MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Amy E. Karozos
Public Defender of Indiana

Archer Randy Rose, Jr.
Public Defender of Indiana

Anne Murray Burgess
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Courtney Staton
Deputy Attorney General

Robert M. Yoke
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

David Singleton,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 20, 2023

Court of Appeals Case No. 22A-CR-1155

Appeal from the Allen Superior Court

The Honorable David Zent, Judge

Trial Court Cause No. 02D06-2010-F3-71

Memorandum Decision by Judge Bradford
Judges Robb and Kenworthy concur.

Bradford, Judge.

Case Summary[1]

[1] In February of 2021, David Singleton entered into a plea agreement by which he pled guilty to Level 3 felony burglary for acts committed in late 2020; however, Singleton moved to set aside that plea the morning of his sentencing hearing. The trial court denied his motion and sentenced him to fourteen years of incarceration. In February of 2022, Singleton moved for leave to file a belated appeal, which the trial court denied. Singleton filed a motion to correct error, which the trial court also denied. Singleton contends that the trial court abused its discretion in denying his motion to correct error because he is entitled to a belated appeal under Indiana Post-Conviction Rule 2. Because we disagree, we affirm.

Facts and Procedural History

[2] On October 6, 2020, the State charged Singleton with Level 3 felony burglary and Level 6 felony domestic battery. In January of 2021, the State added an additional Level 6 felony domestic battery charge. Singleton ultimately entered into a plea agreement pursuant to which he agreed to plead guilty to Level 3 felony burglary and, in exchange, the State agreed to dismiss all other counts. The plea agreement left sentencing to the trial court's discretion and, pursuant

[1] We held oral argument in this case on March 3, 2023, at Ivy Tech-Lafayette. We commend counsel for the quality of their presentations and extend our gratitude to the students, administration, faculty, and staff of Ivy Tech-Lafayette for their assistance and hospitality.

to its terms, Singleton "knowingly and voluntarily" waived his right to appeal that sentence. Appellant's App. Vol. II p. 35.

[3] During the change-of-plea hearing, at which the trial court advised Singleton of the penalty range for a Level 3 felony and that if he were to go to trial and be convicted, he would have the right to appeal that conviction. The trial court further explained the charge to which Singleton was pleading guilty. Singleton testified that he understood that he was pleading guilty to Level 3 felony burglary resulting in bodily injury and he had read the plea agreement and understood its terms. Singleton also testified that entering this plea agreement was his own free and voluntary choice. At that point, Singleton pled guilty and explained that he had gone "to Ashley Hoffman's house with the intent to take money" and "kick[ed] the door in[,]" injuring her. Tr. Vol. II p. 10.

[4] On February 24, 2021, the trial court held a sentencing hearing. Earlier that day, however, Singleton had filed a motion to set aside his guilty plea. Singleton's counsel explained that Singleton had originally decided to plead guilty, in large part, because of the "likelihood that the State would file the habitual offender enhancement should [Singleton] go to trial." Tr. Vol. II p. 16. Singleton's counsel further explained that, after reading the victim's impact statement, he had experienced a "change of heart" and now "wishe[d] to go forward and fight this case." Tr. Vol. II p. 16.

[5] The trial court denied Singleton's motion to set aside his guilty plea. Singleton then requested a continuance on the sentencing hearing because he had "several

people that wanted to speak on his behalf" who were not present "because of [his] decision to try and set aside the plea[.]" Tr. Vol. II p. 19. Again, the trial court denied Singleton's request. The trial court then entered judgment against Singleton and sentenced him to fourteen years of incarceration. Singleton had until March 26, 2021, to file his notice of appeal.

[6] On February 24, 2022, Singleton moved for leave to file a belated appeal. In that motion, Singleton explained that he had not known about the right to appeal the trial court's denial of his motion to withdraw his guilty plea and had therefore failed to file a timely appeal based "[o]n advice of his previous counsel." Appellant's App. Vol. II p. 54. However, in January of 2022, Singleton became aware of the possibility of a belated appeal after he had spoken with fellow inmate, Ronnie Miles, and "began to research Indiana law on his own[.]" Appellant's App. Vol. II p. 61.

[7] Singleton supported his motion with an affidavit from Miles, who had allegedly been present at Singleton's sentencing hearing. In that affidavit, Miles claims that he had overheard Singleton's counsel inform him that "the only thing [Singleton] could do is file a modification in 5 to 6 years." Appellant's App. Vol. II p. 58. According to Miles, ten months after Singleton's sentencing hearing, Miles had encountered Singleton again at the Miami Correctional Facility and had informed him that his prior attorney had "lied about not being able to appeal" the denial of his motion to withdraw his guilty plea. Appellant's App. Vol. II p. 57. On March 11, 2022, the trial court denied Singleton's motion for leave to file a belated appeal without a hearing.

[8] On April 15, 2022, Singleton filed a motion to correct error. In that motion, Singleton argued that he was an eligible defendant under Indiana Post-Conviction Rule 2, he had not been advised of his right to appeal, and he had been diligent in requesting leave to file a belated notice of appeal. To support his motion, Singleton included Miles's affidavit and his own affidavit, in which he alleged that his prior counsel had failed to inform him of his right to appeal and that he had been diligent in seeking an appeal when he had learned of his right to do so. The State filed its statement in opposition to Singleton's motion to correct error on April 18, 2022. Three days later, the trial court denied Singleton's motion to correct error.

Discussion and Decision

[9] Singleton appeals from the denial of his motion to correct error.

> In general, we review a trial court's ruling on a motion to correct error for an abuse of discretion. *Hawkins v. Cannon*, 826 N.E.2d 658, 661 (Ind. Ct. App. 2005), *trans. denied*. However, to the extent the issues raised […] are purely questions of law, our review is de novo. *See Ind. BMV v. Charles*, 919 N.E.2d 114, 116 (Ind. Ct. App. 2009) ("Although rulings on motions to correct error are usually reviewable under an abuse of discretion standard, we review a case de novo when the issue ... is purely a question of law."); *Christenson v. Struss*, 855 N.E.2d 1029, 1032 (Ind. Ct. App. 2006) (challenge to magistrate's authority to conduct hearing on motion to correct error presented question of law reviewed de novo).

City of Indpls. v. Hicks, 932 N.E.2d 227, 230 (Ind. Ct. App. 2010), *trans. denied*.

[10] Singleton contends that he is entitled to file a belated appeal under Indiana Post-Conviction Rule 2. Under that rule, 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 motion to appeal." *Moshenek v. State*, 868 N.E.2d 419, 422–23 (Ind. 2007). "Generally, the decision of whether to grant or deny a petition for permission to file a belated notice of appeal is within the sound discretion of the trial court." *George v. State*, 862 N.E.2d 260, 264 (Ind. Ct. App. 2006) (citing *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), *trans. denied*). "Where, as here, a trial court rules on such a motion on a paper record without holding a hearing, our review is de novo." *Wihebrink v. State*, 181 N.E.3d 448, 450 (Ind. Ct. App. 2022) (citing *Fields v. State*, 162 N.E.3d 571, 575 (Ind. Ct. App. 2021), *trans. denied*), *trans. denied*.

[11] While a notice of appeal generally must be filed within thirty days after the entry of a final judgment is noted in the chronological case summary, Post-Conviction Rule 2 provides an exception. Ind. App. Rule 9(A)(1). Post-Conviction Rule 2(a)(1)–(3) provides that

> [a]n 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.

An "eligible defendant" is one "who, but for [his] 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." *Id*.

[12] The State concedes that Singleton is an eligible defendant under Post-Conviction Rule 2. Therefore, we turn our attention to whether Singleton met the additional burden of proving that he was (1) without fault in the delay to file a timely appeal and (2) diligent in seeking leave to file a belated appeal. "'There are no set standards of fault or diligence, and each case turns on its own facts.'" *Sholes v. State*, 878 N.E.2d 1232, 1235 (Ind. 2008) (quoting *Moshenek*, 868 N.E.2d at 423). Instead, a range of factors informs this analysis, 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, whether he committed an act or omission which directly contributed to the delay[,]" and other relevant factors such as "the overall passage of time; the extent to which the defendant was aware of relevant facts; and the degree to which delays are attributable to other parties." *Land v. State*, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994), *trans. denied*; *Moshenek*, 868 N.E.2d at 424.

[13] Singleton claims that he bears no fault for the delay because he was never informed of his appellate rights. In doing so, Singleton equated this case during oral argument with the Indiana Supreme Court's divided opinion in *Leshore v. State*, No. 23S-CR-51, 2023 WL 2275547 (Ind. Feb. 28, 2023). In that case, Leshore pled guilty to a series of crimes in 1999, for which the trial court sentenced him to seventy years of incarceration. *Id*. at *1. Neither the trial court nor Leshore's public defender advised him that he could appeal his sentence. *Id*. In 2001, Leshore sought post-conviction relief under Post-Conviction Rule 1; however, the public defender's office reviewed this petition, concluded that Leshore had been advised of all necessary rights, and withdrew representation. *Id*. at *2. Twenty years later, after learning of his right to appeal his sentence for the first time from a fellow inmate, Leshore petitioned for post-conviction relief under Post-Conviction Rule 2. *Id*. The trial court denied Leshore's petition without a hearing. *Id*. Ultimately, the Indiana Supreme Court concluded that the trial court had erred in denying Leshore's petition seeking permission to file a belated appeal. *Id*. at *5. In so holding, the Court reasoned that Leshore had not been at fault for the delay in seeking an appeal and had been diligent once he learned of that right. *Id*. at *3–5.

[14] In making his argument, Singleton claims that his case is factually similar to *Leshore*. Like Leshore, Singleton argues that "[h]e was not advised by the trial court [that] he had the right to appeal" its decisions on his motion to withdraw his guilty plea and to continue the sentencing hearing, and that "his counsel did not advise him [that] he had the right to appeal those rulings." Appellant's Br.

p. 12. As a result, Singleton claims that "he had no reason to appeal his sentence [because] he was never aware of his right to do so." *Leshore*, at *4. We disagree.

[15] For its part, the State argues that Singleton bears some responsibility for the delay. In our view, *Leshore* supports the State's position because it is readily distinguishable from Singleton's case. In *Leshore*, the Indiana Supreme Court noted that the equitable factors weighed in Leshore's favor. *Id*. at *4. Notably, he was merely "nineteen years-old when sentenced, he had limited education and contact with the legal system, and no experience with appellate law and its many rules." *Id*. at *4. Those factors do not, however, afford Singleton any relief. Specifically, "at the time he committed the crime, Singleton was [thirty-two] years-old and had been convicted of [twelve] prior misdemeanors and three prior felonies." Appellee's Br. p. 11. Singleton was also on probation in two different cases, one in Indiana and one in Ohio. Moreover, Singleton had "attended high school until the 12th grade and attended St. Clair Community College for one year before completing a five-year apprenticeship through Millwright Union." Appellee's Br. p. 11. Put simply, Singleton is a well-versed litigant who was older, more educated, and had significantly more experience with the legal system than Leshore.

[16] Additionally, the State points out that included in Singleton's motion to set aside his guilty plea is a memorandum of law that sets out Indiana Code section 35-35-1-4—the procedures for withdrawing a guilty plea. That memorandum explains that the "ruling of the court on the motion [to withdraw a guilty plea]

shall be reviewable on appeal only for an abuse of discretion." Appellant's App. Vol. II p. 43. Therefore, Singleton knew, or should have known, that he had the right to appeal the trial court's decision on his motion to withdraw his guilty plea. As a result, we cannot say that Singleton is faultless in his delay in seeking an appeal.

[17] Even if we assume that Singleton was not at fault, he would still need to establish that he was diligent in seeking a belated appeal. In attempting to do so, Singleton emphasizes "the passage of time." *Land,* 640 N.E.2d at 108. To start, in *Haddock v. State*, 112 N.E.3d 763, 768 (Ind. Ct. App. 2018), *trans. denied*, the defendant did not learn that he could appeal an illegal sentence until he met with post-conviction counsel—just over two years after his sentencing hearing. Then, only two months had passed before he sought a belated appeal, which this Court concluded was reasonable. *Id*. Here, Singleton alleges that neither the trial court nor his prior counsel had informed him of his right to appeal; instead, he claims he learned of it from Miles in January of 2022, ten months after his sentencing hearing. In February of 2022, Singleton secured appellate counsel and moved for leave to file a belated appeal. Singleton claims this timeline is reasonable, as he took no longer than the defendant in *Haddock* once he discovered his right to appeal.

[18] Singleton, during oral argument, also relied on *Leshore* in making this point. In that case, twenty years passed before Leshore sought a belated appeal; however, once Leshore learned of that right, a mere nineteen days passed before he petitioned the trial court. *Id*. at *5. Singleton argues that he learned of his right

to appeal only ten months after his sentencing and, after learning of that right, took less than two months to petition for permission to file a belated appeal.

[19] There is, however, some important distinctions between Singleton's case and *Leshore* on this issue. At the time Leshore was originally seeking post-conviction relief in 2001, *Collins v. State*, 817 N.E.2d 230 (Ind. 2004) had not been decided. In that case, the Indiana Supreme Court "prescribed the proper procedure for challenging a sentence imposed under an 'open plea' agreement: file a direct appeal; or, if the time for filing a direct appeal has run, seek permission to file a belated appeal under Post-Conviction Rule 2." *Id*. at *4. Since *Collins*, there has been a distinct pool of petitioners who had petitions for post-conviction relief pending at the time of that opinion. In 2008, the Indiana Supreme Court held that "[p]rompt efforts to pursue those challenges through P-C.R. 2 were allowed to proceed." *Johnson v. State*, 898 N.E.2d 290, 292 (Ind. 2008). Because Leshore had a post-conviction relief challenge pending in 2001, which remained pending until after the *Collins* decision, the Indiana Supreme Court held that Leshore fell within the pool of petitioners noted in *Johnson*.

[20] Singleton does not fall within *Johnson*'s distinct pool of post-conviction relief petitioners. In his dissent, Justice Goff noted that "when the State [Public Defender] withdrew from Leshore's case, the post-conviction landscape was less clear than today." *Leshore*, at *6 (Goff, J., dissenting). By 2021, that landscape had become well-defined. Therefore, *Leshore* is distinguishable and affords Singleton no relief on the diligence factor. Moreover, Singleton offered no evidence to establish what steps he took to either get a second opinion or

conduct his own research into his appellate rights between his sentencing hearing in February of 2021 and when Miles allegedly informed him of his right to appeal in January of 2022. Additionally, unlike Leshore, Singleton provided no affidavit or other evidence from his trial counsel supporting Miles's claim that the advice Singleton's trial counsel had given him "was a lie." Appellant's App. Vol. II p. 57. In short, we cannot say that Singleton was faultless for the delay in seeking an appeal or that he was diligent in doing so.

[21] The judgment of the trial court is affirmed.

Robb, J., and Kenworthy, J., concur.