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IN THE
COURT OF APPEALS OF INDIANA

ALEXANDER CHRISTOPHER ALLEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0811-PC-682
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry Shewmaker, Judge
Cause No. 20C01-0205-CF-53

July 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Alexander Christopher Allen appeals the post-conviction court's denial of his petition for post-conviction relief, claiming that the trial court improperly denied him an evidentiary hearing.

We affirm.

FACTS AND PROCEDURAL HISTORY

Following a jury trial, Allen was convicted of Class A felony attempted murder, and in April 2003, the trial court sentenced him to forty-five years of incarceration. He filed a direct appeal, and this court affirmed his conviction by unpublished decision in 2004. Our Supreme Court denied Allen's subsequent petition to transfer.

In June 2005, Allen filed a pro se petition for post-conviction relief ("PCR"), and the next month the public defender filed an appearance on Allen's behalf.[1] In August 2005, the State answered Allen's PCR petition. The chronological case summary ("CCS") reflects that the next filing was made more than one year later, in October 2006, when the State filed an "Objection to Motion for Modification of Sentence."[2] In October 2007, the trial court, on its own motion, set the PCR petition for hearing in December 2007. Two days before the hearing, Allen filed a motion to continue the matter, seeking that a hearing be set over a year later, to January 31, 2009; that same date, the public defender withdrew its representation of Allen. The trial court granted Allen's request for

[1] Appellant's Appendix does not include a copy of Allen's PCR petition or any other pleadings. It contains: (1) the chronological case summary; (2) the trial court's order denying Allen's PCR petition; and (3) several pages of the PCR hearing transcript. A full transcript of the PCR hearing was filed separately.

[2] The CCS does not reflect that Allen had filed a petition for modification, which seems to suggest that the State's filing was in response to Allen's PCR petition.

a continuance, but set the matter for hearing in August 2008. In May 2008, Allen filed a petition for modification of his sentence, which the court denied, noting that Allen was sentenced more than one year prior to that date and that the court was "[without] jurisdiction to modify [Allen's] sentence [without] the State of Indiana granting jurisdiction to the Court and no such grant of jurisdiction has been received." *Appellant's App*. at 11. Shortly thereafter, in June 2008, Allen filed a pro se amendment to his PCR petition. A month later, he requested that the court issue subpoenas to certain witnesses. The trial court granted the subpoena request, and the State filed a motion to quash.

The matter came for hearing on August 7, 2008. At or near the beginning of the hearing, Allen verbally advised the court that his desire was a sentence modification. The trial court then asked Allen whether the witnesses he had subpoenaed were necessary for the sentence modification; Allen conceded they were not, so the trial court excused them. Allen proceeded to present evidence and argument to the court. Initially, the trial court took the matter under advisement and later issued its ruling in September 2008 denying Allen's PCR petition. Allen now appeals.

DISCUSSION AND DECISION

Allen contends that the trial court erred when it denied his petition for PCR. Post-conviction procedures do not afford the convicted an opportunity for a "super appeal." *Diaz v. State*, 753 N.E.2d 724, 727 (Ind. Ct. App. 2001), *trans. denied*. Rather, they create a narrow remedy for subsequent collateral challenges to convictions and sentences, challenges that must be based on grounds enumerated in the post-conviction rules. *Id.*; *see* Ind. Post-Conviction Rule 1. Petitioners bear the burden of establishing their grounds

by a preponderance of the evidence. *Diaz*, 753 N.E.2d at 727. On appeal from a denial of post-conviction relief, we neither reweigh the evidence nor judge witness credibility. *Id*. When appealing the negative judgment of a post-conviction court, petitioners must show that the evidence, when taken as a whole, leads unerringly and unmistakably to a conclusion opposite of that reached by the trial court. *Id*. "In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did." *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *cert. denied*, 540 U.S. 830, 124 S. Ct. 69 (2003).

Here, Allen's specific claim of error is that he was denied an evidentiary hearing on his PCR petition. Our post-conviction rules require the trial court to hold an evidentiary hearing if an issue of material fact is raised in the petition. P-C.R. 1(4)(g). The hearing is to be heard without a jury, and the petitioner bears the burden of establishing his grounds for relief by a preponderance of the evidence. P-C.R. 1(5). The trial court may receive depositions, oral testimony, or other evidence. *Id*.

On August 7, 2008, Allen appeared for the hearing on his PCR petition. At the beginning of the hearing, the trial court recited on the record a conversation that had transpired before the start of the hearing:

> Court: Mr. Allen was asked what he really wanted in this matter, and he indicated, I believe, that he really wanted a sentence modification, and he had some argument and some documents he wanted to present in support of his position. Was that correct, sir?
>
> Mr. Allen: Yes, sir.
>
> Court: All right. Do you want to go ahead and do that?

Mr. Allen: Yes, I would.

Tr. at 3. Thereafter, Allen and the court engaged in a discussion about the necessity of the witnesses, including a detective, who had been subpoenaed.

> Court: Okay. We have some witnesses here that were under subpoena. There's a motion to quash. If we're going to deal with the modification issue, you really don't need them, do you?
>
> Mr. Allen: No.
>
> Court: They're excused.

Id. at 4.

At the hearing, Allen presented thirty-four documentary exhibits that were marked and admitted into evidence without objection.[3] These documents reflected his academic achievements attained while incarcerated, such as his general educational development (GED) diploma, a certificate of completion of a computer business course, an associate of science degree, and a bachelor of organizational management degree. The trial court also admitted certificates of Allen's completion of other various programs, such as parenting classes, anger management courses, and alcoholics anonymous. Allen testified to his good conduct while incarcerated, including no incidents of violence. The court then asked Allen, "All right. Anything else you want to tell me, sir? And you want me to reduce your sentence or change placement or what? Tell me what you want me to do specifically." *Id*. at 7. Allen responded, "What I was looking for is a reduction. . . . I

[3] The record before us does not contain any of those exhibits.

was looking for a reduction either work release or home detention." *Id*. After taking the matter under advisement, the trial court subsequently denied Allen's PCR petition.

Allen's claim that he was denied an evidentiary hearing is not supported by the record before us. He appeared for the hearing on August 7, 2008, unequivocally stated the relief he desired (sentence reduction), presented documentary evidence, and provided oral testimony. Allen's appellate brief suggests that he had sought, but was denied the ability to present, "an ineffective claim" to the trial court, which we presume refers to an ineffective assistance of counsel claim. *Appellant's Br*. at 2. We do not have a copy of the PCR petition and thus do not know what claim or claims it presented; however, regardless of what issues the petition may or may not have raised, Allen expressly and repeatedly stated at the hearing that what he desired was a reduction in his sentence. Allen did not present any evidence on, or otherwise raise, other issues at his hearing. He was not prevented from doing so; rather, he made that choice, and he cannot now claim error on this basis. *Pinkton v. State*, 786 N.E.2d 796, 798 (Ind. Ct. App. 2003) (invited error is not reversible error), *trans. denied*.

Lastly, we note that Indiana Code section 35-38-1-17 permits a trial court, under certain circumstances, to reduce a defendant's sentence. In particular, if more than a year has elapsed since the defendant began service of his or her sentence, as is the case here, then the prosecutor must approve of the modification. In the record before us there is no indication that the prosecution had extended this consent to Allen; accordingly, the trial court was without authority to reduce Allen's sentence.

Because Allen has failed to establish that the evidence, when taken as a whole, leads unerringly and unmistakably to a conclusion opposite to that reached by the trial court, we find no error.

We affirm.

RILEY, J., and MATHIAS, J., concur.