

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.

ATTORNEY FOR APPELLANT:

MONTY B. ARVIN
Kokomo, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LARRY E. HOUNCHELL, JR.,)

Appellant-Defendant,)

vs.)

No. 34A02-0603-CR-238

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
Cause No. 34C01-9907-CF-191

October 23, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Larry Houchell (“Houchell”) appeals his sentence after a guilty plea in Howard Circuit 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 erred when it allowed Houchell’s belated notice of appeal. Concluding the trial court erred when it granted Houchell’s petition for permission to file a belated notice of appeal, we dismiss.

Facts and Procedural History

On November 15, 1999, Houchell pleaded guilty to murder, Class A felony criminal deviate conduct, Class A felony burglary, two counts of Class B felony robbery, and Class B felony conspiracy to commit robbery. The trial court conducted a sentencing hearing on December 14, 1999 and sentenced Houchell to an aggregate term of one hundred forty-five years.

On November 31, 2000, Houchell filed a petition for sentence reduction, which the trial court denied on January 31, 2001. Some five years later, on February 2, 2006, Houchell filed a motion for permission to file a belated notice of appeal. The trial court granted the motion the same day without conducting a hearing. Houchell then filed his belated notice of appeal on February 22, 2006.

Discussion and Decision

In its cross-appeal, the State asserts that the trial court erred when it granted Houchell’s February 2, 2006 motion for permission to file a belated notice of appeal.

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 decision, and review the grant of Houchell's motion de novo. Id.

The State acknowledges that Houchell may have been without fault for not timely filing his notice of appeal because the trial court did not advise him of his appeal rights, but points out that nowhere in his petition did Houchell provide any information on his diligence. Thus, Houchell clearly and wholly failed to establish both requirements of Post-Conviction Rule 2(1) by a preponderance of the evidence. As such, the trial court erred when it granted Houchell permission to file a belated appeal. See Townsend v. State, 843 N.E.2d 972, 975 (Ind. Ct. App. 2006).

Dismissed.

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