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IN THE
COURT OF APPEALS OF INDIANA

JAMES L. FORTHENBERRY, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 79A05-0701-CR-41
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-9511-CF-108

February 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

James L. Forthenberry, Jr., appeals a trial court order denying his motion for permission to file a belated notice of appeal. We affirm.

Issue

The issue is whether the trial court abused its discretion in finding that Forthenberry was not diligent in seeking a belated direct appeal under Indiana Post-Conviction Rule 2.

Facts and Procedural History

On October 11, 1996, Forthenberry pled guilty but mentally ill to criminal deviate conduct as a class A felony. Sentencing was left open to the trial court, subject to a cap of the thirty-year presumptive sentence for a class A felony. On November 12, 1996, the trial court sentenced Forthenberry to thirty years. The trial court did not advise Forthenberry of his right to appeal his sentence. The public defender who represented him at that time does not recall advising him that he could appeal his sentence. According to Forthenberry, at the time of sentencing, his public defender had advised him that he had one year to request a sentence modification. Tr. at 17.

Forthenberry filed motions for sentence modification in 1998 and 2002. Both were denied because the prosecutor did not approve the modifications.[1]

On December 3, 2002, Forthenberry filed a pro se petition for post-conviction relief under Indiana Post-Conviction Rule 1 ("P-C.R. 1 petition"). Forthenberry did not challenge his sentence in his P-C.R. 1 petition. On December 5, 2002, the trial court appointed the

[1] *See* Ind. Code § 35-38-1-17(b).

State Public Defender to represent Forthenberry in his post-conviction relief proceedings. On February 3, 2003, the State Public Defender entered an appearance on Forthenberry's behalf.

On January 26, 2005, following our supreme court's decision in *Collins v. State*, 817 N.E.2d 230 (Ind. 2004), Forthenberry filed a motion to dismiss his P-C.R. 1 petition without prejudice and a petition for appointment of counsel at county expense to pursue a belated appeal under Indiana Post-Conviction Rule 2 ("P-C.R. 2"). Following the trial court's February 2, 2005, denial, Forthenberry filed a motion to reconsider on February 24, 2005. The trial court denied the motion on March 25, 2005. On October 24, 2006, Forthenberry filed a P-C.R. 2 motion for permission to file a belated notice of appeal, and the trial court held a hearing on December 1, 2006. The trial court denied Forthenberry's motion on December 20, 2006. This appeal ensued.

Discussion and Decision

The decision to grant or deny a petition for permission to file a belated notice of appeal "is a matter entrusted to the sound discretion of the trial court." *Beatty v. State*, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006). We reverse only if the trial court abused its discretion or the decision is contrary to law. *Id*. The defendant bears the burden of proving his grounds for relief by a preponderance of the evidence. *Witt v. State*, 867 N.E.2d 1279, 1281 (Ind. 2007).

Indiana Post-Conviction Rule 2 provides a mechanism for a defendant to appeal his conviction and/or sentence when the time for filing a direct appeal has expired. When Forthenberry filed his P-C.R. 2 petition, the rule read in pertinent part as follows:

> 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[1] 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.

Ind. Post-Conviction Rule 2(1)(a). In *Collins*, our supreme court resolved a conflict in the Court of Appeals, holding that a direct or belated appeal is the only permissible method for challenging a sentence when the defendant has entered an "open plea" agreement. 817 N.E.2d at 232. In this case, Forthenberry entered an open plea agreement in which sentencing was left to the trial court's discretion, subject to a thirty-year cap. Therefore, he is a pre-*Collins* defendant now subject to the *Collins* ruling restricting his remedy to a belated appeal under P-C.R. 2.

At the hearing on Forthenberry's P-C.R. 2 petition, the trial court stated that Forthenberry was not at fault for failing to file a timely notice of appeal, but had not been diligent in requesting permission to file a belated notice of appeal. Tr. at 25. The trial court's written order, however, states that Forthenberry was at fault and was not diligent. Appellant's App. at 192. The fact that a trial court failed to advise a defendant about the right to appeal his sentence can be sufficient to establish that the defendant was without fault in the delay of filing a timely appeal. However, the defendant must still establish that he acted diligently. *Moshenek v. State*, 868 N.E.2d 419, 424 (Ind. 2007); *see also Witt*, 867 N.E.2d at 1282 (holding that the trial court's improper advisement regarding the defendant's right to

[1] Effective January 1, 2008, Indiana Post-Conviction Rule 2 was revised to include "sentence" as well as "conviction," in keeping with the rule laid down in *Collins*.

appeal his sentence satisfied the "without fault" prong but not the "diligence" prong of the P-C.R. 2 test). We need not resolve the discrepancy in the trial court's spoken and written pronouncements regarding whether Forthenberry was at fault in failing to file a timely notice of appeal because we conclude that he was not diligent in requesting permission to file a P-C.R. 2 petition.

Several factors are relevant in determining a defendant's diligence. Among these are the overall passage of time, the defendant's age, education, and familiarity with the legal system, the extent to which the defendant was aware of relevant facts, appellate rights, and procedural remedies, and the degree to which delays are attributable to other parties rather than any act or omission on his part. *Id*. at 423-24.

Ten years elapsed between Forthenberry's sentencing in November 1996 and his October 2006 petition for permission to file a belated notice of appeal. In 1998 and 2002, Forthenberry petitioned for sentence modification pursuant to Indiana Code Section 35-38-1-17. The State contends that Forthenberry's failure to file for modification within one year of sentencing is evidence of a lack of diligence that can be used against him in his pursuit of a belated appeal under P-C.R. 2. We disagree. Regarding the timeliness of a modification petition, Indiana Code Section 35-38-1-17 states,

> (a) Within three hundred sixty-five (365) days after:
>
> (1) a convicted person begins serving the sentence imposed on the person;
> (2) a hearing is held:
> (A) at which the convicted person is present; and
> (B) of which the prosecuting attorney has been notified; and
> (3) the court obtains a report from the department of correction concerning the convicted person's conduct while imprisoned;

> the court may reduce or suspend the sentence. The court must incorporate its reasons in the record.
>
> (b) If more than three hundred sixty-five (365) days have elapsed since the convicted person began serving the sentence and after a hearing at which the convicted person is present, the court may reduce or suspend the sentence, subject to the approval of the prosecuting attorney.

A petition for sentence modification differs substantively from a direct appeal of a sentence. While the latter alleges some legal defect in the sentence, the former envisions practical circumstances, such as the defendant's good behavior while imprisoned, that might merit the reduction or suspension of his sentence. Ind. Code § 35-38-1-17(a)(B)(3). Thus, modification and direct appeal are two separate avenues for relief, and Forthenberry was not advised of his right to pursue the avenue of direct appeal. Given the substantive distinctions between the two avenues, we conclude that his failure to petition for modification within one year of sentencing does not amount to a lack of diligence in requesting permission to file a petition pursuant to P-C.R. 2.[1]

We now address Forthenberry's attempt to gain relief under P-C.R. 1. Forthenberry filed a pro se petition for post-conviction relief under P-C.R. 1 on December 3, 2002. In *Kling v. State*, 837 N.E.2d 502, 508 (Ind. 2005), our supreme court held that a pre-*Collins* P-C.R. 1 challenge to a sentence can serve to establish diligence. However, in its recent decision in *Moshenek*, the court examined the actual basis of the defendant's P-C.R. 1 challenge and found a lack of diligence where the defendant did not raise sentencing as an issue in his P-C.R. 1 petition. 868 N.E.2d at 424. Like Moshenek, Forthenberry did not raise

[1] The language of Indiana Code Section 35-38-1-17 does not indicate that filing a petition for sentence modification after one year has elapsed is untimely; rather, after one year has elapsed, the trial court's decision is subject to the approval of the prosecutor.

sentencing as an issue in his P-C.R. 1 petition.[1] As a pre-*Collins* defendant, Forthenberry made use of a P-C.R. 1 remedy available to him at the time and did not pursue the issue that he now wishes to convince us he has been diligent in pursuing all along.

Here, as in *Moshenek*, the trial court conducted a hearing on the defendant's motion for permission to file a belated notice of appeal and was in a better position to weigh evidence and assess credibility. 868 N.E.2d at 424. The trial court therefore is entitled to deference. *Id.* "[N]ot every motion to file a belated appeal should be automatically granted by trial courts simply because *Collins* has been decided, especially if there is no indication that the defendant had previously made attempts to collaterally attack a sentence imposed following a guilty plea." *Perry v. State*, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006), *trans. denied*. Forthenberry failed to challenge his sentence in his P-C.R. 1 petition. Therefore, the trial court did not abuse its discretion in determining that Forthenberry failed to demonstrate the diligence required to proceed with a belated appeal.

Affirmed.

DARDEN, J., concurs.

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[1] Forthenberry has not included the P-C.R. 1 petition in his appendix on appeal. The only evidence in the record regarding the issues raised in the P-C.R. 1 petition appears in the transcript of the P-C.R. 2 hearing in the form of an interchange between Forthenberry's counsel and the trial court, during which his counsel specifically indicated to the court that Forthenberry had not challenged the appropriateness of his sentence in the P-C.R. 1 petition. Rather, the only issues he raised were a faulty factual basis for one of the original charges and ineffective assistance of counsel. Tr. at 3, 22-24. A different attorney represented

MAY, J., concurs in result with separate opinion.

Forthenberry at the time, and there was no evidence that the ineffectiveness claim was in any way related to sentencing issues.

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MAY, Judge, concurring in result.

I agree with the majority that Forthenberry's failure to challenge his sentence in his P-C.R. 1 petition supports the trial court's finding Forthenberry was not diligent in requesting relief under P-C.R. 2, and I therefore concur in the result. I write separately because I believe, on the facts of this case, Forthenberry's failure to seek a sentence modification within a year independently demonstrates he was not diligent.

A sentence modification is an avenue of relief independent of post-conviction relief, and a defendant's failure to seek a sentence modification will not necessarily evidence a lack of diligence in pursuing post-conviction relief. However, in Forthenberry's case, sentence modification was the only avenue of relief presented to him at the time of sentencing, and

there is no apparent reason why he waited nearly two years to pursue that avenue.[1] He knew he could pursue a sentence modification, and his failure to do so is additional evidence he was not diligently seeking review of his sentence.

[1] There is no deadline for requesting a sentence modification; a sentence may be modified outside a year if the prosecutor approves. However, the fact that a sentence modification was not foreclosed does not explain why he did not attempt to modify his sentence within a year, as he was explicitly instructed. (*See* Tr. at 16) (Forthenberry responded affirmatively when asked, "[Y]our public defender in this case, told you about sentence modifications and that there was a one-year deadline?").