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IN THE
COURT OF APPEALS OF INDIANA

JESSE L. WHITFIELD,	)	
	)	
Appellant-Defendant	)	
	)	
vs.	)	No. 03A01-0511-PC-501
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0209-FA-1344 & 03D01-0504-PC-699

October 23, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

In 2003, Jesse Whitfield ("Whitfield") pled guilty in Bartholomew Superior Court to Class B felony child molestation and was sentenced to serve eighteen years. In 2005, Whitfield filed a petition for permission to file a belated notice of appeal. The trial court denied Whitfield's petition without a hearing. Whitfield appeals and raises several issues in his brief. However, the only issue properly before us is whether the trial court properly denied Whitfield's petition to file a belated notice of appeal.[1] Concluding that Whitfield was not at fault for failing to file a timely notice of appeal and that he requested permission to file a belated notice of appeal with the required diligence, we reverse.

Facts and Procedural History

On October 9, 2003, Whitfield pled guilty to Class B felony child molestation in an "open plea" that capped his sentence at twenty years. At the guilty plea hearing, Whitfield was informed that by pleading guilty to a Class B felony, he could receive a sentence anywhere from six to twenty years, with the presumptive sentence being ten years. After reviewing the Presentence Investigation Report and finding that the aggravating factors outweighed the mitigating factors, the trial court sentenced Whitfield to eighteen years in the Department of Correction with no time suspended.

On April 29, 2005, Whitfield filed a pro se petition for post-conviction relief, claiming that the trial court improperly enhanced his sentence by including aggravating factors that were not determined by a jury. Appellant's App. p. 168. On June 9, 2005, Whitfield filed a pro se motion to withdraw his petition for post-conviction relief without

[1] As the State has no objection to Whitfield being represented by the Bartholomew County Public Defender's Office, we will not address this issue raised by petitioner. Furthermore, we will not address the merits of petitioner's Blakely claim at this time as the dispositive issue is whether the trial court improperly denied Whitfield's petition to file a belated notice of appeal.

prejudice, and at the same time, he filed a pro se petition for appointment of local counsel to aid him with proceedings under Indiana's Post-Conviction Rule 2. The trial court denied Whitfield's petition to file a belated appeal without hearing on September 20, 2005. Whitfield's counsel then filed a motion asking for clarification of the trial court's order. On November 7, 2005, the trial court issued an order clarifying its previous order by finding no grounds to permit the filing of a belated notice of appeal. Whitfield now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Whitfield argues that he qualifies under Post-Conviction Rule 2 to file a belated notice of appeal. Specifically, he contends that he was both diligent with his notice and not at fault for failing to file a timely notice of appeal given his limited understanding of the legal process and his rights. Br. of Appellant at 7. In response, the State contends that Whitfield was advised of his right to appeal his sentence at the guilty plea hearing and that he was not diligent in filing his petition for permission to file a belated appeal. Br. of Appellee at 6.

Our Supreme Court held in Collins v. State, 817 N.E.2d 230, 232 (Ind. 2004) that a defendant must challenge a sentence imposed upon an open plea by means of a direct appeal, or if the time for filing a direct appeal has run, a defendant may seek permission to file a belated direct appeal under Post-Conviction Rule 2. This rule 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.

Ind. Post-Conviction Rule 2 (2006).

We review the question of Whitfield's petition to review his sentence de novo under Post-Conviction Rule 2 because the trial court did not hold a hearing on the matter. Therefore, we owe no deference to its findings. Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005).

First, we must examine whether Whitfield was at fault in failing to file a timely notice of appeal. "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. at 224.

At his plea hearing on October 9, 2003, Whitfield asked the judge, "Well, what is an appeal?" Tr. p. 6. After the trial court explained that an appeal was having another court review the decision, Whitfield asked, "Well, can I still have a plea bargain?" Tr. p. 6. The trial court then told Whitfield that his plea bargain would preclude him from appealing any issues except for the fairness of his sentence. However, during the sentencing hearing, which took place on November 5, 2003, the trial court failed to explain to Whitfield that he maintained the right to appeal his sentence and that he had a right to appointed counsel to represent him on appeal. See Tr. pp. 19-41. Thus, the trial court provided insufficient guidance to Whitfield on what claims he could raise on appeal after pleading guilty.

In addition, the Presentence Investigation Report states that Whitfield has a learning disability and an IQ of only 77. Appellant's App. p. 260. He quit school at the age of 16 to work, and he continues to have problems with reading and writing. Id. Given Whitfield's diminished capacity, his obvious confusion with the legal process, and the trial court's failure to inform him of the claims he could raise on appeal, we conclude that Whitfield was not at fault in failing to file a timely notice of appeal.

The second consideration under Post-Conviction Rule 2 is whether Whitfield was diligent in requesting permission to file a belated notice of appeal. As our Supreme Court noted in Kling v. State, 837 N.E.2d 502, 509 (Ind. 2005), "Collins resolved a conflict in earlier Court of Appeals' opinions regarding whether such a defendant could include a sentencing challenge in a [post conviction] petition, and some delay may be attributable to the prior uncertainty in the law rather than the defendant's lack of diligence." As Collins was handed down on November 9, 2004, and Whitfield filed his pro se petition challenging the validity of his sentence in April, merely five months after the Collins decision, we find this delay to be reasonable given the uncertainty of the law. Under these facts and circumstances, we conclude that Whitfield was diligent in pursuing his claim.

Whitfield's failure to file a timely notice of appeal was not due to his own fault, and he pursued permission to file a belated notice of appeal with the required diligence. Therefore, the trial court improperly denied his petition.

Reversed.

FRIEDLANDER, J., concurs.

BARNES, J., dissents with separate opinion.

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STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BARNES, Judge, dissenting with separate opinion

I respectfully dissent. I disagree with the majority's conclusions that Whitfield was not at fault for failing to file a timely notice of appeal and that Whitfield was diligent in pursuing his claim.

Initially, I point out that a successful belated appeal petitioner must prove by a preponderance of the evidence that he or she is entitled to relief. See Townsend v. State, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), trans. denied. Further, our review of the trial court's denial of Whitfield's petition is de novo because the only basis for the trial court's decision was that contained in the paper record attached to his petition on appeal. See Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). On appeal, we review the same information that was available to the trial court. See id.

Attached to Whitfield's motion were several exhibits, including his plea offer, his written waiver of rights, the sentencing order, his petition for post-conviction relief, the finding of indigency, correspondence from the Indiana Public Defender's office, his petition for appointment of local counsel, his petition to withdraw his petition for post-conviction relief, and various trial court orders. These exhibits provide little insight as to whether the failure to file a timely notice of appeal was Whitfield's fault and whether Whitfield had been diligent in requesting permission to file a belated notice of appeal.

Nevertheless, in his motion to the trial court, Whitfield concedes that at the guilty plea hearing the trial court advised him "that he had not in fact given up his right to appeal the sentence . . . ." App. pp. 106-07. At the guilty plea hearing, the following colloquy took place:

> [Court]: If you were to have a trial and if you were to be found guilty at the trial instead of pleading guilty today, you would have the right to file an appeal in that case to either that Court of Appeals or the Supreme Court of this State. Do you understand that?
>
> [Whitfield]: Yes. Well what is an appeal?
>
> [Court]: I'm sorry?
>
> [Whitfield]: What does that mean? The appeal.
>
> [Court]: The appeal. Well if you think somebody did something wrong usually the Court and you didn't think they did the right thing, you could have another Court review and decide whether you were right or not.
>
> [Whitfield]: Well can I still have a plea bargain?
>
> [Court]: Well you are . . , once a person pleads guilty, if you believe mistakes were made other than the sentence itself, you give up the right of any plea . . . or appeal. Okay

> now if you don't think the sentence that the Court may give you at some point, if we ever get there, then yes. You can appeal the sentence. But you would be giving up the right to appeal other kinds of mistakes. Do you understand that?
>
> [Whitfield]: Yeah. I understand now.

Tr. pp. 6-7 (emphasis added).

Even assuming Whitfield's "lack of mental ability and limited understanding of the process" was supported by evidence properly submitted to the trial court, I believe the trial court's advisement at the guilty plea hearing alone was sufficient to inform Whitfield of his right to appeal his sentence. App. p. 107. In my opinion, no subsequent reminder of Whitfield's right to appeal his sentence was necessary. Given that Whitfield was specifically advised of his right to appeal during the guilty plea hearing, I am not convinced that the failure to file a timely notice of appeal was not Whitfield's fault.

Further, I am not convinced that Whitfield has been diligent in requesting permission to file a belated notice of appeal pursuant to Post-Conviction Rule 2. Indeed, the procedure for belatedly challenging a sentence imposed following a guilty plea was not clear until our supreme court decided Collins. However, I do not believe that Whitfield's delay in challenging his sentence was based on his decision to await the resolution of Collins, which specifically explained that the proper procedure for belatedly challenging a sentence is to file a petition for permission to file a belated notice of appeal and not to file a petition for post-conviction relief. See Collins, 817 N.E.2d at 233. On April 29, 2005, several months after Collins was handed down and in direct conflict with the holding in Collins, Whitfield filed a petition for post-conviction relief. It was not until June 9, 2005, that Whitfield moved to withdraw his petition for post-conviction

relief. After that, Whitfield subsequently sought permission to file a belated notice of appeal pursuant to Post-Conviction Rule 2. Thus, Whitfield was not guided by Collins when he filed his petition for post-conviction relief.

Moreover, I cannot overlook the fact that Whitfield first challenged his sentence in April 2005, almost a year and half after the November 5, 2003 sentencing hearing. I do not agree with the majority that Whitfield was diligent in requesting permission to file a belated notice of appeal.

I do not believe that Whitfield established by a preponderance of the evidence that the failure to file a timely notice of appeal was not his fault and that he was diligent in requesting permission to file a belated notice of appeal. For these reasons, I vote to affirm the trial court's denial of Whitfield's request to file a belated notice of appeal.