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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID OHM,)
)
 Appellant-Defendant,)
)
 vs.) No. 79A02-0604-CR-336
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-8904-CF-5

February 19, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, David Ohm (Ohm), appeals his sentence for Counts I and II, murder, Ind. Code § 35-43-1-1.

We dismiss.

ISSUE

Ohm raises two issues on appeal, which we find non-dispositive and instead, raise the following issue *sua sponte*: Whether the trial court abused its discretion by granting Ohm's Petition for Permission to File a Belated Notice of Appeal.

FACTS AND PROCEDURAL HISTORY

On August 31, 1989, Ohm pled guilty to Counts I and II, murder, I.C. § 35-43-1-1, in an open plea agreement. Pursuant to the plea agreement, all other counts were dismissed, the request for the death penalty was dismissed, and both sentences were to run concurrently. On July 20, 1990, a sentencing hearing was held and the trial court sentenced Ohm to an executed sentence of sixty years.

On October 30, 1990, Ohm filed a Petition for Modification of Sentence that was later denied on January 11, 1991. On July 12, 2000, Ohm filed a Verified Motion for Reduction or Suspension of Sentence, which was later denied on July 31, 2000. On March 7, 2006, Ohm filed a Petition for Permission to File a Belated Notice of Appeal, which was granted by the trial court on March 14, 2006. On September 14, 2006, he filed his Belated Notice of Appeal.

Ohm now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Whether to grant or deny a defendant's petition to file a belated notice of appeal is a matter entrusted to the sound discretion of the trial court and the trial court's decision will be reversed only for an abuse of discretion or where the decision is contrary to law. *Roberts v. State*, 854 N.E.2d 1177, 1178 (Ind. Ct. App. 2006). A trial court abuses its discretion where its decision is against the logic and effect of the facts and circumstances before it. *Id.*

Indiana Post-Conviction Rule 2(1) allows a defendant to seek permission to file a belated notice of appeal, and 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 defendant bears the burden to prove both of these requirements by a preponderance of the evidence. *Beatty v. State*, 854 N.E.2d 460, 409 (Ind. Ct. App. 2006). Post-Conviction Rule 2(1) also requires that the trial court consider these two factors in deciding whether to grant or deny a petition to file a belated notice of appeal and that the trial court must grant the petition where it finds that the defendant has established the two factors. P-C. R. 2(1).

With regard to fault, Ohm claims in his Petition for Permission to File a Belated Notice of Appeal that he was never instructed he could file a direct appeal challenging his sentence by the trial court. Our review of the record indicates otherwise, as the trial court stated:

About his appellate rights---well, he may plan to appeal whatever I've done, so, [Ohm], you have the right to appeal what I've done here and the right to counsel at all stages of the proceedings. If you cannot afford a lawyer I will appoint one for you at no expense to you.

(Sentencing Transcript p. 83). Ohm provides no other evidence to support he was without fault in pursuing a belated appeal.

There are no set standards defining delay or diligence and each case must be decided on its own facts. *Roberts*, 854 N.E.2d at 1178. Factors affecting the determination 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.* at 1179.

With respect to diligence, Ohm filed a Petition for Modification of Sentence three months after he was sentenced. Nine years later, in 2000, he petitioned for a reduced or suspended sentence. And six years after that, in 2006, he filed his Petition for Permission to File a Belated Notice of Appeal. Even if we were to consider that there was conflicting case law regarding the proper avenue for challenging a sentence after pleading guilty, in 2004, our supreme court clarified

that the correct means was via a direct appeal. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004).

In *Roberts*, the defendant waited eight months to file his Verified Petition for Leave to File a Belated Notice of Appeal after becoming learning of the *Collins* decision, and we found he was not diligent. *See Roberts*, 854 N.E.2d at 1179. In the instant case, Ohm waited two years after the *Collins* decision before filing his Petition. While Ohm may not have learned about *Collins* in the same manner as *Roberts* – his petition to transfer was denied one month after *Collins* was decided – we cannot find on the facts of this case that Ohm was diligent in filing his Petition two years later. Thus, based on the fact that the trial court informed Ohm of his right to appeal and his lack of diligence in filing an appeal, we find the trial court abused its discretion in granting Ohm’s Petition for Permission to File a Belated Notice of Appeal.

CONCLUSION

Based on the foregoing, we find that the trial court abused its discretion when it granted Ohm’s Petition for Permission to File a Belated Notice of Appeal. Consequently, we dismiss Ohm’s Petition.

Dismissed.

KIRSCH, C.J., and FRIEDLANDER, J., concur.