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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER BARGHOLZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A05-0609-CR-483
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Robert Gilmore, Judge
Cause No. 46C01-0411-FA-547

November 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Christopher Bargholz ("Bargholz") brings this pro se appeal challenging his sentencing, pursuant to a guilty plea, for aiding, inducing or causing burglary, as a class B felony. The State cross-appeals that Bargholz's claim should be dismissed as an improper attempt to pursue a belated appeal.

We dismiss.

ISSUE[1]

Whether Bargholz's appeal should be dismissed as an improper attempt to pursue a belated appeal.

FACTS

On November 21, 2004, Bargholz and David McIntosh, one of them armed with a knife, robbed the LaPorte County home of Nick Searles and Jenna Smith. During the robbery, Searles sustained serious bodily injury at the hand of either Bargholz or McIntosh. On November 24, 2004, the State charged Bargholz with two counts of class A felony aiding, inducing or causing robbery. On May 13, 2005, Bargholz agreed to plead guilty to one count of aiding, inducing, or causing robbery, as a class B felony.

At Bargholz's sentencing hearing on August 26, 2005, the trial court imposed a twenty-year sentence in the Department of Correction, and ordered five years of the sentence suspended to probation. On July 24, 2006, Bargholz filed a verified petition to file belated notice of appeal, wherein he argued that he "was not aware that he was

[1] Bargholz also argues that his sentence violated his Sixth Amendment right to trial by jury; however, because we find the State's issue on cross-appeal to be dispositive, we do not reach the merits of Bargholz's argument.

entitled to appeal his sentence as the court mislead [sic] him to believe he was giving up **ALL** appeal rights when he entered a plea of guilty." (Bargholz's App. 21) (emphasis in original). The record contains no order from the trial court granting Bargholz's petition. On December 15, 2006, a panel of this court dismissed Bargholz's appeal. On January 12, 2007, Bargholz filed, and was granted a petition for rehearing. On February 5, 2007, the notice of completion of clerk's record was filed indicating that the transcript was not yet completed. On February 26, 2007, an amended notice of completion of clerk's record was filed indicating that there was no transcript to prepare.

Additional facts will be provided below as necessary.

DECISION

On cross-appeal, the State argues that Bargholz's appeal should be dismissed as an improper attempt to pursue a belated appeal. Specifically, the State argues that Bargholz has not demonstrated that he is entitled to permission to file a belated notice of appeal, and moreover, that the record does not indicate that the trial court ever granted Bargholz such permission.

Generally, the trial court has discretion in reviewing a petition for permission to file a belated notice of appeal and its decision will not be disturbed unless an abuse of discretion is shown. *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Long v. State*, 867 N.E.2d 606, 618 (Ind. Ct. App. 2007). However, where, as here, the trial court does not conduct a hearing on a

petition for permission to file a belated appeal, we review a trial court's decision regarding the petition *de novo*. *Townsend,* 843 N.E.2d at 974.

Indiana Post-conviction Rule 2(1) 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 . . . . 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.

The petitioner must demonstrate by a preponderance of the evidence that he is entitled to the relief sought. Ind. Post-Conviction Rule 1(5). Thus, in a proper petition for a belated notice of appeal, the petitioner must demonstrate that he was without fault in any delay in filing the notice of appeal and further, that he was diligent in pursuing the appeal. *Townsend,* 843 N.E.2d at 974.

Bargholz has not met his burden. Pursuant to Indiana Appellate Rule 9, a notice of appeal must be filed within thirty days after the entry of a final judgment. Failure to timely file a notice of appeal is a jurisdictional bar that forfeits the right to appeal, except as provided by Post-Conviction Rule 2. Ind. Appellate Rule 9(A)(5); *Davis v. State*, 771 N.E.2d 647, 648-49 (Ind. 2002). Here, the trial court entered its final judgment on

August 26, 2005. Bargholz did not file his notice of appeal until July 24, 2006, long after the expiration of the thirty-day deadline.

Bargholz has presented no evidence to indicate that he attempted to seek relief from the trial court to excuse his failure to file the notice of appeal in a timely manner; nor does his belated notice of appeal establish good cause for that failure. Given the foregoing, and Bargholz's failure to demonstrate that the trial court granted him leave to file his petition for permission to file a belated notice of appeal, we are without jurisdiction to entertain his appeal. Thus, we must dismiss Bargholz's appeal.

Appeal dismissed.[2]

MAY, J., and CRONE, J., concur.

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[2] As an aside, we note that in his verified petition to file belated notice of appeal, Bargholz argues that he was misled into believing that he was giving up all appeal rights by pleading guilty, and thereby suggests that he was without fault in the delay of filing the notice of appeal; however, Bargholz neither asserts nor presents evidence to indicate that he was also diligent in pursing permission to file a belated motion to appeal. Our supreme court has recently held that

> [t]he fact that a trial court did not advise a defendant about [his right to challenge a sentence on appeal] can establish that the defendant was without fault in the delay of filing a timely appeal. However, a defendant must still establish diligence.

Moshenek v. State, 868 N.E.2d 419, 424 (Ind. 2007) (emphasis added). "Without any evidence regarding the two elements of [Post-Conviction Rule 2(1)], a petitioner cannot have met his burden of proof." *Townsend*, 843 N.E.2d at 975. Bargholz has not carried his burden.