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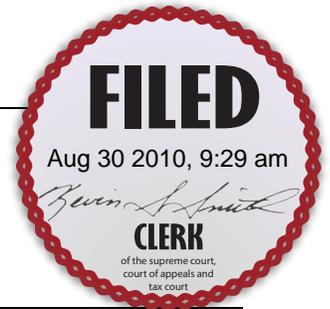
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**IN THE
COURT OF APPEALS OF INDIANA**



RICHARD L. CRIPE,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 20A05-1002-CR-159

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0303-FA-48

August 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Richard Cripe (“Cripe”) pleaded guilty in Elkhart Superior Court to Class A felony child molesting. He was sentenced to an aggregate sentence of fifty years, with twenty years suspended. Six years after his sentencing, Cripe filed a petition for permission to file a belated appeal, which the trial court denied. Cripe appeals and argues that the trial court abused its discretion in denying his petition for permission to file a belated appeal. We affirm.

Facts and Procedural History

On March 10, 2003, the State charged Cripe with two counts of Class A felony child molesting and one count of Class C felony child molesting relating to two of his stepdaughters. On June 12, 2003, Cripe entered into a plea agreement whereby he pleaded guilty to one count of Class A felony child molesting in exchange for the dismissal of the remaining charges. The plea agreement limited the executed portion of Cripe’s sentence to no more than thirty years. On August 7, 2003, the trial court sentenced Cripe to fifty years, suspending twenty years to comport with the terms of the plea agreement. Cripe was not advised of his right to appeal his sentence.

Cripe did not file a direct appeal of his sentence. On March 26, 2004, Cripe filed a petition for transcripts of his guilty plea and sentencing hearings, which the trial court denied. Cripe took no action to challenge his sentence until May 9, 2007, when he filed a motion for modification of his sentence, which the trial court denied. On June 17, 2008, the trial court received a handwritten letter from Cripe again requesting modification of

his sentence, which the trial court denied the same day. On July 7, 2008, Cripe filed a third motion for modification of his sentence, which the trial court also denied.

On January 7, 2009, Cripe filed a petition for post-conviction relief. On August 10, 2009, Cripe filed a motion to withdraw his petition for post-conviction relief, which the court granted. On the same day, Cripe filed a petition for permission to file a belated notice of appeal. On November 9, 2009, the trial court conducted a hearing on the petition. The petition was denied on January 25, 2010. Cripe now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Cripe contends that the trial court abused its discretion in denying his petition for permission to file a belated notice of appeal. The decision whether to grant permission to file a belated appeal is within the sound discretion of the trial court. George v.State, 862 N.E.2d 260, 264 (Ind. Ct. App. 2006). Where, as here, a trial court's ruling on a petition for permission to file a belated notice of appeal is made after a hearing, it will be reversed only for abuse of discretion. Moshenek v. State, 868 N.E.2d 419, 423-24 (Ind. 2007).

In Collins v. State, our supreme court held that the proper procedure for contesting a trial court's sentencing decision where the trial court has exercised sentencing discretion is a direct appeal and not a proceeding under Indiana Post-Conviction Rule 1. 817 N.E.2d 230, 231-32 (Ind. 2004). A defendant who fails to file a timely notice of

appeal may petition for permission to file a belated appeal under Indiana Post-Conviction Rule 2 if he meets the standards set forth in the Rule. Id. at 233.

Post-Conviction Rule 2 provides:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal of the conviction may be filed with the trial court where:

- (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.

The Rule also gives a defendant the right to appeal a trial court's denial of permission to file a belated notice of appeal. Moshenek, 868 N.E.2d at 422. The defendant bears the burden of proving by a preponderance of the evidence that he was without fault in failing to file a timely notice of appeal and diligent in pursuing permission to file a belated notice of appeal. Salazar v. State, 854 N.E.2d 1180, 1184 (Ind. Ct. App. 2006).

There are no definitive standards of fault or diligence; each case must be decided on its own facts. Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). Because diligence and fault are fact-sensitive inquiries, this court gives substantial deference to the trial court's ruling. Moshenek, 868 N.E.2d at 423.

Although the trial court is not required to inform the convicted defendant of the right to appeal a sentence before accepting a guilty plea, the fact that a trial court did not advise the defendant of that right can serve to establish that the defendant was without fault in the failure to file a timely appeal. Id. at 424. Because Cripe was not informed of

his right to appeal his sentence, we conclude that he was without fault in the failure to file a timely appeal. See Baysinger, 835 N.E.2d at 226.

However, PCR 2 is written in the conjunctive, and the second prerequisite for permission to file a belated appeal is that, even if he is without fault in his failure to timely file, Cripe must also establish diligence during the period of time since he was sentenced. Factors relevant to our determination of diligence 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. Bosley v. State, 871 N.E.2d 999, 1002 (Ind. Ct. App. 2007) (citing Moshenek, 868 N.E.2d at 424).

Cripe claims that he was diligent during the six-year lapse between his sentencing and his petition for permission to file a belated appeal. Specifically, Cripe asserts that he exhibited the requisite diligence by seeking modification of his sentence in 2007 and 2008, and by filing his petition for post-conviction relief in 2009. Additionally, Cripe contends that his delay in challenging his sentence is attributable to the fact that, as a first-time offender convicted of child molestation, he was unfamiliar with the legal system and concerned with keeping the details of his offenses confidential within the prison system.

When reviewing diligence for purposes of belated appeal, this court has considered defendants' previous efforts to challenge their sentences. For example, in Mead v. State, this court held that defendant satisfied the diligence requirement when he

filed motions or petitions challenging his sentence every eight months from the time he was sentenced. 875 N.E. 2d 304, 308 (Ind. Ct. App. 2007). However, in Moshenek, our supreme court determined that a defendant had not established diligence when he filed two pro se motions requesting transcripts and stating his intent to seek post-conviction relief in the year following sentencing, but failed to pursue post-conviction relief until three years after receiving the transcripts. 868 N.E.2d at 421, 424.

The length of time a defendant waited to file a petition for permission to file a belated appeal after Collins was handed down has also factored into our diligence analysis. For example, in Baysinger, this court held that a defendant who was sentenced prior to Collins satisfied the diligence requirement when he filed a petition for permission to file a belated appeal approximately four months after Collins was handed down. Baysinger, 835 N.E.2d at 226; see also Perry v. State, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006) (holding defendant acted diligently where he filed petition for permission to file belated appeal seven months after Collins was decided).

Here, Cripe was sentenced on August 7, 2003. Our supreme court handed down Collins on November 9, 2004. Although Cripe filed a petition for transcripts of his guilty plea and sentencing hearings on March 26, 2004, he took no action to challenge his sentence until he filed his first motion to modify his sentence almost four years post-sentence, on May 9, 2007. He filed two additional requests to modify his sentence on June 17, 2008, and July 7, 2008, and his petition for post conviction relief was filed on

January 7, 2009. Six years after he was sentenced, on August 10, 2009, Cripe filed his petition for permission to file a belated notice of appeal.

Unlike the defendant in Mead, Cripe did not consistently and frequently challenge his sentence from the date of his sentencing forward. In fact, Cripe failed to raise any challenge to his sentence for nearly four years after his sentencing. Also, unlike the defendants in Baysinger and Perry, Cripe did not file his petition for permission to file a belated appeal promptly after Collins was decided. Rather, his petition was filed more than four years after Collins was handed down. Although Cripe attributes this delay to his inexperience with the legal system and his reluctance to share the details of his offenses with his fellow inmates, Cripe testified that he was aware of Post-Conviction Rule 2 in 2004. Tr. of Evidentiary Hearing pp. 37-38. Under these facts and circumstances, we cannot say that the trial court abused its discretion in denying Cripe's petition for permission to file a belated appeal for lack of diligence.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.