MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Charlie D. Leshore, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

August 2, 2022

Court of Appeals Case No. 22A-CR-193

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D04-9804-CF-207

Robb, Judge.

Case Summary and Issue

[1] Charlie Leshore filed a petition for permission to file a belated notice of appeal which the trial court denied. Leshore now appeals, raising one issue for our review which we restate as whether the trial court erred by denying Leshore's petition for permission to file a belated notice of appeal. Concluding the trial court did not err by denying Leshore's petition, we affirm.

Facts and Procedural History

[2] In 1999, Leshore pleaded guilty to the following: burglary, a Class B felony; two counts of robbery as Class B felonies; rape, a Class A felony; and two counts of criminal confinement as Class B felonies. Pursuant to the plea agreement, the trial court retained the "final and full authority to impose the sentence it deems proper." Appellant's Appendix, Volume 2 at 24.

[3] Prior to accepting Leshore's guilty plea, the trial court advised Leshore of the rights he was forfeiting by pleading guilty, including the right to appeal his conviction. The following exchange occurred:

> Court: If you were to have a trial and were found guilty you'd have the right to appeal your conviction. Do you understand this?
>
> Mr. Leshore: Yes.
>
> Court: Do you understand that by pleading guilty you would give up all of these rights?

Mr. Leshore: Yes.

Id. at 31. The trial court then accepted the guilty plea and sentenced Leshore to an aggregate of seventy years to be served in the Indiana Department of Correction. The trial court did not advise Leshore that he could appeal his sentence.

[4] In 2001, Leshore filed a petition for post-conviction relief claiming, in part, that his sentence was inappropriate in light of the nature of the offense and the character of the offender.[1] *See id.* at 81. The State Public Defender's office reviewed Leshore's petition and evaluated the merits of his claims. Concluding that Leshore had not raised any meritorious claims and that the "trial court advised Leshore of all necessary rights[,]" the State Public Defender's office withdrew their representation in the matter. *Id.* at 82. Leshore then withdrew his petition for post-conviction relief.

[5] On December 20, 2021, Leshore filed a petition for permission to file a belated notice of appeal claiming that when he "signed his guilty plea, there was no [a]dvisement that he had the right to [a]ppeal his sentence[.]" *Id.* at 17. Leshore alleged that he did not learn that he could appeal his sentence until he was told by another inmate on December 1, 2021. *See id.* at 83-85. The trial court denied Leshore's petition without holding a hearing. Leshore now appeals.

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[1] Leshore did not include his petition for post-conviction relief in his appendix, so we rely on the State Public Defender's review of his petition to determine which claims he attempted to raise.

Discussion and Decision

I. Standard of Review

[6] 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.*

II. Belated Notice of Appeal

[7] Leshore appeals the trial court's denial of his petition for permission to file a belated notice of appeal. Indiana Post-Conviction Rule 2(1)(a) allows a convicted defendant to seek permission to file a belated notice of appeal when:

> (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.

[8] "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] Leshore argues the trial court erred by denying his petition because he was never advised he had the right to appeal his sentence. In *Baysinger*, the trial court failed to inform the defendant of his right to appeal his sentence and "instead informed him that by pleading guilty he was giving up 'most' of his grounds for appeal." 835 N.E.2d at 226. We concluded that this was "insufficient guidance to a defendant who is pleading guilty as to what claims may or may not be available for appeal." *Id.* The defendant also asserted that his trial counsel did not inform him of his right to appeal his sentence. Therefore, we concluded the defendant was not at fault for his failure to file a timely notice of appeal. *See id.* Similarly, Leshore pleaded guilty and was not advised by his trial counsel or the trial court that he could appeal his sentence. However, we need not determine whether Leshore was at fault because he is unable to show that he was diligent in his pursuit of permission to file a belated notice of appeal. *See Moshenek v. State*, 868 N.E.2d 419, 424 (Ind. 2007); *see also*

Cole, 989 N.E.2d at 831 (stating that a challenge to a trial court's denial of a petition for permission to file a belated notice of appeal may be "resolved on the diligence component alone").

[10] 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" are all relevant considerations when inquiring as to a defendant's diligence in pursuing permission to file a belated notice of appeal. *Cole*, 989 N.E.2d at 831 (emphasis added); *see also Moshenek*, 868 N.E.2d at 242 ("When the overall time stretches into decades, a belated appeal becomes particularly problematic[.]"). Leshore argues that he did not learn he could appeal his sentence until he was informed of such by another inmate in 2021, after which "he was diligent and immediately began pursuing his [a]ppellate [r]ights." Brief of Appellant at 7.

[11] In 2004, our supreme court held that the proper procedure for challenging a sentence imposed under an "open plea" agreement is to file a direct appeal or, if the time for filing a direct appeal has run, to seek permission to file a belated direct appeal under Post-Conviction Rule 2. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004). Subsequently, our supreme court examined a category of petitioners who had petitions for post-conviction relief containing challenges to their sentence pending at the time of *Collins*. *Johnson v. State*, 898 N.E.2d 290, 292 (Ind. 2008). The *Johnson* court found that "[p]rompt efforts to pursue those challenges through P-C.R. 2 were allowed to proceed." *Id.* In *Johnson*, the defendant amended his petition for post-conviction relief to include a sentencing claim in 2001, then withdrew his post-conviction petition in 2005,

and finally filed a petition for permission to file a belated notice of appeal in 2006. *See id.* at 291. The court instructed the trial court to grant the defendant's petition for permission to file a belated notice of appeal. *Id.* at 292.

[12] Here, Leshore falls within the *Johnson* category of petitioners having filed a petition for post-conviction relief which contained a challenge to his sentence in 2001 and remained pending until after *Collins*.[2] However, unlike the defendant in *Johnson*, Leshore's pursuit of permission to file a belated notice of appeal was not prompt. Leshore withdrew his petition for post-conviction relief in 2005 and did not file a petition for permission to file a belated notice of appeal until 2021 when he claims to have learned of the right to do so from a fellow inmate. This sixteen-year gap is not indicative of diligence on Leshore's part and distinguishes this case from *Johnson*.

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[2] The State Public Defender's office reviewed the merits of Leshore's petition for post-conviction relief. Leshore's petition included a claim that his sentence was inappropriate and two claims that his guilty plea was not knowing, voluntary or intelligent. In its summary, the State Public Defender's office states that "[t]he trial court advised Leshore of all necessary rights." Appellant's App., Vol. 2 at 82. Leshore claims this was an "erroneous advisement" because the trial court never advised him of his right to appeal his sentence. Br. of Appellant at 12. However, given the claims raised by Leshore, the statement is clearly in reference to Leshore's first claim that his guilty plea was not knowing, voluntary or intelligent. Although Leshore raises a sentencing claim, specifically that his sentence was inappropriate in light of the nature of the offense and the character of the offender, the review of such a claim's merits would not require a statement regarding required post-sentencing advisements. Conversely, Leshore's claim that his guilty plea was "not knowing, intelligent and voluntary because the court failed to advise Leshore of his right to confrontation and his right against self-incrimination" would require such a statement, Appellant's App., Vol. 2 at 80, and the right to appeal a sentence is not among those rights of which a trial court is required to inform a defendant before accepting a guilty plea. Ind. Code § 35-35-1-2; *see also Garcia v. State*, 466 N.E.2d 33, 34 (Ind. 1984). Therefore, the State Public Defender's office did not misinform Leshore.

[13] We conclude Leshore was not diligent in pursuing permission to file a belated notice of appeal and the trial court did not err by denying his petition.

Conclusion

[14] The trial court did not err by denying Leshore's petition for permission to file a belated notice of appeal. Accordingly, we affirm.

[15] Affirmed.

Pyle, J., concurs.

Weissmann, J., dissents with separate opinion.

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Weissmann, Judge, dissenting.

[16] When 19-year-old Leshore agreed to an open guilty plea in 1999, no one told him that he could appeal the resulting 70-year sentence. In fact, the public defender assigned to review his 2001 petition for post-conviction relief advised him that he had no remaining means to challenge his sentence. Relying on that counsel, Leshore withdrew his petition four years after it was filed. Meanwhile, his sentencing appeal rights languished.

[17] In 2021, a fellow inmate advised Leshore that he had been misled and could appeal his sentence. Within 19 days of that revelation, Leshore petitioned for a belated appeal. Because Leshore acted diligently under these circumstances, I would reverse the trial court's order denying his petition for a belated appeal.

[18] Indiana Post-Conviction Rule 2(1) allows an eligible defendant to file a belated appeal of a 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." In analyzing Leshore's request for a belated appeal, the majority fails to discuss prong two and misapplies the facts related to prong three. But prongs two and three are intertwined because Leshore reasonably relied on misinformation that caused a delay in action of almost 16 years.

[19] The majority essentially blames Leshore for the entire gap between the withdrawal of his petition for post-conviction relief in 2005 and his belated appeal filing in 2021. According to the majority, neither the trial court's omitted appellate advisement nor the public defender's advisement that "the trial court advised Leshore of all necessary rights" justified Leshore's delay. App. Vol. II, pp. 76, 82.

[20] The majority explains that result in footnote 2 by noting that the right to appeal is not among the "necessary rights" for which a trial court advisement is required when the defendant pleads guilty. The majority views the public defender's assessment as correct because it was limited to Leshore's pro se attack on his guilty plea. But the public defender also informed Leshore that he "did not discover any other post-conviction issues." *Id.* at 82. Through these statements, the public defender effectively communicated to Leshore that he could not proceed to challenge his guilty plea or sentence.

[21] In any case, the majority's narrow construction of the public defender's statements is not reasonable given the public defender's obligations under Indiana Post-Conviction Rule 1(9)(c). That rule specifically required the public defender to confer with Leshore and "*ascertain all grounds for relief under this rule*, amending the petition if necessary to include any grounds not included by petitioner in the original petition." P-C.R. 1(9)(c) (emphasis added). And "[i]n the event that counsel determines the proceeding is not meritorious or in the interests of justice . . . counsel shall . . . [certify] that 1) the petitioner has been consulted regarding grounds for relief in his pro se petition and *any other possible grounds* and 2) appropriate investigation, including but not limited to review of the guilty plea or trial and sentencing records, has been conducted." *Id.* (emphasis added).

[22] The public defender also needed to "explain the reasons for withdrawal to" Leshore. *Id.* Thus, when the public defender informed Leshore that the trial court had advised Leshore of "all necessary rights" and no other post-conviction issues had been discovered, the public defender was offering a general assessment of all of Leshore's potential claims, not just those raised in Leshore's pro se petition.

[23] The majority does not dispute that the sentencing court failed in its duty to inform Leshore of his right to appeal. *See* Indiana Criminal Rule 11 (requiring for more than a half century that trial courts advise the defendant that he has the right to appeal a felony sentence). Though the majority is correct that the lack of an appellate advisement is not grounds for overturning a guilty plea, that

omission is still relevant to determining whether the requirements of Post-Conviction Rule 2 are met. *Moshenek v. State*, 868 N.E.2d 419, 424 (Ind. 2007).

[24] Because the trial court needed to inform Leshore of his right to appeal and did not, Leshore's public defender was mistaken when informing Leshore that the trial court had properly advised him and, essentially, that no grounds for post-conviction relief existed. These errors fused to justify Leshore's inaction. Leshore had no reason to initiate an appeal when the trial court never made him aware of his right to do so. And at the very least, the assertion by the State Public Defender's office that "the trial court advised Leshore of all necessary rights" ensured that Leshore continued to remain unaware of his appellate rights. It is unfair to fault Leshore for reasonably relying on misinformation from the very people responsible for advising him correctly.

[25] The Record reveals other compelling factors militating toward granting relief. Leshore was only 19 years old when he was sentenced. App. Vol. II, pp. 31, 53, 55. He had limited education and contact with the legal system due to his age. *Id.* at 58-59. He was not informed of his appellate rights. These circumstances support his claim that he was unaware of his appellate and other procedural remedies. Leshore also does not appear to have contributed to the delay except by relying on the trial court's erroneous omission and his counsel's incorrect statement. Upon being informed of his ability to appeal his sentence, Leshore acted within 19 days. Because I would not fault Leshore for failing to file his request more promptly, I respectfully dissent.