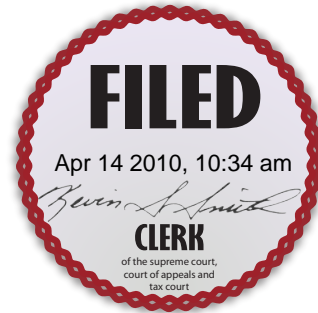


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES ROBERTS,

Appellant/Defendant,

vs.

STATE OF INDIANA,

Appellee/Plaintiff.

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No. 79A02-0909-CR-900

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0812-FA-41

April 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant James Roberts appeals from the sentence imposed following his guilty plea to Class A felony Dealing in Cocaine.¹ Roberts contends that the trial court abused its discretion in sentencing him and that his sentence is inappropriate in light of the nature of his offense and his character. The State cross-appeals, countering that the trial court improperly allowed Roberts to file a belated notice of appeal. We dismiss Roberts's appeal for lack of jurisdiction.

FACTS

On December 3, 2008, the State charged Roberts with two counts of Class A felony dealing in cocaine and two counts of Class B felony cocaine possession. (Appellant's App. 4). On March 26, 2009, the State amended one of the dealing in cocaine counts to Class D felony dealing in a substance represented to be a controlled substance. (Appellant's App. 4). On April 17, 2009, Roberts pled guilty to Class A felony dealing in cocaine. (Appellant's App. 3). On July 17, 2009, the trial court sentenced Roberts to thirty years of incarceration for dealing in cocaine. (Appellant's App. 2). On August 10, 2009, Roberts filed a *pro se* motion to file a belated motion to correct error, which the trial court denied on August 12, 2009. (Appellant's App. 20, 21). On August 24, 2009, Roberts filed a request for appellate counsel "for the purpose of Taking an appeal concerning His right to challenge the Sentence imposed[,]" which the trial court granted on August 26, 2009, treating the request as a belated notice of appeal. (Appellant's App. 23). On September 14, 2009, Roberts filed a belated notice of appeal. (Appellant's App. 24-25).

¹ Ind. Code § 35-48-4-1(b)(3)(B) (2008).

DISCUSSION AND DECISION

Whether the Trial Court Properly Granted Roberts Leave to File a Belated Notice of Appeal

Indiana Post-Conviction Rule 2 (2009) provides in relevant part as follows:

(a) Required Showings. 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.

P-C.R. 2(1) provides petitioners with a mechanism for seeking permission to file a belated appeal where the failure to file a timely notice was not the petitioner's fault and the petitioner was diligent in requesting permission to file a belated notice of appeal. If the trial court finds that the grounds exist, then it "shall" permit the petitioner to file the belated notice of appeal, but such finding is discretionary. *Id.* A defendant bears the burden of proving by a preponderance of the evidence that he was both without fault for not timely filing the notice of appeal and that he has been diligent in requesting permission to file a belated notice of appeal. *See Atwood v. State*, 905 N.E.2d 479, 484 (Ind. Ct. App. 2009). 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. *Moshene v. State*, 868 N.E.2d 419, 423-24 (Ind. 2007). On review we give substantial deference to the trial court's ruling. *Id.*

Cooper v. State, 917 N.E.2d 667 (Ind. 2009).

Roberts's motion to correct error² was denied on August 12, 2009, which meant that his notice of appeal was due September 11, 2009. *See* Ind. Appellate Rule 9(A)(1). Roberts,

² Although styled as "belated," Roberts's motion to correct error was, in fact, filed within the prescribed thirty-day period following his sentencing. *See* Ind. Trial Rule 59(C).

however, did not file his notice of appeal until September 14, 2009, or three days late. Here, even if one assumes that Roberts's request for appellate counsel made on August 24, 2009, qualifies as a request for leave to file a belated notice of appeal, Roberts did not make the diligence and lack-of-fault showings required by Post-Conviction Rule 2(a).³ *See, e.g., Reid v. State*, 883 N.E.2d 872, 874 (Ind. Ct. App. 2008) ("Reid failed to submit any evidence to support his petition. Without evidence regarding his diligence and lack of fault, Reid cannot have met his burden of proof. The trial court erred when it granted his petition to file a belated notice of appeal, and we dismiss Reid's appeal for lack of jurisdiction."). We conclude that the trial court erred when it granted Roberts leave to file a belated notice of appeal, and dismiss Roberts's appeal for lack of jurisdiction.

Dismissed.

RILEY, J., and MATHIAS, J., concur.

³ This is not surprising in light of the fact that the trial court, in essence, preemptively granted Roberts leave to file a belated notice of appeal before his time to file a *timely* notice had run and without requiring that he make the mandatory showings. Based on the record before us, we have no reason to doubt that Roberts would be able to show diligence and lack of fault on his part, should he choose to further pursue a belated appeal. Even so, the showings and findings required by Post-Conviction Rule 2(a) must nonetheless be made before we can assume jurisdiction.