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IN THE
COURT OF APPEALS OF INDIANA

BREOND T. YARBROUGH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0702-CR-117
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William T. Means, Judge
Cause No. 71D01-0003-CF-00176

July 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, Breond T. Yarbrough, challenges the trial court's denial of his petition for permission to file a belated notice of appeal.

We reverse and remand.

The record reveals that the State charged Yarbrough with one count of murder, one county of felony murder, and one count of robbery. On March 12, 2001, Yarbrough agreed to plead guilty to the count of murder in exchange for the other two counts being dismissed. Pursuant to the plea agreement, the executed portion of Yarbrough's sentence was to be capped at fifty-five years if a polygraph examination revealed that Yarbrough was not involved in an unrelated robbery and murder. If the polygraph examination revealed that Yarbrough was involved, the trial court's sentencing discretion would not be limited in any way.

With regard to the right to appeal, the following colloquy took place between Yarbrough and the trial court:

> "[Court]: Do you understand that if you were to have a trial and were found guilty, that you would have the right to appeal your conviction to the Supreme Court or the Court of Appeals as the case might be?
> [Yarbrough]: Yes, sir.
> [Court]: Do you understand this?
> [Yarbrough]: Yes, sir.
> [Court]: Do you understand that by pleading guilty you give up all of these rights?
> [Yarbrough]: Yes, sir.
> [Court]: Do you understand that if you were to have a trial and were found guilty, that you would have a right to appeal your conviction to the Supreme Court or the Court of Appeals?
> [Yarbrough]: Yes, sir.
> [Court]: And do you understand that by pleading guilty you give up that right?
> [Yarbrough]: Yes, sir.

> [Court]: Do you understand that you have the right to be represented by an attorney at all stages of this proceeding, including trial and appeal, and that if you cannot afford to pay an attorney now or at any later time, the Court will appoint an attorney for you at no cost to you? Do you understand this?
> [Yarbrough]: Yes, sir." App. at 47-48.

At the sentencing hearing held on April 11, 2001, Yarbrough conceded that he had not "passed" the polygraph examination, and his sentence was therefore left to the discretion of the trial court. The trial court, citing the "brutal" nature and circumstances of the crime, sentenced Yarbrough to the maximum term of sixty-five years.

The first indication that Yarbrough was seeking review of his conviction and/or sentence came on August 15, 2001—over four months after he was sentenced—when Yarbrough, acting pro se, filed a motion for a transcript of his guilty plea hearing. The CCS reveals that no ruling was made on this motion, and almost two months later, on October 12, 2001, Yarbrough filed a pro se "Motion to Review Court File, Production of Specified Transcripts at Public Expense and Petition for Copy of Record of Proceedings," which was denied the same day. On January 29, 2002, approximately three and a half months after his last motion was denied (and almost ten months after being sentenced), Yarbrough filed a pro se petition for post-conviction relief.[1] Just over five months later, on July 5, 2002, the State Public Defender filed an appearance on behalf of Yarbrough.

On November 9, 2004, over two years after the State Public Defender filed an appearance for Yarbrough, our Supreme Court issued its opinion in Collins v. State, 817

[1] The copy of Yarbrough's petition for post-conviction relief indicates that it was stamped as "FILED" on January 29, 2002. However, the CCS does not contain an entry for that date. Instead, the CCS indicates that Yarbrough filed a petition for post-conviction relief on May 30, 2002.

N.E.2d 230, 233 (Ind. 2004), wherein it 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 [Indiana Post-Conviction Rule] 2." In so holding, the Court resolved a conflict in this court. Compare Taylor v. State, 780 N.E.2d 430 (Ind. Ct. App. 2003) (holding that an individual who pleads guilty in an "open plea" must challenge his sentence by direct appeal), trans. denied, with Collins v. State, 800 N.E.2d 609 (Ind. Ct. App. 2003), trans. granted, and Gutermuth v. State, 800 N.E.2d 592 (Ind. Ct. App. 2003), trans. granted, (both addressing claims of sentencing error upon review of a post-conviction proceeding).

On January 28, 2005, eighty days after the Collins opinion, Yarbrough, by counsel, filed a motion to withdraw his petition for post-conviction relief without prejudice and for appointment of local counsel at county expense to pursue a belated appeal under Post-Conviction Rule 2. There is no indication that the trial court ruled upon this motion before our Supreme Court, on November 29, 2005, issued its opinion in Kling v. State, 837 N.E.2d 502 (Ind. 2005). In Kling, the Court held that it is the responsibility of the State Public Defender to represent a defendant until the trial court grants a motion for permission to file a belated appeal under Post-Conviction Rule 2, at which time the local county public defenders assume responsibility. 837 N.E.2d at 507-08.

With the responsibility of the various public defender offices thus defined, the State Public Defender, on December 27, 2005, twenty-eight days after Kling, sent a letter to the trial court clerk stating that the State Public Defender's office was "[p]resently . . .

investigating" Yarbrough's case. App. at 38. The letter also requested copies of the CCS, the plea agreement, the abstract of judgment, the sentencing order, and the State's answer. On June 13, 2006, five and a half months since the letter to the trial court and six and a half months after the Kling opinion, Yarbrough, represented by the State Public Defender, filed a petition for permission to file a belated notice of appeal. The State filed an objection to this petition on October 6, 2006. On November 15, 2006, Yarbrough filed a request for a ruling from the trial court, and when no ruling was forthcoming, filed another request for a ruling on January 11, 2007. On February 1, 2007, the trial court denied Yarbrough's petition without a hearing. Yarbrough filed a notice of appeal on February 16, 2007.

Belated Appeals Under Post-Conviction Rule 2(1)

Upon appeal, Yarbrough claims that the trial court erred in denying his petition for permission to file a belated notice of appeal. Petitions for permission to file a belated notice of appeal are governed by Indiana Post-Conviction Rule 2(1), which reads in relevant part:

> "Where an eligible defendant[2] convicted after a trial or 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

[2] Post-Conviction Rule 2 defines an "eligible defendant" as "a defendant who, but for the defendant's failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal." There appears to be no contention that Yarbrough is anything other than an eligible defendant.

(b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

The trial court shall consider the above factors in ruling on the petition. Any hearing on the granting of a petition for permission to file the belated notice of appeal shall be conducted according to Section 5, Rule P.C. 1.

If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period."

As the party seeking the belated appeal, Yarbrough bore the burden of proving his grounds for relief by a preponderance of the evidence. See Moshenek v. State, 868 N.E.2d 419, 422-23 (Ind. 2007). The decision of whether to grant permission to file a belated notice of appeal is typically a matter within the trial court's discretion. See id. at 423-24 ("A trial court's ruling on a petition for permission to file a belated notice of appeal . . . will be affirmed unless it was based on an error of law or a clearly erroneous factual determination (often described in shorthand as 'abuse of discretion')."). 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; because we review this same information upon appeal, we owe no deference to the trial court's decision and our review is de novo. Id. at 424 (citing Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005)); see also Cruite v. State, 853 N.E.2d 487, 489-90 (Ind. Ct. App. 2006) (citing Baysinger, 835 N.E.2d at 224), trans. denied.

Fault

With regard to the requirement in Post-Conviction Rule 2(1)(a) that he not be at fault for the delay, Yarbrough refers us to the advisement given to him by the trial court at his guilty plea hearing. At that hearing, the trial court informed Yarbrough that by

pleading guilty, he was giving up his right to appeal his conviction and did not inform him that he did have the right to directly appeal the trial court's sentencing discretion.

The same was true in Moshenek, supra, and in Salazar v. State, 854 N.E.2d 1180 (Ind. Ct. App. 2006). In those cases, the trial court did not advise the defendant of his right to appeal a sentence after an open plea. As we observed in Salazar, such an advisement is not incorrect because a defendant who pleads guilty does waive his right to challenge his conviction by direct appeal. 854 N.E.2d at 1185 (citing Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996)). But although not incorrect, such an advisement is incomplete. Id. A defendant who pleads guilty may give up the right to challenge his *conviction* by direct appeal, but such a defendant may directly appeal the *sentence* imposed to the extent that the trial court exercised its discretion in imposing sentence. Id. (citing Tumulty, 666 N.E.2d at 396).

We acknowledge that a trial court is not required by statute to inform a defendant of the right to challenge the court's sentencing discretion. Moshenek, 868 N.E.2d at 424 (citing Ind. Code § 35-35-1-2 (2004)); Salazar, 854 N.E.2d at 1185. However, the fact that a defendant was not informed of this right is relevant to the question of whether the defendant was at fault for not timely appealing. See Salazar, 854 N.E.2d at 1185. "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." Moshenek, 868 N.E.2d at 424; see also Witt v. State, 867 N.E.2d 1279, 1282 (Ind. 2007) (holding that the defendant was not at fault for failing to file a timely notice of appeal where the trial court advised him that he could not appeal his sentence).

We therefore conclude that there is nothing in Yarbrough's petition, and the materials submitted therewith, that would indicate that he was at fault for not timely filing a notice of appeal. The trial court did not inform him of his right to appeal the court's sentencing discretion, and his petition alleges that he was never advised of his right to appeal his sentence, either by the trial court or his attorney.

The State claims that Yarbrough has not established that he is not at fault because he did not submit any materials with his petition that would establish that he was not at fault, such as that he was not well-educated or that he had no prior contacts with the criminal justice system which would have apprised him of his right to appeal his sentence. We remind the State of the procedural posture of this case. The trial court denied his petition without a hearing, denying Yarbrough the opportunity to present any such evidence or for the State to challenge any evidence presented. Yarbrough averred in his petition that he was not advised of his right to appeal his sentence by either the trial court or his attorney. This is sufficient to warrant a hearing to allow Yarbrough to prove that he has met the requirements of Post-Conviction Rule 2(1). See Welches v. State, 844 N.E.2d 559, 561-62 (Ind. Ct. App. 2006).[3]

[3] The State claims that "even a cursory search" of the case law would have revealed that a defendant may challenge the trial court's sentencing discretion following an "open" plea. Appellee's Br. at 10. We take no issue with the State's assertion that the ability to challenge the trial court's sentencing discretion was established in 1996 in Tumulty. But it cannot be denied that prior to Collins, there was a split on this court with regard to whether a defendant could challenge his sentence upon post-conviction review. See Collins, 817 N.E.2d at 231; Kling, 837 N.E.2d at 506 (noting that Collins "decided the issue" of whether a direct appeal or post-conviction petitions were the proper means of challenging a sentence under an open plea and stating that after Collins, it is now clear that such challenges must be brought on direct appeal if at all). Thus, while we agree that, at least since Tumulty, it has been clear that a defendant who pleads guilty may challenge the trial court's sentencing discretion upon direct appeal, it was not clear until after Collins that direct appeal, and not a petition for post-conviction relief, was the *only* proper method of bringing such challenges.

Diligence

That a defendant is not at fault for failing to timely file a notice of appeal is not the only question; that defendant must also be diligent in requesting permission to file a belated notice of appeal. See Moshenek, 868 N.E.2d at 424, Witt, 867 N.E.2d at 1282 (citing P-C.R. 2(1)(b)). Several factors are relevant to the question of diligence, including: (1) the overall passage of time; (2) the extent to which the defendant was aware of relevant facts; and (3) the degree to which delays are attributable to other parties. Moshenek, 868 N.E.2d at 424. When the overall time of the delay stretches into decades, a belated appeal becomes particularly problematic because of the risk that significant problems will be encountered in any retrial due to unavailable evidence or the failing memories of witnesses. Id.

Here, the State argues that Yarbrough cannot be considered to have been diligent because it took him eighteen months after Collins, and almost seven months after Kling, to file his petition for permission to file a belated notice of appeal. We hold that Yarbrough was at least entitled to a hearing upon the question of his diligence.

Yarbrough filed a pro se request for a transcript of his guilty plea hearing on August 15, 2001—more than four months after his sentence was imposed. Subsequently, Yarbrough again requested the transcript. On January 29, 2002, he filed a pro se petition for post-conviction relief. A pre-Collins petition for relief under Post-Conviction Rule 1 may serve to establish diligence. Moshenek, 868 N.E.2d at 424; Kling, 837 N.E.2d at 508 (noting that, generally, electing to proceed first on a Post-Conviction Rule 1 petition for relief does not preclude a finding of diligence under Post-Conviction Rule 2).

In Moshenek, the court noted that although the defendant in that case had filed a petition for relief under Post-Conviction Rule 1, his petition did not attack his sentence. Here, the State claims that Yarbrough's petition for post-conviction relief similarly did not challenge his sentence. One of the grounds for relief alleged in Yarbrough's post-conviction petition was that his guilty plea was not knowingly and intelligently entered. In support of this claim, Yarbrough alleged that "my guilty plea [was] for 45-55 [years] but they changed it at my sentencing to 65 years which means the State did not hold to what they said to induce my plea." App. at 11. Although not a direct attack on the propriety of his sentence, Yarbrough's petition for post-conviction relief was based in part on a claim that the trial court had imposed a sentence which was overly long. While this may not be strong support for a finding of diligence, we do not think that such should be considered to be a sign of non-diligence. Cf. Moshenek, 868 N.E.2d at 424 (concluding that trial court did not abuse its discretion in finding no diligence where defendant made no direct challenge to his sentence in his post-conviction petition and made no challenge to his sentence for eleven years); Witt, 867 N.E.2d 1282 (concluding that defendant was not diligent where he did nothing to challenge his sentence for over nine and a half years after his conviction).

Shortly after Yarbrough filed his petition for post-conviction relief, the State Public Defender began to represent him. Thereafter, Yarbrough's case seems to have languished, but time spent by the State Public Defender investigating a claim does not

count against the defendant when considering the issue of diligence under Post-Conviction Rule 2(1)(b).[4] Kling, 837 N.E.2d at 508.

Just over two and a half months after Collins was decided, Yarbrough filed a motion to withdraw his petition for post-conviction relief and requested the appointment of local counsel to pursue a belated appeal. At that time, the State Public Defender, who represented Yarbrough, held the opinion that local county public defender offices were responsible for requests to file belated notices of appeal. It was not until after Kling that this issue was settled, and a mere twenty-eight days after Kling, the State Public Defender sent a letter to the trial court seeking discovery and indicating that it was investigating Yarbrough's case. Yarbrough's petition for permission to file a belated notice of appeal was filed 168 days after this letter.

We conclude that the allegations in Yarbrough's petition with regard to the timeline of events are sufficient to warrant a hearing as to whether Yarbrough was diligent in pursuit of his right to appeal. See Salazar, 854 N.E.2d at 1186 (concluding that defendant was diligent where first filing indicating defendant sought belated appeal was filed sixty-four days after Collins); Cruite, 853 N.E.2d at 490-91 (concluding that defendant was diligent where he first indicated that he sought a belated appeal ninety-seven days after Collins); Baysinger, 835 N.E.2d at 226 (concluding that defendant was diligent where he filed request for belated appeal 112 days after Collins). Cf. Moshenek, 868 N.E.2d at 424 (concluding that trial court was within its discretion in finding no

[4] Although the State now claims that Yarbrough has not explained what investigation was needed or done, we again remind the State of the procedural posture of this case, i.e., Yarbrough was not given the benefit of a hearing on his petition at which he could explain any investigation.

diligence where defendant requested belated appeal only eighty-six days after Collins but had not otherwise challenged his sentence in over eleven years); Witt, 867 N.E.2d at 1282 (concluding that defendant was not diligent where he did nothing to challenge his sentence for over nine and a half years after his conviction and his request for belated appeal was filed over eighteen months after Collins). But see Roberts v. State, 854 N.E.2d 1177, 1179-80 (Ind. Ct. App. 2006) (affirming trial court's denial of defendant's petition for permission to file belated notice of appeal where defendant waited over nine months until after Collins to seek a belated appeal), trans. denied. We certainly cannot say as a matter of law that Yarbrough was not diligent, which is the effect of the trial court's denial of the petition without a hearing.

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

ROBB, J., and VAIDIK, J., concur.