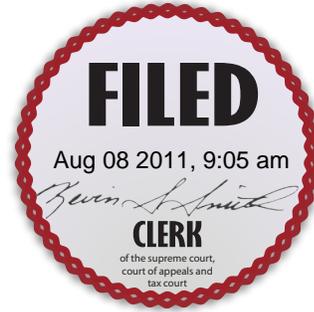


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

STEPHEN T. OWENS
Public Defender of Indiana

JONATHAN O. CHENOWETH
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LEROY H. HALL,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 49A02-1101-PC-65

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
The Honorable Steven J. Rubick, Magistrate
Cause No. 49G01-0607-PC-125775

August 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Leroy H. Hall (“Hall”) appeals the denial of his petition for post-conviction relief, which challenged his convictions for Rape,¹ Attempted Rape,² Criminal Confinement,³ Battery,⁴ Intimidation,⁵ and Criminal Mischief.⁶ We reverse and remand.

Issues

Hall alleges that the post-conviction court imposed an elevated burden of proof upon him, and that he is entitled to post-conviction relief because he was denied the effective assistance of trial counsel. As we find that the first issue is dispositive, we do not reach the latter.

Facts and Procedural History

In 2006, a jury convicted Hall of rape and other crimes against his former fiancée. He admitted his status as a habitual offender, and received an aggregate sentence of sixty-two years. His convictions were affirmed on direct appeal. Hall v. State, No. 49A02-0611-CR-983, slip op. at 1 (Ind. Ct. App. Nov. 27, 2007). The matter was remanded with instructions to impose a twenty-year habitual offender enhancement, reducing Hall’s sentence to fifty-two years. Id.

On October 22, 2008, Hall filed a petition for post-conviction relief, subsequently amended with the assistance of counsel. An evidentiary hearing was conducted on June 8,

¹ Ind. Code § 35-42-4-1.

² Ind. Code §§ 35-42-4-1, 35-41-5-1.

³ Ind. Code § 35-42-3-3.

⁴ Ind. Code § 35-42-2-1.

⁵ Ind. Code § 35-45-2-1.

⁶ Ind. Code § 35-43-1-2.

2010 and on August 3, 2010. On December 16, 2010, the post-conviction court issued its Findings of Fact, Conclusions of Law, and Order denying post-conviction relief. Hall appeals.

Discussion and Decision

Hall contends: “An initial problem is that the post-conviction court erroneously required Hall to establish his claim by clear and convincing evidence, rather than by a preponderance of the evidence, which alone requires that the case be remanded.” Appellant’s Brief at 5. We must agree.

Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1, § 5. Here, the post-conviction court’s order stated, “Defendant has failed to meet his burden of proof. . . . no relief may be granted here because Defendant has failed to establish, by clear and convincing evidence, that any concession made by trial counsel was not previously discussed and agreed to before the trial strategy was employed.” (App. 85.) The order further stated, “[i]t is inescapable that Defendant has not clearly and convincingly established that he forbade his attorney from pursuing a defense which, based on counsel’s notes, was the primary defense tactic from the outset of the representation.” (App. 86.)

A post-conviction petitioner is not required, under the rules of post-conviction relief, to establish grounds for relief by clear and convincing evidence. Here, the post-conviction court imposed upon Hall an onerous and erroneous burden of proof. We reverse and remand for a hearing and decision consistent with the Indiana Rules of Post-Conviction Relief.

Reversed and remanded.

MATHIAS, J., and CRONE, J., concur.