



## **Case Summary**

Nineteen years after Chicago resident Andrew Cory's guilty plea and conviction for operating while intoxicated, he filed a petition for post-conviction relief alleging that he never pled guilty because he was not present in the courtroom. The court denied post-conviction relief. After the presiding judge instead of the judge pro tempore who actually presided over the post-conviction hearing denied Cory's motion to correct error, Cory filed a motion asking the presiding judge to vacate his denial because the wrong judge had ruled on it. The presiding judge then issued a nunc pro tunc order vacating his denial, and the judge pro tempore denied Cory's motion to correct errors.

On appeal, Cory argues that the presiding judge erred in issuing the nunc pro tunc order because the requirements of a nunc pro tunc order were not met, the judge pro tempore improperly ruled on the motion to correct errors because the presiding judge's ruling had the potential to improperly influence the judge pro tempore's ruling, and the post-conviction court erred in denying post-conviction relief. We conclude that even if the presiding judge mislabeled the order as a nunc pro tunc order, the substance of the order was proper because the judge pro tempore should have ruled on the motion to correct errors. We also conclude that the judge pro tempore properly ruled on the motion. Finally, we conclude that the post-conviction court properly denied Cory relief on the basis of laches because Cory unreasonably delayed—for nineteen years—in seeking relief and the State is prejudiced by the delay. We therefore affirm.

## **Facts and Procedural History**

In 1990, Cory, who lived in Chicago, was arrested in Marion County, Indiana, for operating while intoxicated. Cory hired Indiana attorney John Caress. According to the Chronological Case Summary, in April 1990, the State charged Cory with Class A misdemeanor operating a vehicle while intoxicated and Class C misdemeanor operating a vehicle with a .10 BAC. Also according to the CCS, on June 6, 1990, Cory pled guilty to the Class C misdemeanor. The CCS shows the following entry for June 6, 1990:

Def. in person  
Def. by counsel  
State moves to dismiss cnt #(s) 1; GRANTED—SEE MOTION  
Def. w/d N.G. to cnt# 2  
Written plea agree filed  
Written waiver of rights filed  
Ct. orally examines Def: finds Def. understands charges, rights waived and impact of plea. Factual basis found, court confirms Def’s willingness to plead guilty, accepts plea and enters judgment of conviction for count[] 2.  
Def. sentenced-----SEE ORDER

Appellant’s App. p. 3 (line numbers omitted). The trial court sentenced Cory to 60 days, all suspended with no probation, and suspended his license for 90 days with 45 days credit and restricted his license for 180 days in lieu of suspension. *Id.*

Approximately nineteen years later in February 2009, Cory was arrested in Chicago for “driving under the influence,” at which point Cory alleges his Illinois attorney uncovered his 1990 Indiana OWI conviction. Tr. p. 21. Cory hired a new Indiana attorney, Robert D. King, Jr., to file a petition for post-conviction relief attacking his 1990 conviction. In the petition, Cory alleged that he was not present in court on June 6, 1990, and thus “could not have knowingly, voluntarily and intentionally pled guilty to a crime” or knowingly or intentionally waived his *Boykin* rights. Appellant’s App. p. 13.

A hearing on Cory's petition for post-conviction relief was held before Judge Pro Tempore Scott Adams in December 2009. It is undisputed that there is an incomplete file in Cory's 1990 OWI case. In fact, the only document is the CCS, which was admitted at the post-conviction hearing as State's Exhibit 2 over the defense's objection. According to Indiana Criminal Rule 10, however, whenever a defendant pleads guilty, the trial court shall record the proceedings and keep the transcript for only ten years in misdemeanor cases (but fifty-five years in all felony cases).<sup>1</sup> Cory testified on his own behalf, admitting that he had been arrested in Marion County, Indiana, in 1990 for OWI and that he had hired Caress as his attorney. However, Cory testified that he hired Caress over the phone, never met Caress in person, and after bonding out of jail never "return[ed] to the State of Indiana to address this case[.]" Tr. p. 12. Cory testified that Caress told him that he "would handle the case for [him]." *Id.* In essence, Cory claimed that he "never went to trial on this case" and "never pl[e]d guilty in this case." *Id.* at 15. According to Cory:

[Caress] said that he would... Honestly I remember him telling me that he would take it through what ever needed to be done from a legal stand point. Um based on my prior record that is very clean he felt that I would not have an issue with that. Um...

*Id.* at 23. Cory said that at some point, he stopped calling Caress because Caress said "it was taken care of" and would not show up on his driving record. *Id.* at 24, 25. Cory testified that he later received notice from the State of Illinois that his license had been suspended for some period of time because of an "arrest" in Indiana. *Id.* at 26. King told

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<sup>1</sup> The post-conviction court noted that Indiana Criminal Rules 5 and 10 require transcripts and recordings in misdemeanor cases to be kept by the court for only ten years. And because approximately nineteen years had passed in this case, the fact that Cory's file was incomplete was neither "surprising" nor "suspicious" to the court. Appellant's App. p. 49-50.

the court that he was unable to locate Caress, no doubt an important witness. *Id.* at 36. The State argued that the defense of laches applied because nearly two decades had passed since Cory's 1990 OWI conviction. The court took the matter under advisement and asked the parties to prepare proposed findings of fact and conclusions of law.

In January 2010, Judge Pro Tempore Adams denied Cory's petition for post-conviction relief. The post-conviction court concluded, in pertinent part:

In this case, the State offered into evidence the CCS which clearly stated, that [Cory] was present, his attorney was present, a written plea agreement was filed, a written waiver of rights was filed, an oral examination of the court was conducted to determine that [Cory] understood the charges against him, and that a conviction was entered against [Cory]. While [Cory] testified that he never actually was present at any hearing in order to waive any of his constitutional rights there is sufficient evidence to show that [Cory] was present in person and by counsel on June 6, 1990, he signed a written waiver of his constitutional rights and that his guilty plea was knowingly, intelligently and voluntarily made. [Cory] has failed to meet his burden of demonstrating by a preponderance of the evidence that he is entitled to post-conviction relief.

Appellant's App. p. 51. The court then addressed the State's laches defense. The court found that Cory's testimony was "unconvincing" and that Cory's delay in following up on his case and filing his petition for post-conviction relief was "unreasonable." *Id.* at 54. The court therefore concluded that the State met its burden of proving laches.

Cory filed a motion to correct errors, and Judge William J. Nelson denied the motion on February 22, 2010. On March 24, 2010, Cory filed a Motion to Correct Error in Regards to Ruling on Motion to Correct Error and Request for Case Transfer and New Hearing. In this motion, Cory cited (1) Indiana Trial Rule 63, which provides that the judge who presides at the trial of a cause or a hearing at which evidence is received shall, if available, hear motions and make all decisions and rulings required to be made by the

court relating to the evidence and the conduct of the trial or hearing after the trial or hearing is concluded, and (2) Indiana Criminal Rule 9, which provides that the judge who presides at the trial shall, if available, rule on the motion to correct errors. Cory therefore argued that “it was error for anyone other than Judge Pro Tempore Adams to review and rule upon [his] motion to correct errors absent a showing of unavailability.” *Id.* at 61. Cory claimed that “the just and appropriate thing to do is to transfer the case from Courtroom 7 and grant [him] a new hearing.” *Id.*

In response to Cory’s motion, Judge Nelson issued a nunc pro tunc order on April 1, 2010. The order provides:

Comes now the Court, Nunc Pro Tunc, and hereby vacates and strikes from the court’s record its ORDER dated the 22<sup>nd</sup> Day of February 2010 denying [Cory’s] Motion to Correct Errors in that said ORDER was erroneously signed by the Presiding Judge of Marion Superior Court, Criminal Division 7 and not the Judge Pro Tem who heard said cause and entered the original judgment.

*Id.* at 65. That same day, Judge Pro Tempore Adams denied Cory’s motion to correct errors.

On April 29, 2010, Cory filed a motion to vacate the nunc pro tunc order. Cory argued that Judge Nelson’s nunc pro tunc order was improper because it (1) was issued without notice and a hearing and (2) was improperly used to change the law or ruling of the case. Accordingly, Cory asserted that it was “error for the Court to vacate the February 22, 2010, Order which denied Cory’s Motion to Correct Error” and requested the court to reinstate that order. *Id.* at 69. Cory also alleged that because Judge Nelson’s initial denial of his motion to correct errors had “the potential of influencing any subsequent decision now made by the Judge Pro tempore,” the court should transfer the

case to a new courtroom and grant him a new hearing. *Id.* The post-conviction court denied the motion. Cory now appeals.

### **Discussion and Decision**

Cory raises several issues on appeal. First, he contends that Judge Nelson erred in issuing the nunc pro tunc order, which vacated his ruling on the motion to correct errors, because the requirements of a nunc pro tunc order were not met. Second, Cory contends that Judge Pro Tempore Adams then improperly ruled on the motion to correct errors because Judge Nelson's ruling had the potential to improperly influence Judge Adams' ruling. Last, Cory contends that the post-conviction court erred in denying post-conviction relief.

#### **I. Judge Nelson's Nunc Pro Tunc Order**

Cory contends that Judge Nelson erred in issuing the nunc pro tunc order because the judge (1) did not give notice and an opportunity to be heard and (2) was not merely correcting a clerical error but rather was making a judicial change in the actual law or ruling of the case. Our Supreme Court has defined a nunc pro tunc order as “an entry made *now* of something which was actually previously done, to have effect as of the former date.” *Cotton v. State*, 658 N.E.2d 898, 900 (Ind. 1995) (quoting *Perkins v. Hayward*, 132 Ind. 95, 101, 31 N.E. 670, 672 (1892)). Such entries may be used to either record an act or event not recorded in the court's order book or change or supplement an entry already recorded in the order book. *Id.* Its purpose is “to supply an omission in the record of action really had, but omitted through inadvertence or mistake.” *Id.* (quoting *Perkins*, 132 Ind. at 101, 31 N.E. at 672)). That is, the trial court's record must

show that the unrecorded act or event actually occurred. *Id.* Our Supreme Court “has required that a written memorial must form the basis for establishing the error or omission to be corrected by the nunc pro tunc order.” *Id.*; *see also Arsenal Sav. Ass’n v. Westfield Lighting Co.*, 471 N.E.2d 322, 326 (Ind. Ct. App. 1984) (“The crux of a nunc pro tunc entry, then, is that the trial court corrects the record on the basis of information which is *already in the record*. It is not [a] license to make judicial changes in the actual law or ruling of the case.”). Nunc pro tunc ““entries may be made only upon notice to the parties and an opportunity of the parties to be heard on the matter.”” *Anderson v. Horizon Homes, Inc.*, 644 N.E.2d 1281, 1287 (Ind. Ct. App. 1995) (quoting *Stowers v. State*, 266 Ind. 403, 411, 363 N.E.2d 978, 983 (1977)), *trans. denied*.

Here, the record shows that Cory filed a motion claiming that “it was error for anyone other than Judge Pro [T]empore Adams to review and rule upon [his] motion to correct errors absent a showing of unavailability.” Appellant’s App. p. 61. In other words, Cory claimed that Judge Nelson could not rule on the motion to correct errors because he did not preside over the post-conviction relief hearing. Judge Nelson agreed with Cory and vacated his order denying the motion to correct errors. That same day, Judge Pro Tempore Adams denied Cory’s motion to correct errors.

On appeal, the State concedes that “Judge Nelson’s order was improperly labeled a nunc pro tunc entry.” Appellee’s Br. p. 7. The State, however, asserts that this error “does not extend beyond the title of the order.” *Id.* We agree with the State. Despite the erroneous title, the substance of Judge Nelson’s order was proper. According to Trial Rule 63 and Criminal Rule 9, Judge Nelson could not rule on Cory’s motion to correct

errors because he did not preside over Cory's post-conviction proceedings; therefore, Judge Nelson properly vacated his order and allowed Judge Pro Tempore Adams—the proper judge—to rule on the motion. *See Monroe Guar. Ins. Co. v. Engineered Roofing Sys., Inc.*, 859 N.E.2d 754, 762-63 (Ind. Ct. App. 2007) (“However, even assuming that the trial court improperly styled its order as a nunc pro tunc entry, such a purported error is of no moment . . . . Hence, Monroe Guaranty has failed to show that the trial court abused its discretion in entering the amended partial summary judgment order, whether or not the order was properly labeled as a nunc pro tunc entry.”), *reh'g denied*. Because the order was not a nunc pro tunc entry, notice and opportunity to be heard were not required.

Moreover, we emphasize that the order granted Cory the very relief he requested—vacating Judge Nelson's order which denied his motion to correct errors. Cory suffered no prejudice by Judge Nelson's mislabeling of the order as a nunc pro tunc entry.

## **II. Judge Pro Tempore Adams' Ruling on Motion to Correct Errors**

Cory next contends that after Judge Nelson vacated his denial of the motion to correct errors, Judge Pro Tempore Adams improperly ruled on the motion because Judge Nelson's order had “the potential to improperly influence Judge Adams' ruling upon the Motion to Correct Errors.” Appellant's Br. p. 9. In other words, Cory alleges that Judge Pro Tempore Adams was biased and/or prejudiced against him because of Judge Nelson's

earlier ruling on the very same motion.<sup>2</sup> Cory therefore requests transfer of his case to a different criminal division of Marion Superior Court.

Indiana law presumes that a judge is unbiased and unprejudiced. *Everling v. State*, 929 N.E.2d 1281, 1287 (Ind. 2010); *see also* Ind. Judicial Conduct Canon 2.2 (“A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”). To rebut this presumption, a defendant must establish from the judge’s conduct actual bias or prejudice that places the defendant in jeopardy. *Everling*, 929 N.E.2d at 1287.

To support his claim that Judge Nelson’s denial improperly influenced Judge Pro Tempore Adams’ later denial of the very same motion, Cory points to alleged factual errors in Judge Pro Tempore Adams’ order denying him post-conviction relief. We fail to see, however, how any alleged factual errors in Judge Pro Tempore Adams’ order denying post-conviction relief establish that Judge Pro Tempore Adams was biased and/or prejudiced *because of* Judge Nelson’s earlier ruling. *See, e.g., Voss v. State*, 856 N.E.2d 1211, 1217 (Ind. 2006) (“Prior judicial rulings generally do not support a rational inference of prejudice. Adverse rulings and findings by a trial judge from past proceedings with respect to a particular party are generally not sufficient reasons to believe the judge has a personal bias or prejudice.” (citation omitted)).

In any event, Cory then argues that his motion to correct errors, which has merit because of the alleged factual errors he points out, should be considered on those merits “without influence from sources not involved in this case.” Appellant’s Br. p. 11. Cory

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<sup>2</sup> In his reply brief, Cory writes that he is not arguing bias and prejudice; rather, he says he is arguing appearance of impropriety. Regardless of which standard we use, Cory has not met his burden of proving bias, prejudice, or appearance of impropriety.

alleges that what actually happened here “raises the specter that [his] Motion to Correct Errors was not considered in a fair and impartial vacuum by the hearing officer, free of outside voices, but only after the presiding judge signaled how he would rule.” *Id.* at 11-12. In addition, Cory alleges that “such a scenario prevents Judge Pro Tem Adams—a practicing attorney [who] presumably has a good working relationship with the presiding judge—from conducting an impartial review of his Motion to Correct Errors.” *Id.* at 12.

Cory therefore concludes that

his hearing officer is essentially disqualified from ruling on his motion to correct errors given the above history. Because Trial Rule 63 requires that the judge who presided over a hearing should rule on any motion to correct error, and because Judge Adams cannot now (in the opinion of Cory) rule on Cory’s Motion to Correct Errors for the reasons supplied above, the just and appropriate course of action is to remand and order that this case be transferred from the trial court and randomly assigned to a different criminal division of the Marion County Superior Court, pursuant to Marion County Local Criminal Rule 100, so that Cory’s Petition for PCR can be considered anew, justly, and devoid of errors which might call the integrity of the process into question.

*Id.*

Cory has failed to show actual bias or prejudice on the part of Judge Pro Tempore Adams. In fact, the record is devoid of any hint of bias or prejudice. Cory offers only speculation that Judge Nelson’s order improperly influenced Judge Pro Tempore Adams’ denial of Cory’s motion to correct errors. A cursory examination of Cory’s appellate brief bears this out. For example, Cory “presumes” that Judge Pro Tempore Adams has a good working relationship with Judge Nelson and states that it is his “opinion” that Judge Pro Tempore Adams cannot rule on the motion to correct errors. Speculation alone is not enough to disqualify Judge Pro Tempore Adams from ruling on Cory’s motion to correct

errors when, after all, Judge Pro Tempore Adams is the proper judge to rule on the motion. Cory's request for relief is no more than a request for a second bite at the apple, which he is not entitled to. Judge Pro Tempore Adams properly ruled on Cory's motion to correct errors.

### **III. Merits**

Although Cory does not specifically challenge the merits of the post-conviction court's denial of his petition for post-conviction relief until his reply brief, which means that he has therefore waived the issue, we nonetheless address the merits on appeal.

Cory argues that the post-conviction court erroneously relied on the CCS to establish that he was present in court on June 6, 1990, because the CCS has some errors and is therefore unreliable. We first point out that the alleged errors are minor, such as confusing the names of Cory's attorneys and entering the wrong date of Cory's motion to correct errors. In addition, Indiana Trial Rule 77(B) provides:

For each case, the clerk of the circuit court shall maintain a sequential record of the judicial events in such proceeding . . . . Notation of judicial events in the Chronological Case Summary shall be made promptly, and shall set forth the date of the event and briefly define any documents, order, rulings, or judgments filed or entered in the case. . . . *The Chronological Case Summary shall be an official record of the trial court and shall be maintained apart from other records of the court and shall be organized by case number.*

(Emphasis added). We therefore agree with the State's argument on appeal that because the CCS is the official record of the trial court and a trial court speaks through its docket,

*see Gibson v. State*, 910 N.E.2d 263, 267 (Ind. Ct. App. 2009), the post-conviction court properly used the CCS to establish that Cory was present in court on June 6, 1990.<sup>3</sup>

In any event, the State argues that the post-conviction court properly determined that the doctrine of laches bars Cory's entire post-conviction claim. We agree that the State has proven that laches applies.

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) (citing *Armstrong v. State*, 747 N.E.2d 1119, 1120 (Ind. 2001)), *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.* (citing *Williams v. State*, 716 N.E.2d 897, 901 (Ind. 1999)).

A petitioner can seldom be found to have unreasonably delayed unless he or she 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.* “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

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<sup>3</sup> Cory also argues that the post-conviction court could not use the CCS because a docket entry is an insufficient record to support a guilty plea because it reflects only conclusions and not whether the defendant was properly advised of his rights. Appellant's Reply Br. p. 3 (citing *Graham v. State*, 468 N.E.2d 604, 605 (Ind. Ct. App. 1984), *trans. denied*). The court, however, used the CCS to establish that Cory was present in court on June 6, 1990—not to establish that he was actually advised of all his *Boykin* rights. The is because the issue was whether Cory was in court that day, not whether the trial court properly advised him of his rights (which presumes that Cory was in fact in court).

knowledge.” *Id.* (quoting *Perry v. State*, 512 N.E.2d 841, 845 (Ind. 1987), *reh’g denied*).

In addition, 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.*

Here, Cory, a Chicago resident, was arrested in Indiana in 1990 for OWI, and a conviction was entered against him on June 6, 1990. Yet he waited nineteen years to seek post-conviction relief. Cory alleges that he hired Caress over the phone, never met Caress in person, and never returned to Indiana to address the OWI. Cory further alleges that Caress told him everything was taken care of and that the matter would not show up on his driving record. According to Cory, he learned of the 1990 conviction only when he was arrested in Chicago in 2009 for driving under the influence. The post-conviction court, who listened to Cory’s testimony firsthand, found that his testimony was “unconvincing” and therefore concluded that it could reasonably infer that Cory had knowledge of his conviction. Appellant’s App. p. 54. The court also found that Cory’s delay in following up on his case and filing his post-conviction relief petition was “unreasonable.” *Id.*

We conclude that the State proved that Cory unreasonably delayed—for nineteen years—in seeking relief and that the State is prejudiced by the delay because of the incomplete file in Cory’s 1990 misdemeanor case. In addition, it is undisputed that the State used due diligence in investigating the availability of evidence and witnesses. *See* State’s Ex. 1 (affidavit from paralegal at Marion County Prosecutor’s Office). The post-conviction court properly denied Cory’s petition on the basis of laches.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.