



Kenneth Macken, pro se, appeals the trial court's denial of his Verified Petition for Leave to File a Belated Notice of Appeal. He presents the following restated issue for review: Did the trial court err in denying his petition?

We affirm.

On April 12, 1983, Macken pleaded guilty to burglary as a class B felony and theft as a class D felony. The court imposed the minimum six-year sentence for the burglary conviction, with six months executed in the Vanderburgh County Jail on work release and five and one-half years suspended to probation. The court imposed a suspended two-year sentence for the theft conviction, to run concurrent with the burglary sentence.

On April 13, 2007, Macken filed a "Petition of Permission to File a Belated Notice of Appeal of the 4/12/83 Sentencing Order." *Appellant's Appendix* at 5. That petition was denied on May 21, 2007. On June 25, 2008, following a series of legal proceedings at this and the trial court levels, Macken re-filed his Verified Petition For Permission to File a Belated Notice of Appeal. The trial court denied that petition and this appeal ensued.

On October 23, 2008, the State filed a Verified Motion for Involuntary Dismissal, claiming that the issue of sentencing was moot. This court granted the State's motion and dismissed the appeal with prejudice. On January 15, 2009, this court received Macken's petition for rehearing. That petition was granted on February 5, 2009, and Macken's appeal was reinstated. We must now make a determination on the merits with respect to Macken's claim that he is entitled to file a belated notice of appeal.

Indiana Post-Conviction Rule 2 permits a defendant to seek permission to file a

belated notice of appeal. That rule provides, in pertinent part:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

(a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

(b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

The trial court shall consider the above factors in ruling on the petition. Any hearing on the granting of a petition for permission to file a belated notice of appeal shall be conducted according to Section 5, Rule P.C. 1.

If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period.

If the trial court finds no grounds for permitting the filing of a belated notice of appeal, the defendant may appeal such denial by filing a notice of appeal within thirty (30) days of said denial.

A “trial court’s ruling on a petition for permission to file a belated notice of appeal under Post-Conviction Rule 2 will be affirmed unless it was based on an error of law or a clearly erroneous factual determination (often described in shorthand as ‘abuse of discretion’).” *Moshenek v. State*, 868 N.E.2d 419, 423-24 (Ind. 2007). When, as here, the trial court does not conduct a hearing before ruling on a petition to file a belated notice of appeal and the allegations contained in the motion itself provide the only basis in support of a motion, we review the decision de novo. *See Baysinger v. State*, 835 N.E.2d 223 (Ind. Ct. App. 2005).

The State contends Macken’s petition should be denied because the issue is moot. We

agree. An issue is deemed to be moot when the case “is no longer ‘live’ and the parties lack a legally cognizable interest in the outcome of its resolution.” *Jones v. State*, 847 N.E.2d 190, 200 (Ind. Ct. App. 2006), *trans. denied*. The general rule in Indiana is that a case is deemed moot and may be dismissed “when no effective relief can be rendered to the parties before the court.” *W.R.S. v. State*, 759 N.E.2d 1121, 1123 (Ind. Ct. App. 2001).

Putting aside for the moment the fact that the sentence Macken seeks to challenge was the minimum sentence permitted by law, and that all but six months of it was suspended, we note that Macken long ago finished serving this sentence. “Once ‘sentence has been served, the issue of the validity of the sentence is rendered moot.’” *Lee v. State*, 816 N.E.2d 35, 40 n.2 (Ind. 2004) (quoting *Irwin v. State*, 744 N.E.2d 565, 568 (Ind. Ct. App. 2001)).

Macken sought rehearing of the dismissal of his petition for belated appeal on the following grounds: “Because this conviction and sentence was used to obtain Appellant’s Habitual Offender determination he has a right to challenge the conviction and sentence.” Petition for Rehearing at 2. Macken frames the matter as if a habitual offender enhancement may be attacked either by successfully overturning one of the predicate offenses *or* by successfully challenging in some respect the sentence imposed upon one of those convictions. Such mischaracterizes Ind. Code Ann. § 35-50-2-8 (West, PREMISE through 2008 2nd Regular Sess.). Subsection (a) of that provision permits sentence enhancement where the State proves “that the person has accumulated two (2) prior unrelated felony convictions.” Thus, in order to reverse the habitual offender enhancement under I.C. § 35-50-2-8, Macken must reverse or reduce to a misdemeanor one of the predicate offenses,

assuming there are only two. To put it plainly, merely reducing the sentence of a predicate offense will accomplish nothing with respect to a habitual offender enhancement based thereon.

Other than a passing reference to the effect that “the Appellee provided this court with mistaken information as to Appellant’s current convictions”, Petition for Rehearing at 2, Macken’s sole focus in this action has been to challenge the sentences he received for his 1983 convictions. This was clarified in his June 25, 2008 Verified Petition For Permission to File Belated Notice of Appeal, where Macken stated: “The issue to be presented on appeal is: a). Whether the trial court erred when it: 1) provided an inadequate sentencing statement; 2) used improper aggravators; and 3) failed to consider mitigating factors.” *Appellant’s Appendix* at 8. Because Macken’s sentence has been served, the issue of the validity of the sentence is moot. *Lee v. State*, 816 N.E.2d 35.

Ruling affirmed.

NAJAM, J., and VAIDIK, J., concur.