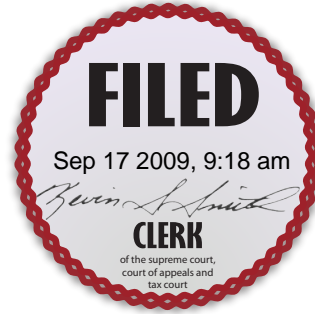


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN E. CAIN,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 79A02-0904-PC-295

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0901-PC-1

September 17, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Brian E. Cain (Cain), appeals the post-conviction court's denial of his petition for post-conviction review.

We reverse and remand with instructions.

ISSUE

Cain raises one issue, which we restate as: Whether the post-conviction court erred when it summarily denied his petition for post-conviction relief without forwarding it to the Public Defender's Office.

FACTS AND PROCEDURAL HISTORY

In 2006, Cain pled guilty to battery on a law enforcement officer, resisting law enforcement, criminal deviate conduct, and admitted to being an habitual offender. He received an aggregate sentence of forty-five years in the Indiana Department of Correction, with five years suspended to probation. Cain did not file a direct appeal of his sentence.

On January 12, 2009, Cain filed a petition for post-conviction relief which included his desire to have "the Public Defender" represent him and an affidavit of indigency stating that he has no property of any value except for his "inmate trust fund and state pay." (Appellant's App. pp. 9 and 29). On February 2, 2009, the State filed an answer to Cain's petition. On February 3, 2009, the post-conviction court summarily denied Cain's petition for post-conviction relief.

DISCUSSION AND DECISION

Cain argues that the post-conviction court erred by not forwarding his petition for post-conviction review to the State Public Defender's Office. Indiana Post-Conviction Rule 1 section (2) provides in relevant part:

If an affidavit of indigency is attached to the petition, the clerk shall call this to the attention of the court. If the court finds that the petitioner is indigent, it shall allow petitioner to proceed in forma pauperis. If the court finds the indigent petitioner is incarcerated in the Indiana Department of Correction, and has requested representation, it shall order a copy of the petition sent to the Public Defender's office.

The State concedes that the post-conviction court made no determination of Cain's indigency despite his affidavit stating he had nothing of value except for his "inmate trust fund and state pay." (Appellant's App. p. 29). Furthermore, it is undisputed that Cain is incarcerated in the Indiana Department of Correction. We will reverse a denial of post-conviction relief where the petitioner makes a showing of clear error and leaves us with a definite and firm conviction that a mistake has been made. *State v. Eubanks*, 729 N.E.2d 201, 204 (Ind. Ct. App. 2000), *trans. denied*. Cain has demonstrated that the post-conviction court committed clear error. Therefore, we remand so that the post-conviction court may determine whether

Cain is indigent, and forward his petition to the Public Defender's Office if he is found to be so.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court committed clear error and remand for proceedings consistent with this decision.

Reversed and remanded with instructions.

BAKER, C.J., and FRIEDLANDER, J., concur.