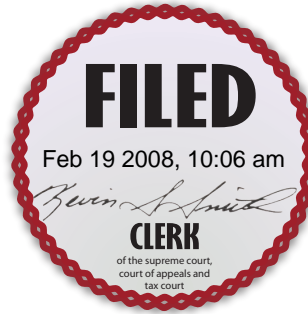


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JIMMY E. MORRIS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A04-0707-CR-387

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 4
The Honorable Patricia J. Gifford, Judge
Cause No. 49G04-9608-CF-123196

February 19, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Jimmy E. Morris (Morris), appeals his sentence for voluntary manslaughter, as a Class A felony, Ind. Code § 35-42-1-3.

We dismiss.

ISSUE

Morris appeals, and the State cross-appeals. The State raises two issues in its cross-appeal, one of which we find to be dispositive: Whether the trial court erred in granting Morris' Petition for Leave to File a Belated Notice of Appeal.

FACTS AND PROCEDURAL HISTORY

On March 4, 1998, Morris pled guilty to voluntary manslaughter, as a Class A felony, I.C. § 35-42-1-3, pursuant to a plea agreement that capped his sentence at thirty years.¹ That same day, the trial court imposed a sentence of thirty years. On October 21, 1999, Morris filed a petition for post-conviction relief. He did not challenge his sentence in that petition, and he withdrew the petition in 2000. Then, on January 17, 2006, Morris filed a motion for modification of sentence pursuant to I.C. § 35-38-1-17. The trial court denied the motion without a hearing. On February 26, 2007, Morris filed his Petition for Leave to File a Belated Notice of Appeal. In it, he alleged: (1) that a timely notice of appeal was not filed because he was not aware of his right to appeal his sentence because neither the trial court nor his counsel ever advised him of that right; (2) that the failure to file a timely notice of

¹ The maximum sentence for a Class A felony is fifty years. *See* I.C. § 35-50-2-4.

appeal was not his fault; and (3) that he “is diligently requesting permission to file a belated notice of appeal[.]” (Appellant’s App. p. 97). The trial court granted Morris’ petition the same day without a response from the State and without holding a hearing.

Morris now appeals, and the State cross-appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Morris argues that his thirty-year sentence for voluntary manslaughter, as a Class A felony, I.C. § 35-42-1-3, is inappropriate in light of the nature of his offense and his character under Indiana Appellate Rule 7(B). The State cross-appeals, arguing that we should dismiss Morris’s appeal because the trial court erred in granting Morris’ Petition for Leave to File a Belated Notice of Appeal. We agree with the State.²

Indiana Post-Conviction Rule 2 permits an individual convicted after a trial or guilty plea who fails to file a timely notice of appeal to petition for permission to file a belated notice of appeal. An individual seeking such permission must make two showings: (1) that the failure to file a timely notice of appeal is not the fault of the petitioner; and (2) that the petitioner 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). The burden is

² Morris contends that the State waived this argument by failing to object to his petition at the trial court level. Because the trial court granted Morris’ petition on the day he filed it without a hearing, the State never had an opportunity to object. Morris argues that the State should have filed a motion to reconsider under Indiana Trial Rule 53.4, a motion to correct error under Indiana Trial Rule 59, or a motion for relief from judgment or order under Indiana Trial Rule 60. However, Morris directs us to no authority for the proposition that the filing of one of those motions is a prerequisite to the filing of an appeal.

on the petitioner to make the showings by a preponderance of the evidence. *Witt*, 867 N.E.2d at 1281. Where, as here, the trial court does not hold a hearing on the petition, the only bases for the decision are the allegations set forth in the petition, and we will review the decision *de novo* without according the trial court's findings any deference. *Williams v. State*, 873 N.E.2d 144, 146 (Ind. Ct. App. 2007) (citing *Hull v. State*, 839 N.E.2d 1250, 1253 (Ind. Ct. App. 2005)); *see also Moshenek v. State*, 868 N.E.2d 419, 424 (Ind. 2007), *reh'g denied*.

Here, even if we assume that Morris was without fault in failing to file a timely praecipe (the equivalent of a notice of appeal in 1998), we conclude that he has failed to establish that he was diligent in requesting permission to file a belated notice of appeal. The record shows that the trial court sentenced Morris in March of 1997. Morris filed a petition for post-conviction relief in 1999, but he did not challenge his sentence. Morris made no challenge to his sentence until January of 2006, almost nine years after he was sentenced, when he filed his Motion for Modification of Sentence. Furthermore, Morris did not file his Petition for Leave to File a Belated Notice of Appeal until February of 2007, nearly ten years after he was sentenced and more than two years after *Collins v. State*, 817 N.E.2d 230 (Ind. 2004), in which our supreme court held that the proper procedure for challenging a sentence imposed following an open plea is a direct appeal. *See Sholes v. State*, 878 N.E.2d 1232 (Ind. 2008) (dismissing belated appeal that was granted more than eight years after sentencing even though petition was filed within seven months of *Collins*); *Moshenek*, 868 N.E.2d 419 (affirming trial court's denial of petition to file a belated motion to correct error that was filed more than sixteen years after sentencing even though petition was filed within three months

of *Collins*); *Witt*, 867 N.E.2d 1279 (dismissing belated appeal that was granted almost ten years after sentencing and where petition was not filed until nineteen months after *Collins* was decided). Because Morris failed to satisfy the diligence requirement of Post-Conviction Rule 2, the trial court should not have granted his Petition for Leave to File a Belated Notice of Appeal.

CONCLUSION

Based on the foregoing, we conclude that the trial court erred in granting Morris' Petition for Leave to File a Belated Notice of Appeal.

Dismissed.

KIRSCH, J., and MAY, J., concur.