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.

FILED
Aug 31 2011, 9:24 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

JEFFREY L. SANFORD
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

TONY BENSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-1103-CR-90
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Jerome Frese, Judge
Cause No. 71D03-0709-FA-35

August 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Tony Benson appeals his sentence following a guilty plea to child molestation as a class A felony.[1] On cross-appeal, the State asserts that the trial court abused its discretion by allowing Benson to file a belated notice of appeal.

We reverse the trial court's order granting Benson permission to file a belated notice of appeal and dismiss this appeal.

ISSUES

Benson raises the following issue:

> Whether the trial court erred in sentencing him.

On cross-appeal, the State raises the following issue:

> Whether the trial court abused its discretion by allowing Benson to file a belated notice of appeal.

FACTS

In August 2007, Benson lived with his sister and twelve-year old niece, A.B. On August 30, 2007, Benson digitally penetrated A.B.'s vagina. On September 2, 2007, the State charged Benson with two counts of class A felony child molestation. Count 1 alleged that Benson had sexual intercourse with his niece while Count 2 alleged that Benson had subjected her to deviate sexual conduct.

On November 26, 2007, Benson and the State entered into a plea agreement, whereby Benson agreed to plead guilty to Count 1 in exchange for the State's dismissal

[1] Ind. Code §35-42-4-3.

of Count 2. The State also agreed to make no sentencing recommendation. Benson was represented by counsel.

During the guilty plea hearing, the trial court advised Benson and his counsel of Benson's right to appeal his sentence following his guilty plea as follows:

> The Court: Okay. You each have a right to appeal the sentence I impose as being illegal or unconstitutional, or even inappropriate. But you have to file a notice within thirty days of being sentenced in order to appeal. Do you understand?
>
> Mr. Benson: But I can't read or write. How can I do that?
>
> The Court: Oh, I'd give you a lawyer at no cost for that.
>
> Mr. Benson: Okay.

(G.P. Tr. 26).[2] The trial court accepted the guilty plea. On January 15 and 16, 2008, the trial court held a sentencing hearing. During the sentencing hearing, the trial court did not re-advise Benson of his right to appeal his sentence or appoint appellate counsel. Benson also did not ask for an appellate attorney during the sentencing hearing. The trial court sentenced Benson to thirty-six years. Benson did not file a direct appeal of his sentence.

On June 27, 2008, Benson filed a motion for transcripts of his guilty plea and sentencing hearing. In his motion, Benson stated that he was in the process of preparing a petition for post conviction relief ("PCR") in which he was specifically planning to raise the issues of an involuntary guilty plea and ineffective assistance of counsel. On

[2] Benson's guilty plea hearing was held in conjunction with another defendant's guilty plea hearing.

September 2, 2008, the trial court granted Benson's motion, and the court reporter sent Benson the transcripts.

On September 30, 2008, Benson filed a PCR petition. On November 3, 2008, an Indiana Public Defender entered an appearance on behalf of Benson. More than two years later, on February 3, 2011, an Indiana Public Defender filed a petition for permission to file a belated notice of appeal pursuant to Post-Conviction Rule 2.[3] In his motion, Benson admitted that the trial court had advised him of his right to appeal his sentence but contended he was not at fault for the delay in filing a timely notice of appeal. He specifically asserted:

> The trial court advised Benson that he had a right to appeal his sentence and would appoint an attorney to do so. Benson indicated he wanted an attorney to perfect an appeal. The record reflects that Benson could not read or write and had problems because of a head injury he sustained when he was a teenager. Benson had to rely on the assistance of an attorney to perfect his appeal. Therefore, the failure to file a timely notice of appeal was not due to the fault of Benson pursuant to Ind. Post-Conviction Rule 2(1)(a)(2).

(App. 42). Benson also asserted that "[h]e had been diligent because he had sought transcripts from the trial court and attempted to attack his case approximately 8 months after his sentence." (App. 43). On February 17, 2011, the trial court, without an evidentiary hearing, granted Benson's motion to file a belated notice of appeal.

DECISION

We address the State's cross-appeal issue first because it is dispositive of this appeal. The State argues on cross-appeal that the trial court abused its discretion by granting Benson permission to file a belated notice of appeal.

[3] Benson did not include a copy of his PCR petition in his motion.

Indiana Post-Conviction Rule 2(1) allows a defendant an opportunity to seek permission from the trial court to file a belated notice of appeal. Generally, the decision to grant or deny a petition for permission to file a belated notice of appeal is within the discretion of the trial court. *Moshenek v. State*, 868 N.E.2d 419, 422 (Ind. 2007). However, if the trial court does not hold a hearing before granting or denying a petition to file a belated notice of appeal, the appellate court owes no deference to the trial court's decision, and the review of the granting of the petition is de novo. *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005).

Benson did not respond to the State's cross-appeal allegation that the trial court committed error by permitting him to file a belated notice of appeal. Because Benson failed to respond to the State's cross-appeal, if we find prima facie error, we may reverse. *In re D.L.*, 814 N.E.2d 1022, 1029 (Ind. Ct. App. 2004). Prima facie is defined as "at first sight, on first appearance, or on the face of it." *Id.* If we find prima facie error in the trial court's granting of Benson's petition, we do not have jurisdiction over the appeal. *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006).

If a defendant fails to file a timely notice of appeal within thirty days of being sentenced, the defendant forfeits the right to appeal unless permission to file a belated notice of appeal is sought through Indiana Post Conviction Rule 2. Ind. Appellate Rule 9(A)(5). Indiana Post Conviction Rule 2(1)(a) provides that 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.

The defendant has to show by the preponderance of the evidence that he was not at fault for the delay in filing and was diligent in pursuing permission to file a belated notice of appeal. *Moshenek*, 868 N.E.2d at 422. There is not a set standard in determining whether a defendant has been without fault and diligent in pursuing permission to file the belated notice of appeal. *Baysinger*, 835 N.E.2d at 224. However, factors an appellate court can consider in determining whether a defendant has been without fault and diligent in pursuing permission to file the belated notice of appeal include the defendant's awareness of his procedural remedies, age, education, familiarity with the legal system, whether the defendant was aware of his appellate rights, and whether he committed an act that contributed to the delay. *Moshenek*, 868 N.E.2d at 423. Generally, if the trial court fails to advise a person of a right to appeal during either the guilty plea or sentencing hearing, the defendant will not be at fault for failing to file a timely notice of appeal. *Jackson v. State*, 853 N.E.2d 138, 140 (Ind. Ct. App. 2006).

At the time of the sentence hearing, Benson was a thirty-three-year-old man who did not finish high school and could not read or write. Benson had a traumatic brain injury as a child, resulting in him having trouble with his memory. Benson, however, was represented by counsel and was made aware of his right to appeal. During Benson's guilty plea hearing, the trial court informed Benson that he had a right to appeal his

sentence and specifically explained that he would have thirty days to file a notice of appeal to initiate such appeal. The trial court did not re-advise Benson of his appellate rights at the sentencing hearing, and neither Benson nor counsel asked the trial court to appoint appellate counsel. Nevertheless, Benson conceded in his belated notice of appeal petition that he was aware of his right to appeal his sentence. In addition, the record reveals that Benson has some familiarity with the legal system with eight convictions for driving while suspended, as well as convictions for conversion, fleeing, trespass, and theft. Benson was on probation at the time of the current offense. The fact that Benson was represented by counsel and was informed of his right to appeal his sentence during the guilty plea hearing, and had some familiarity with the legal system weigh against him in the determination of whether he was at fault for failing to file a timely notice of appeal. *Cf. Johnson v State*, 903 N.E.2d 472, 475 (Ind. Ct. App. 2009) (explaining that the trial court's failure to orally advise defendant of his appellate right established that he was without fault).

Even if Benson proved he was without fault, he must also show that he was diligent in pursuing a belated notice of appeal. *Moshenek*, 868 N.E.2d at 423. Factors in determining diligence include the overall passage of time, the extent the defendant was aware of the facts, and the degree to which the delay was the fault of another party. *Id.*

Benson was sentenced on January 16, 2008. As noted above, and acknowledged by Benson, the trial court had advised him that he could appeal his sentence. Instead of filing a direct appeal, which our Supreme Court in *Collins* stated is the proper method to challenge a sentence following a guilty plea, *see Collins v State*, 817 N.E.2d 230, 233

(Ind. 2004), Benson filed a PCR petition approximately eight months after the trial court sentenced him. Approximately three years after sentencing, Benson filed a petition for permission to file a belated notice of appeal. Because a Public Defender was representing Benson in his PCR and when he filed a belated notice of appeal petition, we would be inclined not to count that time against Benson. *See Kling v. State*, 837 N.E.2d 502, 508 (Ind. 2005) (explaining that the Public Defender investigating a claim is not counted against the defendant).

However, another factor in determining diligence is whether a defendant has made previous attempts to attack his sentence. *See Moshenek*, 868 N.E.2d at 424. Benson has made no showing that he somehow challenged his sentence in the three years between his sentencing in January 2008 and when he filed his belated notice of appeal in February 2011. Benson did not include a copy of his PCR with his belated notice of appeal petition. Furthermore, Benson's transcript request motion, filed in June 2008, specifically stated that he was planning to challenge the voluntariness of his guilty plea and an ineffective assistance of counsel claim in his PCR petition, and it made no mention about attacking his sentence. Thus, Benson has failed to establish that he attacked his sentence following his guilty plea, a factor in determining diligence. *See Perry v State*, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006) (explaining that "not every motion to file a belated appeal should be automatically granted by trial courts simply because *Collins* has been decided, especially if there is no indication that the defendant had previously made attempts to collaterally attack a sentence imposed following a guilty plea"). Benson's failure to challenge his sentence in his PCR petition during the years

prior to filing a belated notice of appeal demonstrates a lack of diligence. *See Sholes v. State*, 878 N.E.2d 1232, 1237-38 (Ind. 2008) (holding that a defendant's failure to challenge a sentence in his post-conviction petition during the years prior to filing for a belated notice of appeal demonstrated a lack of diligence); *see also Moshenek*, 868 N.E.2d at 424 (same). Accordingly, the trial court erred when it granted Benson's petition for permission to file a belated notice of appeal, and therefore we dismiss his appeal for lack of jurisdiction.

Dismissed.

RILEY, J., and BARNES, J., concur.