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IN THE
COURT OF APPEALS OF INDIANA

STEVE D. ELLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 14A05-0912-PC-690
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DAVIES CIRCUIT COURT
The Honorable Gregory A. Smith, Judge
Cause No. 14C01-9901-CF-1

November 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Steve Eller appeals the denial of his petition for post-conviction relief.

We affirm.

ISSUE

Whether the trial court erred in denying Eller's petition for post-conviction relief.

FACTS

Some of the relevant facts are set forth in this court's decision in *Eller v. State*, 757 N.E.2d 141, 142 (Ind. Ct. App. 2001, which reads as follows:

> On January 19, 1999, a nine-count information was filed against Eller in Daviess Circuit Court. Eller was found to be indigent, and a public defender was appointed to represent him. On October 4, 1999, Eller pleaded guilty to two counts of burglary as a Class A felony, one count of possession of a firearm by a felon, a Class D felony, and auto theft, a Class D felony. On December 23, he was sentenced to fifty years with ten years suspended for the Class A felony counts and eighteen months for the Class D felonies. All counts were ordered served concurrently.
>
> On February 8, 2000, Eller filed an affidavit of indigency and praecipe for the record of proceedings. The record was provided to him three months later, and on September 19, Eller filed a petition for post-conviction relief, alleging that his guilty pleas were not entered into knowingly, voluntarily, or intelligently because the plea agreement resulted in him being convicted of two offenses in violation of double jeopardy principles. His petition requested that the State Public Defender be appointed to represent him, but he did not attach an affidavit of indigency. On September 26, the trial court ordered the State to file a written response to the petition, and on the same day the prosecuting attorney filed a one-sentence response requesting that the petition be denied because it was "factually and legally without merit." Two days later, the trial court entered the following order: "The Court, having considered the defendant's Motion for Post Conviction Relief and the State's Objection thereto, now denies the defendant's Motion for Post Conviction Relief."

(Internal citations omitted). Thus, the trial court did not refer Eller's petition to the State Public Defender and summarily denied the petition nine days after Eller filed it.

On appeal, this court found that "where it is clear that a petitioner is likely indigent and has requested referral of his petition to the State Public Defender," the failure to provide an affidavit of indigency does not "strip[] him of the right to referral and review of his case by the State Public Defender." 757 N.E.2d at 144. This court therefore reversed the summary denial of post-conviction relief and remanded with instructions to forward Eller's petition to the State Public Defender's Office.

On August 8, 2001, the trial court set aside the denial of Eller's petition and referred it to the State Public Defender's Office. Deputy Public Defender Stephen Owens filed an appearance on behalf of Eller on August 29, 2001. Eller subsequently retained private counsel. Therefore, the trial court granted Owens's motion to withdraw.

On December 18, 2001, Eller, by counsel, filed an amended petition for post-conviction relief. In June of 2002, the trial court granted Eller's counsel's motion to withdraw his appearance. On July 26, 2002, Eller, pro se, filed a second amended petition for post-conviction relief.

In August of 2002, Deputy Public Defender Todd DeGroff filed an appearance on behalf of Eller. In April of 2004, Deputy Public Defender Jonathan Chenoweth filed his notice of substitution of counsel. On November 15, 2004, however, the trial court granted Chenoweth's motion to withdraw his appearance. After conducting an

investigation, the State Public Defender's Office filed a notice of non-representation on June 20, 2005.

On October 13, 2006, Eller filed a "Motion to Compel Appointment of Independent Counsel," which the trial court denied on October 26, 2006. (App. 11). Eller filed a notice of appeal on November 15, 2006. On March 7, 2007, the Court of Appeals dismissed the appeal.

On February 2, 2009, Eller, pro se, filed a third amended petition for post-conviction relief, asserting ineffective assistance of counsel. The State filed its answer on February 10, 2009. On April 30, 2009, the trial court referred Eller's petition to the State Public Defender's Office. On May 22, 2009, the State Public Defender's Office filed a notice of non-representation.

On July 31, 2009, Eller filed a "Motion to Rule on and Give a Conclusion to on [sic] the Amended Petition for Post-Conviction Relief, Appealable Argument," (app. 16), wherein he requested "a '[r]uling' on any and all facts and laws for his claims of merit within his amended PCR . . . ." (App. 134) (emphasis omitted). After entering its findings of fact and conclusions of law on September 11, 2009, the trial court denied Eller's petition without a hearing.

DECISION

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*. An appeal from the denial of post-conviction relief constitutes an

appeal from a negative judgment. *Id.* Thus, to prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Id.* In the post-conviction setting, conclusions of law receive no deference on appeal. *Id.* As to factual matters, the reviewing court examines only the probative evidence and reasonable inferences that support the post-conviction court's determination and does not reweigh the evidence or judge the credibility of the witnesses. *Id.*

Eller asserts that the trial court erred in disposing of his petition based upon the pleadings. Specifically, he argues that his allegations of ineffective assistance of trial and post-conviction counsel raise questions of fact "that would require an evidentiary hearing to resolve any dispute and conflict." Eller's Br. at 4.

The record shows that Eller requested summary disposition of his petition pursuant to Indiana Post-Conviction Rule 1(4)(g).[1] *See* App. at 16 (Eller's "Motion to Rule on and Give a Conclusion to on [sic] the Amended Petition for Post-Conviction Relief, Appealable Argument"). Indiana Post-Conviction Rule 1(4)(g) provides:

> 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. The court may ask for oral argument on the legal issue raised. If an issue of material fact is raised,

[1] To the extent that Eller claims the trial court improperly considered his petition pursuant to Indiana Post-Conviction Rule 1(4)(g), his claim must fail. *See Pinkton v. State*, 786 N.E.2d 796, 798 (Ind. Ct. App. 2003) ("It is well settled in Indiana that a party may not invite error, and later argue that such error supports reversal because error invited by the complaining party is not reversible error."), *trans. denied*. Invited error is not subject to appellate review. *Id.*

> then the court shall hold an evidentiary hearing as soon as reasonably possible.

We review the trial court's disposition under this subsection as we would a motion for summary judgment. *Schlatter v. State*, 891 N.E.2d 1139, 1141 (Ind. Ct. App. 2008).

> The issue before us is the same as that before the post-conviction court, and we follow the same process. "A grant of summary disposition is erroneous unless 'there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" On review, we must resolve all doubts about facts, and the inferences to be drawn therefrom, in favor of the nonmovant, and the appellant has the burden of persuading us that the post-conviction court erred.

Id. (internal citations omitted).

1. Ineffective Assistance of Trial Counsel

Eller claims ineffective assistance of counsel against trial counsel, Jeffrey Norris and Michael Chestnut.[2]

> To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish before the post-conviction court the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a 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 counsel made errors so serious that counsel was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. To establish prejudice, a defendant must show that there is a reasonable probability that, but for

[2] Norris represented Eller at the guilty plea hearing on October 4, 1999. On November 9, 1999, Eller requested new counsel. On November 15, 1999, the trial court granted Norris's motion to withdraw as Eller's counsel. The following day, the trial court appointed Chestnut to represent Eller. Chestnut filed a motion to withdraw Eller's guilty plea, which the trial court denied. Subsequently, Chestnut represented Eller at the sentencing hearing.

> counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Further, counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.

Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007) (citations omitted), *cert. denied*, 129 S. Ct. 458 (2008). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

With regard to his claim of ineffective assistance of trial counsel, Eller's petition states, in part, as follows:

> Norris[] told the courts if he was denied a continuance he would be ineffective and that itself would constitute an automatic ground for a reversal.[3]
>
> . . . Chestnut[] told the court he had not gotten into the information[] and facts of Eller's case, however the court still listened to the State . . . and didn't allow the withdraw[a]l of the plea when Eller and Chestnut tried.
>
> . . . .
>
> Eller will note that . . . Norris appeared to do all he could[] but was denied every time he tried to act on the legal way of the law.
>
> Eller's second [trial] counsel []Chestnut wasn'[t] given proper time to do the legal research or investigation that his case required.

[3] According to the chronological case summary (the "CCS"), Norris filed a motion to continue the hearing on the State's motion to file an habitual offender allegation. The trial court denied the motion to continue. Norris also filed an objection to the State's "Motion to file Habitual Offender and Notice of Intent to Sentence as Habitual Offender." (App. 4).

> . . . Chestnut didn't get the chance to prove he was effective. . . . Chestnut was trying to do all he could to get Eller's plea withdrawn, but the court was more a mere friend of the State . . . than it was for the [l]egal system.

(App. 89-91).

Eller's own statements refute his assertion that he was prejudiced by his trial counsels' performance. As Eller fails to raise an issue of material fact, we cannot say that the trial court abused its discretion in summarily dismissing Eller's petition.

2. Ineffective Assistance of Post-Conviction Counsel

Eller also argues that Chenoweth rendered ineffective assistance of post-conviction counsel. We disagree.

Regarding Chenoweth, his petition alleges:

> [Chenoweth] abandoned him on appeal/P.C., which made him ineffective for failing to do his duties as counsel. Plus, counsel Mr. Chetonweth [sic] FAILED and REFUSED to address Mr. Eller's FUNDAMENTAL and CONSTITUTIONAL ERRORS. Mr. Chetonweth [sic] never set a date for a hearing, nor did he request any specific information[] from Eller that involved Eller's case.
>
> [Chenoweth] failed to address fundamental constitutional errors, he did not object to any findings of Eller's case at all, nor did [he] [p]reserve [e]rrors for [a]ppellate [r]eview for Eller to go forward with on his next appeal, once or if the court denied his [petition] at his hearing.

(App. 90).

The CCS indicates that Chenoweth filed an appearance on April 12, 2004, after the trial court referred Eller's petition to the State Public Defender's Office. On November 10, 2004, however, Chenoweth filed a withdrawal of his appearance and

certification pursuant to Indiana Post-Conviction Rule 1(9)(c). Chenoweth subsequently filed a "Notice of Non-Representation" on behalf of the State Public Defender's Office. (App. 10).

Indiana Post-Conviction Rule 1(9) provides:

> (a) 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. The Public Defender may refuse representation in any case where the conviction or sentence being challenged has no present penal consequences. Petitioner retains the right to employ his own counsel or to proceed pro se, but the court is not required to appoint counsel for a petitioner other than the Public Defender.
>
> . . . .
>
> (c) Counsel shall confer with petitioner and ascertain all grounds for relief under this rule . . . . In the event that counsel determines the proceeding is not meritorious or in the interests of justice, before or after an evidentiary hearing is held, counsel <u>shall</u> file with the court counsel's withdrawal of appearance, accompanied by counsel's certification that 1) the petitioner has been consulted regarding grounds for relief in his pro se petition and any other possible grounds and 2) appropriate investigation, including but not limited to review of the guilty plea or trial and sentencing records, has been conducted.

(Emphasis added). "[T]he word 'shall' contained within the rule [is] a command rather than an option." *Lott v. State*, 724 N.E.2d 1118, 1119 (Ind. Ct. App. 2000).

Eller makes no assertion that Chenoweth failed to comply with the procedures mandated by the Post-Conviction Rules. Rather, it appears that Chenoweth "did exactly that which the rule provided that he must do." *See id.* As Eller raises no issue of material

fact regarding the effectiveness of post-conviction counsel, the trial court properly disposed of his petition without a hearing.

Affirmed.

BRADFORD, J., and BROWN, J., concur.