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IN THE
COURT OF APPEALS OF INDIANA

ROBERT J. MAXIE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 71A05-0809-PC-560
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D04-9512-CF-571

May 20, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Robert J. Maxie (Maxie), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUES

Maxie presents two issues for our review, which we restate as the following four:

(1) Whether Maxie was entitled to be represented by the Indiana State Public Defender's Office (ISPDO) throughout the post-conviction proceedings;

(2) Whether the post-conviction court erred in its appointment of Maxie's non-ISPDO attorney;

(3) Whether the performance of Maxie's non-ISPDO counsel deprived him of a procedurally fair hearing; and

(4) Whether the post-conviction court erred by relying on a factual summary when the trial transcript was neither filed with the court nor introduced into evidence at the post-conviction hearing.

FACTS AND PROCEDURAL HISTORY

On December 5, 1995, the State filed an Information charging Maxie with burglary, as a Class B felony, I.C. § 35-43-2-1, and alleging that he was an habitual offender, I.C. § 35-50-2-8. The burglary count alleged that Maxie had broken into the house of Jeff Staszewski (Staszewski) in South Bend, Indiana, with the intent to commit theft. The State later added a charge of residential entry, a Class D felony, I.C. § 35-43-2-1.5. This count alleged that

Maxie had broken into the home of Louise Jones (Jones) in South Bend, Indiana. On December 6, 1996, a jury found Maxie guilty as charged of burglary and residential entry and also found him to be a habitual offender. The trial court imposed a sentence of 32 years. On February 19, 1998, we issued an opinion affirming Maxie's convictions.

On October 19, 1999, Maxie filed a petition for post-conviction relief. On October 28, 1999, the post-conviction court appointed the ISPDO to represent Maxie. In turn, the ISPDO appointed outside counsel. On October 12, 2001, the ISPDO filed a motion to withdraw from the case, which the trial court granted. On February 25, 2002, the post-conviction court appointed a St. Joseph County public defender to assist Maxie with his petition.

On February 27, 2007, Maxie filed an amended petition for post-conviction relief. He claimed, in part:

> Evidence obtained from the crime scene at the Jones' residence included some bloody gloves and some bloody U.S. currency. Three pieces of broken glass also with blood on them was [sic] obtained from the Staszewski residence. DNA testing was attempted on the glass obtained from the Staszewski home. The DNA examiner determined that there was not enough blood retrieved from the glass to perform a proper test. Blood was then taken from the gloves found at the Jones' house and a DNA match concluded that the blood from both the Staszewski and Jones' residences belonged to the Defendant.

(Appellant's App. p. 15). Maxie's supporting brief alleged that the DNA match was the result of cross-contamination of the blood found at the Jones residence and the blood found at the Staszewski residence. On July 18, 2008, the post-conviction court held a hearing. Maxie's attorney did not call a DNA expert to support Maxie's cross-contamination theory.

On July 22, 2008, the post-conviction court issued Findings of Fact and Conclusions of Law denying Maxie post-conviction relief.

Maxie now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

The burden on one whose petition for post-conviction relief has been denied is a substantial one. *Hopkins v. State*, 889 N.E.2d 314, 317 (Ind. 2008). We will affirm the denial unless the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Id*.

I. *Maxie's Right to Representation by the Indiana State Public Defender's Office*

Maxie first argues that "[t]he trial court erred in holding the post-conviction petition hearing without a proper legislative appointed of counsel [sic], and in effect denied Maxie's right to a fair hearing in violation of the Fourteenth (14th) Amendment and Sixth (6th) Amendment of the United States Constitution." (Appellant's Br. p. 6). We gather that Maxie is basing this argument on a letter sent to him by the ISPDO on October 9, 2008. The letter provides, in pertinent part:

> It appears that Mr. John Pinnow, Special Assistant to the State Public Defender, was originally appointed to your post-conviction proceedings and then withdrew his appearance in 2001. Thereafter, the post-conviction court appointed [local counsel] to represent you. You should be aware that you actually were not entitled to the representation of [local counsel] because by legislation it is the responsibility of the [ISPDO] to represent petitioners on meritorious post-conviction claims. Nevertheless, the court apparently gave you counsel from the county.

(Appellant's App. p. 37). Citing this letter, Maxie contends, "The trial court abused its discretion when it appointed [local counsel] to represent Maxie in post-conviction proceedings whereby legislation it was and is the responsibility of the [ISPDO], under Susan Carpenter, to represent petitioners who are indigent in post-conviction petition's proceeding [sic]." (Appellant's Br. p. 7).

Maxie apparently believes that he has an absolute right to be represented by the ISPDO. However, Maxie does not cite any authority for this proposition. Moreover, Maxie never made this argument to the trial court. For these reasons, he has waived this argument.

Waiver notwithstanding, we know that post-conviction petitioners in Indiana have no absolute entitlement to representation by the ISPDO throughout all post-conviction proceedings. To be sure, Indiana's post-conviction rules establish that when an indigent person who is incarcerated in the Department of Correction files a petition for post-conviction relief and requests representation, the post-conviction court is required to have a copy of the petition sent to the ISPDO. Ind. Post-Conviction Rule 1(2). However, the ISPDO is not required to represent the petitioner if it "determines the proceeding is not meritorious or in the interests of justice[.]" P-C.R. 1(9)(c); *see also* I.C. § 33-40-1-2(c) (ISPDO is not required "to pursue a claim or defense that is not warranted under law and cannot be supported by a good faith argument for an extension, a modification, or a reversal of law, or that for any other reason is without merit."). The post-conviction rules outline the procedure that the ISPDO must follow in withdrawing from a case: the withdrawal must be accompanied by counsel's certification that "1) the petitioner has been consulted regarding

grounds for relief in his *pro se* petition and any other possible grounds and 2) appropriate investigation, including but not limited to review of the guilty plea or trial and sentencing records, has been conducted," and counsel must provide petitioner with an explanation of the reasons for withdrawal. P-C.R. 1(9)(c). If the ISPDO follows the proper procedure, the post-conviction court must grant the motion to withdraw. *See Lott v. State*, 724 N.E.2d 1118, 1119-20 (Ind. Ct. App. 2000). Maxie makes no allegation that the ISPDO failed to follow the proper procedure when it withdrew from his case.[1] Maxie has not persuaded us that he is entitled to relief on this ground.

II. *Appointment of Local Counsel*

Next, Maxie contends that the post-conviction court erred in appointing a St. Joseph County public defender to represent him without determining counsel's "DNA knowledge and his ability to litigate a DNA post-conviction petition." (Appellant's Br. p. 7). Maxie fails to develop this argument any further or to cite any authority to support it. Therefore, it is waived. *See* Ind. Appellate Rule 46(A)(8)(a).

III. *Performance of Post-Conviction Counsel*

In a related argument, Maxie asserts that his post-conviction counsel "knew nothing about DNA testing and went so far as to try and get Maxie to be certify [sic] by the court as a DNA expert, and failed to call the DNA examiner as a witness." (Appellant's Br. p. 7). When reviewing the performance of post-conviction counsel, we apply a standard that is

[1] Even if Maxie had made such an allegation, we would have no way of testing it since he has not provided us with any documentation or other evidence regarding the ISPDO's reasons for withdrawing.

even less stringent than the already highly deferential standard we apply in reviewing the performance of trial and direct appeal counsel, that being the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), *reh'g denied*. Instead of asking whether the petitioner received "effective assistance of counsel," as we would under *Strickland*, we ask only whether "counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court." *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989).

Maxie has made no real effort to show that his post-conviction counsel failed to meet this relaxed standard. Maxie alleges that counsel sought to have Maxie qualified as a DNA expert during the post-conviction hearing, but he fails to cite a single page of the record that would support that contention. This is not surprising, since, having read the transcript of the post-conviction hearing, we know that never happened. Furthermore, while Maxie faults counsel for failing to call a DNA examiner as a witness at the post-conviction hearing, he offers no indication of how such a witness would have testified. As such, Maxie cannot establish any prejudice in this regard. Maxie has failed to persuade us that he was denied a procedurally fair hearing.

IV. *Trial Court's Reliance on Factual Summary*

Finally, Maxie contends that "[t]he trial court erred by allowing Maxie, or his counsel, to provide an alleged factual summary of events with citation to the trial transcript without the necessary filing of transcripts as required by law." (Appellant's Br. p. 6). We understand Maxie's argument to be that the post-conviction court erred by denying his petition without

the trial transcript having been introduced into evidence. Maxie apparently believes that the transcript of his trial contains something helpful to him that did not otherwise come to light during the post-conviction hearing. If this was true, though, Maxie would have included the trial transcript in the record for this appeal. He has not done so. When appealing a denial of a petition for post-conviction relief, the petitioner has the burden to provide an adequate record for review. *Lile v. State*, 671 N.E.2d 1190, 1193 (Ind. Ct. App. 1996). Because Maxie did not provide us with the transcript of his trial, he cannot prove that he was prejudiced by its omission from the evidence presented below. Maxie has failed to persuade us that he is entitled to relief on this ground.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err in denying Maxie's petition for post-conviction relief and that Maxie is not entitled to a new hearing.

Affirmed.

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