

Appellant-petitioner Jeremy Cuzzort appeals the post-conviction court's denial of his request to pursue a belated appeal. Specifically, Cuzzort argues that he should have been granted permission to pursue the appeal because the three-year delay in making his request was caused by limited access to legal materials in the Indiana Department of Correction (DOC). Concluding that the post-conviction court properly denied Cuzzort's request, we affirm.

FACTS

On August 24, 2001, Cuzzort was charged with burglary, theft, and attempted theft in the Tippecanoe Superior Court under cause number CF-104. The State also filed a notice of its intention to charge Cuzzort as a habitual offender. An initial hearing was held on August 27, at which time the trial court appointed counsel for Cuzzort.

In September 2001, the trial court reduced Cuzzort's bond after it was determined that the State decided not to charge him with being a habitual offender. Thereafter, on April 3, 2003, Cuzzort was charged with conspiracy to deal methamphetamine, a class B felony, and possession of marijuana, a class A misdemeanor, under cause number FB-2. That same day, Cuzzort negotiated a plea agreement with the State. More particularly, Cuzzort agreed to plead guilty to burglary as a class B felony in CF-104, conspiracy to deal methamphetamine as a class B felony, and possession of marijuana as a class A misdemeanor, under the FB-2 cause number. In exchange, the State agreed to dismiss the theft and attempted theft charges in CF-104 and the remaining charges under FB-2.

The State also agreed to dismiss charges that had been filed against Cuzzort in two other felony cases.

Cuzzort was to serve the sentences for burglary and conspiracy consecutively to each other; however, the aggregate sentence would be capped at thirty years and only twenty years would be immediately executed. Cuzzort pleaded guilty pursuant to the agreement and was advised of the rights he waived by pleading guilty, including an advisement that he could appeal his convictions had he gone to trial. The trial court took the agreement under advisement. As a result, Cuzzort's sentence was continued and postponed for several months.

In July 2003, Timothy Broden, Cuzzort's attorney in the CF-104 case, asked to withdraw from the matter. Cuzzort also wanted to withdraw the plea agreement and pursue a motion to suppress that had been filed in the case. Cuzzort intended "to raise advice of undersigned counsel as a basis for his motion to withdraw his guilty plea." Appellant's App. p. 56. Broden subsequently informed the trial court that arrangements had been made for a different attorney to appear and represent Cuzzort. The trial court granted Broden's motion to withdraw in August 2003. One month later, Cuzzort and his new attorney, Thomas O'Brien, moved to withdraw the guilty plea and pursue his previously-filed motion to suppress.

However, on November 20, 2003, Cuzzort withdrew his motion to withdraw the guilty plea and the trial court accepted Cuzzort's proposed plea agreement. In deciding what sentence to impose, the trial court determined that Cuzzort's criminal record and the

likelihood that he will re-offend were aggravating factors. The trial court imposed an aggregate sentence of thirty years, with fourteen years suspended to probation. The trial court did not inform Cuzzort whether he could appeal the sentence.

In September 2006, Cuzzort filed a motion with the trial court, requesting that it compel counsel to provide him with his case file. The motion was then referred to Cuzzort's previous attorney. On April 26, 2007, Cuzzort filed a motion for the transcripts of his guilty plea and sentencing hearings. Cuzzort alleged that his guilty plea was not knowing, voluntary or intelligent and that his counsel was ineffective. The trial court granted Cuzzort's motion that same day.

On May 1, 2007, Cuzzort filed a petition for post-conviction relief, claiming that O'Brien's representation was deficient because he advised Cuzzort that the motion to suppress would not succeed and that he erroneously informed him that a lengthier sentence would be imposed if he did not plead guilty. Cuzzort also claimed that neither Broden nor O'Brien had properly investigated the case, and that evidence had been altered to incriminate Cuzzort. Cuzzort attached an affidavit of indigency to his petition for post-conviction relief that was referred to the Indiana Public Defender (Public Defender).

On October 7, 2010, the Public Defender filed a verified petition for permission to file a belated notice of appeal. This was the first time that Cuzzort questioned the propriety of his sentence. At a hearing, Cuzzort testified that he was "twenty-five or twenty-six" years old when he was sentenced. Tr. p. 2. Cuzzort had completed the

eighth grade of his formal education, and claimed that the three-year delay regarding his attempt to challenge the dispositions in both cases was the result of limited access to legal materials in the DOC.

Cuzzort claimed that he was not aware of his ability to challenge the dispositions in either case until another inmate told him, in April 2007, that he could do so. Cuzzort also acknowledged that his petition for post-conviction relief filed in 2007 had only been meant to challenge his convictions. Cuzzort also testified that one of his attorneys told him that he could not directly appeal his sentence because he had pleaded guilty to the charged offenses. Cuzzort alleged that he had not learned of his right to appeal the sentences on direct appeal until June 2009, when he had conferred with the deputy public defender assigned to his case.

On December 21, 2010, the post-conviction court denied Cuzzort's petition, finding that "it was never at issue whether a defendant could challenge his sentence. The only question was whether it had to be done by a petition for post-conviction relief or by a direct appeal." Appellant's App. p. 161. The post-conviction court noted that defendants sentenced on guilty pleas could challenge their sentences through petitions for post-conviction relief until our Supreme Court determined in Collins v. State, 817 N.E.2d 230 (Ind. 2004), that such challenges should be pursued by way of direct appeal. The post-conviction court further found that although the passage of time after the appointment of the Public Defender was not to be considered, the fact remained that Cuzzort did not seek to challenge his sentence at any time during the three and one-half

years after sentencing, and prior to the Public Defender's appointment. Finally, the post-conviction court determined that Cuzzort had not been diligent in pursuing an appeal. Thus, it denied Cuzzort's request for a belated appeal of the sentences that were imposed in 2003. Cuzzort now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that Indiana Post-Conviction Rule 2 provides a limited remedy to defendants who fail to timely file a notice of appeal. The remedy is available only if a defendant was without fault and acted diligently in seeking an appeal. Ind. Post-Conviction Rule 2(1). The decision to grant or deny a request for a belated appeal is reviewed for an abuse of discretion. Moshenek v. State, 868 N.E.2d 419, 422-23 (Ind. 2007). More specifically, it will be determined whether the post-conviction court's decision is against the logic and effect of the facts and circumstances before it. Weis v. State, 825 N.E.2d 896, 900 (Ind. Ct. App. 2005). Because diligence and relative fault are fact sensitive, we give substantial deference to the trial court's ruling. Moshenek, 868 N.E.2d at 423. This court will consider only the evidence favorable to the trial court's ruling and the reasonable inferences to be drawn therefrom. Id. at 423-24.

To satisfy the requirements of Post-Conviction Rule 2, it is not sufficient to point only to the fact that the trial court did not advise the defendant of the right to appeal a sentence as an "open plea." Id. at 424. In short, our trial courts do not have an obligation to advise defendants of their right to appeal sentences in such cases. Id. (citing Ind. Code

§ 35-35-1-2). On the other hand, even though the fact that a trial court might not have advised a defendant about the right to appeal a sentence can establish that the defendant was without fault in the delay of filing a timely appeal, the lack of such an advisement is insufficient to prove that the defendant was diligent in pursuing appellate review. Id.

II. Cuzzort's Claims

In addressing Cuzzort's contention that the post-conviction court erred in denying his request to file a belated appeal, we note that the post-conviction court found, and Cuzzort acknowledges, that he has always been able to obtain review of his sentences, either by pursuing a petition for post conviction relief, or by initiating a direct appeal. Appellant's Br. p. 7. Indeed, our Supreme Court's decision in Collins held that a defendant who entered an open plea could challenge his sentence on direct appeal. Hence, Cuzzort must still establish that he was diligent in pursuing his appeal.

Various factors are considered with regard to diligence, including the overall passage of time, the extent to which the defendant was aware of relevant facts, and the degree to which delays are attributable to the defendant, including the preparation of transcripts. Moshenek, 868 N.E.2d at 424.

Here, the evidence established that Cuzzort was aware that he could use post-conviction procedures to challenge the disposition of both causes. Tr. p. 4-5. The evidence also demonstrates that Cuzzort was not interested in challenging his sentence when he requested post-conviction relief in May 2007. Appellant's App. p. 96.

Although Cuzzort attempts to characterize his petition for post-conviction relief as a “sentencing claim,” namely as a challenge to the length or terms of his sentence, that contention is not supported by his petition or his own testimony. Appellant’s Br. p. 8. More particularly, Cuzzort’s petition for post-conviction relief alleged that his guilty pleas were invalid because trial counsel did not adequately prepare his defense and pressured him into pleading guilty by advising him that he could receive a longer sentence if he insisted on a trial in both cases. Appellant’s App. p. 97-98. Moreover, Cuzzort testified that his petition for post-conviction relief concerned only the validity of his guilty pleas. Tr. p. 8.

While Cuzzort also claimed that one of his attorneys informed him that the guilty plea precluded a direct appeal of his sentence, this advice was consistent with the law at the time Cuzzort was sentenced. Tr. p. 5-6. See Collins, 817 N.E.2d at 231-32 (summarizing the conflict in the law regarding the availability of direct appeals of sentences that resulted from open pleas). Cuzzort has not claimed that his trial counsel has ever told him that a review of his sentence was not possible. Cuzzort did not present the testimony of either attorney regarding the advice that they might have provided regarding a challenge to the sentences. The absence of such testimony justifies an inference that Cuzzort’s counsel would not have corroborated the allegations in his motion for a belated appeal. Culvahouse v. State, 819 N.E.2d 857, 863 (Ind. Ct. App. 2004).

Cuzzort attempts to rely on the fact that his formal education ceased in the eighth grade to support his contention that he did not understand our post-conviction rules. Appellant's Br. p. 8-9. However, a defendant's criminal history may demonstrate his familiarity with the legal system in establishing a lack of diligence regarding the pursuit of available remedies. Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). Cuzzort's criminal history includes juvenile adjudications for acts that would constitute battery, criminal mischief, and burglary, had they been committed by an adult. His adult criminal record includes convictions for burglary, sexual misconduct with a minor, false informing, and criminal trespass. Appellant's App. p. 177-78. Three of Cuzzort's four suspended sentences had had been revoked for violations of probation. Id. Moreover, Cuzzort filed a number of pleadings in the trial court that requires familiarity with the post-conviction rules and legal precedent. Id. at 88-89, 91-92.

In light of these circumstances, the evidence supports the post-conviction court's determination that Cuzzort was not diligent in challenging his sentence. Thus, we conclude that the post-conviction court properly denied Cuzzort's request for permission to file a belated notice of appeal.

The judgment of the post-conviction court is affirmed.

MAY, J., and BRADFORD, J., concur.