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IN THE
COURT OF APPEALS OF INDIANA

KENNETH MACKEN, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 65A01-0604-PC-154
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE POSEY CIRCUIT COURT
The Honorable James M. Redwine, Judge
Cause No. 65C01-0509-PC-0099

February 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Pro se appellant-petitioner Kenneth Macken, Jr. appeals the denial of his petition for post-conviction relief, claiming fundamental error and ineffective assistance of trial and appellate counsel. Specifically, Macken contends that: (1) fundamental error occurred when the trial court improperly instructed the jury on his attempted murder charge by failing to instruct the jury regarding the specific intent to kill; (2) his trial counsel was ineffective for failing to object to the attempted murder instruction and a habitual offender instruction; (3) his appellate counsel was ineffective for failing to challenge the attempted murder instruction as fundamental error and trial counsel's failure to object to the attempted murder instruction in his direct appeal; and (4) the post-conviction court erred by determining that his post-conviction claims were barred by the equitable doctrine of laches. Concluding that the post-conviction correctly determined that Macken's post-conviction claims were barred by laches, we affirm the judgment of the post-conviction court.

FACTS

The relevant facts as reported in Macken's direct appeal are as follows:

> The facts most favorable to the verdict reveal that early in 1990, the victim heard noises outside of his home. He went to investigate, and while he was outside he was shot. The victim did not see his attacker.
>
> At trial, Lori Wilson testified that within a week after the victim was shot, Macken told her that he had gone to the victim's trailer and shot the victim twice. Tina Schmidt testified at trial that, in her presence, Macken viewed a newspaper article about the shooting and then stated that he "wasn't worried about it, that he wouldn't even get caught because nobody had anything on him." . . . The gun used to shoot the victim was found under Macken's bed after his arrest.

Macken v. State, No. 65A01-9012-CR-529, slip op. at 2 (Ind. Ct. App. June 24, 1991); see also Macken's Post-Conviction Ex. E p. 2-3. Macken testified on his own behalf at trial and denied that he shot the victim and that he made the statements to Wilson and Schmidt. The trial court's instruction on attempted murder did not contain language regarding a specific intent to kill. The jury found Macken guilty of attempted murder and determined that he was a habitual offender. On September 19, 1990, the trial court sentenced Macken to thirty years for the attempted murder conviction, which was enhanced by thirty years to reflect the habitual offender determination. Thus, Macken received an aggregate sixty-year sentence.

Macken then appealed his conviction to this court, arguing that the trial court erroneously admitted into evidence two out-of-court statements made by Macken and that the evidence was insufficient to support his attempted murder conviction. On June 24, 1991, in an unpublished memorandum decision, we affirmed Macken's conviction, holding that the trial court properly admitted the statements and that the evidence was sufficient to support his attempted murder conviction. Macken, slip op. at 3-5.

On April 11, 1997, Macken filed a pro se petition for post-conviction relief, claiming that: (1) the trial court committed fundamental error by failing to properly instruct the jury on the elements of attempted murder; (2) his trial counsel was ineffective for failing to object to the attempted murder instruction; and (3) his appellate counsel was ineffective for failing to raise a fundamental error issue regarding the attempted murder instruction. On May 1, 1997, the State Public Defender entered an appearance for Macken on this post-conviction petition. On August 31, 2000, Macken filed a motion to

withdraw his petition for post-conviction relief without prejudice, and the trial court granted the motion.

On September 23, 2005, Macken filed his current post-conviction petition, raising the same three issues that he had raised in his 1997 post-conviction petition and adding a claim that the habitual offender instruction was improper. The State filed its answer and raised the defenses of laches. On November 18, 2005, a post-conviction hearing was held, and the State presented evidence on its affirmative defense of laches. Specifically, the State presented the testimony of Kenneth Rose, an investigator for the Posey County Prosecuting Attorney's Office, who testified that the victim and the lead detective on the case were deceased.[1] Rose also testified that he was unable to locate the prosecutor's file for Macken's case and was unable to recreate it. In particular, Rose explained that after he had searched the archives of the prosecutor's office and was not able to locate the case file, he searched the archives of the sheriff's department but found nothing; contacted Macken's defense counsel but that he did not have a copy of the case file; contacted the deceased detective's wife to see if the detective had left any copies of old cases around the house and obtained nothing; and contacted another investigating officer on the case but that he had not retained a copy of the case. Rose also testified that he searched the Posey Circuit Court's file and found some depositions and a subpoena list from which he was able to locate some of the witnesses listed. The State argued that the doctrine of

[1] The victim died in 2003, and the lead investigator died in 1991.

laches barred Macken's claims because he rested on his rights for an unreasonable time[2] and because the State was prejudiced in a possible retrial due to its loss of its file and death of two witnesses.

On March 6, 2006, the post-conviction court issued an order, finding that Macken's post-conviction claims were barred by laches. In relevant part, the post-conviction court ruled as follows:

> [Macken's] trial by jury took place from August 29, 1990, through August 31, 1990.
>
> The sole named victim in this conviction for Attempted Murder was Mr. Robert E. Willingham who died from colon cancer, July 08, 2003.
>
> The lead investigator, Deputy Sheriff Larry K. York, died of a heart condition October 05, 1991.
>
> Mr. Macken's conviction and sentences were affirmed by the Indiana Court of Appeals in an unpublished opinion August 26, 1991.
>
> Mr. Macken filed his first Petition for Post-Conviction Relief on April 11, 1997, six years before the victim's death. However, Mr. Macken withdrew his petition [on] August 31, 2000. He reserved the right to file a new petition. Mr. Macken was represented by the State Public Defender's Office in that proceeding.
>
> The issues raised in Mr. Macken's current Post-Conviction Relief Petition were raised in the Petition he withdrew.
>
> Mr. Macken has sat on his rights with full knowledge of their existence for, at least, eight (8) years.

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[2] The State conceded, however, that three of the fourteen years in the delay between the affirmation of his direct appeal and the filing of his current post-conviction petition—specifically, the period of time when the State Public Defender was considering his post-conviction petition (April 1997 to August 2000)—was not chargeable to Macken. See Douglas v. State, 634 N.E.2d 811, 816 (Ind. Ct. App. 1994) (holding that the delay between the filing of the post-conviction petition and the hearing on the petition, during which time defendant was represented by the Public Defender's Office, was not relevant for purposes of laches).

> The victim and lead investigator are now dead. The State of Indiana would be greatly prejudiced if this matter should have to be re-tried.

Appellant's App. p. 54-55 (citations omitted). Despite finding that Macken's claims were barred by laches, the post-conviction court also reviewed his claims on the merits and denied his petition for post-conviction relief. Macken now appeals.

DISCUSSION AND DECISION

Macken argues that the post-conviction court erred by determining that his post-conviction petition was barred by laches. The doctrine of laches operates to bar consideration of the merits of a claim or right of one who has neglected for an unreasonable time, under circumstances permitting due diligence, to do what in law should have been done. Kirby v. State, 822 N.E.2d 1097, 1100 (Ind. Ct. App. 2005), trans. denied. For laches to apply, the State must prove by a preponderance of the evidence that the petitioner unreasonably delayed in seeking relief and that the State is prejudiced by the delay. Id.

Although a lapse of time does not by itself constitute laches, a long delay in filing for post-conviction relief may be sufficient to infer that the delay was unreasonable. Id. at 1011 (citing Mahone v. State, 742 N.E.2d 982, 985 (Ind. Ct. App. 2001)). A petitioner can seldom be found to have unreasonably delayed unless he has knowledge of a defect in the conviction. Id. A finding of knowledge and acquiescence is therefore implicit in a finding of unreasonable delay. Id. at 1100. Repeated contacts with the criminal justice system, consultation with attorneys, and incarceration in a penal institution with legal facilities are all facts from which the fact finder may infer knowledge. Id.

For post-conviction laches purposes, prejudice exists when the unreasonable delay operates to materially diminish a reasonable likelihood of successful re-prosecution. Id. The inability to reconstruct a case against a petitioner is demonstrated by unavailable evidence such as destroyed records, deceased witnesses, or witnesses who have no independent recollection of the event. Id. The State has an obligation to use due diligence in its investigation of the availability of evidence and witnesses. Id.

Because the State had the burden of proving laches as an affirmative defense, Macken is not appealing from a negative judgment, and the applicable standard of review requires that we affirm unless we find that the judgment was clearly erroneous. Id. This is a review for sufficiency of evidence. Id. As with other sufficiency of the evidence claims, we do not reweigh the evidence nor judge the credibility of witnesses when reviewing a claim that evidence is insufficient to establish laches. Id. Rather, we consider only the evidence most favorable to the judgment, together with all reasonable inferences to be drawn therefrom. Id. If the post-conviction court's finding is supported by substantial evidence of probative value, the judgment will be affirmed. Id.

With respect to unreasonable delay, the record reveals that Macken waited fourteen years after his conviction was affirmed by this court to file his current post-conviction petition. Specifically, Macken, who has been incarcerated in the Indiana Department of Correction since his 1990 attempted murder conviction and habitual offender determination, had his conviction affirmed by this court in 1991 and then waited six years before he filed his first post-conviction petition in 1997. He was represented by the State Public Defender's Office on that post-conviction petition, which lingered for

three years before Macken moved to dismiss it in 2000. Macken then delayed another five years—to 2005—before he filed his current post-conviction petition, in which he raised the same issues contained in his 1997 post-conviction petition and added a claim regarding an erroneous habitual offender instruction.

From Macken's repeated contacts with the criminal justice system, the trial court could have reasonably inferred that Macken had access to the law library and, thus, could have learned about post-conviction remedies. Indeed, Macken had filed a prior post-conviction petition—in which he raised the same claims as he raises in his current petition—and had consultation with counsel from the public defender's office. Macken's delay in filing the current petition for post-conviction relief, coupled with his presumed knowledge of the criminal justice system, is sufficient for the trial court to infer that the delay in dispute was unreasonable.

With regard to the prejudice prong of laches, the evidence reveals that an investigator was unable to locate the Prosecutor's file for Macken's case and was unable to recreate it. In addition, the circuit court's file only contained some depositions and a subpoena list. Although the investigator was able to locate some of the witnesses contained on the subpoena list, the victim and the lead detective on the case were dead. This evidence is sufficient to show that, because of Macken's lengthy delay in filing his current petition for post-conviction relief, the State was unable to reconstruct its case

against Macken and has, thus, suffered prejudice. As such, the post-conviction court did not err by denying Macken's petition for post-conviction relief based on laches.[3]

The judgment of the post-conviction court is affirmed.

DARDEN, J., and ROBB, J., concur.

[3] Because we affirm the post-conviction court's judgment that Macken's post-conviction claims were barred based on laches, we need not address the merits of his individual post-conviction claims.