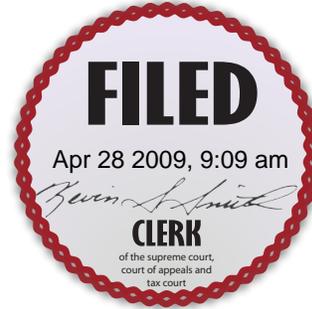


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

RICHARD N. SAYLES
Carlisle, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD N. SAYLES,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 03A01-0805-CR-228

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-0210-MR-1238

April 28, 2009

MEMORANDUM DECISION– NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Richard Sayles appeals the denial of his motion to compel his attorney to produce all documents related to the representation of Sayles during Sayles's criminal trial. Finding that the post-conviction court erred by denying Sayles's motion without holding a hearing thereon, we reverse and remand with instructions to hold a hearing on the motion to compel.

FACTS

Sayles has been before this court in a direct appeal and a post-conviction appeal. On August 28, 2003, a jury found Sayles guilty of murder, and on October 7, 2003, the trial court sentenced Sayles to sixty-five years imprisonment. Sayles appealed his conviction and sentence, and this court affirmed on June 29, 2004. Sayles v. State, No. 03A01-0311-CR-451 (Ind. Ct. App. June 29, 2004). On February 8, 2006, Sayles filed an amended petition for post-conviction relief, and on May 23, 2007, the post-conviction court denied Sayles's petition. He appealed that order and this court affirmed on October 18, 2007. Sayles v. State, No. 03A04-0707-PC-367 (Ind. Ct. App. Oct. 18, 2007), trans. denied.

At some point, Sayles filed a petition for habeas corpus relief in federal court. On April 4, 2008, Sayles filed a motion with the trial court to compel the attorney who represented him at trial to produce all documents and photographs pertaining to Sayles and to return any unearned fees. On April 14, 2008, the attorney, Donald S. Edwards, responded to Sayles's motion:

1. [Edwards] believes that all documents, photographs and other items of discovery as well as all pleadings and motions filed or received by [Edwards] in the above captioned matter have previously been transmitted to [Sayles] at no cost to him during the course of the

representation.

2. [Edwards] has no unearned fees nor any item of monetary value received in the above cause nor is any due and owing. [Edwards] as Public Defender represented [Sayles] due to [Sayles] being a pauper.

3. [Edwards] requests a hearing be set on [Sayles's] motion to determine what items, if any, [Sayles] is seeking, to determine whether the items have previously been provided, if such items exist, and an Order from the Court resolving the production of items since [Sayles] has a propensity to file multiple disciplinary complaints and his motion on its face appears to be made in bad faith given the numerous times the items have been supplied to him during the course of representation and given further that following representation copies of discovery were given to his new counsel and that no subsequent requests were made by [Sayles] prior to him filing his motion.

Appellant's App. p. 6-7. Without holding a hearing, the post-conviction court denied Sayles's motion on April 29, 2008, concluding that "there is nothing pending in this cause since the Petition for Post[-]Conviction Relief has been denied. [Sayles] received documents from his attorney throughout the course of representation." Id. at 15. Sayles now appeals.

DISCUSSION AND DECISION

Initially, we observe that the State did not file an appellee's brief. "The obligation of controverting arguments presented by the appellant properly remains with the State." Mateyko v. State, 901 N.E.2d 554, 557 (Ind. Ct. App. 2009). When, as here, the appellee fails to submit a brief, the appellant may prevail by making a prima facie case of error, i.e., an error at first sight or appearance. Id. Of course, we must still correctly apply the law to the facts of the record to determine if reversal is required. Id.

Sayles directs our attention to Indiana Code section 33-43-1-9, which provides as follows:

If, on request, an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them, in the course of the attorney's professional employment, the attorney may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted or if an action was not prosecuted, by the order of any court of record, to deliver the money or papers within a specified time, or show cause why the attorney should not be punished for contempt.

This statute vests the court in which an action was prosecuted with jurisdiction to consider a motion made pursuant to the statute's terms. Thus, the post-conviction court erred by concluding that Sayles was not entitled to relief simply because there was nothing pending following the denial of his petition for post-conviction relief.

This court and our Supreme Court have held that "when a motion to compel delivery of money or papers is presented, the trial court should provide reasonable notice to the attorney, hold a hearing on the matter, and then rule on the motion." Ferguson v. State, 773 N.E.2d 877, 881 (Ind. Ct. App. 2002) (reversing the trial court's denial of defendant's motion to compel in part because of the trial court's failure to hold a hearing on the matter) (citing Smith v. State, 426 N.E.2d 402, 404 (Ind. 1981) (same)); see also McKim v. State, 528 N.E.2d 484, 485-86 (Ind. Ct. App. 1988) (holding that "the granting of a motion to compel the production of documents which an attorney has received for a client in the course of his employment is not discretionary with the trial court" and "[u]pon motion by the party represented, the trial court shall require an attorney to deliver all papers he obtained

pertaining to the representation to which the client is entitled”). Thus, the post-conviction court erred by failing to hold a hearing on Sayles’s motion. The purpose of the hearing is to enable the post-conviction court to determine whether, in fact, there are any documents that Edwards has inadvertently failed to provide to Sayles and, if such documents exist, to order that they be produced to Sayles.¹

The judgment of the post-conviction court is reversed and remanded with instructions to hold a hearing on Sayles’s motion to compel.

MAY, J., and BARNES, J., concur.

¹ It is evident that there are no unearned fees to be returned, inasmuch as Edwards was a public defender representing Sayles, a pauper who was unable to pay for an attorney.