

Case Summary and Issue

Michael Love appeals the trial court's denial of his petition to file a belated notice of appeal. On appeal, Love raises two issues, which we consolidate and restate as whether the trial court properly denied Love's petition. Concluding the trial court's denial was improper, we reverse and remand with instructions to permit Love to file a belated notice of appeal.

Facts and Procedural History

On August 12, 2005, Love agreed to plead guilty to voluntary manslaughter and aggravated battery in an "open plea," leaving sentencing to the trial court's discretion. In exchange for Love's guilty plea, the State agreed to dismiss charges of murder, attempted murder, robbery, and battery. On November 18, 2005, the trial court sentenced Love to consecutive terms of thirty years for voluntary manslaughter and seven years for aggravated battery, resulting in an aggregate sentence of thirty-seven years. After sentencing, the trial court explained Love's appeal rights to him:

I need to inform you that you have the right to appeal this sentence. Because it's a sentence that was decided by me, you have the right to appeal that sentence to the Indiana Court of Appeals, one of our higher courts. You have the right to an attorney, if you cannot afford an attorney [sic]. You must make the decision on whether to appeal this sentence within the next 30 days on either whether to seek the filing of an appeal or motion to correct errors. If you wait longer than the 30-day mark from today's date, your appeal right may be gone or waived forever.

[Defense counsel], I don't know whether this is something that you've discussed already with your client, but this is a decision that must be made within the next 30 days. I advise you to seek that counsel with your client and make the decision within the next 30 says [sic]. And we'll show for the record you have been advised of the right to appeal this sentence to a higher court under our laws.

Appellant's Appendix at 177-78. On December 28, 2005, ten days after the deadline to file a notice of appeal had passed, Love filed a request for appointment of counsel to help him pursue an appeal. On the same day, the trial court denied Love's request and instructed him to file a belated notice of appeal petition "[b]ecause more than thirty (30) days have passed since the sentencing hearing in this case" Id. at 44.

On March 30, 2006, Love filed a pro se motion requesting transcripts of the guilty plea and sentencing hearings. On May 4, 2006, Love filed a pro se motion for clarification of his sentence. On May 25, 2006, Love filed a pro se petition for post-conviction relief. On June 30, 2006, counsel from the State Public Defender's office filed an appearance on Love's behalf in the post-conviction proceeding. On February 23, 2007, Love filed a petition to file a belated notice of appeal. On March 29, 2007, the trial court denied the motion without a hearing. On April 16, 2007, Love filed a motion to correct error, which the trial court denied on May 18, 2007. Love now appeals.

Discussion and Decision

I. Standard of Review

The standard of review applied to a trial court's ruling on a belated notice of appeal petition depends on whether the trial court held a hearing. Moshenek v. State, 868 N.E.2d 419, 423-24 (Ind. 2007). If there was a hearing on the petition, we review the trial court's ruling for an abuse of discretion because "[t]he trial court is in a better position to weigh evidence, assess the credibility of witnesses, and draw inferences." Id. at 424. However, in cases such as this one where the trial court did not conduct a hearing, we review the trial

court's decision de novo "[b]ecause we are reviewing the same information that was available to the trial court." Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005).

II. Propriety of Trial Court's Decision

Love argues the trial court improperly denied his petition to file a belated notice of appeal. A defendant may file a belated notice of appeal if he proves the following by a preponderance of the evidence: 1) the failure to file a timely notice of appeal was not the defendant's fault and 2) the defendant has been diligent in requesting permission to file a belated notice of appeal. Ind. Post-Conviction Rule 2, § 1; Witt v. State, 867 N.E.2d 1279, 1281 (Ind. 2007). We reiterate that our standard of review is de novo. Baysinger, 835 N.E.2d at 224.

A. Evidence of Absence of Fault

Whether a defendant was without fault is a fact-sensitive determination. Welches v. State, 844 N.E.2d 559, 561 (Ind. Ct. App. 2006). Factors informing this determination include the defendant's degree of awareness of his procedural remedy, age, education, and familiarity with the legal system; whether he was informed of his appellate rights; and whether he committed an act or omission contributing to the delay. Id.

Love does not argue the trial court inadequately informed him of his appellate rights. Instead, Love argues he was without fault by placing blame on his trial counsel and her office. Specifically, Love alleges counsel failed to contact him despite the trial court's instruction that she assist him in deciding whether to appeal and despite his leaving two phone messages with her office on December 12 and 13, 2005. Love also alleges that when

he left one of the messages, a secretary with counsel's office told him he could not pursue a pro se appeal.¹ The State does not contest these allegations. Instead, the State argues Love has not carried his burden because the trial court adequately informed Love of his appellate rights and "the record indicates [Love] to be educated, mentally stable, and familiar with the criminal justice system." Appellee's Brief at 7.

We are convinced Love has established by a preponderance of the evidence that he was without fault. Although the trial court made it abundantly clear to Love that he had to file a notice of appeal by December 18, 2005, to preserve his appellate rights, the trial court also told counsel to assist Love in deciding whether to appeal. Love's counsel, however, failed to assist him and did not return his calls in the days preceding the deadline.² See Appellant's App. at 234 (Love's affidavit stating that "On December 12 and 13, 2005, my mother or myself via a three-way call contacted my attorney . . . at the Lake County Public Defender's Office about an appeal" and that "[counsel] did not respond to the messages"). Moreover, a secretary with Love's counsel's office misinformed him that he could not pursue a pro se appeal. See id. at 217 (Love's affidavit stating that "I contacted [counsel's

¹ Love also offers two phone messages he left with counsel on December 19 and 21, 2005, and a letter he wrote to her on December 18, 2005, as evidence that he was without fault. To the extent Love argues these phone messages and the letter prove his absence of fault by placing blame on his counsel, we refuse to recognize it as such because counsel received them after the December 18, 2005, deadline. See Appellant's App. at 240 (indicating the letter was received by counsel's office on December 20, 2005). However, as discussed in further detail infra, Part II.B., the phone messages and letter do constitute proof of Love's diligence.

² To counter Love's placement of fault on trial counsel and her office, the State argues the phone messages do not indicate the purpose for which Love called and, even if they did, "nothing in the record indicates that initiation of an appeal was within the scope of counsel's representation." Id. at 8. The State's latter argument is irrelevant because it overlooks Love's counsel's failure to assist Love in deciding whether

office and was told by a secretary that after the guilty plea, [counsel] was no longer my attorney. I was also told that I could not proceed pro se to the appellate courts.”). The record indicates Love believed the secretary because, in a December 28, 2005, letter to the trial court, he neither tried to file a pro se notice of appeal nor inquired about filing one. Instead, Love wrote that “my lawyer . . . was su[p]pose[d] to file an appeal. I want to know if she ha[s] done so. If not, can you appoint me one[?]” Id. at 42. Thus, Love’s dilemma is apparent: he was aware of his appellate rights, believed his counsel was the sole means to assist him in exercising those rights, but was unable to contact her before the deadline because she did not respond to his messages.

Nor do the State’s arguments convince us that Love has not carried his burden. Although it is debatable whether Love’s education level, mental condition, and familiarity with the legal system weigh for or against a finding of fault, without considering these and other factors, a trial court’s failure to advise the defendant about his right to appeal a sentence can establish that the defendant was without fault. Moshenek, 868 N.E.2d at 424. In Baysinger, for example, a panel of this court concluded the defendant was without fault because the trial court’s statement to the defendant that his guilty plea would result in waiver of “most” of his grounds for appeal, coupled with evidence that the defendant’s counsel did not advise him of his appellate rights, “provides insufficient guidance to a defendant who is pleading guilty as to what claims may or may not be available for appeal.” 835 N.E.2d at 226.

to appeal despite the trial court’s instruction to do so. Further, we do not think Love’s failure to specify the

Here, the insufficient guidance came not from the trial court, but from a combination of the trial court instructing Love's counsel to assist him in deciding whether to appeal, Love's counsel's failure to fulfill the trial court's instructions, and the misinformation Love received from counsel's office. These facts convince us that Love was sufficiently misinformed of his appellate rights to relieve him of fault for failing to file a notice of appeal.

B. Evidence of Diligence

Love must also establish by a preponderance of the evidence that he was diligent in requesting permission to file a belated notice of appeal. This also is a fact-sensitive inquiry, and relevant factors include the overall passage of time, the extent to which the defendant was aware of relevant facts, and the degree to which the delays are attributable to other parties. Moshenek, 868 N.E.2d at 424.

We note initially that we disagree with the State regarding its calculation of the overall passage of time. The State argues Love has not established diligence because he "made no efforts at pursuing a direct appeal from December 28, 2005, until February 23, 2007." Appellee's Br. at 8. The State's argument overlooks that time spent by the State Public Defender in investigating the merits of a petitioner's post-conviction claim for relief does not count against a defendant when determining whether he was diligent in pursuing a belated appeal. Kling v. State, 837 N.E.2d 502, 508 (Ind. 2005). Thus, the overall passage of time is more accurately described as the period from the December 18, 2005, notice of appeal deadline to June 30, 2006, which is the date the State Public Defender filed an appearance in

exact reason for his messages relieves counsel of fault.

the post-conviction proceeding on Love's behalf. See Ind. Post-Conviction Rule 1, § 9 ("Upon receiving a copy of the petition . . . from the clerk of the court, the Public Defender may represent any petitioner committed to the Indiana Department of Correction in all proceedings under this Rule . . . if the Public Defender determines the proceedings are meritorious and in the interests of justice.").

Regarding the other factors affecting Love's diligence, the record indicates Love wrote his trial counsel a letter on December 18, 2005, which she received on December 20, 2005, and left her phone messages on December 19 and 21, 2005, and at some point in February 2006. Love's counsel never responded to the letter or the phone messages.³ Love also wrote the trial court a letter on December 28, 2005, asking whether his counsel had filed a notice of appeal and, if not, whether the trial court would appoint counsel to help him pursue an appeal. The court issued an order on the same day denying Love's request and instructing him to file a belated notice of appeal petition. However, Love was not notified of the trial court's order until his current counsel told him of it in February 2007. This delay is attributable to the fact that the trial court sent its denial to the Lake County jail on January 17, 2006, but Love was transferred from the jail to a Department of Correction facility at some point before that date and the order was not forwarded to him. See Appellant's App. at 3 (CCS entry stating trial court's denial was "sent to Michael Love at LCJ" on January 17, 2006); id. at 45 (envelope containing trial court's order stating "ADDRESEE NOT HERE RETURN TO SENDER").

Having not received notice of the trial court's order, Love challenged his convictions and sentence through other means by filing pro se motions on March 30, 2006, and May 4, 2006, for copies of transcripts and sentence clarification, respectively, and a pro se petition for post-conviction relief on May 25, 2006. On June 30, 2006, counsel from the State Public Defender's office filed an appearance and began investigating Love's case. When Love was finally notified in February 2007 that the trial court issued an order on December 28, 2005, denying his request for appointment of appellate counsel and instructing him to file a belated notice of appeal, he complied with the trial court's order by filing one on February 23, 2007.

We conclude these facts establish Love's diligence by a preponderance of the evidence. The critical fact supporting our conclusion is that Love was not notified of the trial court's December 28, 2005, order instructing him to file a belated notice of appeal until February 2007. When he finally received notice, he filed a belated notice of appeal within a month. Cf. Baysinger, 835 N.E.2d at 226 (concluding the defendant established diligence because, upon learning of his right to challenge his sentence as articulated in Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004), he filed a belated notice of appeal just over one month after the Collins decision was handed down). Moreover, the absence of notice did not deter Love from collaterally attacking his convictions by filing a pro se motion for post-conviction relief within seven months of the deadline to file a notice of appeal.

Because we conclude Love established by a preponderance of the evidence that he was without fault in failing to file a timely notice of appeal and that he was diligent in

³ During her investigation into Love's claim for post-conviction relief, Love's current counsel also

requesting permission to file a belated notice of appeal, it follows that the trial court improperly denied Love's petition.

Conclusion

We conclude the trial court improperly denied Love's petition to file a belated notice of appeal. We therefore reverse the trial court's decision and remand with instructions to permit Love to file a belated notice of appeal.

Reversed and remanded.

KIRSCH, J., and BARNES, J., concur.