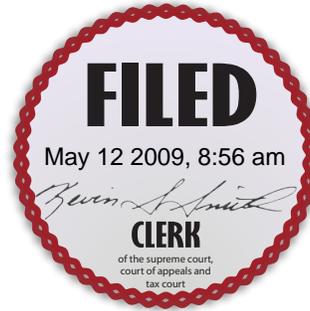


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DONALD ROBBINS, SR., )  
 )  
Appellant-Petitioner, )  
 )  
vs. ) No. 49A04-0806-PC-342  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Respondent. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Patricia J. Gifford, Judge  
Cause No. 49G04-0308-PC-130061

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**May 12, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Donald Robbins, Sr., appeals the post-conviction court's denial of his pro se petition for post-conviction relief. Robbins raises three issues, which we revise and restate as:

- I. Whether the post-conviction court erred when it refused to appoint counsel to Robbins; and
- II. Whether the post-conviction court erred by denying Robbins's petition for post conviction relief.

We affirm.

The relevant facts as discussed in Robbins's direct appeal follow.

The facts favorable to the judgment show that Robbins telephoned Steven May, a tavern manager, to see if his vehicle keys had been found. Robbins thought someone from Missouri had taken them. May did not find the keys. Robbins later came to the tavern, where he approached Wayne and James Kirkland and Matesick. When Robbins asked them if they were from Missouri James Kirkland jokingly replied that he and his brother were from Missouri. However, James Kirkland then told Robbins that they were not from Missouri.

After May announced that the tavern was closing, the Kirklands and Matesick left. Robbins left at the same time. Mark Hutson, an employee of the tavern, also left the tavern. Robbins asked Hutson if he was from Missouri. Robbins pointed out the Kirklands and Matesick and asked Hutson if they were from Missouri. Hutson replied that he was not from Missouri and the other three should be asked if they were. Robbins turned towards the other three men. Hutson saw Robbins pull out a gun. Hutson told Robbins three times to put the gun away. Robbins ignored Hutson as Wayne Kirkland started walking towards Robbins. Robbins shot Wayne Kirkland. Wayne Kirkland grabbed his chest and collapsed. James Kirkland approached Robbins and tried to grab the gun. Robbins shot James Kirkland and then Matesick. James Kirkland attempted to get the gun away from Robbins. The gun was fired one more time and then fell from Robbins hands.

Wayne Kirkland died in the tavern parking lot. James Kirkland was in the hospital for several weeks. Matesick was in the hospital for three days and then discharged. Matesick went home after being discharged. Later in the day Matesick suffered chest and abdominal pains, became unconscious, and died of a heart attack.

Robbins v. State, No. 49A02-0404-CR-374, slip op. at 2-3 (Ind. Ct. App. February 2, 2005).

After a jury trial, Robbins was convicted of felony murder, attempted murder as a class A felony, aggravated battery as a class B felony, battery as a class C felony, and carrying a handgun without a license as a class A misdemeanor. Id. at 2. The trial court sentenced Robbins to eighty-five years in the Department of Correction. Id.

Robbins filed a direct appeal and raised two issues: (1) whether the evidence was sufficient to sustain his conviction for murder; and (2) whether the State disproved Robbins's claim of self defense. Id. We affirmed Robbins's convictions. Id.

On July 20, 2005, Robbins filed a pro se petition for post-conviction relief. A chronological case summary entry dated July 20, 2005, reveals that Robbins was indigent and was referred to the State Public Defender. On July 28, 2005, a state public defender was appointed to Robbins, and a public defender filed an appearance. In September 2005, the public defender filed a motion to withdraw her appearance. On September 16, 2005, the post-conviction court received a status form from Robbins indicating that he wished to proceed pro se.

On November 3, 2005 Robbins filed an amended petition for post-conviction relief. Robbins alleged, in part, that his trial counsel was ineffective because he failed to:

(1) challenge the jury instruction on self defense; (2) request a jury instruction on voluntary manslaughter; (3) share the State's discovery with Robbins so that Robbins could knowingly and intelligently make choices and participate in his defense; and (4) conduct an adequate pretrial investigation.

On November 27, 2006, Robbins filed a pro se motion for appointment of counsel, which the trial court denied. On December 11, 2006, Robbins again filed a motion for appointment of counsel, which the trial court denied.

At the beginning of the post-conviction evidentiary hearing, Robbins asked, "I have Alzheimer's disease. Is there anyway [sic] that I can get an attorney appointed to help me with this?" Transcript at 2. The post-conviction court stated that Robbins was represented by a state public defender who withdrew her appearance. The only piece of evidence admitted by the post-conviction court was an entry discussing Robbins's petition for writ of habeas corpus in the United States District Court for the Southern District of Indiana. After the hearing, the post-conviction court entered findings of fact and conclusions thereon and denied Robbins's claims.

#### I.

The first issue is whether the post-conviction court erred by denying Robbins's request for counsel at the evidentiary hearing. At the beginning of the evidentiary hearing, Robbins stated, "I lost my train of thought now. I have Alzheimer's disease. Is

there anyway [sic] that I can get an attorney appointed to help me with this?”<sup>1</sup> Transcript at 2. The post-conviction court stated that Robbins was represented by a state public defender who later withdrew her appearance.

Ind. Post-Conviction Rule 1(9)(a) provides:

Upon receiving a copy of the petition, including an affidavit of indigency, from the clerk of the court, the Public Defender may represent any petitioner committed to the Indiana Department of Correction in all proceedings under this Rule, including appeal, if the Public Defender determines the proceedings are meritorious and in the interests of justice. The Public Defender may refuse representation in any case where the conviction or sentence being challenged has no present penal consequences. *Petitioner retains the right to employ his own counsel or to proceed pro se, but the court is not required to appoint counsel for a petitioner other than the Public Defender.*

(Emphasis added). The Indiana Supreme Court has held that “[t]he right to counsel in a post-conviction proceeding is guaranteed neither by the Sixth Amendment of the United States Constitution nor article 1, § 13 of the Constitution of Indiana.” Daniels v. State, 741 N.E.2d 1177, 1190 (Ind. 2001) (quoting Baum v. State, 533 N.E.2d 1200, 1201 (Ind. 1989)), reh’g denied. In Evans v. State, 809 N.E.2d 338 (Ind. Ct. App. 2004), trans. denied, this court commented on Daniels in addressing whether the trial court abused its discretion by denying the petitioner’s motion to continue the hearing on his petition for post-conviction relief. Specifically, this court held:

Although the State cites Daniels v. State, 741 N.E.2d 1177 (Ind. 2001) for the proposition that a post-conviction petitioner does not have a federal or state constitutional right to representation by an attorney, we note that such decision was by a 3-2 majority. We further note that in so stating the

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<sup>1</sup> Robbins offered no additional evidence in support of his claimed affliction with Alzheimer’s disease.

Daniels majority relied upon Baum v. State, 533 N.E.2d 1200 (Ind. 1989). In the latter case, although opining that there was no constitutional right to counsel in a post-conviction proceeding, the Court nevertheless proceeded to strongly imply some such right by testing the efficacy of a post-conviction attorney's representation. Although tested by a standard less stringent than that of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Baum Court did not merely disregard the post-conviction appellant's argument upon grounds that he was not constitutionally entitled to representation at all. For this reason, we choose to decide the issue upon the supposition that in some degree a post-conviction petitioner is entitled to advice and assistance of counsel in a post-conviction proceeding, whether that entitlement is conferred by constitution or otherwise.

809 N.E.2d at 342. The court held that the post-conviction court afforded assistance to the petitioner because it forwarded the petition to the public defender's office, which withdrew from the case citing lack of a meritorious claim. Id. The court ultimately concluded that the trial court did not abuse its discretion by refusing to grant the petitioner's continuance. Id.

Here, the trial court referred Robbins to the State Public Defender and a public defender was appointed. The public defender subsequently filed a motion to withdraw her appearance. Given that the right to counsel in a post-conviction proceeding is not guaranteed by either the Sixth Amendment of the United States Constitution or article 1, § 13 of the Indiana Constitution and that Robbins was represented by a public defender until her withdrawal, we cannot say that the trial court erred by denying Robbins's request for counsel. See Daniels, 741 N.E.2d at 1190; Ford v. State, 570 N.E.2d 84, 87 n.1 (Ind. Ct. App. 1991) (holding that Ind. Post-Conviction Rule 1 "denies inmate petitioners the right to continued representation by the [State Public Defender] on

convictions with present penal consequences if after review and investigation, the [State Public Defender] finds the proceeding is not meritorious and in the interests of justice”), trans. denied; Von Hagel v. State, 568 N.E.2d 549, 551 (Ind. Ct. App. 1990) (holding that petitioner had no right to counsel under the constitution, statutes or post-conviction relief rules and that the post-conviction court had no power to appoint counsel other than the State public defender), trans. denied.

## II.

The next issue is whether the post-conviction court erred by denying Robbins’s petition for post conviction relief. Initially, we must address the State’s Verified Motion to Strike Portions of the Appellant’s Appendix and Exhibits,<sup>2</sup> alleging that portions of the appellant’s appendix and his appendix labeled “EXHIBITS” were not a part of the record in this post-conviction proceeding. Specifically, the State points to portions of Robbins’s appendix, which “purport[] to be the jury instructions in [Robbins]’s trial,” and “portions of the trial transcript.” State’s Motion to Strike at 2. The State is correct that these sections were not part of the record in the present proceeding.<sup>3</sup> The record from the trial court and the jury instructions were not admitted at the evidentiary hearing. A post-conviction court may not take judicial notice of the transcript of the evidence from the original proceedings unless exceptional circumstances exist. State v. Hicks, 525 N.E.2d

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<sup>2</sup> Robbins includes an appendix labeled “EXHIBITS,” which includes seventy-six pages of material.

<sup>3</sup> Robbins’s correspondence with this Court addresses the State’s motion, but Robbins does not develop a cogent argument opposing the State’s motion.

316, 317 (Ind. 1988). The transcript must be admitted into evidence just like any other exhibit. Id. The portions of the appellant’s appendix containing portions of the transcript and his appendix labeled “EXHIBITS” were not admitted into evidence, and we cannot say that exceptional circumstances exist. By separate order issued contemporaneously with this opinion, we hereby grant the State’s motion to strike those portions of Robbins’s appendices and Exhibits.

Before discussing Robbins’s allegations of error, we note the general standard under which we review a post-conviction court’s denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The

post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

Robbins argues that his trial counsel was ineffective when he: (A) failed to submit an instruction to clarify the self defense instruction; (B) failed to request a voluntary manslaughter instruction; and (C) failed to conduct an adequate pretrial investigation. Because Robbins did not submit any testimony of his trial counsel or the transcript or jury instructions from his trial, Robbins failed to produce any evidence to support his allegations of ineffective assistance of trial counsel. Consequently, we cannot say that the post-conviction court erred by denying Robbins's petition for post-conviction relief. See Bahm v. State, 789 N.E.2d 50, 58-59 (Ind. Ct. App. 2003) (holding that petitioner failed to produce any evidence to support his allegations of ineffective assistance from trial and appellate counsel because he did not produce any witnesses at the post-conviction hearing or submit his direct appeal record of proceedings), clarified on reh'g, 794 N.E.2d 444, trans. denied.

For the foregoing reasons, we affirm the post-conviction court's denial of Robbins's petition for post-conviction relief.

Affirmed.

CRONE, J. and BRADFORD, J. concur