# Joseph P. Holstead v. State of Indiana

2011 | Cited 0 times | Indiana Court of Appeals | March 31, 2011



MEMORANDUM DECISION - NOT FOR PUBLICATION

Case Summary

This case involves a defendant who pled guilty in 2000 to murder and attempted robbery pursuant to a plea agreement. Sentencing was left to the trial courts discretion, and in 2001, the trial court sentenced the defendant to an aggregate seventy-three-year sentence. In 2002, the defendant sought to challenge his sentence via a pro se petition for post-conviction relief, which was eventually dismissed in 2005. In 2006, acting via pauper counsel, he filed a belated notice of appeal, which the trial court dismissed as defective for failure to first seek permission for such a filing.

Four years later, the defendant, Joseph P. Holstead, filed a motion for permission to file a belated notice of appeal. The trial court denied his motion, finding that he was not diligent in seeking this belated appeal. He now appeals. Finding that he failed to act diligently, we affirm.

Facts and Procedural History

On December 6, 1999, the State charged Holstead with murder, felony murder, and class A felony attempted robbery. On September 29, 2000, Holstead pled guilty via plea agreement to murder and attempted robbery.[1] Sentencing was left open to the trial courts discretion. On February 6, 2001, the trial court sentenced Holstead to consecutive sixty-five- and eight-year terms, and he did not file a direct appeal.

On June 18, 2002, Holstead sought to challenge his sentence by filing a pro se petition for post-conviction relief pursuant to Indiana Post-Conviction Rule 1 ("P-C.R. 1"). On May 26, 2005, with the assistance of the State Public Defender, he filed a petition to dismiss his 2002 petition without prejudice and to appoint counsel at county expense to pursue proceedings under Indiana Post-Conviction Rule 2 ("P-C.R. 2"). On June 8, 2005, the trial court granted his motion to dismiss the P-C.R. 1 petition and ordered an indigency determination. On September 6, 2005, the trial court appointed a county public defender to represent Holstead.

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On September 15, 2005, Holstead, acting via county public defender, filed a notice of belated appeal without having sought and obtained permission to do so as required under PC.R. 2. On January 19, 2006, the State Public Defender filed a motion to vacate the order dismissing the P-C.R. 1 petition and to reinstate the P-C.R. 1 petition. On January 24, 2006, the trial court issued an order reinstating Holsteads previously dismissed June 8, 2005 PC.R. petition and also reinstated the appearance of the State Public Defender. On February 13, 2006, the State filed a cross-appeal, claiming that Holstead had failed to seek permission to file a belated appeal as required under P-C.R. 2. On July 31, 2006, this Court dismissed Holsteads belated appeal for lack of jurisdiction.

More than four years later, on October 14, 2010, Holstead filed a motion for permission to file a belated notice of appeal under P-C.R. 2. On October 27, 2010, the trial court denied his motion without a hearing, finding that he failed to act diligently as required under P-C.R. 2. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

Holstead contends that the trial court erred in finding that he was not diligent in seeking to file a belated notice of appeal to challenge his sentence. At the outset, we note that the trial court denied Holsteads motion for permission to file a belated notice of appeal without holding a hearing. Thus, we review the decision de novo. Bosley v. State, 871 N.E.2d 999, 1002 (Ind. Ct. App. 2007).

Holsteads plea agreement left sentencing open to the trial courts discretion. As such, he could have challenged his sentence by direct appeal. St. Clair v. State, 901 N.E.2d 490, 491 (Ind. 2009). To initiate a direct appeal, he had thirty days from the date of his 2001 sentencing to either file or forfeit his right to direct appeal. Ind. Appellate Rule 9(A)(1), -(5). Having failed to file a direct appeal, he attempted to gain relief via post-conviction proceedings. However, our supreme court has made it clear that a belated challenge to a sentence may not be made by filing a petition under P-C.R. 1, but only by filing a motion for permission to file a belated notice of appeal under P-C.R. 2. Kling v. State, 837 N.E.2d 502, 504-05 (Ind. 2005).

Under Indiana Post-Conviction Rule 2(1)(a), a defendant who has forfeited his right to file a direct appeal may petition the trial court for permission to file a belated notice of appeal of his sentence if "the failure to file a timely notice of appeal was not due to the fault of the defendant; and . the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule." The defendant bears the burden of proving the aforementioned requirements by a preponderance of the evidence. Moshenek v. State, 868 N.E.2d 419, 422-23 (Ind. 2007). If the trial court finds that the requirements set forth in the rule have been met, "it shall permit the defendant to file the belated notice of appeal. Otherwise, it shall deny permission." Ind. Post-Conviction Rule 2(1)(c) (emphasis added).

Here, we agree with the trial court that the evidence unquestionably establishes that Holsteads

failure to file a timely direct appeal was not due to fault on his part because he was never advised at the plea hearing or at sentencing that by pleading guilty pursuant to an open plea agreement, he nevertheless had a right to appeal his sentence. Appellants App. at 209. Thus, this case turns solely on whether the evidence supports Holsteads assertion that he "has been diligent in requesting permission to file a belated notice of appeal." P-C.R. 2(1)(a)(3).

In his 2010 P-C.R. 2 motion, Holstead asserts that the time between his original 2001 sentencing and the instant 2010 motion is "attributable to the procedural uncertainties and errors." Appellants App. at 12. To the extent that this time period includes dates preceding our supreme courts 2005 decision in Kling, we agree that confusion existed as to the exact avenue a defendant had to take when pursuing a post-conviction challenge to his sentence. However, Kling clarified any prior confusion by stating that, after the time for appeal has expired, the only avenue available to a defendant seeking to challenge his sentence is a belated appeal under P-C.R. 2. Kling, 837 N.E.2d at 504-05. Moreover, Holstead was informed of the reasons for this Courts dismissal of his defective 2006 attempt to file a belated notice of appeal, yet he did not correct the defect and make another attempt for more than four years thereafter. We acknowledge his argument that he was shuffled between three different public defenders at the state and county levels. However, his last change of counsel came in February 2007, more than three and a half years before he filed the instant P-C.R. 2 motion. We agree with the trial court that the record is completely devoid of any effort being made by Defendant from the filing of the Motion to Dismiss his PCR Petition on May 26, 2005 to the filing of the present Motion on October 14, 2010-a period of five years and four months-to suggest that Defendant exercised any diligence in requesting permission to file a belated notice of appeal of his sentence even though Defendant had responded to the State P.D. on May 16, 2005 . "stating his desire to have his sentence reviewed on direct appeal .

Id. at 210-11 (emphasis in original).

In sum,Holstead has failed to provide us with any facts demonstrating that he was diligently pursuing a belated appeal during a prolonged period that spanned several years. Thus, we find no error in the trial courts denial of his motion for permission to file a belated appeal. Accordingly, we affirm.

Affirmed.

ROBB, C.J., and NAJAM, J., concur.

1. The trial court took under advisement whether the attempted robbery count could be entered as a class A felony. At sentencing, the trial court entered judgment for class C felony attempted robbery.