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FILED
Sep 14 2009, 8:35 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

DENNIS LANE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0905-CR-272
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause Nos. 71D04-0103-CF-115 and 71D03-0310-PC-35

September 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Dennis Lane appeals the trial court's denial of his verified motion for belated notice of appeal. We reverse and remand.

Issue

Did the trial court err in denying Lane's verified motion for belated notice of appeal?

Facts and Procedural History

On March 23, 2001, the State charged Lane with class A felony rape, two counts of class B felony robbery, class D felony auto theft, two counts of class B felony burglary, and two counts of class B felony criminal confinement. On September 16 and 17, 2002, Lane pled guilty to one count each of class B felony rape, robbery, burglary, and criminal confinement, and one count of class D felony auto theft. The plea agreement was "open," meaning that the trial had discretion in sentencing Lane. At the guilty plea hearing, the trial court advised Lane, albeit incorrectly, that by entering into the open plea agreement, he was forfeiting his right to appeal the length of his sentence. On November 7, 2002, Lane filed a motion to withdraw plea and a motion for change of judge. On November 11, 2002, following a hearing, the trial court denied Lane's motions. On December 16, 2002, the trial court sentenced Lane to twenty years for class B felony rape, twenty years for class B felony robbery, twenty years for class B felony burglary, twenty years for class B felony criminal confinement, and three years for class D felony auto theft, with all terms to be served consecutively, for a total of eighty-three years executed.

On May 13, 2003, Lane wrote to the trial court, requesting copies of the sentencing transcripts. On July 7, 2003, the trial court sent the transcripts to Lane. On September 9, 2003, Lane filed pro se a first request for admissions, interrogatories, and production of documents. On September 15, 2003, the trial court ordered that Lane's discovery requests were "Without Effect." Appellant's App. at 16. On October 22, 2003, Lane filed a pro se petition for post-conviction relief. In the petition, Lane requested appointment of counsel; however, he failed to sign an affidavit of indigency. On November 21, 2003, the State filed its response. On January 28, 2004, the trial court ordered Lane to file a proper affidavit of indigency. On February 10, 2004, Lane filed the affidavit. On February 12, 2004, the trial court appointed counsel, and on March 8, 2004, state deputy public defender Stephen K. Owen entered his appearance on behalf of Lane.

On January 10, 2005, Owens filed a motion to dismiss the petition for post-conviction relief without prejudice and a petition for appointment of a St. Joseph County public defender to pursue a belated appeal pursuant to Indiana Post-Conviction Rule 2. On January 24, 2005, the trial court granted this motion and appointed a county public defender to represent Lane for the purpose of filing a motion to file a belated direct appeal. On July 14, 2005, Lane filed a pro se petition for appointment of counsel at county expense. In an order dated July 22, 2005, the trial court noted that it had already appointed a county public defender in its order of January 24, 2005. On February 9, 2006, the trial court reinstated the post-conviction petition and reappointed the state public defender to represent Lane.

On August 8, 2006, Lane filed a pro se appearance form, request to transport, and a motion for appointment of county public defender for his appeal. On August 11, 2006, the trial court denied Lane's request for appointment of county public defender and directed Lane to contact the state public defender's office for assistance in filing a belated direct appeal of his sentence. On April 11, 2008, the trial court sent a copy of the chronological case summary to state deputy public defender Jeffrey R. Cardella, presumably in response to Cardella's request. On November 10, 2008, Lane, again represented by state deputy public defender Owens, filed a verified motion for belated notice of appeal pursuant to Indiana Post-Conviction Rule 2 and a motion for appointment of county public defender. On December 18, 2008, the State filed its response. On March 20, 2009, the trial court denied Lane's motion without a hearing. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

Lane contends that the trial court erred in denying his motion to file belated notice of appeal. Indiana Post-Conviction Rule 2 states in relevant part as follows:

> **Section 1. Belated Notice of Appeal**
> (a) *Required Showings*. 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 the burden of proving his grounds for relief by a preponderance of the evidence. *Witt v. State*, 867 N.E.2d 1279, 1281 (Ind. 2007). Generally, we will affirm a trial court's ruling on a petition for permission to file a belated notice of appeal unless it was based on an error of law or a clearly erroneous factual determination. *Moshenek v. State*, 868 N.E.2d 419, 423-24 (Ind. 2007). Where the trial court does not hold a hearing before granting or denying such a petition, however, the only basis for its decision is the paper record attached to the petition. *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). Because the trial court did not hold a hearing on Lane's petition, we owe no deference to its findings. *Id*. Thus, we will review the trial court's denial de novo. *Id*.

In considering the applicability of Indiana Post-Conviction Rule 2, we first consider whether Lane was without fault in failing to file a timely appeal of his sentence. According to our supreme court, the fact that the trial court did not advise a defendant about the right to appeal his sentence can establish that the defendant was without fault in the delay of filing a timely appeal. *See Moshenek*, 868 N.E.2d at 424. In the instant case, as the trial court noted in its order denying Lane's motion, the trial court failed to inform of the need to file a notice of appeal within thirty days of his sentencing on December 16, 2002. In fact, the trial court told him that by pleading guilty, he was forfeiting any right to appeal his sentence.

In 2004, our supreme court held that the proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal, or if the time for filing a direct appeal has run, to request permission to file a belated appeal pursuant to Post-Conviction Rule 2. *Collins v. State*, 817 N.E.2d 230, 233 (Ind. 2004). Until

Collins, there was conflicting authority as to which procedural vehicle was appropriate for such an appeal. *See Gutermuth v. State*, 800 N.E.2d 592, 599 (Ind. Ct. App. 2003) (holding that defendant's failure to file a direct appeal did not cause him to waive review of his sentence in post-conviction relief proceeding because trial court misinformed him that he had waived his right to appeal), *trans. granted, opinion vacated*, 817 N.E.2d 233 (Ind. 2004); *see also Taylor v. State*, 780 N.E.2d 430, 435 (Ind. Ct. App. 2002) (holding that defendant who failed to present his claim of sentencing error on direct appeal was foreclosed from later raising it in a post-conviction proceeding), *trans. denied*. In our view, Lane proved by a preponderance of the evidence that he was without fault in failing to file a timely notice of appeal.

The more difficult issue is the diligence prong of Indiana Post-Conviction Rule 2. There are no set standards a court can apply to determine whether a defendant was diligent in requesting permission to file a belated notice. *Land v. State*, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994), *trans. denied* (2005). Relevant factors include the following: 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*. Other relevant factors are 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.

Following Lane's sentencing hearing on December 16, 2002, Lane stayed in fairly regular contact with the trial court, filing pleadings which demonstrated his continued intent to challenge his sentence with the assistance of a public defender. For example, on May 13, 2003, Lane sent a letter requesting copies of the sentencing transcripts. On September 9, 2003, Lane filed several discovery requests; the trial court deemed them "Without Effect," however, because no pleading had been filed. Appellant's App. at 16. On October 22, 2003, Lane filed a pro se petition for post-conviction relief. On January 24, 2004, the trial court denied the petition and ordered Lane to file an affidavit of indigency. Lane did so several days later, and on February 12, 2004, the trial court issued an order appointing a public defender to file a belated notice of appeal on Lane's behalf. Nearly eleven months later, on January 10, 2005, Lane's state public defender filed on his behalf a motion to dismiss the petition for post-conviction relief without prejudice to pursue proceedings under Indiana Post-Conviction Rule 2.

From January 10, 2005, forward, Lane's communication with the trial court and the public defender's office became less frequent and more confusing. On July 14, 2005, Lane filed a second pro se petition for appointment of public defender. The court reminded Lane and the public defender's office that it had appointed a public defender in January 2004. On February 6, 2006, Lane again filed a pro se motion to dismiss the post-conviction petition for relief and for appointment of counsel. On February 9, 2006, citing *Collins*, the trial court reinstated Lane's post-conviction petition and reappointed a state public defender to represent him. *Id*. at 2. Some delay and confusion is understandable considering the above-

mentioned conflict in the law related to sentence-related appeals at that time.[1]

On August 8, 2006, Lane filed a pro se appearance form, request to transport, and yet another motion for appointment of public defender. On August 11, 2006, the trial court denied Lane's request and instructed him to contact the state public defender's office for assistance with his case. On February 1, 2007, Lane filed with the court a letter he had written and sent to Owens, asking for assistance with the motion for belated notice of appeal. According to Lane, this was the third letter he had written to Owens. In December 2007, Owens filed a notice of substitution with the trial court. More than two years later, public defender Owens filed a verified motion for belated notice of appeal on Lane's behalf.

All in all, it appears from the record that the trial court assigned Lane's case to the state and the county public defender's offices at different times. Perhaps as a result of these orders, along with the changing law in this area at the time, neither office took significant action on the case for several years despite Lane's attempts to communicate with both offices

[1] In addition to *Collins*, there was another significant Indiana holding relevant to Lane's case. In 2005, our supreme court considered the issue of whether it was the responsibility of the state or the county public defender to represent an indigent defendant in his motion to file a belated notice of appeal pursuant to Indiana Post-Conviction Rule 2. *See Kling v. State*, 837 N.E.2d 502 (Ind. 2005). Generally, the state public defender represents an indigent person "in a postconviction proceeding testing the legality of the person's conviction, commitment, or confinement, if the time for appeal has expired." *See* Ind. Code § 33-40-1-2(a). When an indigent defendant wants to file a direct appeal of his conviction or sentence, however, it is the county's responsibility to fund counsel to assist the defendant in that endeavor. *See* Ind. Code § 33-40-2-1. In *Kling*, the state public defender argued that any legal action taken pursuant to Indiana Post-Conviction Rule 2, regarding belated notices of appeal, was the responsibility of the appropriate county public defender's office. Our supreme court held that if the state public defender represents an indigent defendant in a post-conviction proceeding, then he or she should counsel that defendant as to the viability of a PCR Rule 2 claim. *Kling*, 837 N.E.2d at 507. If the defendant chooses to then pursue a Rule 2 claim, the state public defender should represent the defendant in filing the motion to file belated notice of appeal, at any hearing on that motion, and if relief is denied, in the appeal of that decision. *Id*. If the trial court grants the defendant's motion to file belated notice of appeal, then the trial court must appoint a county public defender to perfect the direct appeal. *Id*. at 507-08. Based on *Kling*, the state public defender remains the appropriate counsel for Lane at this point in his case.

and the trial court. It appears that Lane did not actually meet with Owens, the state public defender who ultimately filed his motion to file notice of belated appeal, until January 24, 2008, nearly four years after the trial court first assigned the case to that office.[2]

As we have held in previous cases, "We refuse to penalize [the defendant] for the delays caused by the Public Defender's Office. One arm of the State (the Prosecutor) may not take advantage of a delay created by another arm of the State (the Public Defender) to the detriment of the defendant. While we recognize the burdensome caseload of the Public Defender's Office and the high turnover of attorneys resulting in delays, as between a defendant and the State, the defendant will not be penalized for the delays." *Douglas v. State*, 634 N.E.2d 811, 816 (Ind. Ct. App. 1994), *trans. denied*; *see also Kling v. State*, 837 N.E.2d 502, 508 (Ind. 2005) (holding that time spent by the state public defender investigating a claim does not count against the defendant when courts consider the issue of diligence under Ind. Post-Conviction Rule 2). The trial court's denial of Lane's motion in essence punished him for delays beyond his control, including confusion about which office

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[2] As noted by the trial court in its order, a few of Lane's prior pleadings, including those filed on July 14, 2005, and February 6, 2006, indicated that he was aware of *Collins* and that pursuant to *Collins*, he was unable to challenge his sentence on direct appeal and thus required to pursue a belated appeal pursuant to Indiana Post-Conviction Rule 2. Whether Lane knew about *Collins* prior to his January 4, 2008 meeting with state deputy public defender Jeffrey Cardella does not affect the outcome of this case, however, as the fact remains that Lane should not be charged with the delays of his public defender(s).

was legally obligated to represent him, changes in relevant law, and the assignment of two different state public defenders with presumably large caseloads.[3]

In sum, we hereby reverse the trial court's decision denying Lane's motion for belated notice of appeal pursuant to Post-Conviction Rule 2 and remand for further proceedings consistent with this opinion.

Reversed and remanded.[4]

MAY, J., and BROWN, J., concur.

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[3] On July 22, 2006, the chief public defender of St. Joseph County told the trial court that he was going to appoint Greg Kauffman to represent Lane. On December 10, 2007, state deputy public defender Jeffrey R. Cardella filed his notice of substitution of counsel, and on April 1, 2008, he requested a copy of the chronological case summary. On November 10, 2008, state deputy public defender Stephen Owens filed his own notice of substitution of counsel.

[4] We note that Lane included within his appendix a copy of the presentence investigation report. We remind Lane that Indiana Appellate Rule 9(J) requires that documents and information excluded from public access pursuant to Indiana Administrative Rule 9(G)(1), which includes presentence investigation reports, must be filed in accordance with Indiana Rule 5(G). That rule provides that such documents must be tendered on light green paper or have a light green coversheet and be marked "Not for Public Access" or "Confidential." Ind. Trial Rule 5(G)(1).