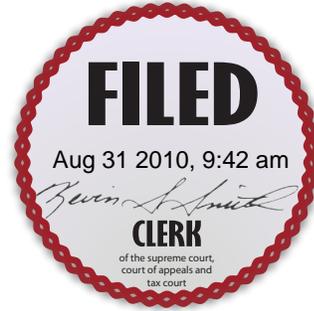


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

STEVIE W. DAVIS,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 20A03-0908-CR-392

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0107-CF-76

August 31, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Stevie W. Davis appeals the trial court's order denying his petition for permission to file a belated notice of appeal. We affirm.

Issue

Davis raises multiple issues on appeal; however, we address only the following restated issue: whether the trial court abused its discretion in finding that Davis was not diligent in seeking a belated direct appeal under Indiana Post-Conviction Rule 2.¹

Facts and Procedural History

On July 6, 2001, the State charged Davis with two counts of dealing in cocaine as Class A felonies² and one count of receiving stolen property as a Class D felony. On November 9, 2001, Davis entered into a written plea agreement in which he agreed to plead guilty to dealing in cocaine as a Class B felony, and the State agreed to dismiss the remaining charges. Davis's plea agreement provided that he reserved the right to file for sentence modification and that he would give up his right to appeal his conviction if he pleaded guilty. On December 21, 2001, the trial court sentenced Davis to twenty years executed. During the sentencing hearing, the trial court made no reference to Davis's right to appeal his sentence.

Davis did not file a direct appeal challenging his sentence. Instead, he filed other

¹ Davis also attempts to raise multiple issues that he would have raised in a direct appeal of his sentence. This appeal, however, is merely from the trial court's denial of his petition for permission to file a belated notice of appeal. Because we affirm the trial court's denial of Davis's belated notice of appeal petition, we need not address these other issues.

² One count was for possessing more than three grams of cocaine with intent to deliver, while the other count was for possessing more than three grams of cocaine within 1,000 feet of school property.

motions in relation to his sentence and credit time. Davis filed motions for modification of his sentence on August 26, 2002 and November 12, 2002, and the trial court denied both motions.

On January 13, 2003, Davis filed a petition for post-conviction relief,³ and the trial court appointed a State public defender to represent Davis. In August 2003, the State public defender withdrew her appearance. Thereafter, on September 16, 2003, Davis moved to withdraw his post-conviction petition without prejudice, and the trial court granted Davis's motion.

On April 1, 2004, Davis filed a third motion for modification of sentence, which the trial court again denied. On January 28, 2005, Davis filed a motion for additional credit time, and the trial court denied it.

On December 7, 2007, Davis filed a motion to correct erroneous sentence, which the trial court denied. Davis appealed the trial court's denial of his motion to correct erroneous sentence.⁴ In July 2008, while the appeal was pending, Davis filed a second motion for additional credit time, and the trial court denied that motion. On November 18, 2008, in an unpublished memorandum decision, we affirmed the trial court's denial of Davis's motion to correct erroneous sentence. See Davis-El v. State, 20A05-0803-PC-139 (Ind. Ct. App. Nov.

³ Davis's Appendix does not include a copy of his post-conviction petition; therefore, it is unclear whether he raised a sentencing claim in his post-conviction petition.

⁴ Davis filed his appeal under the name of Davis-El.

19, 2008). In our opinion, we noted that Davis raised four claims⁵ in his appeal from the denial of his motion to correct erroneous sentence but explained that, pursuant to Robinson v. State, 805 N.E.2d 783 (Ind. 2004), such claims were not cognizable via a motion to correct erroneous sentence because they were not errors that were clear from the face of the sentencing order. See Davis-El, slip op. at 3-4.

On April 14, 2009, Davis filed a petition for permission to file a belated notice of appeal.⁶ The trial court held a hearing on Davis's motion. During the hearing, Davis did not present any witness testimony. Instead, Davis introduced a copy of the transcripts from his guilty plea hearing and sentencing hearing to show that he was not advised of his right to appeal his sentence. He also asked the trial court to take notice of Criminal Rule 11.⁷ The trial court denied Davis's petition for permission to file a belated notice of appeal, concluding, in relevant part, that Davis had "utterly failed to present any evidence justifying his tardiness" or "establishing that he acted diligent in pursuing the remedy available under PC Rule 2." (Appellant's App. at 26.) Davis now appeals.

Discussion and Decision

Davis appeals the trial court's order denying his petition for permission to file a

⁵ Davis's four claims were that: (1) the trial court enhanced his sentence based on improper aggravating circumstances; (2) the trial court breached the terms of the plea agreement; (3) the trial court's sentence was manifestly unreasonable; and (4) the trial court's finding of aggravating circumstances violated his Sixth Amendment rights as articulated in Blakely v. Washington, 524 U.S. 296 (2004).

⁶ Davis's Appendix does not include a copy of his petition for permission to file a belated notice of appeal.

⁷ Criminal Rule 11 addresses instructions by a judge after sentencing and provides that, after sentencing, a trial court judge shall advise a defendant that he is entitled to take an appeal.

belated notice of appeal under Indiana Post-Conviction Rule 2.

Indiana Post-Conviction Rule 2(1) provides a defendant an opportunity to petition the trial court for permission to file a belated notice of appeal. Moshenek v. State, 868 N.E.2d 419, 422 (Ind. 2007), reh'g denied. The decision to deny such a petition is a matter within the discretion of the trial court. Id. “A trial court’s ruling on a petition for permission to file a belated notice of appeal under Post-Conviction Rule 2 will be affirmed unless it was based on an error of law or a clearly erroneous factual determination[.]” Id. at 423-24.

Indiana Post-Conviction Rule 2(1)(a) provides, in part:

An eligible defendant^[8] convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;

- (1) the defendant failed to file a timely notice of appeal;
- (2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (3) the defendant has been diligent in requesting permission to file a

⁸ 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.”

The trial court’s order indicates that Davis was not an “eligible defendant” under Post-Conviction Rule 2(1) because he had already attempted to challenge his sentence via other motions, such as a motion for sentence modification and motion to correct erroneous sentence, which this Court had affirmed on appeal. A motion for sentence modification and motion to correct erroneous sentence, however, are available as alternative remedies or provide an alternative avenue of relief from a direct appeal of a defendant’s sentence. See Hardley v. State, 905 N.E.2d 399, 402 (Ind. 2009) (addressing a motion to correct an erroneous sentence was available as an alternate remedy); Ashby v. State, 904 N.E.2d 361, 364 n. 6 (Ind. Ct. App. 2009) (explaining the difference between a motion for sentence modification under Indiana Code section 35-38-1-17 and a direct appeal). Because Davis had the right to challenge on direct appeal his sentence from his open plea, see Collins v. State, 817 N.E.2d 230 (Ind. 2004), and was thus an eligible defendant, we will review the trial court’s denial of Davis’s belated notice of appeal petition in relation to its determination that Davis has not been diligent in pursuing relief under Post-Conviction Rule 2.

belated notice of appeal under this rule.

Ind. Post-Conviction Rule 2(1)(a).

The defendant bears the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated notice of appeal. Moshenek, 868 N.E.2d at 422-23. “There are no set standards of fault or diligence, and each case turns on its own facts.” Id. at 423. Several factors are relevant to the defendant’s diligence and lack of fault in the delay of filing, including “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.

Here, the record reveals that the trial court did not advise Davis at the sentencing hearing that he could file a direct appeal to challenge his sentence. Thus, he has arguably shown that his failure to file a timely notice of appeal was not his fault. See Moshenek, 868 N.E.2d at 424 (explaining that a trial court’s failure to advise a defendant about his right to appeal his sentence from an open plea may establish that the lack of fault requirement of Post-Conviction Rule 2); Baysinger v. State, 835 N.E.2d 223, 226 (Ind. Ct. App. 2005) (pointing to the trial court’s failure to advise the defendant of his right to challenge his sentence as a factor in establishing that the defendant’s failure to file a timely notice of appeal was not due to his own fault).

Nevertheless, Davis was still required to prove that he was diligent in pursuing permission to file a belated notice of appeal. During the hearing on Davis’s belated notice of

appeal petition, he provided no explanation or argument to establish that he was diligent in filing his petition for permission to file a belated notice of appeal. On appeal, however, Davis argues that, like the defendant in Baysinger, he diligently sought permission to file a belated notice of appeal under Indiana Post-Conviction Rule 2 as soon as he learned of the proper method set forth in Collins v. State, 817 N.E.2d 230 (Ind. 2004).

On November 9, 2004, our Indiana Supreme Court issued its opinion in Collins, 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.” 817 N.E.2d at 233.

In Baysinger, the defendant, who pleaded guilty in an open plea and was sentenced on January 23, 2001, filed his petition for permission to file belated appeal on March 1, 2005. Baysinger learned of his right to appeal his sentences by means of Post-Conviction Rule 2(1) as set forth in Collins, and then filed his petition for permission to file a belated notice of appeal on March 1, 2005, approximately four months after Collins was decided.

In this case, however, Davis was sentenced on December 21, 2001 and did not seek permission to file a belated notice of appeal until April 14, 2009. Davis contends he only become aware of his ability to file for permission to file a belated notice of appeal in April 2009 when a fellow inmate informed him of the procedure set forth in Collins.

We are mindful that “*Collins* resolved a conflict in earlier Court of Appeals’ opinions regarding whether such a defendant could include a sentencing challenge in a P-C.R. 1

petition, . . . and [that] some delay may be attributable to the prior uncertainty in the law rather than the defendant's lack of diligence.” Kling v. State, 837 N.E.2d 502, 509 (Ind. 2005). Additionally, we acknowledge that Davis attempted to challenge his sentence via alternative means. Nevertheless, we must look at the timing of a defendant's efforts to pursue permission to file a belated notice of appeal in relation to our Supreme Court's decision in Collins and not in relation to merely when a defendant became aware of the Collins decision. Davis has not explained why he waited until April 2009—almost four and one-half years after the Collins decision—to file his petition for permission to file a belated notice of appeal, and he failed to meet his burden of showing that he diligently pursued relief through appropriate means under Post-Conviction Rule 2. Under the facts of this case, we conclude that the trial court did not abuse its discretion by finding that Davis was not diligent in petitioning for a belated appeal.

Affirmed.

RILEY, J., concurs.

KIRSCH, J., dissents without separate opinion.