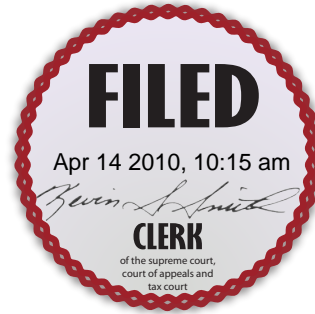


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MARIA CHAVARRIA,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 20A03-0910-CR-494

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0607-FA-57

April 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Maria Chavarria appeals the denial of permission to file a belated Notice of Appeal, presenting the sole issue of whether the decision of the trial court is clearly erroneous. We affirm.

Facts and Procedural History

On March 8, 2007, Chavarria pleaded guilty to Dealing in Cocaine, a Class A felony,¹ pursuant to an agreement whereby the trial court would exercise sentencing discretion but the executed sentence would be capped at forty years. Chavarria, a Mexican citizen unable to read and write English, was provided with a Spanish-speaking interpreter for court proceedings. On April 5, 2007, Chavarria was sentenced to thirty-five years imprisonment. She did not timely appeal.

On June 23, 2008, Chavarria filed a petition for post-conviction relief; the petition was subsequently withdrawn. On March 30, 2009, Chavarria filed a Verified Motion for Permission to File a Belated Notice of Appeal, claiming that her interpreter had failed to convey that she had a right to appeal her sentence. The State filed an objection. After an evidentiary hearing, the trial court denied Chavarria's motion. This appeal ensued.

Discussion and Decision

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:

¹ Ind. Code § 35-48-4-1(b).

An eligible defendant 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 belated notice of appeal under this rule.

The decision whether to grant permission to file a belated notice of appeal is within the trial court's sound discretion. Moshenek v. State, 868 N.E.2d 419, 422 (Ind. 2007). The defendant bears the burden of proving by a preponderance of the evidence that he or she was without fault in the delay of filing and was diligent in pursuing permission to file a belated motion to appeal. Id. at 422-23. There are no fixed standards of fault or diligence; accordingly, each case turns on its own facts. Id. at 423.

Factors relevant to the defendant's diligence and lack of fault in the delay of filing include "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. (quoting Land v. State, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994), trans. denied).

"Because diligence and relative fault are fact sensitive, we give substantial deference to the trial court's ruling." Id. at 423. The trial court's ruling will be affirmed unless it is based upon an error of law or a clearly erroneous factual determination. Id. at 423-24. The trial court is in a superior position to weigh evidence, assess the credibility of witnesses, and draw inferences. Id. at 424. Where an evidentiary hearing is held, as opposed to a ruling on

a paper record, we give deference to the trial court's factual determinations. Id. Factual determinations are clearly erroneous when the record contains no facts to support them either directly or by inference. Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996).

Where the trial court does not advise the defendant of the right to appeal, this may suffice to meet the lack of fault requirement. Moshenek, 868 N.E.2d at 424. Here, the trial court repeatedly advised Chavarria in English of her right to appeal her sentence and the Spanish-speaking interpreter translated for Chavarria. However, Chavarria claimed that the interpreter conflated critical terms such that Chavarria was alternately advised that she could and could not appeal her sentence.² In essence, Chavarria alleged that her interpreter so misled her as to her appeal rights that she effectively received no advisement.

The trial court found that Chavarria was effectively advised of her right to appeal her sentence. At the same time, the trial court found that the interpreter had translated a phrase for Chavarria as, "If you are not happy with your sentence, you have to put another set of papers after 30 days of your sentence." (App. 72-73.) (emphasis added.) This is contradictory to Indiana Appellate Rule 9(A)(1), which provides in relevant part: "A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment." Accordingly, Chavarria received some mis-advice in the course of translation.

² According to the affidavit of interpreter Susannah Bueno, the word "sentenciar" in Spanish means "issue a judgment" and the Spanish word that conveys "length of incarceration" is "condena." (App. 48.) According to Bueno, the interpreter assigned to Chavarria used the Spanish word "sentencia" to convey both "conviction" and "sentence." (App. 48.)

However, there is evidence indicating that Chavarria was able to understand legal proceedings and communicate effectively despite the language barrier. One week prior to her guilty plea hearing, she dictated a letter addressed to the trial court requesting the assignment of another public defender. (Resp. Ex. 1.) At the guilty plea hearing, Chavarria assured the trial court that she was able to understand him “through this particular translator.” (App. 23.) When necessary for clarification, she requested that the trial court repeat his words. Asked if she understood the advisement of rights, Chavarria stated that she did. Immediately after the trial court asked, “Do you understand that you have a right to appeal the sentence that is imposed?” Chavarria responded, “How?” (App. 26.) As such, the finding that Chavarria displayed understanding of her right to appeal her sentence has evidentiary support and is not clearly erroneous.

Moreover, even if one acted without fault, he or she must establish diligence. Moshenek, 868 N.E.2d at 424. An inquiry as to diligence involves several factors, among them: 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.

Chavarria testified that she knew in 2007 that she could appeal her sentence. (Tr. 14.) Nonetheless, she did not raise any challenge to her sentence until the filing of her petition for post-conviction relief in late 2008. In that petition, she raised the sentencing issue only tangentially. She articulated issues regarding assistance of counsel and duplication of cause numbers. In conjunction with her complaint that she was not provided with successive counsel upon request, she stated, “I feel that the Judge was bias on my sentence.” (App.

110). She did not make any factual assertion that she failed to understand her interpreter or her right to appeal the sentence. Chavarria first advised the trial court of the alleged lapse in translation in the motion for permission to file a belated appeal two years after her sentence was imposed. Accordingly, it was not clearly erroneous for the trial court to determine that Chavarria did not establish her diligence in pursuing a belated appeal.

Affirmed.

MAY, J., and BARNES, J., concur.