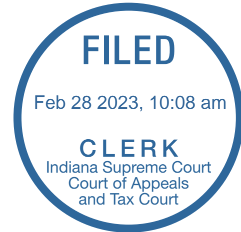

IN THE

Indiana Supreme Court

Supreme Court Case No. 23S-CR-51

Charlie D. Leshore, Jr.,
Appellant (Defendant below),

–v–

State of Indiana,
Appellee (Plaintiff below).

Decided: February 28, 2023
Corrected

Appeal from the Allen Superior Court
02D04-9804-CF-207
The Honorable David M. Zent, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 22A-CR-193

Opinion by Justice Massa

Chief Justice Rush and Justice Molter concur.
Justice Goff dissents with separate opinion in which Justice Slaughter joins.

Massa, Justice.

Chaucer said in *The Canterbury Tales*, "For better than never is late; never to succeed would be too long a period."[1] Centuries later, we simply say, "Better late than never,"[2] and say it here to afford Appellant a chance at relief.

This ancient principle buttresses Post-Conviction Rule 2(1)(a), which permits convicted defendants to seek permission to file a belated notice of appeal under certain circumstances. Yet Charlie Leshore, who pleaded guilty to felonies in 1999, was denied that chance upon discovering **new** information in 2021. He claims that at his guilty plea hearing he was never advised of his right to appeal his sentence, and only recently learned that he could. Still, his post-conviction petition for permission to file a belated notice of appeal was denied in the trial court and the Court of Appeals affirmed over a dissent. We now grant Leshore's petition to transfer, reverse and remand with instructions to let his appeal proceed.

Facts and Procedural History

In 1999, Charlie Leshore pleaded guilty to these crimes: 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. App. Vol. II, p. 24. Under the plea agreement, the trial court was entrusted the "final and full authority to impose the sentence it deem[ed] proper." *Id.* In its colloquy with Leshore, the court advised him that he was relinquishing certain rights by pleading guilty to these felonies, which included the right to appeal his **conviction**. It stated:

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[1] Geoffrey Chaucer, *The Canterbury Tales: The Canon's Yeoman's Tale* 8 (Gerard NeCastro ed. 2007), https://users.pfw.edu/flemingd/23cyt.pdf, archived at https://perma.cc/R8KX-J22P.

[2] Geoffrey Chaucer, THE CANTERBURY TALES: THE CANON'S YEOMAN'S TALE 473 (Nevill Coghill revised ed. 2003).

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 accepted Leshore's guilty plea and sentenced him to seventy years in the Indiana Department of Correction. Neither the trial court nor his public defender advised him that he could appeal his sentence.

In 2001, Leshore petitioned for post-conviction relief under Rule 1, arguing his sentence was inappropriate due to the nature of the offense and the character of the offender.[3] The State Public Defender's Office reviewed Leshore's petition and analyzed its merits, and concluded the "trial court advised Leshore of all necessary rights." *Id.* at 82. In light of these findings, the Public Defender's Office withdrew its representation, and Leshore abandoned his efforts in 2005.

On December 20, 2021, Leshore petitioned for post-conviction relief to file a belated notice of appeal under Rule 2, claiming he "signed his guilty plea," and "there was no [a]dvisement that he had the right to [a]ppeal his sentence." *Id.* at 17. According to Leshore, he did not learn he could appeal his sentence until that information was supplied by another inmate on December 1, 2021. The trial court, however, denied Leshore's petition without a hearing, which Leshore appealed pro se.

In a divided memorandum decision, the Court of Appeals affirmed. *Leshore v. State*, 194 N.E.3d 608, 2022 WL 3036401, at *1 (Ind. Ct. App. Aug.

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[3] On appeal, Leshore did **not** attach his petition for post-conviction relief in his appendix. So, similar to the Court of Appeals' treatment of his petition, we rely on the State Public Defender's review of his petition to discern which claims he attempted to raise.

2, 2022). The panel held Leshore was "unable to show that he was diligent in his pursuit of permission to file a belated notice of appeal," *id.* at *2, and thus the trial court did not err in denying his petition. *Id.* at *3. In reaching its decision, the panel employed several factors under precedent to evaluate his petition, including the "overall passage of time," a fact which cut against Leshore given the time gap between 2005 and 2021. *Id.* at *2–3.

Dissenting from the panel's affirmance, Judge Weissmann concluded Leshore satisfied the three conditions under Indiana Post-Conviction Rule 2(1)(a) and therefore should be allowed to pursue his belated appeal. *Id.* at *4–5. The dissent contended it was error to overlook the **second** prong under Indiana Post-Conviction Rule 2(1)(a)(2)—"the failure to file a timely notice of appeal **was not due to the fault of the defendant**." *Id.* at *4 (emphasis added). Judge Weissmann suggested that condition is indivisibly "intertwined" with Rule 2(1)(a)(3), which requires a defendant to be "**diligent** in requesting permission to file a belated notice of appeal." *Id.* (emphasis added). Because Leshore received mistaken advice from the trial court and counsel, "[t]hese errors fused to justify his inaction." *Id.* at *5. And because he acted nineteen days after receiving the new and correct information, he acted diligently under these circumstances. *Id.*

Leshore now petitions for transfer, which we grant, thus vacating the appellate opinion, *see* Ind. Appellate Rule 58(A), and remanding to the trial court.

Standard of Review

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 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.*

Discussion and Decision

Indiana Post-Conviction Rule 2(1)(a) establishes the requisites for filing a belated notice of appeal:

> "An eligible defendant convicted . . . 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."

P-C.R. 2(1)(a). 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." *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.* at 424. And since each case is shaped by its own circumstances, there are no assigned "standards of fault or diligence." *Id.* 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 *Land v. State*, 649 N.E.2d 106, 108 (Ind. Ct. App. 1994)).

On transfer, we evaluate one issue: whether the trial court erred by denying Leshore's petition for permission to file a belated notice of appeal.[4] For the reasons below, we hold that it did.

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[4] The trial court simply denied the petition without explanation. The appellate panel affirmed for lack of diligence. *Leshore v. State*, 194 N.E.3d 608, 2022 WL 3036401 at *1 (Ind. Ct. App. Aug. 2, 2022).

I. The Rule's requirements are intertwined on these facts.

When confronted with a tardy petition seeking dispensation from otherwise firm deadlines and their decisive consequences, judges must ask, "was it your fault?" And if not, "did you act quickly enough thereafter?" Courts should take these questions up in sequence, though a negative answer to either one can be enough to bar relief. For instance, if the delay were caused through no fault of petitioner, but he still waited years to seek relief after discovery of the error, he could be denied on a lack of diligence alone.

Here the very same facts influence both answers. It was not Leshore's fault because he received inaccurate advisements from both his lawyers and the trial court, and his reliance on that advice led to his long delay in seeking relief until he learned otherwise from another source.

The panel below relied on two cases to affirm the denial of Leshore's petition to file a belated notice of appeal based on a lack of diligence alone: *Moshenek v. State*, 868 N.E.2d 419 (Ind. 2007), and *Cole v. State*, 989 N.E.2d 828 (Ind. Ct. App. 2013), *trans. denied*. We, however, read those cases slightly differently. **First**, while *Moshenek* held the defendant had **not** been diligent in requesting permission to file a belated notice of appeal, this Court still evaluated the issue of fault under subsection (a)(2): "The 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." 868 N.E.2d at 424. On this point, *Moshenek* suggests that a trial court's failure to advise a defendant of his right to appeal can satisfy the no-fault requirement. *See also Jackson v. State*, 853 N.E.2d 138, 141 (Ind. Ct. App. 2006) (misadvisement); *Baysinger v. State*, 835 N.E.2d 223, 226 (Ind. Ct. App. 2005) (same), *trans. denied*. **Second**, while *Cole* indeed authorizes courts to resolve Rule 2(1)(a) petitions on "the diligence component alone," 989 N.E.2d at 831, that principle does not bar Leshore from pursuing his appeal under these circumstances, as he was actually diligent once accurately informed of his rights. Leshore could have lost on the "diligence component alone," *id.*, had he waited too long upon

learning of the trial court's and public defender's errors, but we conclude that he acted with sufficient alacrity.

A. Leshore was not at fault in failing to file a timely notice of appeal.

The source of the delay **was** the mistaken advice shared with Leshore. That said, the panel confirmed in a footnote the right to appeal is not among the necessary rights for which a trial court advisement is required when the defendant pleads guilty. *Leshore*, 2022 WL 3036401, at *3 n.2. In its view, the public defender's assessment was proper because it was limited to Leshore's pro se attack on his guilty plea, and not his sentence. *See id.* Even so, Leshore's public defender also informed Leshore that he "did not discover **any other** post-conviction issues." App. Vol. II, p. 82 (emphasis added).

A public defender has distinct obligations under Indiana Post-Conviction Rule 1(9)(c). That Rule requires the public defender to consult 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). Further, "[i]n the event that counsel determines the proceeding is not meritorious or in the interests of justice, . . . counsel shall [certify] that . . . the petitioner has been consulted regarding grounds for relief in his pro se petition and **any other possible grounds** . . . ." *Id.* (emphasis added). Leshore's public defender also needed to "expla[in] . . . the reasons for withdrawal" to him. *Id.* He did not.

Here, the public defender shared mistaken advice with Leshore about his available post-conviction relief. Leshore had a chance to appeal his sentence, but that choice was never presented to him. As for the sentencing court's error, while the lack of appellate advisement is not grounds for overturning a guilty plea, *see* Ind. Code § 35-35-1-2 and *Garcia v. State*, 466 N.E.2d 33, 34 (Ind. 1984), its absence can constitute grounds for satisfying the no-fault requirement under Rule 2(1)(a)(2). *See Moshenek*, 868 N.E.2d at 424. For example, in *Baysinger v. State*, 835 N.E.2d at 226, 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." *Id.* The court decided this advice was "insufficient guidance to a defendant who is pleading guilty as to what claims may or may not be available for appeal." *Id.* In that case, the defendant asserted his counsel did not inform him of his right to appeal, and so the panel aptly concluded the defendant was **not** at fault for his failure to file a timely notice of appeal. *See id.*

The mistaken advice here establishes Leshore was not at fault for his delay. In short, he had no reason to appeal his sentence when he was never aware of his right to do so. The record also contains equitable factors weighing in his favor: he was 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. These facts, reviewed as a whole, "fused to justify Leshore's inaction." *Leshore*, 2022 WL 3036401, at *5 (Weissmann, J., dissenting). To hold otherwise would be "unfair" because Leshore made a sensible and rational decision based on mistaken advice from "the very people responsible for advising him correctly." *Id.*

B. Leshore was diligent in pursuing his belated notice of appeal.

Leshore argues that he did not learn he could appeal his sentence until he was informed by an inmate in 2021, after which "he was diligent and immediately began pursuing his [a]ppellate [r]ights." Appellant's Br. at 7. We agree.

In 2004, this Court in *Collins v. State*, 817 N.E.2d 230 (Ind. 2004), 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 direct appeal under Post-Conviction Rule 2. *Id.* at 233. Since *Collins*, we have examined a defined universe of petitioners who had petitions for post-conviction relief containing challenges to their sentence at the time of *Collins*. For example, in *Johnson v. State*, 898 N.E.2d 290 (Ind. 2008), this Court found "[p]rompt efforts to pursue those challenges through P-C.R. 2 were allowed to proceed." *Id.* at 292. *Johnson* involved a defendant who amended his petition for post-conviction relief to include a sentencing

claim in 2001, then withdrew his post-conviction petition in 2005, before filing for permission to file a belated notice of appeal in 2006. *See id.* at 291.

Here, Leshore falls within the *Johnson* category of petitioners having petitioned for post-conviction relief, which contained a challenge to his sentence in 2001 and remained pending until after *Collins* was decided. Critically, *Johnson* states the Post-Conviction Rule 2 challenge must be "prompt." 898 N.E.2d at 292. But prompt according to what rightful starting place? Diligence under these facts is best measured from the time when Leshore learned of his rights to the filing of his permission to file a belated notice of appeal.

Thus, the more appropriate starting place for evaluating Leshore's diligence begins on December 1, 2021. Nineteen days later, Leshore filed his petition. Similar to *Baysinger*, when the defendant confirmed he only learned of his right to challenge his sentence after he read *Collins*, Leshore acted promptly **after** discovering his rights from an inmate, who confirmed his discussion with Leshore. *See Baysinger*, 835 N.E.2d at 226. And while we decline to draw a line for when diligence must always begin, we can say Leshore was prompt enough.

Conclusion

The Court of Appeals thus erred in affirming the trial court's decision to deny Leshore's petition for permission to file a belated appeal, so we grant transfer, vacate the opinion, and remand to the trial court with instructions to grant the petition to allow Leshore's appeal to proceed.

Rush, C.J., and Molter, J., concur.
Goff, J. dissents with separate opinion in which Slaughter, J., joins.

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Goff, J., dissenting.

To obtain permission to file a belated notice of appeal, Charlie Leshore had to prove by a preponderance of the evidence that he was "diligent in requesting" such permission. *See* Ind. Post-Conviction Rule 2(1)(a)(3); *Moshenek v. State*, 868 N.E.2d 419, 422–23 (Ind. 2007). The record here does not affirmatively show such diligence.

As the Court relates, Leshore pled guilty to six felony counts in 1999. *Ante*, at 2. His plea agreement left his sentence open. The trial court sentenced him to seventy years. He was not advised by the trial court or, he says, by counsel of his right to appeal his sentence. In 2001, Leshore filed a pro se petition for post-conviction relief under Indiana Post-Conviction Rule 1. The record does not contain a copy of this petition.[1] It is uncertain, therefore, whether Leshore's first petition actually raised a challenge to his sentence, as the Court states. *Id.* at 8.

The State Public Defender reviewed Leshore's case. In a memo approved on April 27, 2004, the State PD determined that Leshore had no meritorious claims that would justify representing him in post-conviction proceedings. *See* P-C.R. 1(9)(c). The memo analyzed several potential sentencing issues but found none that had merit. The State PD was required to "ascertain all grounds for relief under this rule," so the fact that the memo discusses sentencing issues is not evidence that Leshore raised these issues in his pro se petition. *See id.*

The State PD was obligated to consult with Leshore "regarding grounds for relief in his pro se petition and any other possible grounds" and to explain to him "the reasons for withdrawal." *See id.* The Court states that the public defender "did not" do the latter. *Ante*, at 7. But I find no evidence in the record to support this inference. The State PD withdrew from Leshore's case in September 2004.

The Court also claims that the State PD "shared mistaken advice with Leshore about his available post-conviction relief." *Id.* The State PD's

[1] Nor is it available to view in the Odyssey case management system.

memo concluded that the trial court "advised Leshore of all necessary rights" and there were no post-conviction issues beyond those discussed, omitting any right to a belated appeal under Indiana Post-Conviction Rule 2. App. Vol. II, p. 82. However, when the State PD withdrew from Leshore's case, the post-conviction landscape was less clear than today. *See Johnson v. State*, 898 N.E.2d 290, 291 (Ind. 2008) (acknowledging there was formerly "a split in authority" about how to challenge a sentence following an open plea). In 2003, the Court of Appeals decided *Gutermuth v. State*, holding that, because the trial court had not informed the defendant of his right to appeal his sentence, he could instead challenge it via a Post-Conviction Rule 1 petition. 800 N.E.2d 592, 596–97 (Ind. Ct. App. 2003), *vacated* 817 N.E.2d 233 (Ind. 2004); *see also Collins v. State*, 800 N.E.2d 609, 613–14 (Ind. Ct. App. 2003), *vacated* 817 N.E.2d 230 (Ind. 2004). Leshore's case was on all-fours with *Gutermuth*. There was, therefore, no need for the State PD to advise Leshore in September 2004 that he could file for a belated notice of appeal. Only in November 2004 did our Court hand down its decision in *Collins v. State*, explaining that misadvised defendants must proceed via Post-Conviction Rule 2. 817 N.E.2d at 233; *see also Gutermuth*, 817 N.E.2d at 234–35.

In January 2005, following the State PD's withdrawal from his case, Leshore decided to withdraw his Post-Conviction Rule 1 petition without prejudice, rather than continuing pro se. *See* P-C.R. 1(9)(c). At that point, Leshore had received the State PD's advice that his case involved no potentially meritorious sentencing claims. The very fact that the State PD had analyzed his sentencing in depth must have indicated to Leshore that there was an opportunity to challenge his sentence in post-conviction proceedings. Instead, he abandoned any sentencing claim he may have considered bringing. And, from that time until 2021, Leshore did not attempt to pursue post-conviction relief.

In 2021, Leshore filed a Post-Conviction Rule 2 petition addressing his sentence, claiming that he had only recently learned he could file for a belated appeal. App. Vol. II, p. 87. This may be true in the technical sense that he only found out lately about his right to pursue Post-Conviction Rule 2, as opposed to Post-Conviction Rule 1, relief. But, practically speaking, Leshore had already received and abandoned the opportunity

to challenge his sentence in post-conviction proceedings. He enjoyed State PD review at a time when it appeared he could raise a sentencing challenge via the Post-Conviction Rule 1 petition that he filed. His failure to pursue relief upon receipt of the State PD's advice demonstrates a lack of diligence in pursuing his claims. His subsequent discovery that he should, after all, have filed for a Post-Conviction Rule 2 belated appeal does not meaningfully change things. Leshore's position is not like that in *Johnson*, where the defendant filed a prompt sentencing challenge under Post-Conviction Rule 1 and dismissed it after *Collins* only so he could refile under Post-Conviction Rule 2. 898 N.E.2d at 291. Leshore gave up any pursuit of post-conviction relief for a period of sixteen years. Had he proceeded with sentencing claims via Post-Conviction Rule 1 in 2005, he would probably have discovered much sooner that he needed to seek a belated appeal.

Because I find that Leshore has not demonstrated diligence in pursuing an appeal, I respectfully dissent.

Slaughter, J., joins.