

Case Summary

Wayne Mitchell appeals the post-conviction court's dismissal of one claim in his post-conviction relief ("PCR") petition. We dismiss this appeal for lack of jurisdiction.

Issues

Mitchell raises two issues, neither of which is properly before this court at this time.

Facts

Mitchell pled guilty to Class B felony burglary on June 24, 1987. The trial court sentenced him to ten years, with four suspended to probation. Mitchell was released from the Department of Correction in 1990. Shortly after that he was arrested on other charges and convicted of Class A felony burglary, Class B felony rape, and Class C felony robbery. He was sentenced to seventy-eight years on those charges. In the meantime, the State filed a notice of probation violation, and Mitchell admitted to violating probation on April 24, 1991. At that time, the trial court revoked Mitchell's probation and ordered him to serve six years.

Mitchell filed a pro se PCR petition on June 11, 2008, claiming that he was denied the right of effective assistance of counsel, which made his guilty plea to Class B felony burglary involuntary, and that he was improperly sentenced twice for the same crime when his probation was revoked. The State filed a "belated answer and motion to dismiss allegation 8(b)/9(b)." App. p. 24.

The trial court granted the motion to dismiss only as to the improper sentence allegation, which was enumerated in the PCR petition as 8(b)/9(b), on July 31, 2008. The

trial court did not address Mitchell's ineffective assistance claim. Mitchell filed a motion for summary judgment, which was denied.¹ This appeal followed.

Analysis

In ruling on the State's belated answer and motion to dismiss, the post-conviction court ordered:

Granted, as pursuant to *Collins v. State*, 817 N.E.2d 230 (Ind. 2004), this Court lacks jurisdiction in this matter and this Motion to Dismiss Allegation 8(b)/9(b) is being granted without prejudice to any right Mitchell may have to file a belated notice of appeal in accordance with the requirements of Ind. Post-Conviction Rule 2, or to file other appropriate motions regarding his sentence for the violation of probation.

App. p. 28. Both Mitchell and the State incorrectly treat this order as a dismissal of Mitchell's entire PCR petition. The additional claims Mitchell brings have not yet been adjudicated by the post-conviction court and are not properly before this court.

The State specifically titled its motion as only requesting dismissal of allegation 8(b)/9(b) and used similar wording in its conclusion of the motion. Accordingly, the trial court only dismissed Mitchell's claim relating to the allegedly improper sentence, which was enumerated in parts 8(b) and 9(b) of his PCR petition. The chronological case summary also clearly states that "allegations 8(b)/9(b) are dismissed without prejudice." Id. at 12.

¹ The purpose of this motion is unclear.

The post-conviction court's order was not a final judgment as defined by Indiana Rule of Appellate Procedure 2(H). Nor was the dismissal certified as an interlocutory order pursuant to Appellate Rule 14. We do not have jurisdiction over this matter. See Ind. Appellate Rule 5(A) and (B). In addition, we remind the parties that the post-conviction court has not yet addressed Mitchell's ineffective assistance of counsel claim; therefore, Mitchell's PCR petition is still pending before it. Any arguments regarding Mitchell's ineffective assistance claim are also not properly before this court because no final judgment has been entered.

Conclusion

We dismiss this appeal for lack of jurisdiction.

Dismissed.

BAKER, C.J., and MAY, J., concur.