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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH D. CREE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A02-1009-PC-1008
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard Maughmer, Judge
Cause No. 09D02-1009-PC-5

May 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Joseph D. Cree appeals the summary denial of his petition for post-conviction relief. We conclude that Cree's cause was properly dismissed. His amended petition sets forth only conclusory allegations of ineffective assistance with no supporting factual basis. We affirm the order of the post-conviction court.

Facts and Procedural History

Cree was convicted of Class A felony manufacturing methamphetamine. His conviction was affirmed on direct appeal in an unpublished memorandum decision. *Cree v. State*, No. 09A02-0504-CR-369 (Ind. Ct. App. June 1, 2006).

Cree filed a pro se petition for post-conviction relief alleging ineffective assistance of trial and appellate counsel. Cree claimed that trial counsel was ineffective for his "failure to investigate" and appellate counsel for his "failure to raise obvious issues on appeal." Appellant's App. p. 11-12.

The State requested summary disposition, stating that Cree's petition for post-conviction relief provided no factual or legal basis to support his allegations.

The post-conviction court referred Cree's cause to the State Public Defender. Indigent counsel entered an appearance on Cree's behalf but withdrew after concluding that his claims lacked merit. Counsel advised Cree to file an amended petition on his own.

Cree filed a pro se motion for leave to amend his original petition. Along with the motion, he submitted an amended petition averring in pertinent part that (a) trial counsel rendered ineffective assistance by failing "to file a motion to suppress evidence," "to

object to evidence entered during trial," and "to file [a] motion for fast and speedy trial," and (b) appellate counsel rendered ineffective assistance by failing "to raise prosecutorial misconduct on direct appeal" and "to file trial court error on direct appeal." *Id.* at 25. In addition, Cree moved to compel trial counsel to produce his client trial file.

The post-conviction court denied Cree's motions and petition summarily. The court ordered that Cree's "Motion for Leave to Amend Petition for Post-Conviction [is] denied without hearing," his "Petition for Post Conviction Relief is denied without hearing based upon the pleadings in this action," and his "Motion to Compel is denied without hearing as moot." *Id.* at 35.

Cree appeals.

Discussion and Decision

Cree argues that the post-conviction court erred in denying his motions and petition for post-conviction relief without a hearing.

Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Conner v. State*, 711 N.E.2d 1238, 1244 (Ind. 1999), *reh'g denied*. Among the issues cognizable in post-conviction proceedings are claims of ineffective assistance of counsel. *See Rogers v. State*, 897 N.E.2d 955, 964 (Ind. Ct. App. 2008), *trans. denied*.

A post-conviction proceeding is initiated by filing a verified petition with the court in which the petitioner's conviction took place. Ind. Post-Conviction Rule 1(2). The petitioner shall be given leave to amend the petition as a matter of right no later than sixty

days prior to the date the petition has been set for trial. Ind. Post-Conviction Rule 1(4)(c).

If post-conviction pleadings show conclusively that the petitioner is entitled to no relief, the court may deny the post-conviction petition without further proceedings. Ind. Post-Conviction Rule 1(4)(f). Where a court disposes of a petition accordingly, we review the court's decision as we would a motion for judgment on the pleadings. *Allen v. State*, 791 N.E.2d 748, 752 (Ind. Ct. App. 2003), *trans. denied*. The court errs in disposing of a petition in this manner unless the pleadings show that the petitioner is entitled to no relief. *Id.* at 752-53. The petitioner has a burden "only to plead facts that raise[] an issue of possible merit." *Id.* at 754. When a petitioner alleges ineffective assistance of counsel and the facts pled raise an issue of possible merit, the petition should not be summarily dismissed. *Id.* at 756. But "without specific factual allegations in support of the claim of inadequacy of representation no evidentiary hearing is required." *Sherwood v. State*, 453 N.E.2d 187, 189 (Ind. 1983).

The post-conviction court shall make specific findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. Ind. Post-Conviction Rule 1(6); *Clayton v. State*, 673 N.E.2d 783, 786 (Ind. Ct. App. 1996).

Here we conclude that the post-conviction court properly dismissed Cree's petition for post-conviction relief. To be sure, we believe it was error for the court to purportedly deny Cree leave to amend his original petition. That decision was not explained in the court's order and appears to be without justification. Nonetheless, denial of Cree's cause as set forth in his amended petition was appropriate. Cree's amended petition alleged

that trial counsel was deficient for failing to file a suppression motion, to object to evidence offered at trial, and to move for a fast and speedy trial. The petition alleged that appellate counsel was deficient for failing to argue prosecutorial misconduct and challenge trial court error on direct appeal. But Cree furnished no statements or even implications of fact in support of these claims. Although petitioners are allowed some latitude at the pleading stage, we conclude that Cree has failed to sustain his burden to plead facts in support of his claims of ineffective assistance, and we therefore find his allegations insufficient to withstand summary dismissal. *See, e.g.*, *Tyson v. State*, 868 N.E.2d 855, 858 (Ind. Ct. App. 2007) (allegation that "trial counsel failed to introduce available exculpatory evidence" insufficient to plead ineffective assistance), *reh'g denied*, *trans. denied*; *Hutchinson v. State*, 540 N.E.2d 109, 110-11 (Ind. Ct. App. 1989) (allegation that counsel "only put on a pro forma defense on my behalf to satisfy the requirement that I have counsel" insufficient), *trans. denied*; *cf. Sherwood*, 453 N.E.2d at 189 (pleadings held sufficient; petitioner alleged that lawyer wrongly advised that "I would be place[d] in a hospital to do my time" following guilty plea); *Clayton*, 673 N.E.2d at 786 (pleadings held sufficient; petitioner alleged he would not have pled guilty had trial counsel informed him that one-year license suspension under guilty plea would begin after one-year administrative suspension); *Allen*, 791 N.E.2d at 755-56 (pleadings held sufficient; petition alleged ineffective assistance for failure to depose some seventy witnesses, to hire a blood splatter expert the court had approved, to show an investigator's report to the jury, and to call witnesses that petitioner asked counsel to call). We further conclude that denial of Cree's motion to compel production was not

improper. The motion was rendered moot in the absence of a hearing on Cree's petition for post-conviction relief. *See, e.g.*, *Allen*, 791 N.E.2d at 756 (denial of request for subpoenas not error in light of denial of evidentiary hearing). And importantly, Cree does not argue on appeal that he needed his client file in order to make more specific assertions of fact in his amended petition.

For the reasons stated we affirm the order of the post-conviction court.

Affirmed.

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