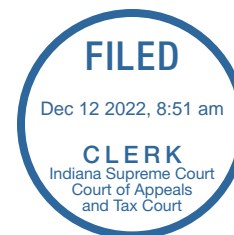


MEMORANDUM DECISION

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.



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IN THE COURT OF APPEALS OF INDIANA

Thomas Hardy,
Appellant / Defendant-Cross-Appellee,

v.

State of Indiana,
Appellee / Plaintiff-Cross-Appellant

December 12, 2022

Court of Appeals Case No.
22A-CR-880

Appeal from the LaPorte Circuit
Court

The Honorable Thomas Alevizos,
Judge

Trial Court Cause No.
46C01-1604-F1-322

Crone, Judge.

Case Summary

- [1] Thomas Hardy appeals the trial court’s denial of his motion to withdraw his guilty plea. He argues that the trial court’s decision constituted an abuse of discretion. On cross-appeal, the State contends that Hardy’s appeal should be dismissed because his notice of appeal was untimely, and he did not meet his burden to prove by a preponderance of the evidence that he was without fault and was diligent in pursuing permission to file a belated notice of appeal in compliance with Indiana Post-Conviction Rule 2. We agree with the State and dismiss this appeal.

Facts and Procedural History

- [2] In April 2016, the State charged Hardy with two counts of level 1 felony attempted murder and one count of level 3 felony aggravated battery. In September 2018, Hardy pled guilty to one count of level 1 felony attempted murder pursuant to a fixed-term plea agreement. The agreement provided that Hardy would be sentenced to a fixed term of thirty-three years, with ten years suspended, and would be able to petition to modify the sentence after twelve years. The agreement further provided that Hardy’s current sentence would run concurrent to that in a case from another county. During the guilty plea hearing, and after Hardy had entered his plea, Hardy’s counsel informed the trial court that Hardy was “eager to get to the Department of Correction” so he could begin participation in the various programs. Tr. Vol. 2 at 11.

[3] The trial court held a sentencing hearing on October 12, 2018. At the beginning of the hearing, Hardy made an oral motion to withdraw his guilty plea. Hardy's counsel indicated that he had prepared a written motion to withdraw but had not yet filed. The trial court examined the written document, which claimed only that "[t]he Defendant has had time to reflect on the plea of guilty and desires to withdraw the plea because his plea was not intelligently, knowingly and voluntarily entered because the Defendant did not understand the possible sentence that he could receive pursuant to the plea agreement." Appellant's App. Vol. 3 at 10. The trial court denied the motion to withdraw, noting that there was no allegation of self-defense or innocence in the written motion, and further that a motion to withdraw "has to be in writing. The rule is that everything has to be in writing." Tr. Vol. 2 at 20. Hardy then blurted out, "I'm innocent." *Id.* The trial court ruled that Hardy had "not made that claim in [his] motion and he's not going to make it now after I've ruled on his motion." *Id.* The court further stated, "[Y]ou can't now, after I've already ruled on it, tell me that now we're going to add something else maybe like I wasn't guilty." *Id.*

[4] The court proceeded with the sentencing hearing. Hardy asked to further explain why he wanted to withdraw his plea, which the trial court permitted. Hardy made multiple claims, including that he acted in self-defense because "the victim tried to rob [him] and pointed a firearm at [him]," that he was innocent, and that he was "forced" into pleading guilty because his attorney had no time to prepare for trial. *Id.* at 36-37. Hardy's counsel interjected and disagreed with Hardy, assuring the trial court that he had time to prepare and

that time constraints had nothing to do with the guilty plea. The trial court repeated its denial of the motion to withdraw, concluding that Hardy's plea was entered into knowingly and voluntarily. Pursuant to the terms of the fixed-term plea agreement, the trial court sentenced Hardy to thirty-three years, with ten years suspended to probation.¹ The trial court advised Hardy that although he had waived his right to appeal his conviction and sentence due to his guilty plea, he did have the right to appeal the denial of his motion to withdraw his guilty plea. Hardy stated that he understood his rights, and he did not indicate that he wished to appeal at that time.

[5] More than three years later, on December 8, 2021, Hardy filed a pro se petition for permission to file a belated notice of appeal. The trial court granted Hardy's petition without a hearing on January 6, 2022, setting the deadline for filing the belated notice as February 7, 2022. Hardy did not file a notice of appeal. Then, on March 7, 2022, Hardy asked the trial court if it planned to appoint counsel to assist him in perfecting his appeal. The trial court ordered Hardy to file an affidavit of indigency. Hardy complied, and the trial court appointed appellate counsel on April 12, 2022. Appointed counsel filed a motion alleging that Hardy had missed the first belated appeal deadline because counsel had not yet been appointed and requested a new deadline. The trial court granted the

¹ The trial court addressed all of Hardy's concerns about getting proper credit time applied to his sentence as alleged in his written motion to withdraw, and the court made sure that the resulting sentence satisfied Hardy's concerns in that regard.

motion, and Hardy's appointed counsel filed the belated notice of appeal on April 19, 2022. This appeal followed.

Discussion and Decision

[6] We find the State's cross-appeal issue dispositive. The State challenges the trial court's grant of Hardy's pro se petition for permission to file a belated notice of appeal. Specifically, the State argues that Hardy's appeal should be dismissed because his notice of appeal was untimely, and he failed to meet his burden pursuant to Indiana Post-Conviction Rule 2 regarding belated notices of appeal. We agree.

[7] Generally, "[w]e review a trial court's ruling on a petition for permission to file a belated notice of appeal for an abuse of discretion." *Cole v. State*, 989 N.E.2d 828, 830 (Ind. Ct. App. 2013), *trans. denied*. However, where, as here, the trial court did not hold a hearing and ruled on a paper record, we will review the denial of the petition de novo. *See Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). Thus, we owe no deference to the trial court's determination. *Id.*

[8] Indiana Post-Conviction Rule 2(1)(a) allows a convicted defendant² to seek permission to file a belated notice of appeal when:

² Post-Conviction Rule 2 expressly applies only to an "eligible defendant," which is "a defendant who, but for the defendant's failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal." The parties agree that Hardy is an eligible defendant.

(1) the defendant failed to file a timely notice of appeal;

(2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

(3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

“If the trial court finds that the requirements of Section 1(a) are met, it shall permit the defendant to file the belated notice of appeal. Otherwise, it shall deny permission.” Ind. Post-Conviction Rule 2(1)(c). “The defendant bears the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated notice of appeal.” *Cole*, 989 N.E.2d at 830. As there are no set standards for showing lack of fault or diligence, each case turns on its own facts. *Strong v. State*, 29 N.E.3d 760, 764 (Ind. Ct. App. 2015). However, relevant factors to be considered include “the defendant’s level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether the defendant was informed of his appellate rights, and whether he committed an act or omission which contributed to the delay.” *Id.* (citation omitted).

[9] Here, the record indicates that, at the conclusion of his sentencing hearing, the trial court unequivocally advised Hardy that he had the right to appeal the denial of his motion to withdraw his guilty plea, and Hardy stated that he understood that right. In his petition for permission to file a belated notice of appeal, Hardy does not allege that he was unaware of or not informed of his

appellate rights. Rather, Hardy simply alleges that he was not advised that he would not necessarily have to pay for an appeal and that he could seek to have pauper counsel appointed to pursue an appeal for him. Hardy further claimed that in October and November 2018, both before and after sentencing, he was denied access to the jail law library, so he was unable to investigate “how to file a motion for appeal.” Appellant’s App. Vol. 2 at 187.

[10] However, Hardy’s petition does not explain, or allege any relevant facts which might explain, the reason for the more than three-year delay that ensued before he finally filed his pro se petition for permission to file a belated notice of appeal. He makes no claim that he was denied access to information to investigate his legal options between November 2018 and November 2021, nor does he offer any explanation as to how he diligently pursued his appellate rights during that time. Hardy simply states that he “did not know how to file a pro se motion for appeal” prior to November 2021.³ Without more, Hardy’s petition fails to demonstrate that he was without fault or that he was diligent in his efforts to file a belated notice of appeal. As stated above, this was his burden. Based on the record before us, and our de novo standard of review, we conclude that Hardy did not meet his burden of proving by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in

³ Interestingly, Hardy seemingly had little difficulty filing other pro se motions with the trial court during this time. *See* Appellant’s App. Vol. 2 at 164-79 (motion to produce evidence filed June 7, 2021; motion to compel attorney to produce client file filed October 4, 2021).

pursuing permission to file a belated notice of appeal. Accordingly, we dismiss this appeal.

[11] Dismissed.

May, J., and Weissmann, J., concur.