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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD CLARK,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 85A05-0707-CR-370

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen III, Judge
Cause No. 85C01-0009-CF-50

December 6, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Richard Clark (“Clark”) appeals his convictions and sentences entered pursuant to a guilty plea for two counts of child molesting as a Class A felony. Specifically, he argues that his guilty plea given at a preliminary hearing without assistance of counsel was improperly entered because he did not knowingly and voluntarily waive his right to counsel and that the trial court abused its discretion in not extending more mitigating weight to his guilty plea. In return, the State argues that the trial court improperly granted Clark’s petition to file a belated notice of appeal. Finding that the trial court did not clearly err in allowing Clark to file a belated appeal, that he cannot challenge the propriety of his convictions on direct appeal, and that the trial court did not abuse its discretion in sentencing him, we affirm.

Facts and Procedural History

On the morning of September 24, 2000, forty-one-year-old Clark entered the Wabash City Police Department and asked to speak with an officer. Clark then met with Officer James Kirk and Detective Tony Frawley and admitted, in a tape-recorded statement, sexual activity with twelve-year-old A.B. Clark told the officers that A.B. often spent the night in his home because of her friendship with his daughters. During these sleepovers, A.B. asked Clark for cigarettes, and he provided them in return for sexual favors. He admitted that over the course of ten to twelve months, he engaged A.B. in oral intercourse ten to twenty times, fondled her breasts, penetrated her vagina with his finger approximately five times, and unsuccessfully attempted sexual intercourse once.

Clark's sexual contact with A.B. culminated when, on June 17, 2000, he penetrated her vagina with his penis. Thereafter, his contact with her ceased.

On September 25, 2000, the State charged Clark with two counts of Class A felony child molesting, one charge alleging sexual intercourse and one charge alleging deviate sexual conduct. Appellant's App. p. 11. An initial hearing was held the following day, during which Clark, unrepresented by counsel, pled guilty to both charges. After a sentencing hearing on November 20, 2000, during which Clark was represented by an attorney, the trial court recognized aggravating and mitigating circumstances. In aggravation, the court found that Clark had a prior conviction for a similar offense, and, in mitigation, the court recognized that Clark "appear[ed] remorseful and entered his pleas of guilty without counsel at the initial hearing." *Id.* at 31. The trial court then imposed concurrent fifty-year sentences.

Clark did not file a notice of direct appeal. Instead, he filed a Petition for Post-Conviction Relief on October 1, 2002. The State Public Defender entered an appearance on his behalf on October 21, 2002, but also filed a Verified Notice of Present Inability to Investigate requesting the court to stay post-conviction proceedings "until such time as counsel is ready to proceed." *Id.* at 55. The trial court granted the motion. On January 7, 2005, the State Public Defender filed a 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, which the court granted. On February 7, 2005, counsel was appointed to pursue a belated appeal for Clark. However, appointed counsel did not enter an appearance until November 22, 2005. *Id.* at 66.

Clark wrote letters to the trial court on July 4, 2005, October 24, 2005, and September 13, 2006, indicating that his appointed counsel had not yet contacted him or responded to his correspondence. *Id.* at 64, 65, 67. On October 6, 2006, Clark's appointed counsel filed a Motion to Withdraw Appearance due to his lack of experience handling belated appeals, and the court granted the motion. The trial court appointed Clark's present counsel on October 11, 2006, for the purpose of pursuing a petition for permission to file a belated appeal. Present counsel filed an appearance on October 13, 2006, and, on the same day, requested relevant transcripts. On April 23, 2007, Clark, by counsel, filed a Motion for Leave of Court to File a Belated Notice of Appeal, alleging that Clark was not advised of his right to appeal the trial court's sentencing order, that Clark sought post-conviction relief, and that Clark was diligent in pursuing a belated appeal. *Id.* at 76-77. The trial court granted the motion, and Clark now appeals.

Discussion and Decision

Clark raises two arguments on appeal. First, he argues that his guilty plea was improperly entered because he did not knowingly and voluntarily waive his right to counsel. Second, he challenges his sentence, arguing that the trial court abused its discretion in not extending more mitigating weight to his guilty plea. In return, the State argues that the trial court improperly granted Clark's motion for permission to file a belated notice of appeal. We begin by addressing the State's argument.

Pursuant to Indiana Post-Conviction Rule 2(1), a defendant who failed to timely perfect an appeal may file a petition for permission to file a belated notice of appeal 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.” Ind. Post-Conviction Rule 2(1). The burden rests with the defendant to prove both of these requirements by a preponderance of the evidence. *Beatty v. State*, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006), *reh’g denied*. We will affirm a trial court’s ruling on a petition for permission to file a belated notice of appeal “unless it was based on an error of law or a clearly erroneous factual determination (often described in shorthand as ‘abuse of discretion’).” *Moshenek v. State*, 868 N.E.2d 419, 423 (Ind. 2007) (citing *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), *trans. denied*). “There are no set standards defining delay or diligence; each case must be decided on its own facts.” *Land v. State*, 640 N.E.2d 106, 108 (Ind. Ct. App. 1999), *reh’g denied, trans. denied* (citing *Bailey v. State*, 440 N.E.2d 1130, 1131 (Ind. 1982)). “Because diligence and relative fault are fact sensitive, we give substantial deference to the trial court’s ruling.” *Moshenek*, 868 N.E.2d at 423.

In this case, after a hearing, the trial court permitted Clark to file a belated notice of appeal. The court found: “The Defendant was not sufficiently informed of his right to appeal his sentence following an open plea. Further, he has been diligent in pursuing his appeal.” Appellant’s App. p. 81. On appeal, the State argues only that Clark has failed to show that he was diligent in requesting to file a belated notice of appeal.¹ We disagree. In November 2004, our Supreme Court decided *Collins v. State*, 817 N.E.2d 230 (Ind.

¹ The State concedes that “Defendant was able to show the court did not advise him of his right to appeal, and in fact informed Defendant by pleading guilty he gave up the right to appeal his conviction. The court did not inform Defendant he could not appeal his sentence, nor did the court affirmatively inform Defendant he could appeal his sentence. The preponderance of the evidence showed Defendant was without fault at the time of his sentencing hearing.” Appellee’s Br. p. 5-6.

2004), which determined that the proper procedure for challenging a sentence imposed following an open plea is through a direct appeal. Clark’s petition for post-conviction relief was withdrawn on January 7, 2005—less than two months after *Collins*—and, by February 7, 2005, counsel was appointed to pursue permission to file a belated notice of appeal on Clark’s behalf. Although the matter lingered for more than two years before the petition was filed, the record reflects that Clark was anything but idle during this period of time. Specifically, he wrote letters dated July 4, 2005, October 24, 2005, September 13, 2006, and April 4, 2007, requesting information regarding the status of his case and alerting the trial court of his efforts to pursue a belated appeal. Appellant’s App. p. 64, 65, 67, 74. In two of these letters, he expressed particular concern that the trial court would not believe that he was diligent in pursuing a belated appeal, writing, “This is to inform the court that I am trying to diligently pursue relief as soon as I was made aware that I could[,]” *id.* at 65, and “I have tried to show the court my attempts of being diligent in my efforts of obtaining any form of sentence reductions I might be granted[,]” *id.* at 74. Given these facts, we cannot conclude that the trial court erred in finding that Clark diligently pursued a belated appeal. The trial court’s ruling allowing Clark to file a belated notice of appeal was therefore not clearly erroneous.

This brings us to Clark’s challenge to his convictions for two counts of child molesting as a Class A felony. Clark argues that his guilty plea was improperly entered because he did not knowingly and voluntarily waive his right to counsel. However, it is well-settled that “[a] person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal.” *Collins*, 817 N.E.2d at 231. *See also Kling v. State*,

837 N.E.2d 502, 504 (Ind. 2005); *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996). The appropriate forum in which to challenge a trial court's acceptance of a guilty plea is in a post-conviction proceeding. *Tumulty*, 666 N.E.2d at 395. Clark's challenge to his convictions is, therefore, unavailable in this appeal.

Finally, we reach Clark's challenge to his fifty-year aggregate sentence. Sentencing decisions rest within the sound discretion of the trial court, and they are generally reviewed only for abuse of discretion. *Archer v. State*, 689 N.E.2d 678, 683 (Ind. 1997). Under the presumptive sentencing scheme, which is applicable in this case because Clark was convicted and sentenced in 2000, "[t]he trial court's discretion included the ability to determine whether the presumptive sentence for a crime will be increased or decreased because of aggravating or mitigating circumstances, and whether sentences on different counts will be served concurrently or consecutively." *Id.* (citations omitted). When enhancing a sentence under the presumptive scheme, a trial court must: "(1) identify significant aggravating and mitigating circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating circumstances." *Vazquez v. State*, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005), *trans. denied*.

At the time of Clark's conviction and sentencing, Indiana Code § 35-50-2-4 provided that the presumptive sentence for a Class A felony was thirty years. The trial court, at its discretion, could add no more than twenty years for aggravating circumstances and could subtract no more than ten years for mitigating circumstances.

Ind. Code § 35-50-2-4 (1999). After a sentencing hearing during which Clark testified, the trial court recognized Clark's early guilty plea as a mitigating circumstance. However, the court imposed maximum fifty-year sentences on both Class A felony convictions and ran the sentences concurrent to each other. The trial court explained to Clark, "I do think you are remorseful about what happened and . . . you entered your plea of guilty without counsel at the initial hearing based upon your own feeling that it was the right thing to do." Sent. Tr. p. 34. The trial court also recognized:

The aggravating circumstance that the Court found is that you do have a prior conviction for a similar type of offense and about your behaviors that should have allowed you to uh, prevent this from happening again, after the previous offense. You've been given that opportunity for counseling and hopefully it did work, although at this point if [sic] didn't work as it should have.

Id.

Clark's only challenge to his sentence is that "[t]he trial court . . . failed to give appropriate mitigating weight to the fact that Clark pleaded guilty at his initial hearing, and received no apparent benefit for doing so." Appellant's Br. p. 4. "It is within a trial court's discretion to determine whether a mitigating circumstance is significant . . . and what weight should be given that particular mitigating circumstance[.]" *Jones v. State*, 705 N.E.2d 452, 454 (Ind. 1999) (citations omitted). Our Supreme Court has recognized that a guilty plea generally deserves "some" mitigating weight. *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007). However, "a guilty plea may not be significantly mitigating when the defendant receives a substantial benefit in return . . . or when the defendant does not show acceptance of responsibility." *Id.* (citations omitted). Here, contrary to Clark's assertion that he received no benefit in return for his guilty plea, he received

concurrent, rather than consecutive, sentences.² This reduced Clark's total sentence by fifty years. The trial court weighed Clark's guilty plea against his criminal history and determined that Clark's pattern of molesting A.B. warranted aggravated sentences. In determining the aggravating weight of Clark's criminal history, the court noted the similarity of Clark's previous conduct to his conduct in this case. Indeed, Clark's prior similar conviction was for molesting his daughter. Sent. Tr. p. 21. The trial court did extend mitigating weight to Clark's guilty plea, but, given the relevance of the aggravating factor against which it was weighed, we cannot conclude that the trial court abused its discretion in failing to extend more mitigating weight to the plea.

The trial court did not err in allowing Clark's belated appeal, Clark's challenge to his convictions cannot be raised on direct appeal, and the trial court did not abuse its discretion in its assignment of mitigating weight to Clark's guilty plea.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.

² Additionally, the record reflects Clark's somewhat equivocal acceptance of responsibility for his actions. While he did plead guilty early and apologize during his sentencing hearing and in a letter to his victim, *see* Sent. Tr. p. 26, 28-30, Clark described A.B. to the preparer of his presentence investigation report as a "pleaser" who has been "trained" by someone. Appellant's App. p. 23. In describing his sexual proclivities, Clark informed the officer, "I only hope that in your investigation you will note the different ways I tried not to get into any situation of this nature but then 'I got surprised' and couldn't handle it. Everything from being grabbed at the first time . . . to her desire to become the 'ultimate pleaser.'" *Id.* at 22.