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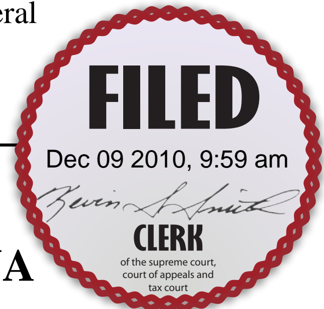

IN THE
COURT OF APPEALS OF INDIANA

JAMES A. BRIDGES,	)	
	)	
Appellant-Defendant/Cross-Appellee,	)	
	)	
vs.	)	No. 49A02-1003-CR-373
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff/Cross-Appellant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Linda Brown, Judge
Cause No. 49F10-9402-CM-21499

December 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issue

This case addresses the question of whether a driver who looks, smells, and acts drunk can be convicted of operating a vehicle while intoxicated ("OWI") without a chemical test result to verify his drunkenness. Late one night, an Indianapolis police officer arrived at the scene of an auto accident and saw a vehicle that had collided with a parked car. The driver of the moving vehicle was near his vehicle, and the officer noticed that he smelled of alcohol and had slurred speech and bloodshot eyes. The driver failed all of the sobriety tests at the scene. He agreed to undergo a chemical intoxication test at the police station, but was uncooperative during the test.

The driver, James A. Bridges, was tried and convicted of class A misdemeanor OWI. He now appeals, challenging the sufficiency of evidence to support his conviction. The State cross-appeals, arguing that the trial court erred in granting Bridges's motion for belated appeal. We affirm.

Facts and Procedural History

At 11:30 p.m. on February 25, 1994, Indianapolis Police Officer Christopher Smith responded to a dispatch indicating a two-vehicle injury accident. He proceeded directly to the scene, where he observed a vehicle that had hit a parked car. He observed Bridges outside the vehicle, and Bridges told him that his vehicle had malfunctioned and swerved into the parked car. Officer Smith was trained in detecting signs of intoxication. He noticed that Bridges had bloodshot eyes and slurred speech. He also noticed the strong smell of alcohol on Bridges's breath. He administered three field sobriety tests and a portable breath test, all

of which Bridges failed. Bridges agreed to accompany Officer Smith to the police station for a chemical breath test. However, he was uncooperative during the administration of the test, and a valid result could not be obtained.

On February 28, 1994, the State charged Bridges with class A misdemeanor OWI and class C misdemeanor operating a vehicle without proof of financial responsibility. Bridges failed to appear for his September 22, 1994 trial. Instead, he left the state. In September 2009, he returned to Indiana, and when he applied for employment, the prospective employer found an outstanding warrant for his arrest. On January 20, 2010, Bridges received a bench trial on the 1994 charges. That same day, the trial court found Bridges guilty of OWI and not guilty of operating a vehicle without proof of financial responsibility.

On March 1, 2010, Bridges filed a petition for permission to file a belated appeal. The trial court granted his petition without a hearing, and Bridges filed this belated appeal on March 31, 2010. The State cross-appeals, asserting that Bridges's belated appeal should be dismissed for insufficient proof that he was diligent and not at fault for the delay in filing an appeal. Additional facts will be provided as necessary.

Discussion and Decision

I. Belated Appeal

The State contends that the trial court abused its discretion in granting Bridges's petition for permission to file a belated notice of appeal. The decision to grant a petition for permission to file a belated notice of appeal is a matter within the trial court's discretion. *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), *trans. denied*. As such, we

typically review the decision for an abuse of discretion. *Id.* However, in cases where the allegations contained in the petition itself provide the only basis in support of such petition, we review the decision de novo. *Id.* Here, we note that Bridges did not file a reply brief in response to the State's cross-appeal. As such, we review the issue using a prima facie error standard. *Id.* Prima facie means, "at first sight, on first appearance, or on the face of it." *Id.* (citation and quotation marks omitted).

Pursuant to Indiana Appellate Rule 9(A), a defendant has thirty days from the date of the entry of final judgment to file a notice of appeal. If he fails to make a timely filing, his right to appeal is forfeited unless sought pursuant to Indiana Post-Conviction Rule 2, which states in pertinent part,

> 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.

Ind. Post-Conviction Rule 2(1)(a).

If the aforementioned "requirements … are met, the trial court *shall* permit the defendant to file the belated notice of appeal. Otherwise, it *shall* deny permission." Ind. Post-Conviction Rule 2(1)(c) (emphases added). The defendant/petitioner bears the burden of proving by a preponderance of evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated notice of appeal. *Moshenek v. State*, 868

N.E.2d 419, 422-23 (Ind. 2007). There are no set standards of what constitutes fault or diligence; rather, each case turns on its own facts. *Id*. at 423. Factors relevant to determining diligence and lack of fault include: "the defendant's 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." *Ricks v. State*, 898 N.E.2d 1277, 1280 (Ind. Ct. App. 2009).

Here, Bridges filed his petition for permission to file a belated appeal ten days after the expiration of the thirty-day time limit. As such, he bore the burden of proving that his failure to file a timely appeal was not attributable to any fault or lack of diligence on his part. In his petition, he specifically requested a hearing before the trial court "to clarify" and "to make certain the record regarding [his] diligence and lack of fault in this matter is clear to the appellate court." Appellant's App. at 24. Nevertheless, the trial court granted his petition *without* a hearing. Thus, on the record before us, it is impossible to tell whether Bridges was at fault and lacked diligence. Indiana Post-Conviction Rule 2 does not specifically require that a hearing be held, but where the record is relatively undeveloped regarding diligence and lack of fault, a hearing is the only means of determining whether a defendant is entitled to file a belated notice of appeal. *See Welches v. State*, 844 N.E.2d 559, 562 (Ind. Ct. App. 2006) (holding that hearing was warranted on petition for belated appeal where record was undeveloped regarding defendant's diligence and lack of fault and where trial court's advisements affected such determination). Here, the record is relatively undeveloped regarding Bridges's diligence and lack of fault, and he specifically requested a hearing.

Under these circumstances, a hearing should have been granted, and thus it would be permissible for us to remand for a hearing. *See Ricks*, 898 N.E.2d at 1280 (holding that trial court erred in granting defendant's petition for belated appeal without hearing, but remanding for hearing to determine fault/diligence). However, in the interest of judicial economy, we address the merits of Bridges's appeal.

II. Sufficiency of Evidence

Bridges contends that the evidence is insufficient to sustain his OWI conviction. When reviewing sufficiency claims, we neither reweigh evidence nor judge witness credibility. *Fields v. State*, 888 N.E.2d 304, 307 (Ind. Ct. App. 2008). Rather, we consider only the evidence and reasonable inferences most favorable to the judgment. *Id*. We will affirm if there is probative evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id*.

To establish that Bridges committed class A misdemeanor OWI, the State was required to establish beyond a reasonable doubt that he (1) operated a vehicle, (2) while intoxicated. Ind. Code § 9-30-5-2 (1994). Bridges challenges the sufficiency of the evidence supporting the intoxication element. A person is intoxicated if he is under the influence of alcohol or other intoxicants to the extent "that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." Ind. Code § 9-13-2-86. To establish impairment, the State can use evidence of: "(1) the consumption of a significant amount of alcohol; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of alcohol on the breath; (5) unsteady balance; (6) failure of field sobriety tests; and

(7) slurred speech." *Vanderlinden v. State*, 918 N.E.2d 642, 644 (Ind. Ct. App. 2009), *trans. denied* (2010).

Here, Officer Smith was a veteran of the police force and had worked specifically with the OWI enforcement branch. He had received training in detecting intoxication through both the police force and medic school. When he arrived at the scene of the accident, he described Bridges as smelling of alcohol and having bloodshot eyes and slurred speech. When he administered three field sobriety tests at the scene, Bridges failed them all.

To the extent Bridges claims that the lack of a conclusive result on the chemical intoxication test amounts to insufficient evidence, we note that proof of intoxication may be established by a showing of impairment and that under Indiana law, there is no statutory requirement of proof of a particular blood-alcohol content above which a person is intoxicated. *Monjar v. State*, 876 N.E.2d 792, 798 (Ind. Ct. App. 2007), *trans. denied* (2008). We also note that such claim goes to the weight of the evidence, *Vanderlinden*, 918 N.E.2d at 644, and we decline Bridges's invitation to reweigh evidence. In sum, the evidence and inferences most favorable to the judgment are sufficient to support Bridges's OWI conviction. Accordingly, we affirm.

Affirmed.

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