

# MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



---

## ATTORNEY FOR APPELLANT

Jonathan D. Harwell  
Harwell Legal Counsel, LLC  
Indianapolis, Indiana

## ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Attorney General of Indiana  
Megan M. Smith  
Deputy Attorney General  
Indianapolis, Indiana

---

# IN THE COURT OF APPEALS OF INDIANA

---

James Broadus,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

July 27, 2023

Court of Appeals Case No.  
22A-CR-2474

Appeal from the Marion Superior  
Court

The Honorable Shatrese M.  
Flowers, Judge

Trial Court Cause No.  
49G02-1706-MR-23569

**Memorandum Decision by Judge Riley**  
Judges Bradford and Weissmann concur.

**Riley, Judge.**

## **STATEMENT OF THE CASE**

[1] Appellant-Defendant, James Broadus (Broadus), appeals the trial court's denial of his petition for permission to file a belated notice of appeal.

[2] We affirm.

## **ISSUE**

[3] Broadus presents this court with one issue on appeal, which we restate as:  
Whether the trial court erred by denying his petition, requesting permission to file a belated notice of appeal.

## **FACTS AND PROCEDURAL HISTORY**

[4] On June 26, 2017, the State filed an Information, charging Broadus with murder, a felony; robbery resulting in serious bodily injury, a Level 2 felony; and carrying a handgun without a license, a Level 5 felony. On April 19, 2018, the State amended the charging Information to include the charge of felony murder. On May 22, 2019, a jury found Broadus guilty of felony murder, robbery resulting in serious bodily injury, and carrying a handgun without a license, as a Class A misdemeanor. On June 7, 2019, during the sentencing hearing, the trial court vacated the conviction for robbery resulting in serious bodily injury, and sentenced Broadus to fifty-five years for felony murder to and 365 days for carrying a handgun without a license, with sentences to be served concurrently. After pronouncing the sentence, the trial court advised Broadus of his right to appeal the convictions and sentence and informed him that “[i]f [he] intend[ed] to do so, [he] must notify [his] attorney within 30 days from

today's date so that [his] attorney may perfect an appeal." (Transcript Vol. IV, p. 132). The parties and the trial court then discussed Broadus' charges in another criminal matter. At no point did Broadus indicate that he wished to appeal his convictions or sentence.

[5] On April 17, 2020, Broadus filed a verified petition for permission to file a belated notice of appeal, stating that he intended to appeal based on perceived voir dire issues but failed to disclose how he was without fault for the delay in filing his petition or how he had been diligent in seeking permission to file a belated appeal. Four days later, on April 21, 2020, the trial court granted Broadus' petition and instructed him "to file his Belated Notice of Appeal with the Clerk of the Indiana Court of Appeals." (Appellant's App. Vol. II, p. 77). On June 5, 2020, Broadus filed a motion for extension of time to file his belated notice of appeal, noting that he had not received the trial court's order granting his petition until May 8, 2020. The trial court granted Broadus' motion for extension of time. On June 14, 2020, Broadus filed a second motion to request an extension of time to file his belated notice of appeal due to being unable to access the law library. The trial court granted Broadus' motion and extended his time to file a belated notice of appeal until August 21, 2020. On August 20, 2020, Broadus filed a belated notice of appeal with the clerk of the trial court but did not file a belated notice of appeal with this court. Broadus took no further action.

[6] Approximately two years later, on September 2, 2022, Broadus filed a renewed verified petition for permission to file a belated notice of appeal. In his petition,

Broadus claimed that he had been diligent in seeking an appeal, that filing his notice with the trial court instead of the court of appeals was a clerical error, and that lockdowns during the COVID-19 pandemic at the Department of Correction (DOC) prevented him from “access[ing] the law library to litigate this appeal” and taking further action. (Appellant’s App. Vol. II, p. 114). On September 19, 2022, the trial court denied Broadus’ renewed petition.

[7] Broadus now appeals. Additional facts will be provided as necessary.

## **DISCUSSION AND DECISION**

[8] Broadus contends that the trial court erred by denying his petition for permission to file a belated notice of appeal. An appeal is initiated by filing “a Notice of Appeal within thirty days after the entry of final judgment.” Ind. Appellate Rule 9(A)(1). “Unless the Notice of Appeal is filed timely, the right to appeal shall be forfeited except as provided by [Post-Conviction Rule] 2.” App. R. 9(A)(5). The latter rule allows a defendant who fails to timely file a notice of appeal to “petition the trial court for permission to file a belated notice of appeal.” Ind. Post-Conviction Rule 2(1). Such a petition may be granted only where (1) the defendant was without fault for failing to timely file the notice of appeal, and (2) the defendant has been diligent in requesting permission to file the belated notice of appeal. *Id.* The defendant bears the burden to prove both these requirements by a preponderance of the evidence. *Leshore v. State*, 203 N.E.3d 474, 477 (Ind. 2023).

[9] The decision whether to grant permission to file a belated notice of appeal is left to “the sound discretion of the trial court,” and therefore faces an abuse of discretion review. *Moshenek v. State*, 868 N.E.2d 419, 422 (Ind. 2007). But when, as here, the trial court did not hold a hearing on the motion to file a belated notice of appeal, “we are reviewing the same information available to the trial court,” so we review these unique petitions *de novo*. *St. Clair v. State*, 901 N.E.2d 490, 492 (Ind. 2009). We therefore afford no deference to the trial court’s determination. *Id.*

[10] Indiana Post-Conviction Rule 2 provides that an “eligible defendant” for purposes of the Rule—and undisputed for the purpose of this cause—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.” Ind. Post-Conviction Rule 2(1)(a) establishes the requisites for filing a belated notice of appeal:

An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;

(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.

“Under this Rule, ‘[t]he 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 motion to appeal.’” *Leshore*, 203 N.E.3d at 477 (quoting *Moshenek*, 868 N.E.2d at 422-23). “These inquiries are fact-sensitive because ‘[t]here is substantial room for debate as to what constitutes diligence and lack of fault on the part of the defendant.’” *Id.* (quoting *Moshenek*, 868 N.E.2d at 424). “And since each case is shaped by its own circumstances, there are no assigned ‘standards of fault or diligence.’” *Id.* (quoting *Moshenek*, 868 N.E.2d at 423). “Instead, courts examine a range of factors, including ‘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.* (quoting *Moshenek*, 868 N.E.2d at 423 (quoting *Land v. State*, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994), *reh’g denied*, *trans. denied*)).

[11] Despite Broadus’ allegations to the contrary, after sentencing, the trial court advised Broadus, who was represented by counsel, of his appellate rights and the timeline in which to exercise those rights. It was not incumbent upon the trial court to ensure that Broadus actually exercised that right. Although Broadus filed his first verified petition for permission to file a belated notice of appeal ten months late and did not establish diligence or a lack of fault in his petition, the trial court nonetheless granted his request to seek a belated appeal. On August 20, 2020, Broadus filed a belated notice of appeal with the clerk of

the trial court but did not file a belated notice of appeal with this court despite being instructed by the trial court's April 21, 2020, order to file his notice of appeal with the clerk of the court of appeals. *See* Ind. Appellate Rule 9(A)(1) (“A party initiates an appeal by filing a Notice of Appeal with the Clerk [of the court of appeals][.]”). For more than two years, Broadus did not follow up with the trial court: he filed no petitions, sent no correspondence, and made no requests for counsel. After almost two years, Broadus retained counsel and, on September 2, 2022, Broadus filed a renewed verified petition for permission to file a belated notice of appeal. It is the trial court's denial of this second verified petition that is the subject of this appeal.

[12] In his second petition, Broadus claimed—in very generalized terms—that, during these approximately two years, he was diligent in seeking an appeal, that filing his notice with the trial court instead of the court of appeals was a clerical error, and that lockdowns during the COVID-19 pandemic at the Department of Correction (DOC) prevented him from accessing the law library and taking further action. Broadus fails to explain how he filed his notice in the wrong tribunal after being informed in which court to file his belated notice of appeal; he fails to detail how the lockdowns prevented him from following up with the court; and he fails to explain which research he needed to undertake in the law library after having already filed his petition.

[13] Similarly, we are not persuaded by Broadus' argument that his age and experience with the legal system negated his fault or lack of diligence in seeking a belated appeal. Although Broadus was twenty-four years old at the time of

sentencing, he had received his GED, had significant contact with the juvenile system, had two prior criminal convictions as an adult, and had another pending felony at the time of sentencing. While we agree with Broadus that his previous lower-level convictions resulted in guilty pleas and he thus might have been unfamiliar with the criminal appellate rules, in the instant case, Broadus was advised of his appellate rights at sentencing and the trial court advised him in its April 21, 2020, order to file his belated notice of appeal with the court of appeals.

[14] Broadus likens his situation to *Hitch v. State*, 261 N.E.2d 564, 565 (Ind. 1970), where Hitch’s counsel failed to file a motion to correct error. After retaining new counsel, a petition for permission to file a belated appeal was filed within ninety days of sentencing. *Id.* at 599. Although the trial court denied Hitch’s petition, we reversed on appeal because Hitch had been “diligent in obtaining counsel for the purpose of representing him and in requesting permission to file a belated petition.” *Id.* at 600. Unlike Hitch, Broadus makes no allegation that he attempted to retain counsel or that counsel failed to file his appeal as directed; rather, Broadus sat on his appellate rights for ten months prior to filing his first petition for permission to file a belated appeal. Once granted, he filed two motions for extension of time and then erroneously filed his notice of appeal in the trial court despite being instructed to file it with the court of appeals. He then waited two years—versus the ninety days in *Hitch*—before following up or taking any action with respect to his belated appeal.



[15] Broadus failed to show that he made an attempt, let alone a diligent one, to seek review of his conviction during the approximately two-year period between his errant notice of appeal and his second petition for permission to file a belated appeal. Although we recognize that this court has an interest in judicial economy and bringing finality to proceedings by post-conviction petitioners, and that “whenever possible,” Indiana courts have a preference to “‘resolve cases on the merits instead’ of on procedural grounds,” we also acknowledge that this discretion and preference is not unlimited. *Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015) (quoting *Roberts v. Cmty. Hosp. of Ind., Inc.*, 897 N.E.2d 458, 469 (Ind. 2008)). While our discretion is necessarily bordered by the parameters set by Post-Conviction Rule 2(1), it may, to some extent, be expanded by the presence of extraordinary compelling reasons. Without these safeguards, the application of Post Conviction Rule 2(1) would become meaningless. Here, Broadus failed to “submit any evidence to support his petition,” he failed to persuade this court that he was without fault, had been diligent in seeking and pursuing a belated appeal in accordance with Post-Conviction Rule 2, and his age, education, and experience with the judicial system do not compel us to revisit the trial court’s denial of Broadus’ petition for permission to file a belated notice of appeal. *Reid v. State*, 883 N.E.2d 872, 874 (Ind. Ct. App. 2008).

## **CONCLUSION**

[16] Based on the foregoing, we hold that the trial court did not err in denying Broadus’ petition for permission to file a belated notice of appeal.

[17] **Affirmed.**

[18] **Bradford, J. and Weissmann, J. concur**