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IN THE
COURT OF APPEALS OF INDIANA

Trey M. Fields,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 26, 2021

Court of Appeals Case No.
20A-CR-1799

Appeal from the Madison Circuit
Court

The Honorable David A. Happe,
Judge

Trial Court Cause No.
48C04-1602-F4-407

Najam, Judge.

Statement of the Case

- [1] Trey M. Fields appeals the trial court’s denial of his petition for permission to file a belated notice of appeal. Fields presents one issue for our review, namely, whether the trial court erred when it denied his petition. We conclude that, notwithstanding a waiver of appeal provision in his plea agreement, Fields is an “eligible defendant” entitled to a belated appeal of his sentence under Post-Conviction Rule 2. We reverse and remand with instructions.

Facts and Procedural History

- [2] On May 5, 2016, the State filed an amended information and charged Fields with the following offenses: stalking, as a Level 4 felony; stalking, as a Level 5 felony; battery against a public safety official, as a Level 5 felony; disarming a law enforcement officer, as a Level 5 felony; resisting law enforcement, as a Level 6 felony; and escape, as a Level 6 felony. The State additionally alleged that Fields was a habitual offender. On July 5, the State and Fields entered into a plea agreement. Pursuant to the terms of the agreement, Fields agreed to plead guilty as charged.
- [3] Fields’ plea agreement included a provision that stated: “The Defendant hereby waives the right to appeal any sentence imposed by the Court, including the right to seek appellate review of the sentence pursuant to Indiana Appellate Rule 7(B), so long as the Court sentences the defendant within the terms of this plea agreement.” Appellant’s App. Vol. 2 at 100. The plea agreement left

sentencing “open to argument” but provided “a cap of twenty-five (25) years on any executed sentence.” *Id.* at 99 (emphasis removed).

[4] The court held a hearing on Fields’ guilty plea. At the beginning of the hearing, the court advised Fields that, if he were to go to trial and be found guilty, he would “have the right to appeal any decision made by the court.” Appellant’s App. Vol. 3 at 33. But the court stated that, by pleading guilty, Fields was “giving up” that right. *Id.* Fields also testified that he had reviewed the plea agreement and that he understood everything in it. Fields then provided the factual basis for his guilty plea. Among other things, Fields admitted that he had stalked a woman after having previously been convicted of stalking her. *See id.* at 41, 43.

[5] On August 22, the court held a sentencing hearing. At the conclusion of the hearing, the court accepted Field’s guilty plea and entered judgment of conviction on all counts except for stalking, as a Level 5 felony.¹ The court then identified as an aggravating factor the fact that Fields “has a significant criminal history now having reoffended against the same victim repeatedly[.]” *Id.* at 76-77. The court sentenced Fields to an aggregate term of thirty-seven years, with twenty-five years executed and twelve years suspended.

¹ While Fields pleaded guilty to both stalking, as a Level 4 felony, and stalking, as a Level 5 felony, the trial court did not enter a judgment of conviction on the Level 5 felony. *See* Appellant’s App. Vol. 3 at 75.

[6] On August 27, 2020, Fields filed a petition for permission to file a belated notice of appeal. In that petition, Fields asserted that his sentence was contrary to law because the trial court had used an improper aggravator when it sentenced him. Specifically, Fields asserted that the trial court’s use of the fact that he had reoffended against the same victim was an improper aggravator because that fact was also an element of stalking, as a Level 4 felony, to which he had pleaded guilty.² Fields included as attachments to his petition his plea agreement and the transcripts from the guilty plea and sentencing hearings. He also included an affidavit in which he stated that he did not initially file an appeal because he “was informed that [his] plea agreement waived [his] right to appeal both [his] conviction and sentence.” *Id.* at 89. He further stated: “Neither [trial counsel] nor the Court told me that the appellate waiver provision in my plea agreement did not prevent me from challenging the lawfulness of my sentence on direct appeal. I first learned of this possibility on May 27, 2020, during a conference with” a public defender. *Id.* The trial court denied Fields’ petition without a hearing. This appeal ensued.

Discussion and Decision

[7] Fields appeals the trial court’s denial of his petition for permission to file a belated notice of appeal. Indiana Post-Conviction Rule 2 allows a defendant to

² The offense of stalking is elevated from a Level 6 felony to a Level 4 felony if the act or acts were committed while the person was armed with a deadly weapon or, as alleged here, if the person has “an unrelated conviction for an offense under this section against the same victim or victims.” Ind. Code § 35-45-10-5(c)(2) (2020).

seek permission to file a belated notice of appeal. In particular, Section 1(a) of that rule provides:

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.

Ind. Post-Conviction Rule 2(1)(a). “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 the petition.” P-C.R. 2(1)(c).

[8] “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). Usually, “[t]he decision whether to grant permission to file a belated notice of appeal . . . is within the sound discretion of the trial court.” *Id.* at 422. And, in its brief, the State relies on an abuse of discretion standard of review. But 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.

[9] Fields contends that the trial court erred when it denied his request for a belated notice of appeal because he is eligible under Post-Conviction Rule 2 to file a belated appeal. He also asserts that his failure to timely file a notice of appeal was not due to any fault of his own and that he had been diligent in requesting permission to file the belated notice of appeal. We address each argument in turn.

Eligibility

[10] Fields first asserts that the court erred when it denied his petition because he is eligible under Post-Conviction Rule 2 to seek a belated appeal. 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.” P-C.R. 2.

[11] Here, the State contends that Fields is not eligible under our post-conviction rules because he waived the right to appeal his sentence pursuant to the terms of the plea agreement. Again, Fields’ plea agreement included a provision that stated: “The Defendant hereby waives the right to appeal any sentence imposed by the Court, including the right to seek appellate review of the sentence pursuant to Indiana Appellate Rule 7(B), so long as the Court

sentences the defendant within the terms of this plea agreement.” Appellant’s App. Vol. 2 at 100. That waiver appears on its face to be absolute and unequivocal. And it is well settled that a defendant can waive his right to appeal a sentence. *See Crider v. State*, 984 N.E.2d 618, 623 (Ind. 2013).

[12] But even where the waiver appears to be unqualified, a defendant retains the right to appeal his sentence under certain circumstances. A defendant’s waiver of appellate review is only valid if the sentence is imposed in accordance with the law. *See id.* at 625. Thus, if a sentence imposed is contrary to law, and the defendant did not agree to the specific sentence, the waiver-of-appeal provision does not apply. *See id.* On appeal, Fields contends that his sentence is contrary to law because the court relied on an improper aggravator, which is an issue he would have had the right to raise on direct appeal. As such, he maintains that he is eligible to file a belated appeal.

[13] We note initially that, on its face, it may appear that the trial court sentenced him as provided in the plea agreement. However, our inquiry does not end there. “[E]ven where a plea agreement sets forth a sentencing cap or sentencing range, the court must still exercise some discretion in determining the sentence it will impose. That is, the trial court must nonetheless decide whether, in the case of a sentencing cap, to impose the maximum sentence allowed by the cap or to impose a lesser sentence.” *Childress v. State*, 848 N.E.2d 1073, 1078 (Ind. 2006). Here, while Fields’ plea agreement included a sentencing cap on any executed portion, the court still retained discretion to determine the length of his sentence and how that sentence would be served. Thus, while Fields agreed

to a maximum executed sentence of twenty-five years, he did not agree to be sentenced either to the full twenty-five-year executed term, or to an additional twelve years suspended, based on an improper aggravator. We therefore address whether the trial court erred when it denied Fields' petition for permission to file a belated appeal.

[14] We recently addressed the same issue in *Haddock v. State*, 112 N.E.3d 763 (Ind. Ct. App. 2018), *trans. denied*. In that case, Haddock entered into a plea agreement with the State in which he agreed that he had sold drugs to a confidential informant “in the physical presence” of a child. *Id.* at 765. In addition, Haddock agreed to “knowingly and voluntarily waive” his right to appeal his sentence so long as the Judge sentenced him within the terms of the agreement. *Id.* At a subsequent sentencing hearing, the court noted that the “factual basis for this particular offense specifically includes that it took place in the physical presence of a child less than eighteen (18) years of age.” *Id.* (citation omitted). Accordingly, the trial court sentenced Haddock to an aggravated term of fourteen years. *Id.*

[15] Two years later, Haddock filed a petition for permission to file a belated notice of appeal in which he asserted that his sentence was contrary to law because the trial court had used an improper aggravator when it sentenced him. *Id.* at 766. Specifically, he asserted that the trial court's use of the fact that Haddock had committed the offense while in the presence of a child was an improper aggravator because that was also an element of the offense to which he had pleaded guilty. *Id.* The court denied his petition without a hearing. On appeal,

this Court held that, because Haddock would have had the right to raise in a timely appeal the issue of whether his sentence was contrary to law, he was an eligible defendant pursuant to Post-Conviction Rule 2. *Id.* at 767.

[16] Likewise, here, Fields asserted in his petition for permission to file a belated notice of appeal that his sentence was contrary to law because the trial court had used an improper aggravator when it sentenced him, namely, that he had reoffended against the same victim, which is an element of stalking, as a Level 4 felony. That is an issue Fields would have had the right to raise in a timely appeal. *See id.* Accordingly, we hold that Fields is an eligible defendant pursuant to Post-Conviction Rule 2. *See id.*

[17] The State acknowledges our holding in *Haddock* but asks us to “reevaluate” that holding and to require a defendant to identify and plead a “specific and plausible” theory of illegality in order to be an eligible defendant under Post-Conviction Rule 2. Appellee’s Br. at 14. According to the State, the “current rule set forth in *Haddock* allows a defendant to circumvent [his] knowing and voluntary waiver of [his] right to directly appeal [his] sentence so long as [he] baldly claim[s]—without providing any basis for such claim—that [his] sentence is illegal.” *Id.*

[18] If we were to adopt the State’s position on appeal, the only way to determine whether Fields, or any other similarly situated defendant seeking to file a belated appeal, is an eligible defendant under Post-Conviction Rule 2 would be to analyze and make a threshold determination whether his sentence is, in fact,

contrary to law. But that is the substance of the issue Fields seeks to raise in his belated appeal. In other words, the State asks us to address the merits of Fields' putative belated appeal in order to determine whether he is eligible to be heard on the merits of his belated appeal. We decline to adopt that "circular reasoning." *Haddock*, 112 N.E.3d at 767.

[19] At this stage of the proceeding, we are simply tasked with determining whether Fields is eligible to file a belated appeal. As such, we are unwilling to place the burden on Fields to argue the merits of his putative belated appeal in order to decide whether he is eligible to file a belated appeal. Rather, as discussed above, we hold that Fields would have the right to raise on direct appeal the issue of whether his sentence is contrary to law and, as such, he is an eligible defendant under Post-Conviction Rule 2.

Fault and Diligence

[20] Fields also asserts that the trial court erred when it denied his petition for permission to file a belated appeal because his failure to timely file a notice of appeal was not due to any fault of his and because he was diligent in requesting permission to file a belated notice of appeal. The Indiana Supreme Court has previously stated that "[t]here is substantial room for debate as to what constitutes diligence and lack of fault on the part of the defendant as those terms appear in Post-Conviction Rule 2." *Moshenek*, 868 N.E.2d at 424. Some factors that may be considered are 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.* at 423.

Fault

[21] As to whether Fields was at fault for his failure to timely file a notice of appeal, we note that Fields signed a plea agreement that indicated he waived his right to appeal his sentence. In addition, Fields stated at his guilty plea hearing that he had carefully reviewed the agreement. And, at his guilty plea hearing, the court advised Fields that, by pleading guilty, he was “giving up” the “right to appeal any decision made by the court.” Appellant’s App. Vol. 3 at 33. Accordingly, the record demonstrates that Fields believed that he had waived the right to appeal his sentence.

[22] Further, at his sentencing hearing, the trial court did not advise Fields of his right to appeal a sentence that is contrary to law. It is well settled that “[t]he fact that a trial court did not advise a defendant about this right can establish that the defendant was without fault in the delay of filing a timely appeal.” *Moshenek*, 868 N.E.2d at 424. Here, it was not until almost four years after Fields’ sentencing hearing, when he met with an attorney on May 27, 2020, that Fields learned he was entitled to appeal his sentence on the ground that it was contrary to law. Based on those facts, Fields has demonstrated that his failure to timely file a notice of appeal was not due to his own fault.

Diligence

[23] Finally, we address whether Fields has established that he was diligent in requesting permission to file a belated notice of appeal. There are several factors to consider in order to determine if a defendant was diligent in seeking a belated appeal. *See id.* Those factors include the overall passage of time, the extent to which the defendant was aware of the relevant facts, and the degree to which delays are attributable to other parties. *Id.*

[24] Here, four years had passed between the date the court sentenced Fields and the date he filed his petition for permission to file a belated notice of appeal. But, as discussed above, he did not learn that he could appeal his sentence as contrary to law until he met with an attorney in May 2020. Then, once he learned that he could appeal his sentence, only three months passed before he filed his petition. Because Fields filed his petition within a reasonable time after he had learned of his right to appeal his sentence, we hold that he has demonstrated that he was diligent in requesting permission to file a belated notice of appeal.

Conclusion

[25] In sum, Fields is an “eligible defendant” pursuant to Post-Conviction Rule 2 because he would have had the right to challenge his sentence that was purportedly contrary to law in a timely appeal notwithstanding the waiver provision in his plea agreement. Further, the undisputed facts show that Fields’ failure to file a timely notice of appeal was not due to his own fault and that he was diligent in requesting permission to file a belated notice of appeal. As such,

applying our *de novo* standard of review, we hold that the trial court erred when it denied his petition to file a belated notice of appeal. We therefore reverse the trial court's judgment and remand with instructions for the trial court to grant Fields' petition for permission to file a belated notice of appeal.

[26] Reversed and remanded with instructions.

Riley, J., and Crone, J., concur.