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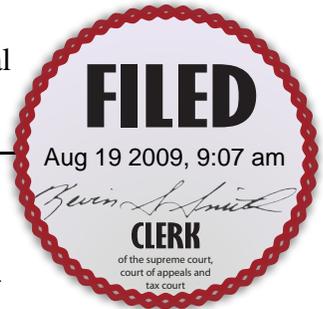
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**IN THE
COURT OF APPEALS OF INDIANA**

MARK D. YOUNGS,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 71A03-0903-CR-105

APPEAL FROM THE ST. JOSEPH COUNTY COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0803-FC-49

August 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Mark Youngs appeals his conviction of one count of battery, a class C felony. The State brings a cross-appeal, arguing that Youngs' appeal should be dismissed for failure to comply with the procedural requirements of Post-Conviction Rule 2(1)(a).

We dismiss.

ISSUES

Youngs raises the following issue:

Whether the State provided sufficient evidence to support Youngs' battery conviction.

On cross-appeal, the State raises the following issue:

Whether the trial court erred in permitting Youngs to file a belated notice of appeal when he made no showing that he was without fault in the delay of filing a timely notice or that he had been diligent in seeking to file a belated notice.

FACTS

On February 29, 2008, Youngs entered the Martin's grocery store in Granger, Indiana and hid two bottles of vodka beneath his shirt. When Youngs tried to leave the store without paying for the vodka, a store employee, James Lakowski, approached Youngs and asked to speak with him. As Youngs hurried out of the store, Lakowski grabbed his right arm. Youngs struggled to free himself, and two additional employees, Anthony Lombardi and Raymond Barna, came to Lakowski's aid. Lombardi grabbed Youngs' left arm, and Barna wrapped his arms around Youngs from behind.

Youngs struggled with the three men and fought his way closer to his vehicle, dragging the three employees forward with him. Richard Thompson, a sixty-nine year old employee who was outside collecting shopping carts, saw his coworkers struggling with Youngs and went over to help the others subdue him. Youngs continued to struggle and eventually fell to the ground, bringing Thompson down with him. Thompson fell backward; his head hit the pavement and bounced.

Witnesses saw blood running down Thompson's head onto his clothes. Emergency responders transported him to the hospital where he received nine stitches for his head wound. At trial, Thompson testified that when he was injured, he "saw stars" and was "hurt bad." Tr. 78.

On March 3, 2008, the State charged Youngs with one count of criminal conversion,¹ a class A misdemeanor, and one count of battery,² a class C felony. On May 19, 2008, the State filed an additional count, alleging that Youngs was a habitual offender.³

On September 29, 2008, the trial court found Youngs guilty of criminal conversion and class C felony battery. After an evidentiary hearing, the trial court also found Youngs to be a habitual offender.

On October 20, 2008, the trial court sentenced Youngs to one year for criminal conversion and four years for battery, to be served concurrently. The court also imposed

¹ Ind. Code § 35-43-4-3.

² I. C. § 35-42-2-1(a)(3).

³ I. C. § 35-50-2-8.

a habitual offender enhancement of ten years, for a total executed sentence of fourteen years. At the sentencing hearing on October 20, 2008, Youngs was informed of his right to appeal, and he indicated that he wished to do so. The court appointed a public defender to represent him.

On December 9, 2008, Youngs sought permission to file a belated notice of appeal, which the trial court granted. Youngs filed his brief on April 6, 2009. On May 11, 2009, the State filed its brief, wherein it asserted on cross-appeal that Youngs' appeal should be dismissed for lack of subject matter jurisdiction.⁴ Youngs did not reply to the State's cross-appeal.

DECISION

On appeal, Youngs challenges the sufficiency of the State's evidence supporting his battery conviction. The State cross-appeals that the trial court improperly permitted Youngs to file a belated notice of appeal. Specifically, the State alleges that Youngs did not present any evidence to the trial court to warrant its granting permission to file a belated appeal.

When reviewing a trial court's ruling on a petition to file a belated notice of appeal, we generally will affirm unless the decision constitutes an abuse of discretion. *Moshenek v. State*, 868 N.E.2d 419, 424 (Ind. 2007). We recognize the advantage that

⁴ The State incorrectly asserts that this court lacks subject matter jurisdiction; we have subject matter jurisdiction over direct appeals from criminal convictions. *See* Ind. Constitution, Art. 7 § 6, Ind. Appellate Rule 5. At issue here, rather, is whether Youngs complied with procedural requirements for invoking our subject matter jurisdiction. *See Packard v. Shoopman*, 852 N.E.2d 927, 930 (Ind. 2006) (noting that what used to be called "jurisdiction of the case" refers to failure to meet procedural requirements and "does not constitute a limitation on subject matter jurisdiction in the sense that the court cannot hear cases of the same general class.").

the trial court has when weighing evidence, assessing witness credibility, and drawing inferences; accordingly, we show deference to its factual determinations. *Id.* However, in circumstances where no hearing was held on the matter and the motion's supporting evidence comprises only the allegations in the motion itself, the trial court's ruling is subject to *de novo* review. *Id.*; see also *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). In other words, when a trial court bases its determination solely on a paper record, we need not show deference to its findings. *Moshenek*, 868 N.E.2d at 424. When a defendant does not respond to the State's allegations on cross-appeal that the trial court erred in permitting the defendant to file belated notice of appeal, we may reverse the trial court's decision granting belated appeal if we find *prima facie* error. *Townsend v. State*, 843 N.E.2d 972, 975 (Ind. Ct. App. 2006) (citing *In re D.L.*, 814 N.E.2d 1022, 1029 (Ind. Ct. App. 2004)).

A defendant seeking permission to file a belated notice of appeal 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 appeal. Ind. Post-Conviction Rule 2(1)(a). To show diligence and a lack of fault, a defendant may provide evidence regarding several relevant factors, "includ[ing] '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.'" *Moshenek*, 868 N.E.2d at 423 (quoting *Land v. State*, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994)).

Here, as the State correctly notes, Youngs' petition for a belated notice of appeal fails to include any facts to satisfy the showing required by Post-Conviction Rule 2(1)(a). In his petition, Youngs did not allege that he was without fault or that he was diligent in pursuing permission to file belatedly, and he provided no evidence to support either criterion. During his sentencing hearing in October 2008, Youngs was informed of his right to appeal and to court-appointed counsel; the record offers no explanation as to what caused Youngs' delay in filing notice, and Youngs provides none here.

Without evidence that he meets the two criteria set forth in Post-Conviction Rule 2(1)(a), a petitioner cannot satisfy his burden of proof. *See, e.g., Townsend*, 843 N.E.2d at 975. Therefore, we find that the trial court erred in permitting Youngs to file a belated notice of appeal, and we dismiss this appeal.

Dismissed.

BAILEY, J., and ROBB, J., concur.