

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.

APPELLANT PRO SE:

ROBERT CLARK
Bunker Hill, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT CLARK,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

)
)
)
)
)
)
)
)
)
)
)

No. 18A02-0612-PC-1123

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18D02-9110-CF-65

September 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

In this pro se appeal, Appellant-Petitioner, Robert Clark, appeals the trial court's denial of his petition for a belated appeal. We affirm.

FACTS

Our February 6, 2004 opinion in Clark's appeal of his probation revocation is instructive as to the underlying facts of this case:

On February 27, 1992, Clark entered a plea of guilty to one count of burglary, as a Class C felony, and one count of theft, as a Class D felony. On May 7, 1992, the trial court sentenced Clark to consecutive terms of eight years for the burglary count and three years for the theft count. Prior to sentencing, Clark petitioned for and was accepted into a program through the Indiana Department of Mental Health (DMH) for drug and alcohol treatment in lieu of sentencing. Accordingly, at his sentencing hearing, the trial court suspended Clark's aggregate sentence of eleven years, and placed him on probation for eleven years. In lieu of imprisonment, the trial court ordered the Delaware County Sheriff to deliver custody of Clark to the DMH at Richmond State Hospital to begin his treatment program. In addition, the trial court ordered Clark to comply with the treatment program and to abide by the rules of the DMH.

However, on July 17, 1992, the director of the treatment program at Richmond State Hospital notified Stephen Sarris, the director of the Criminal Justice Program of the DMH (DMH Director Sarris), by letter that Clark failed to comply with the rules of the DMH and had, in fact, left Richmond State Hospital the previous day. On July 23, 1992, DMH Director Sarris, in turn, filed the letter, along with other documentation in support of Clark's alleged violation, with the trial court. DMH Director Sarris also wrote a letter to the trial court, included with the materials filed on July 23rd, in which he requested "some other disposition" for Clark's case. On July 27, 1992, the trial court issued a warrant for Clark's arrest.

Clark remained a fugitive until March 7, 2003. The trial court conducted an initial hearing on the revocation of Clark's probation on May 22, 2003. On July 3, 2003, subsequent to a hearing on Clark's alleged violations of probation, the trial court found Clark in violation of his conditions of probation, revoked his probation, and ordered execution of his aggregate sentence of eleven years at the Indiana Department of Correction.

Clark v. State, No. 18A02-0307-CR-594 (Ind. Ct. App. Feb. 6, 2004) (record citation omitted). In Clark's direct appeal of his probation revocation, he also sought to challenge

the original sentence imposed by the trial court. This court, in declining to review his challenge in the context of an appeal of a probation revocation, indicated that in order to pursue a challenge to his original sentence, Clark needed to have filed a timely notice of appeal or, to the extent the claimed sentencing error was an alleged consequence of ineffective assistance of counsel, challenge it in a petition for post-conviction relief. *Id.*

On December 30, 2004, Clark requested permission from this court to file a belated notice of appeal, which we denied. *See Clark v. State*, 18A02-0511-PC-1088 (Ind. Ct. App. Sept. 26, 2006). Clark filed a petition for post-conviction relief on January 11, 2005, which was denied on October 27, 2005. *See id.* This court, in affirming the denial of his petition for relief, held that Clark's direct challenge to his sentence could not be pursued in a petition for post-conviction relief. *See id.* We further held that, in light of Clark's failure to file a timely notice of appeal in 1992, if Clark wished to challenge his sentence, he needed to request permission to file a belated notice of appeal from the trial court. *Id.* (citing Ind. Post-Conviction Rule 2(1)).

On October 18, 2006, Clark filed a petition for permission to file a belated notice of appeal. The trial court held a hearing on November 16, 2006, after which it denied Clark's motion. This appeal follows.

DISCUSSION AND DECISION

Indiana Post-Conviction Rule 2(1) provides the following 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.

We will affirm a trial court's ruling on a petition for permission to file belated notice of appeal unless it was based on an error of law or a clearly erroneous factual determination. *Moshenek v. State*, 868 N.E.2d 419, 423-24 (Ind. 2007). Whether the petitioner has established by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated notice of appeal is a matter within the trial court's discretion. *Id.* at 422-23. There are no set standards defining delay or diligence, and each case must be decided on its own facts. *Id.* at 423. 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.*

In denying Clark's petition for request to file a belated notice of appeal, the trial court focused upon Clark's lengthy absence from the jurisdiction:

At this particular time, Mr. Clark, the Court's position would be that pursuant to section one under the belated notice of appeal, the failure to file a timely notice of appeal was due to your fault. You were the one who was absenting yourself from the jurisdiction of the Court and from the State. The total failure is yours. The fault is yours and no one else. So the Court would deny your Motion. And at this particular time then, you [will] be remanded to the custody of the Sheriff for transmittal to the Indiana Department of Correction.

Petition for Belated Appeal Tr. at 14.

In contesting the trial court's denial of his request for permission to file a belated notice of appeal, Clark focuses upon the facts that he was not informed of his right to appeal his sentence and that he was in custody during the thirty days following his sentence, suggesting that the fact of his failure to file a timely notice of appeal was not his fault.

Even if Clark's failure to file a timely notice of appeal was not his fault, under Post-Conviction Rule 2(1), he still must demonstrate that he was diligent in pursuing a belated appeal. *Moshenek*, 868 N.E.2d at 420. Clark does not dispute that he was released from custody on approximately June 10, 1992, and that he proceeded to violate his probation by "walking away" from his drug treatment facility shortly thereafter. Appellant's Brief at 2. He further does not dispute that, having "walked away" and absented himself from the jurisdiction for the next eleven years, he made no effort to pursue a belated appeal during that time. In light of his absence and failure to pursue a belated appeal for at least the first eleven years following his sentence, the trial court was within its discretion to determine that Clark had not satisfied the requirements of Post-Conviction Rule 2(1) in order to pursue a belated appeal. Such an eleven-year span of inaction demonstrates a lack of diligence, and we therefore find no clear error in the trial court's denial of Clark's petition for permission to pursue a belated appeal. *See Moshenek*, 868 N.E.2d at 424.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.