

SUPREME COURT OF INDIANA

Moshenek v. State

868 N.E.2d 419 (Ind. 2007) · No. 42S04-0706-PC-244 · Decided June 20, 2007

SUMMARY

The Indiana Supreme Court holds that a trial court's ruling on a petition for permission to file a belated notice of appeal or motion to correct error under Post-Conviction Rule 2 should be affirmed unless based on an error of law or clearly erroneous factual determination. The court explains that a defendant's lack of advisement regarding the right to appeal an open-plea sentence may support lack of fault, but the defendant must also establish diligence. Applying that standard, the court affirms denial of David Moshenek's petition because his lengthy delay and failure to raise a sentencing challenge in his post-conviction petition demonstrated insufficient diligence.

CASE DETAILS

COURT	Supreme Court of Indiana
WRITING FOR THE COURT	Boehm, Justice; Shepard, Chief Justice; Dickson, Justice; Sullivan, Justice; Rucker, Justice
JURISDICTION	Indiana
DECIDED	June 20, 2007
DOCKET	42S04-0706-PC-244
DISPOSITION	affirmed
PROCEDURAL POSTURE	On petition to transfer from the Indiana Court of Appeals, which had reversed the trial court's denial of Moshenek's petition for permission to file a belated motion to correct error under Indiana Post-Conviction Rule 2.
STANDARD OF REVIEW	A trial court's ruling on a petition for permission to file a belated notice of appeal or belated motion to correct error under Post-Conviction Rule 2 is affirmed unless based on an error of law or a clearly erroneous factual determination. Substantial deference is given because the trial court is in the better position to weigh evidence, assess credibility, and draw inferences.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	David L. Moshenek v. State of Indiana

TOPICS

state post-conviction relief

appellate procedure

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standard of review

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PRACTICE AREAS

Indiana post-conviction procedure

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sentencing appeals

QUESTIONS PRESENTED

1. What standard of review governs a trial court's ruling on a petition for permission to file a belated notice of appeal or belated motion to correct error under Indiana Post-Conviction Rule 2?
2. Whether Moshenek established that his failure to timely challenge his sentence was not his fault and that he had been diligent in seeking permission to file a belated motion to correct error.
3. Whether the trial court's failure to advise Moshenek, after an open guilty plea, of his right to appeal his sentence established the lack of fault and diligence required by Post-Conviction Rule 2.

HOLDINGS

1. A trial court's ruling on a petition for permission to file a belated notice of appeal or belated motion to correct error under Post-Conviction Rule 2 must be affirmed unless it rests on an error of law or a clearly erroneous factual determination.
2. A trial court's failure to advise a defendant of the right to appeal the sentence imposed after an open guilty plea may establish that the defendant was without fault in failing to file a timely appeal, but it is not alone sufficient to satisfy Post-Conviction Rule 2; the defendant must also make an additional showing of diligence.
3. Moshenek failed to establish the diligence required by Post-Conviction Rule 2, and the trial court did not abuse its discretion in denying permission to file a belated motion to correct error.

KEY QUOTATIONS

"We hold that a trial court's ruling on a petition for permission to seek relief under Post-Conviction Rule 2 should be affirmed unless it was based on an error of law or a clearly erroneous factual determination." (at 420)

"Moreover, if the trial court did not advise a defendant of the right to appeal the sentence in an "open plea," that may well suffice to meet the lack of fault requirement under Post-Conviction Rule 2 depending on other evidence, but the defendant must make some additional showing to establish diligence." (at 420)

"It was not clearly erroneous for the trial court to determine that an eleven-year span without any effort to raise a sentencing claim showed lack of diligence in pursuing a belated appeal." (at 424)

FACTUAL BACKGROUND

In 1988, Moshenek forced Anthony Barrix's car off the road, fought with Barrix, and repeatedly stabbed him, causing his death. Moshenek pleaded guilty to murder in January 1989. The trial court imposed the maximum sixty-year sentence after finding aggravating and mitigating circumstances, but it did not advise Moshenek of a

right to appeal his sentence. Moshenek obtained transcripts in February 1991, filed a Post-Conviction Rule 1 petition in 1994 without challenging his sentence, and waited until February 2005 to seek permission to file a belated motion to correct error.

PROCEDURAL HISTORY

Moshenek pleaded guilty to murder in 1989 and received a sixty-year sentence. He filed a Post-Conviction Rule 1 petition in 1994 that did not directly challenge his sentence. In 2005, while that proceeding remained pending, he sought permission under Post-Conviction Rule 2 to file a belated motion to correct error, arguing that he had not been advised of his right to appeal his sentence and had relied on counsel. The trial court denied relief for lack of diligence; the Court of Appeals reversed. The Indiana Supreme Court granted transfer and affirmed the trial court.

DISPOSITION

affirmed

CASES CITED

- Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)
- Gutermuth v. State, No. 10S01-0608-CR-306, 868 N.E.2d 427, 2007 WL 1776278 (Ind. June 20, 2007)
- Moshenek v. State, 851 N.E.2d 339 (Ind. Ct. App. 2006)
- Davis v. State, 771 N.E.2d 647, 649 (Ind. 2002)
- Collins v. State, 817 N.E.2d 230, 231-33 (Ind. 2004)
- George v. State, 862 N.E.2d 260, 264 (Ind. Ct. App. 2006)
- Whitmire v. State, 498 N.E.2d 380, 381 (Ind. 1986)
- Witt v. State, 867 N.E.2d 1279, 1281 (Ind. 2007)
- Dobeski v. State, 275 Ind. 662, 665, 419 N.E.2d 753, 755 (1981)
- Zellers v. State, 271 Ind. 22, 389 N.E.2d 299 (1979)
- Land v. State, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994)
- Tredway v. State, 579 N.E.2d 88, 90 (Ind. Ct. App. 1991)
- Kling v. State, 837 N.E.2d 502, 508 (Ind. 2005)
- Baysinger v. State, 835 N.E.2d 223, 224, 226 (Ind. Ct. App. 2005)
- Townsend v. State, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006)
- Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004)
- Houser v. State, 678 N.E.2d 95, 98 (Ind. 1997)
- Garcia v. State, 466 N.E.2d 33, 34 (Ind. 1984)