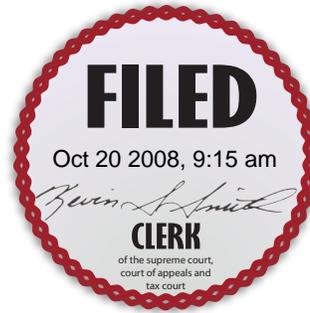


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ELMER SAXTON,)

Appellant-Defendant,)

vs.)

No. 49A05-0803-PC-155

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-9805-PC-77567

October 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Elmer Saxton belatedly appeals his 1999 sentences for Child Molesting, as a Class B felony,¹ and Neglect of a Dependent, as a Class B felony,² and the State cross-appeals the grant of Saxton's petition for permission to file a belated notice of appeal. We dismiss.

Issue

Saxton raises two issues regarding his sentence on appeal. However, we find the State's issue to be dispositive: whether the trial court erred in granting Saxton's petition to file a belated notice of appeal.

Facts and Procedural History

In 1998, the State charged Saxton with Child Molesting, as a Class B felony, Battery, as a Class B felony,³ and Murder.⁴ The first charge was based on Saxton having sexual intercourse with a twelve-year-old girl, which resulted in the birth of a son ("the Child"). The other charges were based on the events that occurred in May of 1997 that ended in the death of the Child at the age of eleven weeks. On May 21, 1999, Saxton entered into a plea agreement to plead guilty to the Child Molesting charge and a count of Neglect of a Dependent, as a Class B felony. In return, the State agreed to dismiss the charges for Battery

¹ Ind. Code § 35-42-4-3 (1998).

² Ind. Code § 35-46-1-4(b) (1998).

³ Ind. Code § 35-42-2-1 (1998).

⁴ Ind. Code § 35-42-1-1 (1998).

and Murder. The agreement was for an “open plea,” leaving the length of Saxton’s sentences to the discretion of the trial court. The trial court accepted the plea agreement, entered judgment on the specified charges, and dismissed the remaining charges, accordingly.

After the sentencing hearing on September 16, 1999, the trial court sentenced Saxton to twenty years on each conviction, suspended ten years of the molestation sentence, and ordered the sentences to be served consecutively.

On July 10, 2006, Saxton, *pro se*, filed a verified petition for post-conviction relief under Indiana Post-Conviction Rule 1, claiming that his guilty plea “as to Count 4” was not knowingly, intelligently, and voluntarily entered into as to mandating consecutive sentences and ineffective assistance of counsel. Appendix at 135-137. On the petition form, Saxton indicated that, prior to the instant petition, he had not filed any petitions for post-conviction relief, habeas corpus, certiorari, or any other petitions, motions or applications to any court. Subsequently, Saxton was appointed counsel and, on February 28, 2008, filed a petition for permission to file a belated notice of appeal, pursuant to Indiana Post-Conviction Rule 2. Without conducting a hearing, the trial court granted the petition and ordered Saxton’s petition under Post-Conviction Rule 1 to be held in abeyance pending the resolution of the appeal.

This appeal ensued.

Discussion and Decision

Indiana Post-Conviction Rule 2(1) provides a defendant the ability to petition the trial court for permission to file a belated notice of appeal. It provides as follows:

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.

In Collins, our Supreme Court held that a direct appeal, rather than proceeding under Post-Conviction Rule 1, was the proper procedure for challenging a trial court's sentencing decision where the trial court exercised discretion in sentencing. Collins v. State, 817 N.E.2d 230, 231-32 (Ind. 2004). However, if an individual failed to file a timely notice of appeal, he could seek relief by filing permission to file a belated appeal under Post-Conviction Rule 2 if he met the Rule standards. Id. at 233.

The threshold question is the one the State raises on cross-appeal: whether Saxton satisfied the standards of Post-Conviction Rule 2 in order to pursue a belated appeal. A trial court's ruling on a petition for permission to file a belated notice of appeal pursuant to Post-Conviction Rule 2 will be affirmed unless it was an abuse of discretion or contrary to law. Moshenek v. State, 868 N.E.2d 419, 423-24 (Ind. 2007), reh'g denied. However, where the trial court does not conduct a hearing on such a petition, we review the trial court's ruling on the petition *de novo*. Bosley v. State, 871 N.E.2d 999, 1002 (Ind. Ct. App. 2007).

The parties do not dispute that Saxton failed to file a timely notice of appeal after his 1999 conviction. However, they do dispute the fulfillment of the remaining fault and diligence requirements. The defendant has the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing

permission to file a belated motion to appeal. Moshenek, 868 N.E.2d at 422-23. As there are not set standards of fault or diligence, each case turns on its particular facts. Id. at 423. Factors relevant to the defendant's diligence and lack of fault in the delay of filing 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. (quoting Land v. State, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994), trans. denied).

It is clear from the record that at the guilty plea hearing the trial court informed Saxton that by pleading guilty that he was giving up his right to appeal his conviction. Furthermore, the trial court did not inform him during sentencing that he could appeal his sentence. "The fact that a trial court did not advise a defendant about this right can establish that the defendant was without fault in the delay of filing a timely appeal. However, a defendant still must establish diligence." Id. at 424. Factors to consider whether a defendant was diligent include the overall passage of time; the extent to which the defendant was aware of the relevant facts; and the degree to which delays are attributable to other parties. Id.

Although Saxton was not at fault for the delay, the record does not support that he was diligent in pursuit of relief from his sentences. Seven years passed between Saxton's conviction and his filing of his petition for relief under PC 1. In that time, Saxton did not make any attempt to challenge his convictions or sentences. Not only is the overall passage of time relevant to the determination of diligence but also whether the defendant made attempts to collaterally attack his sentences in that time. Perry v. State, 845 N.E.2d 1093,

1096 (Ind. Ct. App. 2006), trans. denied. We acknowledge that Saxton was twenty years old when he was convicted, has a low average to borderline range of intelligence, and an eighth grade level of education. However, we find that in light of the significant passage of time without any action on the part of Saxton, he has not demonstrated diligence. Therefore, the trial court erred in granting Saxton's petition to file a belated notice of appeal.

Dismissed.

RILEY, J., and BRADFORD, J., concur.