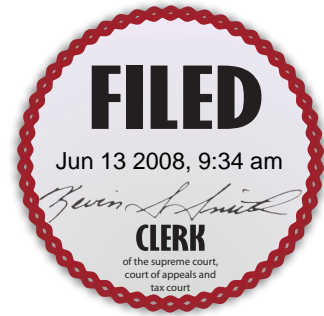


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN KORP,)
)
 Appellant-Defendant,)
)
 vs.) No. 75A03-0803-CR-98
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Kim Hall, Judge
Cause No. 75C01-0605-FC-20

June 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

John Korp appeals from the trial court's denial of his petition for leave to file a belated notice of appeal. He presents a single dispositive issue for our review, namely, whether the trial court abused its discretion when it denied his petition.

We reverse and remand with instructions.

STATEMENT OF THE CASE

On April 27, 2007, Korp was convicted of Child Molesting, as a Class C felony, following a jury trial, and the trial court sentenced him accordingly on May 22, 2007. During the sentencing hearing, the trial court informed Korp, who was represented by counsel, that he had thirty days to file a notice of appeal. Korp stated that he "hoped" that his trial counsel would represent him on appeal, but that was uncertain. Accordingly, the trial court informed Korp as follows:

Well, if you are financially unable to employ an attorney, the Court will appoint counsel for you at public expense for the purpose of filing a motion to correct error[] and for taking an appeal. But nothing for me to do today on that issue. If you wish to take an appeal, you must file a notice of appeal designating what is to be included in the record on appeal within 30 days after the sentencing hearing or within 30 days after the motion to correct error[] is denied. If the notice of appeal is not timely filed, the right to appeal may be forfeited.

Transcript of Sentencing Hearing at 27 (emphasis added). Korp told the trial court that he understood those advisements.

Korp's trial counsel had already informed Korp and Korp's family members that he would not represent Korp on appeal if his fees for the trial were not paid. Following sentencing, on May 29, trial counsel met with Korp and reiterated that there was a thirty-day deadline to file an appeal and that he would not represent Korp on appeal without

first being paid for accrued attorney's fees. On June 1, trial counsel sent Korp's mother and sister a letter informing them of the same. On June 19, the day before the thirty-day deadline, Korp's mother telephoned trial counsel and asked whether he would represent Korp on appeal in exchange for partial payment of his attorney's fees. Trial counsel declined that offer.

Korp did not timely file an appeal, and on August 15, he wrote a letter to the trial court requesting indigent counsel for the purpose of filing an appeal. Following a hearing on September 10, the trial court appointed counsel for Korp. And on October 9, Korp filed a petition requesting permission to file a belated notice of appeal. The State filed a response in opposition to that petition, and the trial court denied the petition following a hearing. This appeal ensued.

DISCUSSION AND DECISION

Indiana Appellate Rule 9 governs the initiation of an appeal and provides:

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. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court's ruling on such motion

Ind. Appellate Rule 9(A)(1). The rule also provides, "Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided in [Post-Conviction Rule] 2." Id. at 9(A)(5). Post-Conviction Rule 2(1) provides in relevant 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.

P-C.R. 2(1).

Korp has the burden of proving his grounds for relief by a preponderance of the evidence. See Beaudry v. State, 763 N.E.2d 487, 489-90 (Ind. Ct. App. 2002).

Deciding whether the defendant is responsible for the delay is within the trial court's discretion. A defendant must be without fault in the delay of the filing. There are no set standards defining delay or diligence; each case must be decided on its own facts. Factors affecting the determination 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. at 490 (quoting Tolson v. State, 665 N.E.2d 939, 942 (Ind. Ct. App. 1996)).

Here, at sentencing, the trial court initiated a Criminal Rule 11 inquiry, including asking whether Korp wanted to pursue an appeal and whether he needed an attorney. Korp stated that he wished to file an appeal and that he "hoped" his trial counsel would represent him on appeal. The following colloquy took place:

COURT: And then, Mr. Korp, do you have an attorney for your appeal yet?

KORP: Well I'm hoping it's Mr. Allen. If not, no, I don't.

COURT: Okay. Well, if you are financially unable to employ an attorney, the Court will appoint counsel for you at public expense for the purpose of . . . taking an appeal. But nothing for me to do today on that issue. . . .

Sentencing Transcript at 27 (emphasis added). After Korp's response that he was "hoping" to hire private counsel, the trial court did not inquire whether Korp had

sufficient funds to hire private counsel, as required by Criminal Rule 11. And Korp did not request pauper counsel at that time.

At the hearing on his petition for permission to file a belated notice of appeal, Korp testified that during the thirty days after the sentencing hearing, he was relying on his mother and sister to pay his trial counsel so that he could timely file an appeal. As soon as Korp learned that they had been unable to secure his trial counsel's services on appeal, he asked the trial court to appoint pauper counsel. While this was not Korp's first contact with the criminal justice system, he testified that he was "not really" familiar with the legal system. Transcript of Hearing on Petition to File Belated Notice of Appeal at 10. And he testified that someone helped him write the letter to the trial court requesting pauper counsel.

We conclude that Korp was diligent in requesting pauper counsel only two months after the deadline had expired and in promptly requesting permission to file a belated notice of appeal thereafter. Korp has demonstrated that he made a good faith and timely attempt to retain private counsel and that only after that attempt had failed did he request the appointment of pauper counsel to perfect an appeal. Under these circumstances, including the trial court's incomplete Criminal Rule 11 advisement at sentencing, we conclude that Korp was not at fault in failing to timely file a notice of appeal, and he was diligent in requesting permission to file a belated notice of appeal. See P-C.R. 2(1). We reverse the trial court's denial of Korp's petition for permission to file a belated notice of appeal and remand with instructions to permit the belated notice of appeal.

Reversed and remanded with instructions.

DARDEN, J., and BROWN, J., concur.