



David Smith (“Smith”) pleaded guilty in Hamilton Superior Court to Class C felony forgery and Class D felony operating a vehicle while intoxicated. He was sentenced to an aggregate sentence of nine years with seven years suspended to probation. Smith filed a petition for permission to file a belated appeal, which the trial court denied. Smith appeals and argues that he was diligent in pursuing a belated appeal.

### **Facts and Procedural History**

On January 2, 2003, Smith pleaded guilty to Class C felony forgery and Class D felony operating a vehicle while intoxicated. For the forgery conviction, he was sentenced to serve six years with one year of home detention, eleven months of work release, and the remainder suspended to probation. He was sentenced to a consecutive term of three years, with one month of home detention and the remainder suspended to probation for his operating while intoxicated conviction. Smith was not advised of his right to appeal his sentence.

Smith’s probation was revoked in 2004 and 2005. After his August 4, 2005 probation revocation, Smith filed a pro se Notice of Appeal, and he attempted to appeal his original sentence. Smith was later appointed counsel for the appeal of his probation revocation and, after learning of our supreme court’s decision in Collins v. State, told counsel that he wanted to challenge his original sentence. Appellant’s App. p. 29. On January 13, 2006, our court granted counsel’s motion to withdraw from Smith’s appeal of his probation revocation. Thereafter, Smith filed a pro se motion to remand his case to the trial court so that he could challenge his sentence through the post-conviction process.

Smith's motion was granted and on March 8, 2006, he filed a pro se petition for post-conviction relief. The court then appointed counsel, and on October 20, 2006, Smith filed a petition for permission to file a belated notice of appeal. In his petition, Smith alleged that his failure to file a timely notice of appeal was not his fault and that he had been diligent in requesting permission to file a belated notice of appeal. Specifically, Smith stated that as soon as he learned of the Collins decision he told his appellate attorney that he wanted to challenge his original sentence. Appellant's App. p. 32. The State objected to Smith's petition, and on March 21, 2007, his petition was denied. Smith now appeals.

### **Discussion and Decision**

Indiana Post-Conviction Rule 2(1) (2007) provides a defendant an opportunity to petition the trial court for permission to file a belated notice of appeal and states:

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

The Rule also gives a defendant the right to appeal a trial court's denial of permission to file a belated notice of appeal. Moshenek v. State, 868 N.E.2d 422, 422 (Ind. 2007).

The proper procedure for contesting a trial court's sentencing decision where the trial court has exercised sentencing discretion is a direct appeal and not a proceeding under Post-Conviction Rule 1. Collins v. State, 817 N.E.2d 230, 231-32 (Ind. 2004). A defendant who fails to file a timely notice of appeal may petition for permission to file an

appeal under Post-Conviction Rule 2 if he meets the standards set forth in the Rule. Id. at 233.

The decision whether to grant permission to file a belated notice of appeal is within the sound discretion of the trial court. George v. State, 862 N.E.2d 260, 264 (Ind. Ct. App. 2006). 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 motion to appeal. Witt v. State, 867 N.E.2d 1279, 1281 (Ind. 2007).

“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. Moreover, “[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. When the trial court does not hold a hearing before denying the defendant’s petition, our court “owes no deference to the trial court’s factual determinations because they were based on a paper record.” Id. at 424.

In order to establish diligence and lack of fault as required under 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 after an “open plea.” The right to appeal a sentence is not among those rights of which a trial court is required to inform a defendant before accepting a guilty plea. 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. However, a defendant still must establish diligence. Several factors are relevant to this inquiry. Among them are 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 other parties[.]

Id. Our court has also considered whether the defendant made previous efforts to challenge the sentence through other collateral means, and the timing of such efforts in relation to our supreme court's decision in Collins. See e.g., Salazar v. State, 854 N.E.2d 1180, 1186 (Ind. Ct. App. 2006); Cruite v. State, 853 N.E.2d 487, 490-91 (Ind. Ct. App. 2006), trans. denied. Moreover, "not every motion to file a belated appeal should be automatically granted by trial courts simply because Collins has been decided, especially if there is no indication that the defendant had previously made attempts to collaterally attack a sentence imposed following a guilty plea." Perry v. State, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006), trans. denied.

Smith was not advised of his right to appeal his sentence either at his guilty plea or his sentencing hearings. The State essentially concedes that Smith "could show lack of fault because he was not advised at sentencing that he could appeal his sentence[.]" Br. of Appellee at 6. Therefore, we turn to the question of whether Smith has established that he was diligent in requesting permission to file a belated notice of appeal.

Smith made no effort to collaterally attack his January 2, 2003 sentence, and did not attempt to appeal his sentence until after his probation was revoked on August 4, 2005. Moreover, Smith did not initiate any challenge of his sentence until nine months after Collins was decided. For all of these reasons, Smith was not diligent in requesting permission to file a belated notice appeal. Therefore, we conclude that the trial court acted within its discretion when it denied Smith's petition for permission to file a belated notice of appeal.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.