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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL SAKHA,)
)
Appellant-Petitioner,)
)
vs.) No. 49A05-0702-PC-88
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-9609-CF-179351

October 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Michael Sakha appeals the denial of his petition for post-conviction relief under Post-Conviction Relief Rule 2, claiming that his request to file a belated notice of appeal was improperly denied. Specifically, Sakha contends that the post-conviction court erred because the evidence demonstrated that he was without fault and was diligent in pursuing an appeal of his sentence. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

On September 20, 1996, at approximately 9:30 p.m., Joel Goode was in the process of depositing money in an ATM in Indianapolis when Sakha approached him, placed a gun to his back, and demanded all of the money in his bank account. Although Goode attempted to comply with Sakha's demand, the ATM would not permit Goode to perform another transaction. As a result, Sakha demanded that Goode drive him around town and withdraw all of his money from other ATMs. Goode refused and began to walk away. Sakha then told Goode that he was going to "blow [his] brains out." Ex. A, 20-21. After a brief struggle, Sakha shot Goode in the neck and fled. The shooting was photographed by the ATM's camera.

Goode's injuries have left him paralyzed from the chest down. Goode has incurred substantial medical bills and undergone several surgeries. As a result of the incident, Sakha was charged with attempted murder, a class A felony, attempted robbery, a class A felony, and carrying a handgun without a license, a class A misdemeanor.

On August 20, 1997, Sakha and the State entered into a plea agreement, which provided that Sakha would plead guilty to all counts. The agreement called for an “open” sentence, with all sentences to run concurrently with each other. Appellant’s App. p. 56-57. The trial court accepted the agreement, and on September 24, 1997, Sakha was sentenced to fifty years of incarceration on each of the two class A felonies and to one year on the handgun conviction, resulting in an aggregate sentence of fifty years.

Thereafter, on January 27, 2003, Sakha filed a praecipe for transcripts of the guilty plea and sentencing hearings. Sakha then filed a petition for permission to file a belated notice of appeal under Post-Conviction Rule 2, as well as a petition for post-conviction relief in accordance with Post-Conviction Rule 1, on June 2, 2004. Sakha raised a number of ineffective assistance of trial counsel claims in support of his request for post-conviction relief.

On February 15, 2006, the post-conviction court held a hearing on Sakha’s motion for permission to file the belated notice of appeal, at which time Sakha withdrew his ineffective assistance of counsel claims without prejudice. The only evidence presented at the hearing consisted of the transcripts of the guilty plea and sentencing hearings. The post-conviction court denied Sakha’s request to file a belated notice of appeal, and he now appeals.

DISCUSSION AND DECISION

We initially observe that a defendant who pleads guilty is not entitled to directly appeal the conviction; however, he or she may directly appeal the sentence imposed. Jackson v. State, 853 N.E.2d 138, 139 (Ind. Ct. App. 2006). This includes the use of the belated

notice of appeal procedure under Indiana Post-Conviction 2, where appropriate. Witt v. State, 867 N.E.2d 1279, 1280-81 (Ind. 2007). This rule provides that:

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 trial court shall consider the above factors in ruling on the petition. Any hearing on the granting of a petition for permission to file a 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.

If the trial court finds no grounds for permitting the filing of a belated notice of appeal, the defendant may appeal such denial by filing a notice of appeal within thirty (30) days of said denial.

P-C.R. 2.

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 petitioner has the burden to prove by a preponderance of the evidence that he or she was without fault in the delay of seeking to appeal and was diligent in pursuing permission to file a belated notice of appeal. Moshenek v. State, 868 N.E.2d 419, 422-23 (Ind. 2007). There

are no set standards for determining whether a petitioner is without fault and has been diligent, and each case must be decided on its own facts. Id. However, several factors are relevant to the determination of fault and diligence, 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. Because diligence and relative fault are fact sensitive, we give substantial deference to the trial court’s ruling. Id.

In this case, Sakha argues that he was without fault in failing to timely file a notice of appeal because the trial court did not advise him that he could appeal his sentence. Appellant’s App. p. 83; Appellant’s Br. p. 4. Indeed, the transcripts of the sentencing hearing that were admitted into evidence do not show that Sakha was advised of his right to appeal, and the lack of such an advisement may suffice to establish the “without fault” requirement of Post-Conviction Rule 2. Moshenek, 868 N.E.2d at 424. However, “a defendant still must establish diligence.” Id.

The right of a defendant to directly appeal his sentence following a guilty plea was a well-established rule when Sakha pleaded guilty. See Tumulty v. State, 666 N.E.2d 394-96 (Ind. 1996). There is no evidence that Sakha conferred with his counsel about appealing the sentence, and Sakha did not claim that he was unfamiliar with the legal system. Sakha also provided no evidence regarding his awareness of his legal remedy and when he initially learned of a remedy.

Sakha was sentenced in September 1997, and he did nothing to challenge his sentence until he filed his petition for permission to file a belated notice of appeal on June 2, 2004. Appellant's App. p. 13-16, 83-84. Moreover, Sakha provided no explanation at the hearing as to why he did not pursue his remedy at an earlier time. Tr. p. 1-10. Hence, because Sakha failed to provide any evidence of diligence, he has failed to meet his burden of proof. Therefore, we conclude that the post-conviction court did not abuse its discretion in denying Sakha's motion to file a belated notice of appeal.

The judgment of the post-conviction court is affirmed.

BAILEY, J., and VAIDIK, J., concur.