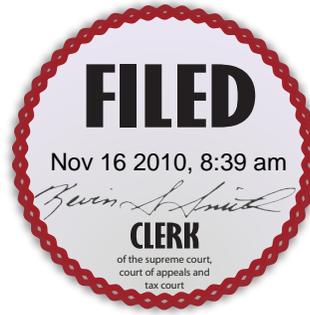


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JUSTIN STANBACK,)
)
Appellant/Defendant,)
)
vs.) No. 49A05-1004-CR-251
)
STATE OF INDIANA,)
)
Appellee/Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Linda E. Brown, Judge
Cause No. 49F10-0905-CM-47692

November 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Justin Stanback appeals the trial court's denial of his request to file a belated notice of appeal. We reverse and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

On May 13, 2009, Indianapolis Metropolitan Police Officer Anthony Patterson was dispatched to Central Avenue in Indianapolis in response to a report that a person with a gun was standing near a gold Crown Victoria. Upon arriving on the scene, Officer Patterson noticed several individuals, one of whom was later determined to be Stanback, standing near a gold Crown Victoria which was partially blocking traffic in an alley. Officer Patterson detained the individuals in handcuffs for the purpose of officer safety while he investigated the report that an individual near the gold vehicle was armed.

During the investigation, Officer Patterson determined that Stanback was not a subject in his investigation, but that the gold vehicle belonged to Stanback and was inoperable. Officer Patterson informed Stanback that because he did not consider Stanback to be a suspect, the handcuffs would be removed, but that the gold vehicle would have to be towed because it was inoperable and blocking traffic. As Officer Patterson turned to walk away from Stanback and continue his investigation, Stanback "head butted" Officer Patterson in the back of the head. Tr. p. 11. Officer Patterson and another officer on the scene then forced Stanback to the ground.

On May 14, 2009, the State charged Stanback with battery as a Class A misdemeanor and resisting law enforcement as a Class A misdemeanor. On October 29, 2009, the trial

court conducted a bench trial, at the conclusion of which it found Stanback guilty of the battery charge and not guilty of the resisting law enforcement charge. The trial court subsequently sentenced Stanback to time served with 180 days on probation and thirty hours of community service.

On February 22, 2010, Stanback, by counsel, filed a Motion for Appeal and Appointment of Pauper Counsel to Perfect Belated Request. The trial court denied Stanback's motion the following day. On March 9, 2010, Stanback, by counsel, filed a Verified Motion to Reconsider "Motion for Appeal and Appointment of Pauper Appellate Counsel to Perfect Belated Request" and Request to Set the Matter for Hearing. In this motion, Stanback claimed that his failure to file a timely appeal was not his fault because neither the trial court nor his trial counsel informed him of his right to appeal his conviction. Stanback also claimed that he had been diligent in bringing his appeal since learning that he had a right to do so. The trial court denied Stanback's motion to reconsider and request to set the matter for a hearing on April 12, 2010. Stanback now appeals.

DISCUSSION AND DECISION

Generally, the decision whether to grant or deny a petition for permission to file a belated notice of appeal is a matter within the discretion of the trial court. *Atwood v. State*, 905 N.E.2d 479, 483 (Ind. Ct. App. 2009). However, where, as here, the trial court does not hold a hearing before granting or denying the petition, the only basis for its decision is the paper record attached to the petition. *Id.* Because we review the same information upon appeal, we owe no deference to the trial court's decision and our review is de novo. *Id.*

Indiana Post-Conviction Rule 2 provides a defendant with an opportunity to petition the trial court for permission to file a belated notice of appeal when 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. *Beatty v. State*, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006). The defendant bears the burden to prove both of these requirements by a preponderance of the evidence. *Id.*

A. Evidence of Absence of Fault

Whether a defendant was without fault is a fact-sensitive determination. *Welches v. State*, 844 N.E.2d 559, 561 (Ind. Ct. App. 2006). Factors informing this determination include the defendant's degree of awareness of his procedural remedy, age, education, and familiarity with the legal system; whether he was informed of his appellate rights; and whether he committed an act or omission contributing to the delay. *Id.*

Our review of the record reveals that Stanback claimed that he was not at fault for his delay in appealing his sentence because he was not advised of his appellate rights by either the trial court or his trial counsel, and we were unable to find any evidence in the record contrary to this claim. Stanback also claimed that he had never been a party to an appeal before this case and that he did not understand his appellate rights. On appeal, the State does not dispute Stanback's claim that he was not advised of his appellate rights, but rather argues that Stanback failed to carry his burden with respect to diligence. In light of the trial court's failure to inform Stanback, a young man who was seemingly unaware of the appellate process, of his appellate rights, we are convinced that Stanback has established by a

preponderance of the evidence that he was not at fault for his failure to file a timely appeal.

B. Evidence of Diligence

Stanback must also establish by a preponderance of the evidence that he was diligent in requesting permission to file a belated notice of appeal. This also is a fact-sensitive inquiry, and relevant factors include the overall passage of time, the extent to which the defendant was aware of relevant facts, and the degree to which the delays are attributable to other parties. *Moshenek v. State*, 868 N.E.2d 419, 424 (Ind. 2007).

Our review of the record reveals that Stanback claimed that he was informed by a friend of his right to appeal his conviction and sentence upon the completion of his community service obligation. On appeal, the State argues that Stanback has failed to prove by a preponderance of the evidence that he was diligent in pursuing his appellate rights because he failed to allege exactly when he was informed of his appellate rights, and as a result, the trial court's order denying Stanback's request to file a belated notice of appeal should be affirmed. However, the record reveals that Stanback requested a hearing during which he could present additional evidence relating to his diligence, a request which was denied by the trial court. We conclude that it was error under these circumstances for the trial court to deny Stanback's request for a hearing, effectively denying him the opportunity to present evidence that he was diligent in pursuing his appellate rights. *Cf. Ricks v. State*, 898 N.E.2d 1277, 1280 (Ind. Ct. App. 2009) (concluding that the trial court erred when it granted defendant's permission to file a belated notice of appeal, but remanding for the trial court to conduct a hearing to determine where defendant was at fault for failing to file a

timely notice of appeal).

In sum, we conclude that Stanback was not at fault for failing to timely file his notice of appeal in light of the trial court's failure to advise him of his appellate rights. Furthermore, under these circumstances we conclude that the trial court erroneously denied Stanback the opportunity to present evidence relating to his diligence in pursuing his appellate rights. Therefore, we reverse and remand with instructions for the trial court to conduct a hearing to determine whether Stanback was diligent in pursuing his appellate rights.

The judgment of the trial court is reversed and remanded for further proceedings consistent with this opinion.

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