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**IN THE
COURT OF APPEALS OF INDIANA**

KRISTOFFERSON H. PORTER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 02A03-0603-CR-132

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0310-FB-174

October 23, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Kristofferson H. Porter (“Porter”) appeals his sentence after a guilty plea in Allen Superior Court, raising one issue: whether his sentence is inappropriate in light of the character of the offender and nature of the offense. The State raises one issue on cross-appeal: whether the trial court abused its discretion when it allowed Porter’s belated notice of appeal. We affirm.

Facts and Procedural History

In the early morning hours of October 1, 2003, Porter and an armed accomplice broke into the home of Stephanie Gonzalez (“Gonzalez”) in Fort Wayne. Porter confined Gonzalez and her children in the home’s bathroom while he and the accomplice ransacked the home and took money, electronic equipment, and the family’s three-month-old puppy. Porter then stole Gonzalez’s car.

A Fort Wayne Police officer responding to a call about the incident observed a vehicle matching the description of Gonzalez’s stolen car, made a U-turn, and began following the vehicle. Porter accelerated and a high-speed chase ensued. The chase ended when Porter ran a red light and hit an SUV, causing it to roll over several times. Porter then crashed into a van. Gonzalez’s car was destroyed, and the puppy died in the accident.

On April 7, 2004, Porter pleaded guilty to Class B felony burglary, Class B felony robbery, Class B felony criminal confinement, Class D felony auto theft, and Class D felony resisting law enforcement. The trial court conducted a sentencing hearing on May 4, 2004. The trial court found Porter’s juvenile and adult criminal history and parole status at the time of the crimes as aggravating circumstances and his guilty plea and

acceptance of responsibility as mitigating circumstances. Finding that the aggravators outweighed the mitigators, the court sentenced Porter to fifteen years on each of the three Class B felony convictions, and three years on the Class D felony resisting law enforcement. The court determined that the auto theft conviction merged into the robbery conviction and imposed no sentence on that count. The trial court then ordered all the sentences be served consecutively, for an aggregate term of forty-eight years.

On July 8, 2005, Porter filed a pro se petition for post-conviction relief. On August 26, 2005, Porter filed both a pro se petition appointment of local counsel and a pro se motion to withdraw his petition for post-conviction relief. The trial court granted the motion to withdraw the PCR petition on September 19, 2005, and granted the request for counsel on October 19, 2005. On January 11, 2006, Porter filed his petition to file a belated notice of appeal, which the trial court granted without a hearing two days later.

Discussion and Decision

I. Cross-Appeal¹

In its cross-appeal, the State asserts that the trial court abused its discretion when it granted Porter's January 11, 2006 motion for permission to file a belated notice of appeal. In particular, the State maintains that Porter did not allege, and the trial court did not make specific findings, that Porter was (1) without fault in the delay, and (2) diligent in requesting permission to file a belated notice of appeal.

¹Because the issue raised by the State on cross-appeal implicates this court's jurisdiction, we address that issue first. See Hull v. State, 839 N.E.2d 1250, 1253 n.1 (Ind. Ct. App. 2005).

Indiana Post-Conviction Rule 2, which permits a defendant to seek permission to file a belated notice of appeal, provides in part:

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.

Ind. Post-Conviction Rule 2(1) (Supp. 2006).

Although there are no set standards defining delay and each case must be decided on its own facts, a defendant must be without fault in the delay of filing the notice of appeal. Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). Factors affecting this determination include the defendant's level of awareness of his or her procedural remedy, age, education, familiarity with the legal system, whether he or she was informed of his or her appellate rights, and whether he or she committed an act or omission that contributed to the delay. Id.

Whether a defendant is responsible for the delay is generally a matter for the trial court's discretion. Id. Where, as here, the trial court does not hold a hearing before granting or denying a petition to file a belated notice of appeal, the only bases for that

decision are the allegations contained in the motion to file a belated notice of appeal. Hull v. State, 839 N.E.2d 1250, 1253 (Ind. Ct. App. 2005). Because we are reviewing the same information that was available to the trial court, we owe no deference to its findings, and review the grant of Porter's motion de novo. Id.

The trial court granted the motion without a hearing and without making specific findings. We note that the statute does not require a court to do so. However, we believe the better practice for trial courts in these situations would be to conduct a hearing in order to make a better-informed determination of a defendant's lack of fault and diligence. Here, contrary to the State's contention, Porter did allege in his petition to file belated notice of appeal both that he was without fault and that he was diligent in pursuing a belated appeal. Appellant's App. p. 107. As such, we will address the merits of his appeal.

II. Inappropriate Sentence

Porter contends that his aggregate forty-eight year sentence is inappropriate. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2005); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied.

The record before us reveals that Porter broke into the Gonzalez home in the middle of the night, forced the family into the bathroom, and stole their property, including the family pet. In an attempt to evade arrest, he then caused a three-vehicle

accident in which the Gonzalez puppy was killed. In addition, Porter was convicted of burglary and robbery in 1997, and had been on parole for less than a year when he committed the crimes at issue here. In light of the nature of the offenses and Porter's character, we cannot conclude his enhanced and consecutive sentences are inappropriate.

Conclusion

The trial court did not abuse its discretion when it granted Porter permission to file a belated notice of appeal. Porter's sentence is not inappropriate.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.