



## **Case Summary**

Harry Oberlin appeals the denial of his petition for post-conviction relief (“PCR”).

We affirm.

### **Issue**

Oberlin raises one issue, which we restate as whether the post-conviction court properly concluded that Oberlin received effective assistance of counsel.

### **Facts**

On October 15, 1987, the State charged Oberlin with two counts of Class B felony rape and two counts of Class B felony incest. The victim was Oberlin’s twenty-seven year old mentally-challenged daughter. The initial hearing was held on October 22, 1987. At that time, the trial court set a pretrial conference for December 10, 1987, and an omnibus date for December 17, 1987, but no date was set for a jury trial. Attorney R.W. Mehl filed his appearance for Oberlin at the initial hearing and represented him throughout the proceedings.

On November 25, 1987, the pretrial conference was continued on Oberlin’s motion to January 7, 1988. At the pretrial conference, a hearing for the acceptance of a guilty plea was scheduled for January 21, 1988. That hearing was rescheduled and then continued on Oberlin’s motion to April 14, 1988, to allow completion of blood testing of the child born to the victim of the rape and incest. Apparently the blood test results were not available until November 23, 1988. In the interim, the hearing was continued five times on Oberlin’s motion. Finally, on December 22, 1988, the parties stipulated into evidence a paternity evaluation report. Trial was set for May 15, 1989.

Oberlin was convicted of all counts. His convictions were affirmed in a belated appeal in Oberlin v. State, 740 N.E.2d 592 (Ind. Ct. App. 2000). Oberlin filed a pro se PCR petition on June 11, 2003. Counsel entered an appearance for Oberlin and filed an amended PCR petition. Following an evidentiary hearing, the PCR court denied Oberlin's petition. This appeal followed.

### **Analysis**

Oberlin argues that his trial counsel, Attorney Mehl, was ineffective for failing to make a motion to dismiss the case pursuant to Indiana Rule of Criminal Procedure 4(C). A petitioner who appeals the denial of post-conviction relief faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. Kien v. State, 866 N.E.2d 377, 381 (Ind. Ct. App. 2007), trans denied. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than was reached by the PCR court. Id. The petitioner has the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Kien, 866 N.E.2d at 381.

When ruling on a PCR petition, a court must render findings of fact and conclusions of law on all issues presented in the petition. P-C.R. 1(6). "Our review is limited to these findings and conclusions. We apply a deferential standard of review when examining these findings and conclusions." Allen v. State, 749 N.E.2d 1158, 1164 (Ind. 2001). The findings must be supported by the evidence and the conclusions must be

supported by law. Id. The appellate court must accept the PCR court's findings of fact and may only reverse if the findings are clearly erroneous. Kien, 866 N.E.2d at 381.

A claim of ineffective assistance of counsel requires the defendant to show by a preponderance of the evidence that (1) counsel's performance was below the objective standard of reasonableness based on prevailing professional norms and (2) the defendant was prejudiced by counsel's substandard performance, i.e. there is a reasonable probability that, but for counsel's errors or omissions, the outcome of the trial would have been different. Stephenson v. State, 864 N.E.2d 1022, 1031 (Ind. 2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). Counsel's performance is presumed effective. Id. "The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors and bad tactics do not necessarily mean that representation was ineffective." Grinstead v. State, 845 N.E.2d 1027, 1036 (Ind. 2006).

Attorney Mehl passed away in 1991, but his son Attorney Richard Mehl, testified at the PCR hearing that he assisted his father with major felony cases, including Oberlin's. At the time of Oberlin's trial, Rule 4(C) provided:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act . . . .

Ind. Crim. Rule 4(C).

Another subsection of Rule 4 indicated that “when a continuance is had on motion of the defendant, or delay of trial is caused by his act, any time limitation contained in this rule shall be extended by the amount of the resulting period of such delay caused thereby.” Crim. R. 4(F).

The State maintains that the PCR court correctly determined that Attorney Mehl properly did not file a motion to discharge under Rule 4(C) because he had already filed numerous motions to continue on Oberlin’s behalf, which extended the one-year time limit. According to his son, attorney Mehl’s trial strategy was to request continuances until he could obtain the results of a blood test on the child born to Oberlin’s victim. Attorney Mehl’s son testified that Attorney Mehl understood Rule 4(C) and had used the rule in the past. Attorney Mehl realized his own delays and continuances on behalf of the defendant pushed the trial date setting beyond the one year mark.

Oberlin argues that State ex rel. O’Donnell v. Cass Superior Court, 468 N.E.2d 209 (Ind. 1984), and Smith v. State, 495 N.E.2d 539 (Ind. Ct. App. 1986), support the proposition that Attorney Mehl should have filed a motion for discharge. Those cases, however, are distinguishable from the situation Attorney Mehl considered in Oberlin’s case. In the O’Donnell case it was solely the action of the State that resulted in a long delay. The defendant had merely agreed to the State’s request for a continuance. The O’Donnell court held that “when a defendant has agreed to a continuance prior to the setting of any trial date, those days shall not be attributed to the defendant for the purposes of [Rule 4(C)].” O’Donnell, 468 N.E.2d at 211. It would not have been reasonable for Attorney Mehl to rely on this case in support of a discharge under Rule

4(C). Nor would it have been reasonable for Attorney Mehl to rely on the Smith case. The defendant in Smith had not filed any continuances, whereas Oberlin's repeated requests for continuances caused the delay in bringing his case to trial. See Smith, 495 N.E.2d at 541 ("The court's docket entries reflect no delay in the scheduling of the trial that can be attributed to Smith.").

Oberlin directs us to cases after his guilty verdict that expanded on the holding in O'Donnell, and contends that had Attorney Mehl made the motion for discharge it could have been granted. To support this proposition Oberlin relies on a stream of cases from the early 1990's that were eventually overruled by our supreme court in 2004 in Cook v. State, 810 N.E.2d 1064 (Ind. 2004). See State v. Hurst, 688 N.E.2d 402 (Ind. 1997); Carr v. State, 790 N.E.2d 599 (Ind. Ct. App. 2003); Harrington v. State, 588 N.E.2d 509 (Ind. Ct. App. 1992); Solomon v. State, 588 N.E.2d 1271 (Ind. Ct. App. 1992); Miller v. State, 570 N.E.2d 943 (Ind. Ct. App. 1991). Attorney Mehl could not have been expected to anticipate that courts would misinterpret Rule 4(C) in the coming decade. To the extent that Oberlin insists Attorney Mehl should have relied on Cook and other cases prior to it, an ineffective assistance of counsel claim must be judged by the law as it existed at the time. See Gann v. State, 550 N.E.2d 73, 75 (Ind. 1990) (explaining that for ineffective assistance of counsel claims, the law requires consideration of legal precedent available to counsel at the time of his representation of the accused). Counsel will not be deemed ineffective for not anticipating or initiating changes in the law. Id.

Attorney Mehl could not ignore the plain language of Rules 4(C) and (F). Under that language, any delay in setting of Oberlin's trial date was attributed to the defense.

Nor did applicable case law support the granting of a motion for discharge under Rule 4. Oberlin has not convinced us that Attorney Mehl's performance fell below an objective standard of reasonableness or that the outcome would have been different but for any error or omission of Attorney Mehl. The evidence and reasonable inferences support the judgment of the PCR court.

### **Conclusion**

Oberlin's trial counsel was not ineffective. The PCR court properly denied Oberlin's PCR petition. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.