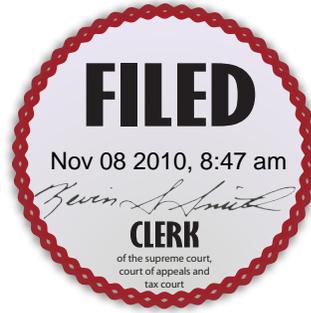


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MATTHEW HOLLAND, )  
 )  
Appellant/Cross-Appellee/Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee/Cross-Appellant/Plaintiff. )

No. 49A04-1004-CR-218

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Mark D. Stoner, Judge  
The Honorable Jane Magnus-Stinson, Judge  
Cause No. 49G06-0005-CF-88056

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November 8, 2010

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant/Cross-Appellee/Defendant Matthew Holland appeals following his guilty plea to and conviction for Class B felony Attempted Aggravated Battery,<sup>1</sup> Class B felony Criminal Confinement,<sup>2</sup> and Class B felony Prisoner Possessing a Dangerous Device or Material.<sup>3</sup> On appeal, Holland contends that his convictions violate the constitutional prohibitions against double jeopardy and that his thirty-year sentence is inappropriate in light of the nature of his offenses and his character. Additionally, the State cross-appeals the trial court's order granting Holland's petition requesting permission to file a belated notice of appeal. Concluding that Holland has failed to establish that he was diligent in requesting permission to file the belated notice of appeal, we reverse the trial court's order granting Holland's petition and dismiss Holland's appeal.

### **FACTS AND PROCEDURAL HISTORY**

The stipulated factual basis entered during the May 3, 2001 plea hearing provides as follows:

On May 29<sup>th</sup> of the year 2000, John Redmond was a corrections officer employed with the Marion County Sheriff's Department. He'd been a corrections officer, had been employed by the MCSO for approximately fifteen years. On the 29<sup>th</sup> of May in the year 2000, the defendant, Matthew Holland, was incarcerated in the Marion County Jail [i]n what is known as 4-West. He was there with other individuals, particularly a Michael Henson, a [Damon Forte], and others. On that day and before noon on that day, this defendant possessed a shank. A shank is a—in this case, was a piece of metal that had been secured from the prison library. It ha[d] been sharpened by it being filed against the walls and bars of a jail cell, and had a handle made of cloth wrapped around one end so as to be grabbed.

This defendant possessed a shank along with the aforementioned

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<sup>1</sup> Ind. Code § 35-41-5-1 (1999), Ind. Code § 35-42-2-1.5 (1999).

<sup>2</sup> Ind. Code § 35-42-3-3 (1999).

<sup>3</sup> Ind. Code § 35-44-3-9.5 (1999).

Henson and Forte. At approximately 12:15 in the afternoon, John Redmond and a trustee by the name of Jesse Carter came into 4-West to serve lunch. As was Mr. Redmond's practice, he and Mr. Carter took the trays on a cart, pushed it all the way to the end of the cell block, then turned around and came back to serve the individual prisoners. Mr. Redmond had passed cell number eight, which was Mr. Forte's cell, and had not noticed that Matthew Holland was in Mr. Forte's cell, and had been standing behind him or had been hidden. When Mr. Redmond came back up and was in a position near cell eight and with his back to it, Damon Forte opened the door and Forte and the defendant rushed John Redmond.

Mr. Forte grabbed John Redmond from behind around the arms and around the neck, and the defendant taking the shank that he had possessed earlier began to stab at John Redmond's abdomen. Mr. Redmond, because of his training, was able to block the blows from the defendant, and was not struck by the shank in the abdomen.

Mr. Carter fled. The defendant took a swing at Mr. Carter. Mr. Redmond was able to free himself from Mr. Forte and from Mr. Holland's assault. Mr. Holland had secured to grab the keys of the cell block from John Redmond in this altercation. Mr. Redmond and Mr. Carter fled and secured assistance of other officers. They responded to the scene. They came into the cell block. They found the shank that the defendant had, now was hidden behind a television set in the cell block. They locked down the prisoners, searched the cells, and came up with shanks in the possession of other individuals as well.

It was the defendant's intent to cause serious injury to Mr. Redmond by stabbing at his abdomen with the shank; and had he succeeded in hitting, would have caused internal injuries to John Redmond. He had no possession, no authority to be [in] possess[ion] of a dangerous weapon, a shank; and was a prisoner properly in the Marion County Jail at that time. His participation with Mr. Forte constituted the criminal confinement in that both were armed with shanks, and they held Mr. Redmond against his will during the course of the attack.

All of these events occurred in the Marion County Jail, which is at 50 South Alabama in the City of Indianapolis, Marion County.

Guilty Plea Hearing Tr. pp. 24-27.

On May 31, 2000, the State charged Holland with two counts of Class A felony attempted murder, one count of Class B felony criminal confinement, one count of Class B

felony conspiracy to commit escape, one count of Class B felony attempted escape, and one count of Class B felony prisoner possessing a dangerous device or material. On May 3, 2001, Holland pled guilty to one count of Class B felony criminal confinement, one count of Class B felony prisoner possessing a dangerous device or material, and an added charge of Class B felony attempted aggravated battery. In exchange for Holland's plea, the State agreed to cap Holland's executed sentence at thirty-five years and to dismiss the remaining charges. The trial court accepted the plea agreement and scheduled a sentencing hearing for May 11, 2001. Following the conclusion of the sentencing hearing, the trial court imposed an aggregate thirty-year sentence.

On December 7, 2007, Holland filed a pro se Motion for Transcript of Guilty Plea Proceedings. In this motion, Holland asserted that he needed the transcripts because he intended to file a petition for post-conviction relief. Holland's motion was denied on January 4, 2008.

On May 7, 2008, Holland filed a pro se Motion for Transcripts of Guilty Plea and Sentencing Hearing. In this motion, Holland again asserted that he needed the transcripts because he intended to file a petition for post-conviction relief, in which he planned to argue that he had suffered ineffective assistance of trial counsel. Holland's motion was again denied on May 8, 2008, because no proceeding was pending before the court.

On August 11, 2008, Holland sent a letter to the trial court again requesting the transcripts of his guilty plea and sentencing hearings. Holland also requested his pre-sentence investigation report and his arrest record. Holland's request was again denied

because he did not have any proceedings pending before the court.

On September 5, 2008, Holland again sent a letter to the trial court requesting the above-mentioned documents. Holland claimed that he was entitled to these documents under the “Freedom of Information Act.” Appellant’s App. p. 58. The trial court did not grant Holland’s request, but noted that Holland’s correspondence with the court had been received.

On October 1, 2008, Holland, by counsel, filed a Praecipe for Transcript, in which he requested that the trial court prepare a transcript of his guilty plea and sentencing hearings. On October 2, 2008, the trial court granted Holland’s request and ordered that a copy of each of the transcripts be prepared.

On April 28, 2009, Holland filed a Verified Petition for Permission to File a Belated Notice of Appeal pursuant to Indiana Post-Conviction Rule 2(1). In this petition, Holland asserted, for the first time, that he wished to challenge his thirty-year aggregate sentence. In support of his petition, Holland claimed that he was not at fault for the delay in requesting an appeal because he did not know that he could challenge his sentence by appeal, and that after learning that he could in fact challenge his sentence, he had been diligent in trying to do so. The trial court granted Holland’s petition on May 4, 2009. Holland, however, failed to initiate appellate proceedings at this time.

On February 4, 2010, Holland again filed a Verified Petition for Permission to File a Belated Notice of Appeal pursuant to Indiana Post-Conviction Rule 2(1). In support of this petition, Holland again claimed that he was not at fault for the delay and that after learning that he could challenge his sentence, he had been diligent in trying to do so. On February 18,

2010, Holland filed a pro se Petition for Post-Conviction Relief pursuant to Indiana Post-Conviction Rule 1. The trial court conducted a hearing on Holland's petition requesting permission to file a belated notice of appeal on March 18, 2010, at the conclusion of which it granted Holland's request over the State's objection. On April 13, 2010, Holland filed a belated notice of appeal. Holland now appeals and the State, on cross-appeal, appeals the trial court's order granting Holland's petition for permission to file a belated appeal.

### **DISCUSSION AND DECISION**

Turning first to the State's cross-appeal, we observe that whether to grant or deny a defendant's petition for permission to file a belated notice of appeal is a matter entrusted to the sound discretion of the trial court and the trial court's decision will be reversed only for an abuse of discretion or where the decision is contrary to law. *Beatty v. State*, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006). A trial court abuses its discretion where its decision is against the logic and effect of the facts and circumstances before it. *Id.*

A petition for permission to file a belated notice of appeal may be granted where the defendant was without fault for failing to file a timely notice of appeal and where the defendant was diligent in requesting permission to file the belated notice of appeal. *Id.* The defendant bears the burden to prove both of these requirements by a preponderance of the evidence. *Id.* Post-Conviction Rule 2(1) also requires that the trial court consider these two factors in deciding whether to grant or deny a petition to file a belated notice of appeal and that the trial court must grant the petition where it finds that the defendant has established the two factors. *Id.* Because diligence and relative fault are fact sensitive, we give substantial

deference to the trial court's ruling. *Moshenek v. State*, 868 N.E.2d 419, 423 (Ind. 2007).

There is substantial room for debate as to what constitutes diligence and lack of fault on the part of the defendant as those terms appear in Post-Conviction Rule 2(1). *Id.* at 424. However, the Indiana Supreme Court has held that in order to meet the requirements of Post-Conviction Rule 2(1), it is not sufficient to point only to the fact that the trial court did not advise the defendant of the right to appeal a sentence after an "open plea" because the right to appeal a sentence is not among those rights of which a trial court is required to inform a defendant before accepting a guilty plea. *See Id.* at 424 (providing that while the fact that a trial court did not advise a defendant about this right to appeal his sentence following an "open plea" can establish that the defendant was without fault in the delay of filing a timely appeal, the defendant must still establish diligence).

Here, it is undisputed that the trial court did not advise Holland of his right to appeal his aggregate thirty-year sentence following his guilty plea.<sup>4</sup> However, pursuant to the Indiana Supreme Court's holding in *Moshenek*, the fact that the trial court failed to advise Holland of his right to appeal his sentence following his guilty plea does not guarantee Holland an automatic right to file a belated notice of appeal. *See id.* Holland must still establish diligence, which he has failed to do.

Holland pled guilty to and was sentenced for his convictions relating to the attack in

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<sup>4</sup> According to the terms of Holland's plea agreement, his sentence was capped at thirty-five years but was otherwise left to the discretion of the trial court. A "capped plea" is more akin to an open plea than a fixed plea because "even where a plea agreement sets forth a sentencing cap or a sentencing range, the court must still exercise some discretion in determining the sentence it will impose." *Childress v. State*, 848 N.E.2d 1073, 1078 (Ind. 2006).

the Marion County jail in May of 2001. He did not file any direct appeal, request the transcripts from the relevant hearings, or make any indication that he wished to pursue any challenge relating to his convictions or sentence until December of 2007, when he requested a copy of the transcript from his guilty plea hearing because he intended to file a post-conviction claim of ineffective assistance of trial counsel. Holland's request was subsequently denied by the trial court. During 2008, Holland filed numerous subsequent requests for the transcripts from his guilty plea and sentencing hearings as well as other documents, again because he intended to file a post-conviction claim of ineffective assistance of counsel. Holland did not indicate that he wished to challenge his sentence in any of these requests.

Holland contends that his act of filing numerous requests for the production of certain documents relating to and the transcripts for his guilty plea and sentencing hearings establishes that he has been diligent in attempting to challenge his sentence since learning that he had a right to do so. However, Holland has failed to establish when he learned of his right to appeal his sentence and how he has been diligent in trying to challenge his sentence since that time.

In addition, upon review, the record indicates that Holland requested the documents and transcripts in connection with a possible post-conviction claim of ineffective assistance of trial counsel. Therefore, we conclude that Holland's act of filing numerous requests for the transcripts and related documents does not demonstrate that he was diligent in trying to obtain those materials for the purpose of challenging his sentence, but rather, at most, that he

was diligent in trying to obtain them for the purpose of filing a post-conviction claim of ineffective assistance of counsel.

Furthermore, on April 28, 2009, Holland, by counsel, filed a petition seeking permission to file a belated notice of appeal. In this petition, Holland indicated for the first time that he wished to challenge his sentence. The trial court issued an order granting Holland permission to file a belated notice of appeal on May 4, 2009. Holland, however, did not file a belated notice of appeal. On January 13, 2010, Holland's counsel filed a motion to withdraw her appearance, in which she stated that the "Marion County Public Defender Agency is willing to file another Petition for Permission to File a Belated Appeal and belated appeal for the Defendant, but needs to be appointed by Court first." Appellant's App. p. 68. On January 22, 2010, the trial court appointed the Marion County Public Defender Agency to represent Holland, who, by counsel, filed the instant petition for permission to file a belated notice of appeal on February 4, 2010. Holland claims that he was diligent in pursuing his appeal during the approximately seven months between May 4, 2009, when the trial court granted him permission to file a belated appeal and January 13, 2010, when his counsel filed a motion to withdraw her appearance as counsel of record, but fails to establish how he diligently pursued his appeal during this time.

Insomuch as we have concluded that the evidence does not support a conclusion that Holland was diligent in requesting permission to file a belated notice of appeal, we must reverse the judgment of the trial court and dismiss Holland's appeal.

Moreover, even if the evidence would have supported a conclusion that Holland was

diligent in requesting permission to file a belated notice of appeal, we do not believe that Holland would be entitled to his requested relief. Holland contends on appeal that his convictions for aggravated battery, criminal confinement, and prisoner possessing a dangerous device or material violate the constitutional prohibitions against double jeopardy. However, the Indiana Supreme Court has made it clear that a defendant waives his challenge to the propriety of his convictions, including challenges on double jeopardy grounds, when he enters a guilty plea. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004); *Lee v. State*, 816 N.E.2d 35, 40 (Ind. 2004); *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996). Therefore, we conclude that because Holland entered a guilty plea, he has waived his right to challenge these convictions on double jeopardy grounds.

Holland also contends that the aggregate thirty-year sentence imposed by the trial court was inappropriate in light of the nature of his offenses and his character. Indiana Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” The defendant bears the burden of persuading us that her sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

With respect to the nature of Holland’s offenses, our review of the record indicates that Holland, along with a few other inmates, attacked and attempted to overpower a correctional officer at the Marion County Jail who was merely trying to bring them lunch. Holland attempted to stab the correctional officer with a shank, which could have caused

serious bodily injury or even death. The attack was planned and also involved lying in wait. With respect to Holland's character, our review of the record indicates that at the time he committed the instant offenses, Holland was eighteen years old but had already amassed a substantial criminal history. Holland's criminal history included seven juvenile true findings, three misdemeanor charges, and twelve felony charges. Holland has failed to prove that his aggregate thirty-year sentence is inappropriate.

Holland also contends that the trial court abused its discretion in sentencing him because it failed to find the fact that he took responsibility for his actions by pleading guilty and his youthful age to be substantial mitigating factors. It is well-established that the trial court does not abuse its discretion to find a guilty plea to be a significant mitigating factor where, as here, the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005). Here, in exchange for Holland's guilty plea, the State agreed to dismiss two Class A felony charges for attempted murder and two Class B felony charges relating to conspiracy to commit escape and attempted escape. Clearly, Holland received a substantial benefit from his guilty plea. Additionally, the trial court is not required to agree with the defendant as to the weight or value to be given to proffered mitigating facts. *Newsome v. State*, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003). The trial court was not required to find Holland's youthful age to be a substantial mitigating factor, especially in light of the substantial criminal history that Holland has amassed to date. The trial court did not abuse its discretion in sentencing Holland.

The judgment of the trial court is reversed and appellant's appeal is dismissed.

DARDEN, J., and BROWN, J., concur.