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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL HICKINGBOTTOM,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 48A02-1012-PC-1429
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable David Happe, Judge
Cause No. 48D04-1004-PC-108

July 26, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Michael Hickingbottom ("Hickingbottom") challenges the Madison Superior Court's denial of his petition for post-conviction relief. We affirm.

Facts and Procedural History

Hickingbottom was arrested and charged with two counts of Class D felony battery resulting in serious bodily injury on March 28, 2006. An initial hearing was held on April 26, 2006, at which Hickingbottom orally requested a "speedy trial." Appellant's App. p. 28. At the time, Hickingbottom was serving a sixty-year sentence in the Indiana Department of Correction on an unrelated case. On May 4, 2006, the trial court noted that Hickingbottom's earliest projected release date from the Department of Correction was not until 2063. The trial court therefore ordered Hickingbottom to be released on his own recognizance.

On June 30, 2006, Hickingbottom appeared with counsel for a pre-trial hearing. At this hearing, the trial court, without objection, set Hickingbottom's case for a jury trial on January 24, 2007. On July 12, 2006, Hickingbottom filed a *pro se* motion to dismiss with prejudice, which the trial court declined to file because Hickingbottom was represented by counsel. The trial court subsequently reset the trial date to August 1, 2007. On March 1, 2007, Hickingbottom filed another *pro se* motion to dismiss, claiming that he was entitled to discharge under Criminal Rule 4(B). Again, the trial court declined to file this motion because Hickingbottom was represented by counsel.

The trial court subsequently continued the trial date several times. Ultimately, the jury was selected for Hickingbottom's trial on September 24, 2008. On September 26, 2008, right before the commencement of the trial, Hickingbottom agreed to plead guilty

as charged. The trial court took the matter under advisement and scheduled a sentencing hearing, which was eventually held on December 2, 2008. Hickingbottom was not personally present at the sentencing hearing because he refused to move from his cell. The trial court denied Hickingbottom's counsel's request for a continuance, accepted the guilty plea, and sentenced Hickingbottom *in absentia* to concurrent terms of three years for each Class D felony conviction. The trial court also ordered these sentences to be served consecutively to a sentence imposed in another cause.

On April 7, 2010, Hickingbottom filed a *pro se* petition for post-conviction relief, alleging that the trial court committed fundamental error in denying his motions to dismiss and in refusing to accept his *pro se* motions to dismiss. He also alleged that his trial counsel had provided ineffective assistance by failing to file motions for Hickingbottom's discharge due to alleged violations of Criminal Rule 4(B). The post-conviction court held a hearing on Hickingbottom's petition on August 30, 2010. On November 29, 2010, the post-conviction court entered findings of fact and conclusions of law denying Hickingbottom's petition. Hickingbottom now appeals.

Post-Conviction Standard of Review

A post-conviction petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Henley v. State, 881 N.E.2d 639, 643 (Ind. 2008). On appeal from the denial of post-conviction relief, the petitioner is appealing from a negative judgment. Id. To prevail on appeal from the denial of post-conviction relief, the petitioner must therefore show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Id. at

643-44. When the post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to the court's legal conclusions, but the "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. at 644.

I. Freestanding Claims of Fundamental Error

Hickingbottom first claims that the post-conviction court erred in denying his petition because, he claims, the trial court's denial of his motions to dismiss constitute fundamental error. It is well-settled, however, that "a free-standing claim of fundamental error is not available in post-conviction proceedings." Taylor v. State, 922 N.E.2d 710, 715 (Ind. Ct. App. 2010), trans. denied (citing Lindsey v. State, 888 N.E.2d 319, 324 (Ind. Ct. App. 2008)). To the extent that Hickingbottom's Criminal Rule 4(B) argument is presented as a free-standing claim of fundamental error, it is not reviewable in a post-conviction proceeding. See id.; Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) ("It was wrong to review the fundamental error claim in a post-conviction proceeding.").

II. Ineffective Assistance of Trial Counsel

Hickingbottom also claims that his trial counsel was ineffective for failing to file a motion to dismiss the charges and discharge the defendant. In addressing this claim, we are mindful of the standard of review regarding claims of ineffective assistance of trial counsel:

> A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show that

> counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001) (citations and quotations omitted).

In the present case, Hickingbottom claims that his trial counsel's performance was deficient because he did not file a motion to dismiss the charges against him based on an alleged violation of Criminal Rule 4(B). Thus, Hickingbottom must show that, had his counsel filed such a motion, it would properly have been granted. See Moore v. State, 872 N.E.2d 617, 621 (Ind. Ct. App. 2007) ("To prevail on an ineffective assistance of counsel claim based upon counsel's failure to file motions on a defendant's behalf, the defendant must demonstrate that such motions would have been successful."), trans. denied. This requires us to address the merits of Hickingbottom's Criminal Rule 4(B) claim.

Criminal Rule 4(B) provides in relevant part:

> If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar. . . .

Under Criminal Rule 4(B), the State has an affirmative duty to try an incarcerated defendant who requests a speedy trial within seventy days, and the defendant need only

move for discharge once the time period has elapsed. State v. Jackson, 857 N.E.2d 378, 380 (Ind. Ct. App. 2006).

Hickingbottom orally requested a "speedy trial" at his initial hearing on April 26, 2006.[1] Seventy days from this date is July 5, 2006. Under Criminal Rule 4(B), so long as Hickingbottom remained incarcerated, the State was required to bring Hickingbottom to trial no later than July 5, 2006. However, on May 4, 2006, before the expiration of this deadline, the trial court released Hickingbottom on his own recognizance.

By its own terms, Criminal Rule 4(B) applies to those defendants "in jail on an indictment or an affidavit[.]" "The purpose served by Crim. R. 4(B) is to prevent a defendant from being *detained in jail* for more than 70 days after requesting an early trial." Williams v. State, 631 N.E.2d 485, 486-87 (Ind. 1994) (emphasis added). Thus, once Hickingbottom was released on his own recognizance, he lost the benefit of Criminal Rule 4(B). See Williams, 631 N.E.2d at 486-87 (concluding that requirements of Criminal Rule 4(B) were satisfied where defendant was released from incarceration within seventy-day period); Dubinion v. State, 600 N.E.2d 136, 138 (Ind. Ct. App. 1992) (holding that defendant who was released from custody on bond lost the benefit of Criminal Rule 4(B)).

We acknowledge that when Hickingbottom was released on his own recognizance, he remained incarcerated in the Department of Correction on another conviction. But as

[1] The State notes that Criminal Rule 4(B) requires that a motion for a speedy trial be "filed," which the State claims means that the motion must be in writing. We have noted before, however, that "Criminal Rule 4(B) contains no requirement that an early trial motion be made in writing." Wilkins v. State, 901 N.E.2d 535, 538 n.4 (Ind. Ct. App. 2009), trans. denied (citing McGowan v. State, 599 N.E.2d 589, 591 (Ind. 1992)).

we recently concluded, "under Criminal Rule 4(B), a defendant must be incarcerated *on the pending charges* to be entitled to the benefits of the seventy-day speedy trial rule." Cundiff v. State, No. 31A05-008-CR-607, 2011 WL 2496659, slip op. at 8 (Ind. Ct. App. June 23, 2011) (emphasis added), trans. pending. Here, after he was released on his own recognizance in the instant case, Hickingbottom was no longer incarcerated on these pending charges, and Criminal Rule 4(B) was inapplicable.

Thus, even if Hickingbottom's trial counsel had filed a motion to dismiss under Criminal Rule 4(B), it would not have been successful. The post-conviction court properly concluded that the performance of Hickingbottom's trial counsel's was not deficient, nor could he have been prejudiced by the failure to file such a non-meritorious motion. In short, the post-conviction court did not err in rejecting Hickingbottom's claim of ineffective assistance of trial counsel.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.