

James Walsh (“Walsh”) appeals the denial of his petition for post-conviction relief. We find one of the issues he raises dispositive: whether the trial court erred in denying his petition on the basis of the laches doctrine. We affirm.

Facts and Procedural History

Walsh was initially charged as a juvenile until the juvenile court waived jurisdiction on February 15, 1990. Walsh was then charged with one count of Class B felony burglary and two counts of Class D felony theft. He pleaded guilty to burglary and one count of theft, and the other theft charge was dismissed. On May 1, 1990, the trial court sentenced him to an aggregate term of six years. Walsh served that time and was released in 1995.

Apparently, the 1990 convictions were used “as the basis of [a] Habitual Offender [enhancement] applied to [Walsh’s] most recent offense.” Tr. p. 4. Walsh then filed a notice of appeal on May 5, 2005, which was dismissed by our court on September 14, 2005. On October 7, 2005, Walsh filed a petition for post-conviction relief, which he amended on December 6, 2006. In his petition, Walsh alleged lack of notification of his waiver hearing, ineffective assistance of counsel, and the trial court’s failure to advise him of his constitutional rights at the waiver hearing.

The trial court held a hearing on January 29, 2007. The evidence presented revealed that neither Walsh’s defense counsel nor the presiding judge in the waiver hearing had any independent recollection of the fifteen-year-old case. Furthermore, much of the record from the juvenile proceedings had been destroyed in accordance with applicable administrative rules. Although Walsh discusses the transcript of the waiver

hearing, he never offered such transcript into evidence, and he has likewise not provided this court with a copy. The evidence also revealed that Walsh had been convicted of at least one subsequent felony charge, in which he had again consulted with attorneys.

Following the hearing, the trial court denied Walsh's petition for post-conviction relief. Specifically, the trial court found two grounds for denying Walsh's petition:

The Defendant failed to prove, as is his burden, that his attorney's performance was unreasonable or ineffective; that he was not properly advised of any and all rights he possessed, both as a juvenile and as an adult; or, that the proceedings waiving him to adult court were deficient in any manner.

The State has also raised the defense of laches. While laches is not often appropriate; in this case, due to the lapse of time between the Defendant's convictions in 1990 and his filing of his Petition for Post Conviction Relief in 2005 coupled with the destruction of some of the records and the inability of critical witnesses to recall the events of this case; that defense has merit and the Defendant's Petition must fail for this reason as well.

Br. of Appellant at 20. Walsh now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Allen v. State, 791 N.E.2d 748, 751 (Ind. Ct. App. 2003), trans. denied. Such proceedings are not "super appeals" through which convicted persons can raise issues that they failed to raise at trial or on direct appeal. Id. Post-conviction proceedings are civil in nature, and petitioners bear the burden of establishing their grounds for post-conviction relief by a preponderance of the evidence. Smith v. State, 822 N.E.2d 193, 198 (Ind. Ct. App. 2005), trans. denied.

When a petitioner appeals the denial of post-conviction relief, he appeals from a negative judgment. Allen, 791 N.E.2d at 752. “[T]o the extent his appeal turns on factual issues, the petitioner must convince this court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction relief court.” Smith, 822 N.E.2d at 198 (citation omitted). “It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law.” Godby v. State, 809 N.E.2d 480, 481 (Ind. Ct. App. 2004), trans. denied. We accept the post-conviction court’s findings of fact unless they are clearly erroneous, but we do not give deference to the court’s conclusions of law. Allen, 791 N.E.2d at 752.

The equitable doctrine of laches operates to bar consideration of the merits of a claim or right of one who has neglected for an unreasonable time, under circumstances permitting due diligence, to do what in law should have been done. Armstrong v. State, 747 N.E.2d 1119, 1120 (Ind. 2001). For laches to apply, the State must prove by a preponderance of the evidence that the petitioner unreasonably delayed in seeking relief and that the State is prejudiced by the delay. Id. In reviewing a finding of laches, the applicable standard of review is the same as in any other sufficiency question. Id. Without reweighing the evidence or assessing the credibility of witnesses, but looking only to the evidence and reasonable inferences favorable to the judgment, we will affirm if there is probative evidence to support the post-conviction court’s judgment. Id.

In determining whether the trial court properly denied Walsh’s petition on the basis of laches, we initially observe that unless a petitioner has knowledge of the defect in

his conviction or the means to seek relief from the conviction, he can seldom be said to have delayed unreasonably in seeking relief. Lile v. State, 671 N.E.2d 1190, 1194 (Ind. Ct. App. 1996). Many factors are considered when determining whether a petitioner had knowledge of post-conviction remedies, such as repeated contacts with the criminal justice system, incarceration in a penal institution with legal facilities, and consultation with counsel. Id. While the mere passage of time is not enough to constitute laches, it is an important factor to consider when evaluating the petitioner's knowledge. Id. The Indiana Supreme Court has recognized that a change of circumstances, such as incarceration, provides a petitioner with adequate opportunity and incentive to inquire about his rights and remedies. Gregory v. State, 487 N.E.2d 156, 158 (Ind. 1986).

Here, Walsh served more than five years for the burglary and theft convictions and was discharged in November 1995. During his incarceration, Walsh certainly had an incentive to inquire about his rights and remedies and the means to use Westville Correctional Facility's legal facilities. Upon his release, Walsh was convicted of at least one more felony, another burglary. Appellant's App. p. 66. It was not until the 1990 convictions were used to find Walsh a habitual offender that he challenged them. Based upon this evidence, the post-conviction court properly concluded that a fifteen-year delay in challenging the theft and burglary convictions was unreasonable. Walsh has failed to show that the evidence is without conflict and leads only to a conclusion opposite that of the trial court.

In addition to unreasonable delay, we must also determine whether the State was prejudiced by such delay. Prejudice exists when the unreasonable delay operates to

materially diminish a reasonable likelihood of successful reprosecution. Kirby v. State, 822 N.E.2d 1097, 1100 (Ind. Ct. App. 2005), trans. denied. The inability to reconstruct a case against the petitioner is demonstrated by unavailable evidence such as destroyed records, deceased witnesses, or witnesses who have no independent recollection of the event. Id. The State has an obligation to use due diligence in its investigation of the availability of evidence and witnesses. Id.

In this case, much of the record regarding the waiver hearing has been destroyed as provided for under the retention schedules set forth in Indiana Administrative Rule 7. The transcripts Walsh alleges were not destroyed were never presented to the trial court for review. The juvenile court judge who had presided over the waiver hearing has retired and has no independent recollection of the case. However, he testified that he always followed a checklist in advising defendants of their rights and had no reason to believe that he would have deviated from this standard procedure in Walsh's case. In addition, Walsh's defense counsel had no independent recollection of the waiver hearing, the trial, or his meetings with Walsh.

Under these facts and circumstances, the State would be unable to defend against Walsh's claims that he received ineffective assistance of counsel, was not notified of the waiver hearing, and was not properly notified of his rights at the waiver hearing. Based upon this evidence, the post-conviction court could reasonably conclude that the State was prejudiced by its diminished ability to successfully re prosecute the case.¹

Affirmed.

¹ Because we conclude that the trial court correctly denied Walsh's petition for post-conviction relief on the basis of laches, we do not address Walsh's claim that he sustained his burden of proof on his claims for post-conviction relief.

DARDEN, J., and KIRSCH, J., concur.