a Class A felony and remanded for resentencing. The trial court appointed counsel to represent Russelburg at resentencing, and, on March 11, 1996, the court vacated the Class A felony robbery conviction; entered judgment on Class C felony robbery; and resentenced Russelburg on that count for five years, concurrent with his other sentences. Accordingly, his aggregate sentence did not change. Russelburg did not appeal that sentence.

Meanwhile, in 1995, Russelburg obtained permission to file a successive petition for post-conviction relief, which he filed pro se. But in 1996, Russelburg obtained counsel to represent him in the post-conviction proceedings. The next entry in the CCS shows that pursuant to a motion by the State, the trial court dismissed Russelburg's successive motion for post-conviction relief with prejudice in 2000.

¹ Neither party has explained the delay between the filing of the petition and the post-conviction court's ruling.

In 2002, Russelburg filed a pro se motion to correct erroneous sentence, which the trial court denied. Russelburg timely filed a pro se notice of appeal, but later moved to dismiss the appeal. Thereafter, Russelburg, pro se, sought permission to file a successive petition for post-conviction relief, which the trial court denied. In 2005, Russelburg retained counsel and filed a motion to reduce his sentence, but the trial court denied that motion. This court affirmed the trial court on appeal.

Russelburg subsequently filed a pro se legal malpractice claim against the attorney who represented him in his motion to reduce sentence. The trial court granted the defendant's summary judgment motion, but this court reversed that decision on appeal. Russelburg was unsuccessful at trial and appealed that judgment, which this court affirmed.

On January 15, 2010, Russelburg filed a verified petition for permission to file a belated appeal from his 1996 resentencing. The State filed a response in opposition to that petition, and the trial court denied the petition without a hearing. This appeal ensued.

DISCUSSION AND DECISION

Indiana Appellate Rule 9 governs the initiation of an appeal and provides:

A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court's ruling on such motion

Ind. Appellate Rule 9(A)(1). The rule also provides, “[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided in [Post-Conviction Rule] 2.” *Id.* at 9(A)(5). Post-Conviction Rule 2(1) provides in relevant 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:

- (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.

P-C.R. 2(1).

Russelburg has the burden of proving his grounds for relief by a preponderance of the evidence. See Beaudry v. State, 763 N.E.2d 487, 489-90 (Ind. Ct. App. 2002).

A defendant must be without fault in the delay of the filing. There are no set standards defining delay or diligence; each case must be decided on its own facts. Factors affecting the determination 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 490 (quoting Tolson v. State, 665 N.E.2d 939, 942 (Ind. Ct. App. 1996)). Where, as here, the trial court does not hold a hearing on a petition to file a belated notice of appeal, our review of the court's grant or denial of the petition is de novo. See Hull v. State, 839 N.E.2d 1250, 1253 (Ind. Ct. App. 2005).

Here, Russelburg was unable to obtain a transcript from his resentencing hearing, so there is no record of whether the trial court advised him of his right to appeal. In his verified petition for permission to file a belated appeal, Russelburg states that neither the trial court nor his counsel advised him of his right to appeal. And Russelburg states that

he “did not discover until December 20, 2009, that he had a right to an appeal from the March 11, 1996, resentencing[.]” Appellant’s App. at 10. Russelburg also avers that he

has been diligent in requesting permission to file a belated notice of appeal in that he was not aware that he had a right to an appeal from the trial court’s sentencing order, and that the sentence imposed could not be challenged by means of a petition for post-conviction relief. [Russelburg’s] need for an interpreter delayed discovering sooner his right to an appeal from the sentencing.^[2]

Id. at 10-11. In his affidavit in support of his verified petition, Russelburg states that he

could not have discovered [his right to appeal] sooner because all case law including statutes are on the computer and I have been unable to get anyone to show me how to use a computer. Access to the law library is almost impossible to obtain and when obtained you cannot obtain assistance from offenders working in the library.

Id. at 15-16.

But Russelburg’s extensive experience with pro se litigation belies his claim of ignorance of his right to appeal. He has filed numerous pro se motions and petitions since his 1986 convictions, and he timely filed at least three appeals pro se, including two appeals related to his legal malpractice suit. And in considering the other factors relevant to our determination of whether Russelburg was diligent and was not at fault in causing the approximate fourteen-year delay in filing his petition, we note that Russelburg’s age does not mitigate for or against granting the petition, and he had obtained a GED by the time of his resentencing in 1996.

Russelburg has not proven by a preponderance of the evidence that he was not at fault for failing to timely file an appeal of his 1996 resentencing. On appeal, he avers merely that “[a]n evidentiary hearing would provide [him] the opportunity to prove his

² Russelburg, who is obviously a good writer and fluent in the English language, does not explain what he means by his “need for an interpreter.”

allegations.” Brief of Appellant at 8 n.8. But he does not make any cogent argument to explain the approximate fourteen-year delay in filing the instant petition. His bare assertions of a need for an interpreter and his lack of computer skills are insufficient to carry his burden of proof. The trial court did not abuse its discretion when it denied Russelburg’s petition.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.