



## **Case Summary**

Antonio Stoudemire appeals his three-year sentence for battery, a Class D felony.

We affirm.

### **Issues**

The issues before us are:

- I. whether the trial court properly granted Stoudemire permission to file a belated notice of appeal; and
- II. whether the trial court properly sentenced Stoudemire.

### **Facts**

On July 11, 2006, at approximately 4:00 a.m., Rebecca Folley was sitting on the front porch of her residence located at 615 East 52<sup>nd</sup> Street in Indianapolis when Folley observed Stoudemire walking toward the front steps. Although Folley had a restraining order against Stoudemire, he approached Folley and asked to speak with her. Folley opened the door and Stoudemire struck her on the head. It is unclear whether Stoudemire's hand was opened or closed when he struck Folley.

Upon contact, Folley fell down between a table and the wall. Thereafter, Stoudemire and Folley left Folley's residence and entered a two-door Grand Am vehicle parked in a nearby alleyway. Stoudemire drove around for a brief period, pulled the vehicle over, and then exited, leaving Folley in the passenger seat. After Stoudemire left, Folley phoned the police.

On June 20, 2006, the State charged Stoudemire with Count I, Class D felony criminal confinement; Count II, Class A misdemeanor domestic battery; Count III, Class

A misdemeanor battery; Count IV, Class A misdemeanor invasion of privacy; and Count V, Class D felony battery. The trial was held on July 26, 2006 and Stoudemire was found guilty of Count II, Count IV, and Count V. On August 9, 2006, the sentencing hearing was held. Stoudemire was sentenced to 365 days each for Count II and Count IV and 1095 days for Count V. The sentences for Count II and Count IV were to run concurrently to each other but consecutively to the sentence for Count V. The trial court also suspended 365 days of the sentence to probation.

Stoudemire filed a motion to file a belated notice of appeal on October 23, 2006, and it was granted that same day. On November 27, 2006, Stoudemire filed a belated notice of appeal. Stoudemire now appeals.

## **Analysis**

### ***I. Belated Notice of Appeal***

The State cross-appeals that the trial court improperly granted Stoudemire permission to file a belated notice of appeal. Specifically, the State claims that Stoudemire did not present any evidence to the trial court to warrant permission to file a belated appeal and therefore, this court is without jurisdiction to consider Stoudemire's claims. Generally, the failure to file a timely notice of appeal forfeits the right to an appeal and deprives the appellate court of subject matter jurisdiction over the appeal. See Davis v. State, 771 N.E.2d 647, 649 (Ind. 2002). However, Post-Conviction Rule II allows a person, convicted after a trial or guilty plea, who has failed to file a timely notice of appeal to petition for permission to file a belated notice of appeal. Witt v. State, 867 N.E.2d 1279, 1281 (Ind. 2007). To receive permission to file a belated motion of appeal,

the defendant must show, by a preponderance of the evidence, that: (1) the failure to file a timely notice of appeal is not the fault of the petitioner; and (2) that the petitioner has been diligent in requesting permission to file a belated notice of appeal. Id.

Here, the State asserts that Stoudemire did not satisfy these conditions and accordingly, the trial court was without authority to grant permission to file a belated appeal. Our review of the record reveals that Stoudemire's sentencing hearing was held on August 9, 2006. At the conclusion of that hearing, the trial court informed Stoudemire that he had the right to file an appeal and that appellate counsel would be appointed. Stoudemire's trial counsel filed a motion requesting that Stoudemire be appointed appellate counsel on October 4, 2006. At the time of this request, Stoudemire had already exceeded the thirty-day period designated for appeals. Appellate counsel was appointed on October 18, 2006 and the motion to file a belated notice of appeal was filed within five days of that appointment. Stoudemire's timely filing of a belated notice of appeal after receiving appellate counsel demonstrates Stoudemire's diligence in his effort to secure an appeal. Our review indicates that Stoudemire wanted to pursue an appeal at the time of sentencing, but his trial counsel failed to timely file a notice of appeal. The trial court properly allowed the filing of a Belated Notice of Appeal.

## ***II. Sentence***

Stoudemire claims that the trial court abused its discretion when it sentenced him to the maximum three years for his Class D felony battery conviction. Stoudemire maintains that the nature of the offense and his character do not warrant the maximum sentence. Our supreme court recently provided an outline for the respective roles of trial

and appellate courts under the 2005 amendments to Indiana's sentencing statutes. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

Stoudemire claims that the trial court failed to consider the hardship his incarceration would impose on his eleven-year-old daughter as a mitigating circumstance. The finding of mitigating factors is within the trial court's discretion. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). Moreover, the trial court does not have to explain why proffered mitigators were not accepted. Id. On appeal, Stoudemire must show that the proffered mitigator is significant and clearly supported by the trial record. Id. Here, the facts do not indicate that the alleged hardship is significant and we decline to find that the trial court abused its discretion in its determination that family hardship was not a mitigating circumstance.

Indiana Appellate Rule 7(B) gives us the authority to revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Anglemyer, 868 N.E.2d at 491. Here, the evidence reveals that Stoudemire violated the terms of a protective order, and struck Folley in her home. Moreover, Stoudemire's

criminal history, as detailed by the trial court, is quite extensive and spans several jurisdictions. Stoudemire's convictions include Class D felony Auto Theft, Class D felony theft, Class D felony criminal confinement, and misdemeanor battery. The trial court noted that the instant conviction would be his tenth and that Stoudemire has violated his probation or parole on four separate occasions. In light of the nature of the offense and especially Stoudemire's character, as revealed by his criminal history, we find that the trial court's sentence, three years, is not inappropriate.

### **Conclusion**

The trial court properly allowed Stoudemire to file a belated notice of appeal. Stoudemire's three-year sentence is not the result of an abuse of trial court discretion and is not inappropriate. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.