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IN THE
COURT OF APPEALS OF INDIANA

RICHARD DWENGER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0504-PC-231
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary Miller, Judge
Cause No. 49G05-9412-PC-173833

December 8, 2006

OPINION ON REHEARING - NOT FOR PUBLICATION

MAY, Judge

Richard Dwenger ("Petitioner") appealed the sentence imposed after his plea of guilty but mentally ill to one count of murder. On cross-appeal, the State asserted the trial court erred in granting Dwenger's petition for permission to file a belated notice of appeal. We determined Dwenger did not timely file a notice of appeal and had thereby forfeited his right to appeal unless he properly proceeded under the post-conviction rules. He had not proceeded under those rules; accordingly, we determined we had no jurisdiction to review Dwenger's appeal and we dismissed it. *Dwenger v. State*, No. 49A05-0504-PC-231 (Ind. Ct. App. August 10, 2006). Dwenger sought rehearing.

We grant rehearing, find the appeal should not have been dismissed, and address the merits of Dwenger's appeal.

FACTS

We set out the facts and procedural history of this case in *Dwenger*:

> The State charged Petitioner with one count of murder, a Class A felony on December 7, 1994. Ultimately, a plea agreement was filed and a plea hearing was held on September 15, 1995. Petitioner agreed to plead guilty but mentally ill to the crime of murder, and the State would ask for the presumptive sentence of, at that time, fifty years. The trial court accepted Petitioner's plea, and on October 13, 1995, sentenced Petitioner to a term of fifty years.
>
> On May 28, 2002, Petitioner filed a petition for post-conviction relief. On July 8, 2002, the Indiana State Public Defender appeared on Petitioner's behalf. On September 26, 2002, Petitioner filed a *pro se* petition for modification of sentence. On January 3, 2005, the Indiana State Public Defender filed a motion to dismiss Petitioner's petition for post conviction relief.
>
> On April 12, 2005, Petitioner filed a motion to file a belated notice of appeal. The trial court granted Petitioner's motion on April 18, 2005. Petitioner filed his belated notice of appeal on April 27, 2005. Petitioner now pursues this appeal.

DISCUSSION AND DECISION

1. Dismissal of Dwenger's Appeal

A trial court has discretion in reviewing a motion for permission to file a belated notice of appeal. *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), *trans. denied*. The trial court's decision in that regard will not be disturbed unless an abuse of discretion has occurred. *Id*. Our review on appeal is *de novo*, however, when the only bases in support of the motion are the allegations contained in the motion. *Id*.

Indiana Post-Conviction Rule 2(1) provides in relevant part as follows regarding belated notices of appeal:

> 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.

The petitioner in a post-conviction proceeding bears the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). Therefore, in a proper motion or petition for permission to file a belated notice of appeal, the petitioner must demonstrate that he was without fault in any delay in filing the notice

of appeal and that he was diligent in pursuing the appeal. *Townsend*, 843 N.E.2d at 974.

We noted in our original opinion that the only record regarding Dwenger's pursuit of a belated appeal via the rules for post-conviction relief appeared in the chronological case summary. There were no explicit findings to show the trial court considered Dwenger's diligence or fault, nor was there an order stating why the trial court granted Dwenger permission to file his belated notice of appeal. Absent any factual support for Dwenger's argument he was entitled to file a belated notice of appeal, we found dismissal of the purported belated appeal was appropriate.

That decision was incorrect to the extent it reflected an improper presumption the trial court erred when it granted Dwenger's motion to file a belated appeal.

As noted above, P-C.R. 2 provides certain defendants may petition for permission to file a belated notice of appeal where the failure to file a timely notice of appeal was not due to the fault of the defendant and the defendant has been diligent in requesting permission to file a belated notice of appeal. If the trial court finds grounds, it "shall" permit the defendant to file the belated notice of appeal. P-C.R. 2. Such a finding is within the trial court's discretion. *Townsend*, 843 N.E.2d at 974.

The State asserted in its cross-appeal that "[b]ecause there is no order from the trial court that in any way permits an inference that the trial court considered either of the two requirements before granting [Dwenger's] motion, the appeal should be dismissed as improperly filed." (Br. of Appellee at 9.) The State also noted the record does not include "an order of the trial court showing the reasons why [Dwenger's] petition to file a belated notice of appeal was granted or that a hearing was held in the matter." (*Id*. at 10.)

The State directed us to no authority to support its apparent premise that explicit findings or a formal hearing are required and we find no such requirement in the text of the rule. Rather, the rule requires only that the trial court "consider" the defendant's diligence and fault. We decline to presume from the absence of explicit findings that the trial court improperly failed to do so.

Dwenger petitioned for post-conviction relief, which petition was pending when he filed his "Motion to Dismiss Petition for Post-Conviction Relief Without Prejudice and Petition for Appointment of Counsel at County Expense to Pursue Proceedings Under Ind. Post-Conviction Rule 2." (App. at 89.) Dwenger correctly noted in his motion that according to *Collins v. State*, 817 N.E.2d 230, 233 (Ind. 2004), he was required to challenge his sentence via a belated appeal under P-C.R. 2 rather than a petition for post-conviction relief. *Collins* was decided November 9, 2004, not quite two months before Dwenger submitted his motion to dismiss his Petition for Post-Conviction Relief. This suggests Dwenger was diligent in requesting permission to file a belated notice of appeal.

The trial court's order stated Dwenger's motion was "granted as defendant raised issue as to sentencing." (App. at 92.) It is apparent from Dwenger's January 2005 motion to dismiss his post-conviction relief petition, his Belated Notice of Appeal filed April 27, 2005, and the trial court's grant of the belated appeal stating it "has considered" Dwenger's motion and "being duly advised in the premises now finds the motion should be granted" (App. at 95) that the trial court considered Dwenger's diligence and fault.

A trial court's discretionary ruling is presumptively correct, and the challenger (here, the State) bears the burden of persuading us the court erred in its exercise of discretion. *See, e.g.*, *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 457 (Ind. 2001) (addressing trial court discretion to receive evidence challenged under Ind. Evidence Rule 403). The State did not carry that burden.

We must presume the trial court acted correctly, *see, e.g.*, *Perdue Farms, Inc. v. Pryor*, 683 N.E.2d 239, 240 (Ind. 1997) ("In reviewing a general judgment, we must presume that the trial court correctly followed the law"), and we decline the State's invitation to presume the opposite from the silence of the record. We therefore should not have dismissed Dwenger's belated appeal.

2. Appropriateness of Sentence

The trial court imposed a sentence of fifty years, which at that time was apparently the presumptive sentence for murder.[1] It could have added ten years for aggravating circumstances or subtracted ten years for mitigating circumstances. Dwenger did not explicitly agree to that sentence, but his plea agreement provided the State would

[1] During the 1994 legislative session, the General Assembly twice amended Indiana Code § 35-50-2-3. The first amendment changed the presumptive sentence for murder from forty to fifty years and reduced the possible enhancement time from twenty to ten years. The second amendment allowed for the exclusion of mentally retarded individuals from the death or life imprisonment without parole sentencing option but did not incorporate the changes of the first amendment. Thus, at the time of Dwenger's crime there were two different presumptive sentences for murder. *Smith v. State*, 675 N.E.2d 693, 695 (Ind. 1996).

The General Assembly finally corrected the problem in May of 1995 when it amended the section to provide for a presumptive term of fifty years with up to ten years added for aggravating circumstances or up to ten years subtracted for mitigating circumstances. *Id*. at 695 n.3.

recommend a fifty-year sentence and could present argument and evidence at sentencing.[2]

Under Article VII, Section 6 of the Indiana Constitution, we have the authority to review and revise sentences. *Wilkie v. State*, 813 N.E.2d 794, 802 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 981 (Ind. 2004), *disapproved on other grounds in Hole v. State*, 851 N.E.2d 302 (Ind. 2006). However, we exercise that authority with great restraint, recognizing the special expertise of the trial bench in making sentencing decisions. *Id*. "We are not bound to conduct a *de novo* review of the sentencing hearing and assess or reweigh the trial court's findings and conclusions regarding aggravating and mitigating circumstances." *Bish v. State*, 421 N.E.2d 608, 620 (Ind. 1981).

A sentence that is authorized by statute will not be revised unless it is inappropriate in light of the nature of the offense and the character of the offender. *Wilkie*, 813 N.E.2d at 802; Ind. Appellate Rule 7(B). In considering the appropriateness of the sentence for the crime committed, a court was at the time of Dwenger's sentencing to focus initially on the presumptive sentence. *Kien v. State*, 782 N.E.2d 398, 416 (Ind. Ct. App. 2003), *reh'g denied*, *trans. denied* 792 N.E.2d 47 (Ind. 2003). It could then consider deviation from the presumptive sentence based on a balancing of the statutory factors that must be considered together with any discretionary aggravating and mitigating factors found to exist. *Id*.

[2] The plea agreement provides "State reserves [sic] to present evidence and argument at the sentencing." (App. at 50.)

Sentencing decisions are within the discretion of the trial court and we will reverse only upon a showing of abuse of that discretion. *Jones v. State*, 698 N.E.2d 289, 291 (Ind. 1998). A trial court does not have to set forth its reasons for imposing the presumptive sentence, but if it finds aggravating or mitigating circumstances, it must state its reasons for selecting the sentence imposed. *Gasper v. State*, 833 N.E.2d 1036, 1044 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 190 (Ind. 2005). Thus, if the trial court does not find aggravators or mitigators and imposes the presumptive sentence, it does not need to set forth its reasons for imposing the presumptive sentence. *Id*. But if it finds aggravators and mitigators, concludes they balance, and then imposes the presumptive sentence, it must provide a statement of its reasons for imposing the presumptive sentence. *Id*.

The trial court is not required to find mitigating circumstances a defendant offers or to explain why it has chosen not to make such a finding, *Jones*, 698 N.E.2d at 291, but the failure of a trial court to find mitigating circumstances clearly supported by the record might suggest they were overlooked and hence not properly considered. *Id*.

The State asserts the trial court made no findings as to aggravating or mitigating circumstances, and the sentence is therefore appropriate under the *Gasper* standard. We agree. Neither the State nor Dwenger offered evidence at Dwenger's sentencing hearing and the trial court did not find, either explicitly or implicitly,[3] any aggravating or

[3] The court and counsel did discuss various aspects of Dwenger's mental illness, but as mental illness was an element of Dwenger's offense we decline to find that discussion reflects the court's acknowledgement of a mitigating circumstance.

mitigating circumstances. We accordingly cannot say the trial court erred in imposing a presumptive sentence after finding no aggravating or mitigating circumstances.

We grant rehearing, find we have jurisdiction over Dwenger's belated appeal, and affirm his sentence.

Affirmed.

ROBB, J., concurs.

BAKER, J., dissents with separate opinion.

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	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BAKER, Judge, dissenting.

I respectfully dissent. Dwenger was sentenced in 1995 and allowed nearly seven years to pass before seeking post-conviction review in 2002. It was not until April 12, 2005, ten years after he was sentenced, that Dwenger sought leave to file a direct appeal. As noted by the majority, the petitioner in a post-conviction proceeding bears the burden of establishing the grounds for relief by a preponderance of the evidence. P-C.R. 1(5). The record before us lends no factual support to Dwenger's argument that he is entitled to file a belated notice of appeal. It is apparent, therefore, that Dwenger has wholly failed to sustain his burden of establishing by a preponderance of the evidence that he was diligent in pursuing this appeal and that he was without fault in the delay associated with the pursuit of this appeal.

The Post-Conviction Rules could not be clearer. It is incumbent upon the petitioner to prove by a preponderance of the evidence that he is entitled to a belated appeal based on his diligence in pursuing the appeal and innocence in its delay. The record before us contains no such evidence. Even if the majority is correct in concluding that the trial court was required neither to hold a hearing nor to make explicit findings, Dwenger must still bear the burden of proving his right to a belated appeal by a preponderance of the evidence. Given the record on appeal, I can only conclude that he failed to do so. Consequently, I believe that we are compelled to reverse the judgment of the trial court.