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APPELLANT PRO SE:

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROBERT RODES,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A03-0611-CR-552

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable George W. Biddlecome, Judge  
Cause No. 20D03-0002-CF-18

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**July 3, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Petitioner, Robert Rodes (Rodes), appeals the trial court's denial of his petition for leave to file a belated notice of appeal.

We affirm.

## ISSUE

Rodes raises one issue on appeal, which we restate as: Whether the trial court abused its discretion by denying Rodes' belated notice of appeal.

## FACTS AND PROCEDURAL HISTORY

On March 24, 2000, Rodes entered into a plea agreement whereby he pled guilty to two counts of child molest, as Class B felonies, in exchange for the State reducing the two counts from Class A felonies. The plea agreement left sentencing to the trial court's discretion, and specifically provided that Rodes reserved the right to file for sentence modification. On May 19, 2000, the trial court accepted the plea agreement. The trial court then sentenced Rodes to twenty years on each count and ordered the two sentences be served consecutively, for a total sentence of forty years.

On February 12, 2001, Rodes filed a motion to modify his sentence, which the trial court denied on February 21, 2001. On June 14, 2001, Rodes filed a petition for post-conviction relief, which the trial court denied on the same date. Rodes appealed the trial court's denial of his petition for post-conviction relief, arguing that Indiana's child molest statute is unconstitutional. On June 7, 2002, we issued a Memorandum Decision,<sup>1</sup> disagreeing with Rodes' assertion that the child molest statute was unconstitutional;

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<sup>1</sup> See *Rodes v. State*, No. 20A05-0108-PC-338 (Ind. Ct. App. June 7, 2002).

consequently, we affirmed the trial court's denial of his petition for post-conviction relief. Subsequently, our supreme court denied transfer of Rodes' case. More than four years later, on August 7, 2006, Rodes filed a petition for leave to file a belated appeal. On September 28, 2006, the trial court held a hearing on this petition, at which no evidence was presented by Rodes or the State. Rather, Rodes simply requested the appointment of counsel at this hearing. On November 10, 2006, the trial court denied Rodes' petition for leave to file a belated appeal and concluded:

[Rodes] is no stranger to the rules of appellate procedure. Although he never sought to file a notice of direct appeal of his sentence, the defendant has filed a motion to modify sentence, a petition for post-conviction relief[,] notice of appeal from an adverse ruling in his post-conviction proceedings, a brief on appeal, a petition to transfer, and a motion to compel. There is nothing in the record to suggest that the defendant's failure to file a timely notice of appeal was due to anything other than the fault of the defendant. Also, during the hearing in this matter, the defendant offered no evidence in support of his petition. Furthermore, it can hardly be said that the defendant has been diligent in requesting permission to file a belated notice of appeal since he was convicted over six (6) years ago. Accordingly, there are no grounds for permitting the filing of a belated notice of appeal.

(Appellant's App. p. 63).

Rodes now appeals. Additional facts will be provided as necessary.

#### DISCUSSION AND DECISION

Rodes argues he is entitled to file a belated appeal of his sentence because the delay was not his fault and he has been diligent in pursuing an appeal. Specifically, he contends that the terms of his plea agreement misled him into believing he could not file a direct appeal of his sentence.

In *Collins v. State*, 817 N.E.2d 230, 233 (Ind. 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 file an appeal under [Ind. Post-Conviction Rule] 2.” Ind. P-C R. 2 provides, in pertinent part:

Where an eligible defendant convicted after . . . a plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

- (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

The defendant bears the burden to prove both of these requirements by a preponderance of the evidence. *Beatty v. State*, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006), *reh’g denied*.

While there are no set standards defining delay and each case must be decided on its own fact, a defendant must be without fault in the delay of filing the notice of appeal. *Roberts v. State*, 854 N.E.2d 1177, 1178-79 (Ind. Ct. App. 2006), *trans. denied*. The following factors have influenced such a determination: 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.* at 1179. Whether a defendant is responsible for the delay is a matter within the trial court’s discretion. *Cruite v. State*, 853 N.E.2d 487, 489 (Ind. Ct. App. 2006), *trans. denied*. When the trial court holds a

hearing, we defer to their discretion in weighing the evidence and judging witness credibility. *Id.*

In the instant case, the trial court held a hearing on Rodes' petition to file a belated notice of appeal. However, our review of the record indicates that Rodes presented no evidence at the hearing, and the State made no remarks. Instead, Rodes only requested that the trial court appoint him counsel to assist him in his filing of a belated notice of appeal. Nevertheless, by examining Rodes' case history, the trial court determined that Rodes' failure to file a direct appeal of his sentence until six years after his conviction was his own fault and thus denied the petition. Yet, our review of the transcript of Rodes' combined plea and sentencing hearing shows that the trial court did not explain to Rodes his right to appeal his sentence, or any other rights he was giving up in exchange for pleading guilty. Since *Collins*, we have held that a defendant's failure to file timely when the trial court did not separately advise him of his appellate rights to directly appeal his sentence does not preclude a belated appeal. *See Cruite*, 853 N.E.2d at 490; *see also Salazar v. State*, 854 N.E.2d 1180 (Ind. Ct. App. 2006). Therefore, we cannot agree with the trial court that Rodes' delay in directly appealing his sentence was entirely his fault.

However, we agree with the trial court's conclusion that Rodes was not diligent in requesting to file a belated notice of appeal. Even though the record indicates, initially, that in the three years following his conviction, from May of 2000 to May of 2003, Rodes was diligent in pursuing his right to appeal,<sup>2</sup> the record is void of such evidence between

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<sup>2</sup> Specifically, the record indicates that in February of 2001, Rodes filed his motion for modification of his sentence. In June of 2001, Rodes filed his petition for post-conviction relief. In July of 2001, Rodes appealed the trial court's

May of 2003 and August of 2006. Nevertheless, we must consider that *Collins* was not decided until November of 2004, and that Rodes was likely not immediately made aware of the *Collins* decision. *See Roberts*, 854 N.E.2d at 1179. Thus, ultimately, Rodes' delay in filing this petition was less than two years. Still, we believe that for an apparently active *pro se* litigant, Rodes' period of inactivity reflects a lack of diligence. In addition, we previously have held that a shorter delay constitutes a lack of diligence on a defendant's part. *See id.* (Roberts did not diligently pursue his belated appeal when he waited over eight months after the *Collins* decision was issued to file his petition for leave to file a belated notice of appeal). Consequently, despite the fact that we conclude the delay was not entirely Rodes' fault, we cannot agree that he was diligent in pursuing a direct belated appeal. Therefore, we conclude that the trial court properly denied his petition for leave to file a belated notice of appeal.

#### CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it denied Rodes' petition for leave to file a belated notice of appeal.

Affirmed.

NAJAM, J., and BARNES, J., concur.

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denial of his petition for post-conviction relief. In June of 2002, Rodes filed a Petition to Transfer with our supreme court. In addition, in April, and again in May, of 2003, Rodes sought compulsion of a copy of the transcript from his combined guilty plea and sentencing hearing – a request to which the trial court and this court did not oblige.