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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT JACKEY,)
)
 Appellant-Defendant,)
)
 vs.) No. 48A04-0702-CR-95
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis Carroll, Judge
Cause No.48D01-9710-CF-272

December 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a jury trial, Robert Jackey appeals the trial court's denial of his motion to file a belated notice of appeal. This appeal raises the sole issue of whether the trial court acted within its discretion in denying this motion.¹ Concluding the trial court acted within its discretion, we affirm.

Facts and Procedural History

On January 21, 1999, a jury found Jackey guilty of two counts of dealing marijuana, both Class A misdemeanors; two counts of dealing a schedule IV controlled substance, both Class C felonies; dealing a schedule III controlled substance, a Class B felony; and dealing a schedule I controlled substance, a Class B felony. Jackey was present for most of his trial, but failed to appear for the reading of the jury's verdict. The trial court issued a warrant for Jackey's arrest. The following day, Jackey failed to appear for the enhancement portion of his trial, at which the jury found him guilty of two counts of dealing marijuana as Class D felonies and found him to be an habitual offender. On February 22, 1999, the trial court conducted a sentencing hearing, at which Jackey also failed to appear, and sentenced Jackey to three years for both counts of dealing marijuana; eight years for each count of dealing a schedule IV controlled substance; twenty years for dealing a schedule III controlled substance; and twenty years for dealing a schedule I controlled substance, enhanced by thirty

¹ Jackey also raises issues going to the merits of his sentencing claims. He may not raise these issues at this time. Cruite v. State, 853 N.E.2d 487, 491 n.4 (Ind. Ct. App. 2006), trans. denied. The only issue properly before this court is the trial court's denial of Jackey's petition to file a belated appeal. Id. (recognizing that Indiana Post-Conviction Rule 2 permits a defendant to appeal the denial of his motion within thirty days of the denial).

years for Jackey's status as an habitual offender, for a total sentence of fifty years. The trial court ordered all counts to run concurrent, except for the fifty-year sentence, which it ordered to run consecutively to the remaining counts, for an aggregate sentence of seventy years.

On March 23, 2000, Jackey was arrested. On September 8, 2000, Jackey filed a motion for appointment of appellate counsel. On September 12, 2000, the trial court denied this motion. On September 29, 2000, Jackey filed a petition for post-conviction relief. On October 25, 2000, the State filed a response to this petition. On May 27, 2006, Jackey's public defender withdrew her appearance. On June 13, 2006, Jackey filed a motion for leave to withdraw petition for post-conviction relief without prejudice. The trial court granted this motion the same day. On September 5, 2006, Jackey filed a pro se motion for correction of erroneous sentence. On October 27, 2006, the trial court denied this motion. On December 5, 2006, Jackey filed a pro se motion for leave to file a belated appeal. On December 6, 2006, the trial court denied this motion with the following entry:

As defendant acknowledges, and as the record herein discloses, defendant absconded and more than a year passed after his sentencing before he was arrested and took any action in this cause. Accordingly, defendant has missed, without legal justification or excuse, the 30 day deadline for appealing his sentence. Accordingly, defendant's exclusive remedy, if any be available, is through post conviction relief Rule 1.

Appellant's Appendix at 11. Jackey now appeals the trial court's denial of this motion.

Discussion and Decision

Although criminal defendants have a state constitutional right to appeal their convictions, such a right is not absolute, and may be waived by failure to file a notice of

appeal within the prescribed time. Clark v. State, 506 N.E.2d 819, 821 (Ind. 1987). Under Indiana Post Conviction Rule 2(1):

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.

These petitions should be decided on the specific facts and circumstances of the case. Cruite, 853 N.E.2d at 489. However, “a defendant must be without fault in the delay of filing the notice of appeal.” Id. A defendant has the burden of proving these factors by a preponderance of the evidence. Beaudry v. State, 763 N.E.2d 487, 489-90 (Ind. Ct. App. 2002). We review the trial court’s decision of whether to grant or deny permission to file a belated notice of appeal for abuse of discretion. Moshenek v. State, 868 N.E.2d 419, 422 (Ind. 2007).

Jackey was a fugitive during and well after the thirty-day period in which he was required to file his notice of appeal. See Ind. Appellate Rule 9(A) (indicating that a party must file its notice of appeal within thirty days of the entry of a final judgment). Under these circumstances, our supreme court has held that a trial court acts properly in denying a defendant’s motion for a belated appeal. Evolga v. State, 519 N.E.2d 532, 534 (Ind. 1988); Prater v. State, 459 N.E.2d 39, 41 (Ind. 1984) (recognizing that “extensions of time and belated appeals are provided for under appropriate circumstances, which do not include the revival of rights lost by voluntary acts”); see also Cruite, 853 N.E.2d at 489 (recognizing

that a factor affecting the determination of whether a petition to file a belated appeal should be granted is whether the defendant committed an act that contributed to the delay). We conclude the trial court acted within its discretion in denying Jackey's motion.

Conclusion

We conclude the trial court acted within its discretion in denying Jackey's motion to file a belated notice of appeal.

Affirmed.

KIRSCH, J., and BARNES, J., concur.