



## Case Summary

Pro-se Appellant-Defendant Daniel R. Fuquay, Sr. (“Fuquay”) appeals the denial of his post-conviction motion to set aside his plea of guilty to Possession of Cocaine, as a Class D felony,<sup>1</sup> on grounds that his plea was involuntary and that he was denied the effective assistance of counsel. Unable to conduct meaningful review in light of the summary disposition of the motion, we reverse and remand for proceedings consistent with the Indiana Rules of Procedure for Post-Conviction Remedies.

## Facts and Procedural History

On March 6, 2007, an officer conducting a traffic stop found Fuquay to be in possession of cocaine. Fuquay was charged with Dealing in Cocaine, as a Class B felony,<sup>2</sup> and initially pleaded not guilty to that offense. On February 1, 2008, Fuquay appeared in court regarding a petition to revoke probation in another case and also regarding a change of plea as to the March 6, 2007 offense.

At the outset of the hearing, the trial court advised Fuquay that he was charged with Dealing in Cocaine as a Class B felony, and also faced unrelated charges for Residential Entry, Domestic Battery, and Strangulation, all Class D felonies. After advising Fuquay as to his rights, and questioning Fuquay as to a factual basis for Class D felony Possession of Cocaine, the trial court permitted Fuquay to withdraw his plea of not guilty to Dealing in Cocaine and enter a plea of guilty to the lesser-included offense of possession.

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<sup>1</sup> Ind. Code § 35-48-4-6(a).

<sup>2</sup> Ind. Code § 35-48-4-1(a)(2).

On March 27, 2008, Fuquay appeared for sentencing. The trial court dismissed the Residential Entry, Domestic Battery, and Strangulation charges and sentenced Fuquay to two years' imprisonment upon the Possession of Cocaine conviction.<sup>3</sup> Finally, Fuquay's probation was revoked.

On May 7, 2009, Fuquay, acting pro-se, filed his "Motion to Vacate the Judgment and Withdrawal of Guilty Plea," wherein he alleged that his guilty plea was involuntary and that he had been denied the effective assistance of counsel. (App. 31.) Fuquay filed an Affidavit of Indigency asserting that he was unable to afford counsel, implicitly requesting representation by the State Public Defender. The motion for withdrawal of the guilty plea was summarily denied on May 11, 2009.<sup>4</sup> This appeal ensued.

### **Discussion and Decision**

Indiana Code Section 35-35-1-4(c) governs withdrawal of a guilty plea after sentencing and provides:

After being sentenced following a plea of guilty, or guilty but mentally ill at the time of the crime, the convicted person may not as a matter of right withdraw the plea. However, upon motion of the convicted person, the court shall vacate the judgment and allow the withdrawal whenever the convicted person proves that withdrawal is necessary to correct a manifest injustice. A motion to vacate judgment and withdraw the plea made under this subsection shall be treated by the court as a petition for postconviction relief under the Indiana Rules of Procedure for Postconviction Remedies. For purposes of this

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<sup>3</sup> By the time of Fuquay's sentencing hearing, he was facing a fifth charge identified by the State as "711FD1233." (App. 26.)

<sup>4</sup> The docket entry provides: "Comes now the court and denies defendant's motion to vacate judgment." (App. 2.)

section, withdrawal of the plea is necessary to correct a manifest injustice whenever:

- (1) the convicted person was denied the effective assistance of counsel;
  - (2) the plea was not entered or ratified by the convicted person;
  - (3) the plea was not knowingly and voluntarily made;
  - (4) the prosecuting attorney failed to abide by the terms of a plea agreement;
- or
- (5) the plea and judgment of conviction are void or voidable for any other reason.

The motion to vacate the judgment and withdraw the plea need not allege, and it need not be proved, that the convicted person is innocent of the crime charged or that he has a valid defense.

Under the foregoing statutory provision, Fuquay's challenge is a petition for post-conviction relief.

Indiana Post-Conviction Rule 1(9) provides in relevant part:

Upon receiving a copy of the petition, including an affidavit of indigency, from the clerk of the court, the Public Defender may represent any petitioner committed to the Indiana Department of Correction in all proceedings under this Rule, including appeal, if the Public Defender determines the proceedings are meritorious and in the interests of justice.

Rule 1(5) provides as follows:

The petition shall be heard without a jury. A record of the proceedings shall be made and preserved. All rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties, except as provided above in Section 4(b). The court may receive affidavits, depositions, oral testimony, or other evidence and may at its discretion order the applicant brought before it for the hearing. The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence.

Rule 1(4)(g) provides in relevant part:

The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted,

that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Additionally, Post-Conviction Rule 1(6) provides in relevant part: “The court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held.”

Here, there is no indication that the motion was forwarded to the Public Defender. The post-conviction court did not set the matter for hearing; nor did either party move for summary disposition of the petition. No findings of fact or conclusions of law were entered. Fuquay asserts that he was denied the effective assistance of counsel and that he did not enter his guilty plea knowingly or voluntarily. The lack of a hearing record, affidavits, or findings and conclusions of law thereon makes meaningful review of Fuquay’s contentions impossible. We remand the case to the post-conviction court for proceedings consistent with the Indiana Rules of Procedure for Post-Conviction Remedies.

Reversed and remanded.

RILEY, J., and KIRSCH, J., concur.