

Appellant-defendant Thomas D. Hunter appeals the denial of permission to file a belated notice of appeal. Specifically, Hunter argues that the trial court erred in denying his request because the original failure to file the request was not his fault and the evidence established that he was diligent in pursuing permission to file a belated motion to appeal. Concluding that the trial court properly denied Hunter's request, we affirm.

FACTS

On January 12, 2001, Hunter went with Clifton Miller and Quinton Clarkson to collect money that Lawrence Nelson owed Miller for drugs. At some point during this encounter, Nelson was shot and killed. As a result, Hunter was charged with felony murder and murder.

On September 27, 2001, Hunter entered into a plea agreement with the State. The terms of the agreement called for Hunter to plead guilty to felony murder and for sentencing to be left to the trial court's discretion. The written plea agreement informed Hunter of his rights and stated that if he had gone to trial and had been found guilty, he would have had the right to appeal his conviction. During the guilty plea hearing that was conducted that same day, the trial court advised Hunter as follows:

Do you understand that if you were to have a trial, and you were found guilty, you would have the right to appeal your conviction to the Indiana Court of Appeals or the Indiana Supreme Court?

...

Do you understand that by pleading guilty you're giving up your right to trial and your right to have an appeal?

Tr. p. 5-6. Hunter acknowledged his understanding of those advisements. The trial court accepted Hunter's guilty plea and sentenced him to sixty-three years of incarceration on

October 25, 2001.

On February 3, 2004, Hunter filed a pro se petition for post-conviction relief, alleging that his guilty plea was not entered into voluntarily, intelligently, and knowingly because the prosecutor had withheld material evidence from the defense prior to the plea agreement, that his trial counsel was not correctly advised of the State's proposed plea agreement regarding Hunter's codefendant, and that his due process rights had been violated.

Thereafter, on March 28, 2005, Hunter filed a motion to withdraw his post-conviction petition—without prejudice—in order to pursue a belated notice of appeal and for appointment of counsel. That same day, the trial court granted Hunter's motion to withdraw the petition but denied his request for appointment of counsel. Thereafter, on April 22, 2005, Hunter filed a motion for the trial court to reconsider his petition for appointment of counsel. As a result, the trial court referred the motion to the prosecutor and deferred any ruling until the State filed a response.

On January 17, 2006, Hunter filed a motion to vacate the dismissal of the post-conviction relief petition and to reinstate that petition. The trial court granted Hunter's motion that same day. Thereafter, on June 16, 2008, Hunter filed a petition for permission to file a belated notice of appeal. Hunter alleged that he was without fault for not timely appealing his sentence because the trial court had not advised him of the right to appeal his sentence at the guilty plea hearing. Hunter also alleged that he did not immediately appeal his sentence because he was ignorant of the law. Moreover, Hunter claimed that he had been diligent in requesting permission to file a belated notice of appeal.

In response, the State asserted that Hunter had failed to demonstrate that he was without fault for not filing a timely appeal of his sentence and that Hunter had not demonstrated that he had been diligent.

At an August 21, 2008 hearing on Hunter's motion for a belated notice of appeal, one of Hunter's trial attorneys—Kelly Schweinzger—testified that she could not recall for certain whether she advised Hunter that he could appeal his sentence. Hunter's other trial attorney admitted that he did not advise Hunter about appealing the sentence.

Hunter testified that he first learned that he could appeal his sentence from Tasha Reed, his second public defender in the post-conviction case, who represented him in September 2004. Hunter claimed that he learned of his right to appeal his sentence from her when she interviewed him. Hunter admitted that he did not immediately seek permission to file a belated notice of appeal because he wanted to “think over his options.” Tr. p. 17.

On October 30, 2008, the trial court issued an order denying Hunter's request for permission to file a belated notice of appeal, primarily on the basis that Hunter had not been diligent in seeking permission to file such a notice. Specifically, the trial court determined that

Considering the factors discussed in Bysinger [v. State, 835 N.E.2d 223 (Ind. Ct. App. 2005),] Petitioner was twenty (20) years of age at the time of his guilty plea; had nearly completed requirements for a high school diploma and ultimately received his GED while incarcerated; was familiar with criminal legal proceedings having committed six prior misdemeanor offenses; and he routinely used the law library at the Department of Correction. Petitioner was aware of his procedural legal remedies, but failed to act. He initially filed a Petition for Post-Conviction Relief on February 3, 2004, and has been represented by the State Public Defender since May 10, 2004. In September 2004, Petitioner was advised that he could appeal his sentence by direct

appeal; however [he] failed to seek permission to do so after the court denied his request for a county public defender in March 2005 because no such petition under PC Rule 2 had been filed or was pending. In fact, no proper petition under PC Rule 2 was filed until June 2008. In Shuler v. State,^[1] 893 N.E.2d 346 (Ind. Ct. App. 2008) (cited for the limited purpose of establishing the law of the case), the Court found that a two year lapse from the date of sentencing until the date petitioner sought permission to file a belated notice of appeal, and a three year lapse between the trial court's denial of the first petition and the filing of a second, did not satisfy the diligence requirement. Here, Petitioner was aware of his right to appeal his sentence for nearly four years and failed to act. Petitioner has failed to show how he was diligent, and, therefore Petitioner has not met his burden of establishing diligence in seeking permission to file a belated notice of appeal.

Appellant's App. p. 142-43 (emphasis in original). Hunter now appeals.

DISCUSSION AND DECISION

The decision to grant permission to file a belated notice of appeal is within the trial court's discretion. Moshenek v. State, 868 N.E.2d 419, 422 (Ind. 2007). In particular, our Supreme Court has determined that:

The 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. There are no set standards of fault or diligence, and each case turns on its own facts. Several factors are relevant to the defendant's diligence and lack of fault in the delay of filing. These 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 422-23 (quoting Tredway v. State, 579 N.E.2d 88, 90 (Ind. Ct. App. 1991)).

¹ We note that Shuler v. State, No. 35A02-0802-CR-157 (Ind. Ct. App. Aug. 14, 2008), is an unpublished memorandum decision. However, the "law of the case" doctrine does not appear to be applicable. See Herrell v. Casey, 609 N.E.2d 1145, 1146 (Ind. Ct. App. 1993) (observing that the "law of the case doctrine designates that an appellate court's determination of a legal issue is binding on both the trial court and the Court of Appeals in any subsequent appeal given the same case and substantially the same facts.")

As for Hunter's claim that he was without fault and acted with diligence in pursuing permission to file a belated appeal, Hunter testified that he knew of the right to appeal his sentence only after he consulted with his second post-conviction counsel. And Hunter is correct that the trial court did not advise him of the right to appeal his sentence.

On the other hand, one of Hunter's trial attorneys could not recall with certainty whether she advised Hunter that he could appeal his sentence. Tr. p. 6. Moreover, the record reflects that Hunter was twenty years old when he committed the offense, earned his GED while incarcerated, was familiar with our legal system in light of his prior convictions and probation violation, and used the prison law library on a routine basis. Id. at 36, 44-45. Under these circumstances, the trial court could have judged the credibility of the witnesses, weighed the evidence, and determined that there was some doubt regarding Hunter's claim that he did not know of the right to appeal the sentence from one of his trial attorneys. Hence, the trial court could have reasonably determined that Hunter was not without fault.

Even more compelling, the record shows that Hunter filed a post-conviction petition in 2004 that did not include any sentencing claim. Id. at 15-16. As noted above, he testified that he learned from his second post-conviction counsel shortly after her appointment in September 2004 that he could appeal his sentence. Id. at 11, 16-17. However, Hunter admitted that he did not immediately do so. Instead, Hunter waited until June 2008 to file his petition for permission to file a belated notice of appeal. Id. at 11, 16-18. Thus, Hunter did not seek to challenge his sentence in any way until nearly three and one-half years after he knew that he could raise that issue, and almost six and one-half years after he was sentenced.

As a result, we cannot say that the trial court abused its discretion in determining that Hunter lacked diligence in seeking permission to file a belated notice of appeal. See Moshenek, 868 N.E.2d at 424 (observing that the defendant's failure to challenge the sentence in his post-conviction petition during the years prior to filing for a belated notice of appeal demonstrated a lack of diligence); see also Sholes v. State, 878 N.E.2d 1232, 1227-28 (Ind. 2008) (holding that a defendant's failure to challenge a sentence in his post-conviction petition during the years prior to filing for a belated notice of appeal demonstrated a lack of diligence). For all of these reasons, we conclude that the trial court properly denied Hunter's request for permission to file a belated notice of appeal.

The judgment of the trial court is affirmed.

BARNES, J., concurs.

MAY, J., dissents with opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS D. HUNTER,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 20A03-0812-CR-601
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	
)	

MAY, Judge, dissenting

I respectfully dissent. The majority notes Schweinzger’s testimony that she could not recall with complete certainty whether she advised Hunter of his right to appeal. More specifically, she testified she believed she would have gone over the rights listed in his plea agreement. “If it wasn’t in his plea agreement, then I did not advise him of it.” (Tr. at 3.) The trial court did not find Hunter was at fault, and I would decline the State’s invitation to infer from Schweinzger’s testimony that Hunter he knew he could appeal his sentence. Rather, the reasonable inference is that Schweinzger had a practice of advising clients based on what was stated in the plea agreement, and it is undisputed that Hunter’s plea agreement did not contain an advisement of his right to appeal his sentence.

I also believe Hunter cannot be held responsible for the entire delay between

September 2004 and the filing of the petition for permission to file a belated appeal in June 2008. The trial court found Hunter was informed of his right to appeal in September 2004, yet waited nearly four years to act. Hunter testified Reed was the first to tell him he could appeal his sentence. She entered her appearance in September 2004, but there is no indication that she immediately told Hunter of his right to appeal. Hunter testified he took some time to “weigh out my options” because he did not understand that failing to pursue a belated appeal “would be actually skipping over the whole process.” (*Id.* at 17.) Although Hunter took some time to weigh his options, Reed filed a motion for appointment of counsel at county expense to pursue a belated appeal on Hunter’s behalf just a few months after *Collins v. State* was decided.² Hunter’s brief hesitation does not support a conclusion that he is responsible for all of the delay that occurred thereafter.

Hunter has been continuously represented by the State Public Defender since May 10, 2004. It is apparent the delay occurring after counsel was appointed is primarily attributable to confusion in the law, four substitutions of counsel, and time counsel spent investigating Hunter’s case. Until our Supreme Court decided *Collins* on November 9, 2004, it was not clear that a petition for permission to file a belated appeal was the proper procedure for raising Hunter’s sentencing claim. Initially, the State Public Defender believed the counties were responsible for providing counsel for defendants making *Collins*-type claims.

² *Collins* overturned Court of Appeals decisions that had permitted defendants to challenge their sentence in post-conviction proceedings when they had an open plea agreement and had not been advised of their right to appeal the sentence. 817 N.E.2d 230, 233 (Ind. 2004). *Collins* held “the proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to file an appeal under P-C. R. 2.” *Id.*

Therefore, Reed requested the trial court appoint counsel at county expense. The trial court denied this, and Reed filed a motion to reconsider. The State did not respond to the motion and the trial court did not rule on it. Later, on November 29, 2005, our Supreme Court handed down *Kling v. State*, 837 N.E.2d 502, 507-08 (Ind. 2005), which explained that the State Public Defender should represent these defendants unless and until permission to file a belated appeal is granted. Thereafter, the State Public Defender substituted counsel two more times in Hunter's case, and the petition for permission to file a belated appeal was not filed until June 16, 2008.

Time spent by the State Public Defender investigating a claim does not count against the defendant when courts consider the issue of diligence. *Id.* at 508. Therefore, I believe the trial court erred by finding Hunter was not diligent because he failed to act between September 2004 and June 2008. Nor does the majority explain why it is holding Hunter accountable for delays caused by the State Public Defender.

Looking to the facts relating to the delay that occurred before Hunter was represented, I conclude Hunter was diligent. Hunter was twenty years old when he was sentenced; thus, he was a relatively young adult. He had been close to graduation, but did not receive his GED until after he was incarcerated. Although he had several previous misdemeanor convictions, he had never spent more than fifteen days in jail, and he had never before appealed a sentence. Hunter gave the following explanation of his actions:

. . . I didn't have any help as far as knowing like time limits on what time that they had to be filed, so – also, I didn't have any paperwork when I first got incarcerated, so it took me some time to get my actual paperwork. And I was denied, like, for my sentencing – my plea bargain sentencing and transcripts, I

was denied of that first.^[3]

* * * * *

I – well, me and a couple of the dudes who work in the law library^[4] and a couple dudes on my – on my dorm at the time, they assisted me in filing my PCR.

* * * * *

The dudes who was helping me with my case, I had told them about me being denied my transcripts; and they said, well, you know – they let me know about the public information. And once your case is done going through the courts, then you could buy it from the courthouse. So I let my family and a couple friends know about it, and we put together some money to end up buying the paperwork.

* * * * *

I mean, like when you – when you, like, almost illiterate to the law and you learn the law, you need a lot of work. You know, so I had access to the law library maybe three times out of a month. Because you put a request in, and when you put a request in, it's like throughout the population it just depends on when they can get you in. So three times out of a month is, like, good.

(Tr. at 10-12) (errors in original). In obtaining further review of his case, Hunter took reasonable steps that were consistent with his age, education, and experience. *See Moshenek v. State*, 868 N.E.2d 419, 422 (Ind. 2007) (factors relevant to diligence include defendant's awareness of procedural remedy, age, education, familiarity with legal system, whether he was informed of appellate rights, and whether he contributed to the delay). The trial court did not explicitly find Hunter was not diligent during the time that he was not represented.

It is true that we often consider the defendant's allegations in previous filings as an additional factor in evaluating the defendant's diligence. As the majority notes, the defendants in *Moshenek* and *Sholes v. State*, 878 N.E.2d 1232 (Ind. 2008) were both found lacking in diligence in part because they did not raise sentencing claims in previous filings.

³ On November 4, 2002, Hunter filed a motion with the trial court requesting a copy of his transcript, which was denied.

However, *Moshenek* and *Sholes* are not comparable to Hunter's case. Moshenek did not file a petition for permission to file a belated appeal until sixteen years after he was sentenced, and our Supreme Court found he had done *nothing* to challenge his sentence for eleven of those years. *Moshenek*, 868 N.E.2d at 424. Our Supreme Court was concerned that a delay that "stretches into decades" makes a belated appeal "particularly problematic because of the risk that significant problems will be encountered in any retrial due to unavailable evidence or witnesses or failing memories." *Id.*

Sholes was sentenced in 1997. In 1998, he filed a petition for post-conviction relief that did not challenge his sentence. In 2000, he received permission to file a successive petition for post-conviction relief. That petition raised ninety-nine issues, and only seven of them arguably related to his sentence. The petition was ultimately dismissed for failure to prosecute. Sholes finally filed a petition for permission to file a belated appeal in 2006. Our Supreme Court noted there was a period of more than eight years where Sholes did not challenge his sentence. In light of all these facts, the Court concluded Sholes was not diligent. *Sholes*, 878 N.E.2d at 1237-38.

Hunter, on the other hand, filed a petition for post-conviction relief a little over two years after he was sentenced. Although he did not directly challenge his sentence, he alleged the State had withheld information about an agreement with a co-defendant. Therefore, it is clear he was dissatisfied with his own bargain and the significantly longer sentence that came

⁴ Hunter testified the people who worked in the law library were fellow inmates.

with it.⁵ The delay attributable to Hunter is consistent with that of other defendants who were found to be diligent. *See Johnson v. State*, 898 N.E.2d 290 (Ind. 2008) (Johnson pled guilty in 1997 and filed a *pro se* P-C.R.1 petition in 2000, which did not include a sentencing claim until amended by the State Public Defender; Johnson ultimately filed P-C.R. 2 petition in 2006 and was found to be diligent); *Cruite v. State*, 853 N.E.2d 487 (Ind. Ct. App. 2006) (Cruite was sentenced in January 1999 and in November 2004 filed a *pro se* P-C.R. 1 petition alleging his sentence was excessive; counsel began pursuing a P-C.R. 2 petition in 2005, and we found Cruite was diligent), *trans. denied* 860 N.E.2d 598 (Ind. 2006).

I believe Hunter met the requirements of Post-Conviction Rule 2, and I would reverse the judgment of the trial court.

⁵ According to Hunter's original petition for post-conviction relief, Clarkson pled guilty to Class B felony delivery of cocaine and received fifteen years executed and two years probation.