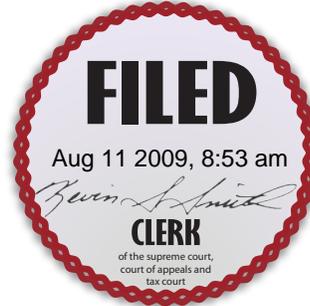


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

JOSE L. HERNANDEZ
Bunker Hill, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JOSE L. HERNANDEZ,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 20A03-0809-CR-472

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0409-FA-120

August 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Jose L. Hernandez appeals the trial court's denial of his petition for permission to file a belated notice of appeal. Hernandez raises several issues which we combine and restate as follows: whether the trial court abused its discretion when it determined that Hernandez failed to establish that the delay in filing a notice of appeal was not the result of his own fault, as required by Indiana Post-Conviction Rule 2.

We affirm.

FACTS AND PROCEDURAL HISTORY

Hernandez pleaded guilty in December 2004 to two counts of Class A felony dealing in cocaine or a narcotic drug, namely methamphetamine.¹ At the guilty plea hearing, the trial court advised Hernandez of his right to appeal any sentence imposed and the requirements for doing so. *Appellant's App.* at 30. On January 13, 2005, the trial court sentenced him to two thirty-year concurrent terms of imprisonment. At the sentencing hearing, the trial court again advised Hernandez of his right to appeal his sentence and the thirty-day time limit for doing so. *Tr.* at 1, 10; *Appellant's App.* at 30.

On July 26, 2005, Hernandez filed a pro-se petition for post-conviction relief, and the trial court appointed a state public defender to represent Hernandez. On September 23, 2005, Hernandez, by counsel, filed a motion to dismiss his petition for post-conviction relief without prejudice, and, in addition, he filed a request for local counsel, namely a "Petition for Appointment of Counsel at County Expense to Pursue Proceedings under Indiana Post-Conviction Rule 2." *Appellant's App.* at 28; *Pet. Ex.* 2. The trial court granted the motion to

¹ See Ind. Code § 35-48-4-1(b).

dismiss, but denied the other petition noting that no grounds were set forth to justify the filing of a Post-Conviction Rule 2 petition. Thereafter, the trial court reinstated, at Hernandez's request, his petition for post-conviction relief.

Noticing that the post-conviction petition had been pending for some time, the trial court on its own motion set the matter for hearing on January 3, 2008. Hernandez sought a continuance, which was granted, and the trial court reset the hearing to May 22, 2008. On May 20, two days prior to his hearing on his post-conviction petition, Hernandez, by counsel, filed a motion for permission to file a belated notice of appeal under Post-Conviction Rule 2.²

The trial court held the hearing on May 22, which addressed both Hernandez's petition for post-conviction relief and his motion for permission to file a belated notice of appeal. The court received evidence and took the matter under advisement. On August 5, 2008, the trial court issued an order dismissing Hernandez's petition for post conviction relief with prejudice. The trial court also denied Hernandez's request to file a belated appeal, and it is from this determination that Hernandez now appeals.³

DISCUSSION AND DECISION

Hernandez contends that the trial court erred when it denied his petition for permission to file a belated notice of appeal. Indiana Post-Conviction Rule 2(1) provides a

² The motion seeking permission to file a belated notice of appeal is not included in the record before us.

³ Hernandez filed his notice of appeal in September 2008. Due to various procedural matters and filings, the case was not fully briefed until July 1, 2009. We also note that his appellate counsel sought leave and was granted permission to withdraw her appearance in December 2008.

defendant an opportunity to petition the trial court for permission to file a belated notice of appeal. It provides:

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.

Indiana Post-Conviction Rule 2 also gives a defendant the right to appeal a trial court's denial of permission to file a belated notice of appeal or motion to correct error. *Moshenek v. State*, 868 N.E.2d 419, 422 (Ind. 2007).

The defendant bears the burden of proving by a preponderance of the evidence both that he was without fault in the delay of filing and that he was diligent in pursuing permission to file a belated motion to appeal. *Id.* Several factors are relevant to the defendant's diligence and lack of fault in the delay of filing, such as 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. Because diligence and relative fault are fact sensitive, we give substantial deference to the trial court's ruling. *Id.* A trial court's ruling on a petition for permission to file a belated notice of appeal under Indiana 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"). *Id.* at 423-24.

Here, at the May 22, 2008 hearing on his motion for permission to file a belated notice of appeal, Hernandez acknowledged that he had been advised at his January 13, 2005 sentencing hearing that he had thirty-days to file his notice of appeal. In an effort to establish his diligence in pursuing a belated appeal and to show any delay was not his fault, Hernandez testified that his wife attempted to telephone his trial attorney within thirty days of sentencing to discuss the possibility of an appeal. Also, Hernandez offered into evidence a handwritten letter that he claimed to have written and mailed to his attorney on January 25, 2005, which was less than two weeks after he was sentenced. The trial court sustained the State's objection to the letter and excluded it, finding that the letter lacked foundation and was not properly authenticated, as it was not signed by anyone, did not reflect any postage nor did it include any address indicating where it was mailed, and the name of the person to whom it had been sent had been "scribbled through." *Tr.* at 16-17. The trial court further noted that the letter did not mention "appeal" at any time and, instead, appeared to be more of a general complaint alleging that minorities in the area were receiving longer sentences. *Id.* at 14.

After taking the matter under advisement, the trial court ultimately determined that, based on the evidence presented to it at the May 22, 2008 hearing, Hernandez did not meet his burden of showing that the failure to file a timely notice of appeal was not his fault and that he was diligent in pursuing permission to file a belated notice of appeal. In so doing, the court also observed that Hernandez was thirty years of age when he was sentenced, the possible range of his sentences were explained to him, he was sentenced in accordance with his plea agreement, and he was informed of his appellate rights.

Like the trial court, we conclude that Hernandez failed to meet the requirements of diligence and lack of fault in presenting his claim under Indiana Post-Conviction Rule 2, and the trial court did not abuse its discretion in denying his request for permission to file a belated appeal. *Moshenek*, 868 N.E.2d at 423-24.

Affirmed.

NAJAM, J., and BARNES, J., concur.