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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAVID ELZE, )

Appellant-Defendant, )

vs. )

STATE OF INDIANA, )

Appellee-Plaintiff. )

No. 76A03-0703-CR-118

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APPEAL FROM THE STEUBEN CIRCUIT COURT  
The Honorable Allen N. Wheat, Judge  
Cause No. 76C01-0605-FC-591

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**July 2, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant David Elze appeals his sentence for Possession of Cocaine with a Firearm,<sup>1</sup> a class C felony. Specifically, Elze argues that his four-year sentence is inappropriate in light of the nature of the offense and his character. The State cross-appeals and argues that Elze's appeal should be dismissed because the trial court improperly granted Elze's petition to file a belated notice of appeal. Concluding that the trial court did not abuse its discretion by granting Elze's petition to file a belated notice of appeal and that Elze's four-year sentence is not inappropriate, we affirm the judgment of the trial court.

### FACTS

At approximately 5:00 p.m. on May 29, 2006, Angola Police Department Officer Sandy Justice was dispatched to locate a vehicle that was being driven recklessly in Steuben County. Officer Justice found Elze driving the vehicle and immediately observed him disregard a stop sign. Officer Justice activated the emergency lights on his police car, but Elze did not stop his vehicle. The officer activated his siren and pursued Elze's vehicle. Elze disregarded three more stop signs and eventually drove his vehicle onto railroad tracks in an attempt to evade Officer Justice. Although the officer temporarily lost sight of Elze's vehicle, Steuben County Sheriff's Department officers joined in the pursuit and located Elze in the woods next to the railroad tracks.

Officer Justice placed Elze in custody and removed an SKS rifle from his possession. A search of Elze's vehicle revealed a white, powdery substance that field-tested positive for cocaine, a plastic bag containing numerous smaller bags, and a set of electronic scales. A

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<sup>1</sup> Ind. Code § 35-48-4-6(B)(1).

shell casing was found on the floor of the vehicle and there was a bullet hole in the roof. Upon further investigation, residents in the area told the officers that they had heard several gunshots during the police chase. Elze later admitted that he had been “shooting at shadows” while hiding in the woods because he thought “they were people.” Tr. p. 17.

On May 30, 2006, the State charged Elze with class C felony possession of cocaine with a firearm and class D felony resisting law enforcement by use of a vehicle. Elze pleaded guilty to the class C felony on October 2, 2006, and the State agreed to dismiss the remaining charge. After a sentencing hearing on December 4, 2006, the trial court sentenced Elze to four years imprisonment.

Elze filed an untimely notice of appeal on January 4, 2007, and filed a petition for permission to file a belated notice of appeal on February 22, 2007 (the petition). The trial court granted Elze’s petition that same day. Elze now appeals his sentence. The State cross-appeals the trial court’s grant of Elze’s petition.

## DISCUSSION AND DECISION

### I. Belated Appeal

Turning first to the State’s cross-appeal,<sup>2</sup> we observe that whether to grant or deny a defendant’s petition 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, 854 N.E.2d at 409. A trial court

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<sup>2</sup> We note that the State has the right to cross-appeal the trial court’s decision to grant Elze’s petition. See Beatty v. State, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006) (authorizing the State to cross-appeal the trial court’s grant of a defendant’s petition to file a belated notice of appeal).

abuses its discretion where its decision is against the logic and effect of the facts and circumstances before it. Hart v. State, 829 N.E.2d 541, 543 (Ind. Ct. App. 2005).

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 was diligent in requesting permission to file the belated notice of appeal. Ind. Post-Conviction Rule 2(1). The defendant bears the burden to prove both of these requirements by a preponderance of the evidence. Beatty, 854 N.E.2d at 409. 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.

The State argues that we should dismiss Elze's appeal because he did not present any evidence that he was without fault for failing to file a timely notice of appeal. Consequently, the State argues that our court does not have jurisdiction over this appeal. However, because the trial court granted Elze's petition, we have jurisdiction over his appeal and, as previously noted, the State can cross-appeal if it chooses. Id.

Elze's notice of appeal was filed on January 4, 2007—one day after the thirty-day deadline had expired. While such notice is untimely, it is clear that Elze intended to appeal his sentence, as he indicated at the sentencing hearing. Tr. p. 24. After being informed that his notice was late, Elze promptly filed his petition on February 22, 2007, arguing that “[t]he failure to file a timely notice of appeal was not Elze's fault. It was defense counsel Hardy's fault that he miscalculated the due date on the notice of appeal.” Appellant's App. p. 30.

The State argues that Elze “presented absolutely no evidence to support his assertions that he is without fault and has been diligent.” Appellee’s Br. p. 6. It also criticizes the trial court for not holding an evidentiary hearing. However, the rapid timing of the filings in this case and Elze’s statement at the sentencing hearing that he would like to appeal his sentence support the trial court’s decision to grant Elze’s petition. While his notice of appeal was untimely, it was reasonable for the trial court to conclude that Elze was not responsible for this short delay and, instead, that his attorney had miscalculated the due date. Therefore, we cannot conclude that the trial court abused its discretion by granting Elze’s petition.<sup>3</sup>

## II. Appropriateness

Elze argues that his four-year sentence is inappropriate. While he acknowledges that he received the advisory sentence for a class C felony, he argues that “no one was injured and there is no evidence Elze shot at any police officers.” Appellant’s Br. p. 6.

Before addressing the merits of Elze’s argument, we observe that on April 25, 2005, the General Assembly amended Indiana’s felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an “advisory sentence” somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. When determining the sentence to impose on a defendant, the trial court “may consider” certain enumerated aggravating and mitigating circumstances in addition to other matters not listed in the statute. I.C. §§ 35-38-1-7.1(a) to -7.1(c). Furthermore, the

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<sup>3</sup> While it typically may be proper, even necessary, for the trial court to hold a belated notice of appeal hearing, Elze’s steadfast desire to appeal his sentence and his prompt action upon realizing that his notice of appeal was untimely support the trial court’s decision to grant his petition.

legislature provided that a trial court “may impose any sentence that is . . . authorized by statute . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” I.C. § 35-38-1-7.1(d).

Our court has the constitutional authority to revise a sentence 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.” Indiana Appellate Rule 7(B). However, sentence review under Appellate Rule 7(B) is very deferential to the trial court’s decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Here, Elze committed his offense and was sentenced after the April 2005 amendment of the sentencing statutes; thus, we will apply the amended versions thereof. The amended sentencing statutes provide that for a class C felony, a person “shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years.” Ind. Code § 35-50-2-6.

With regard to the nature of the offense, Elze led the police on a chase that endangered the lives of innocent citizens and the multiple police officers who pursued him. Elze drove through at least four stop signs and left the roadway in an attempt to evade officers during the chase. After exiting his vehicle, Elze hid in the woods and fired his rifle at shadows, “thinking they were people.” Tr. p. 17. Considering the nature of the offense, it

appears to us that Elze failed to injure anyone not because he did not have the malevolent intent to do so, but, instead, because he was lucky.

Turning to his character, Elze emphasizes his guilty plea and the fact that he likely needs mental health treatment. We first note that the State dismissed a class D felony charge in exchange for Elze's guilty plea; thus, he has already received a substantial benefit. Furthermore, Elze's prior criminal history includes various drug-related misdemeanor convictions, for which he has been placed on probation but has never been incarcerated. Although it is apparent that Elze has a substance abuse problem, his previous attempts at seeking treatment have all ended with Elze reverting to a drug-dependent life.

As the State notes, the trial court's decision to impose the advisory, four-year sentence seems appropriate "and even lenient." Appellee's Br. p. 9. After analyzing the nature of the offense and Elze's character, we must agree and do not find Elze's sentence inappropriate.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.