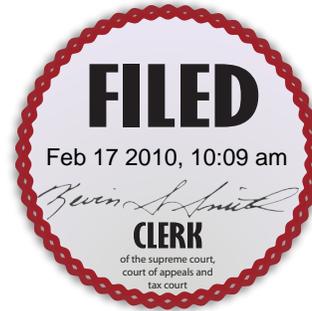


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

LONNIE M. RANDOLPH
East Chicago, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LONNIE M. RANDOLPH,)
)
Appellant,)
)
vs.) No. 45A03-0910-CV-456
)
LARRY HUNTER,)
)
Appellee.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
The Honorable Natalie Bokota, Magistrate
Cause No. 45G04-0303-FA-5

February 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Attorney Lonnie M. Randolph appeals the post-conviction court's order that he return \$3500 to Larry Hunter, a criminal defendant and former client. We affirm.

Issue

Randolph raises eight issues, which we consolidate and restate as whether the post-conviction court clearly erred in ordering him to return \$3500 in unearned attorney fees.¹

Facts and Procedural History

In 2003, Hunter was convicted of Dealing in Cocaine within 1000 Feet of a Family Housing Complex, a Class A felony, and was found to be an habitual offender. On direct appeal, Hunter argued that there was insufficient evidence to support the verdict and that his trial counsel was ineffective; namely, by failing to argue, pursuant to Indiana Code Section 35-48-4-16(c), that the confidential informant had selected the location of the transaction. The State cross-appealed, asserting that the habitual-offender term ordered by the trial court did not comply with the habitual-offender statute. We held that the evidence supported the verdict and that Hunter received effective assistance from his trial counsel, affirmed his conviction, and remanded with instructions to increase Hunter's habitual-offender term by ten years. Hunter v. State, No. 45A03-0311-CR-451 (Ind. Ct. App. Sept. 3, 2004).

Hunter petitioned for post-conviction relief ("PCR"). In 2006, the post-conviction court granted the petition and vacated the habitual-offender finding. All that remained was Hunter's minimum, twenty-year term for the Class A felony, which was non-suspendable.

¹ The appellant failed to file an appendix in this matter. We must assume his failure to do so was a matter of strategy.

Through correspondence, Hunter and Randolph agreed that Hunter would pay Randolph \$1500 to research and evaluate the case and \$3500 for “filing the [PCR] petition and representing [Hunter] at a hearing.” Exhibit 4. After being paid \$1500 in November 2007, Randolph demanded an additional payment of \$3500 “[t]o file [his] appearance and do the sentence modification.” Ex. 6. In January 2008, Hunter informed Randolph that the habitual-offender adjudication had been dismissed.

Randolph received an additional payment of \$3500. On October 31, 2008, he appeared and filed a petition for PCR, Hunter’s second. In it, Randolph referenced the direct appeal and acknowledged that the habitual-offender term had been vacated in 2006. He nonetheless argued, among other things, that Hunter’s trial counsel was ineffective, as evidenced by “trial counsel’s failure to recognize that defendant was not eligible for the 30 year [habitual-offender] enhancement.” Ex. 8 at 8. The post-conviction court denied the petition because Hunter, having previously filed a petition for PCR, would therefore have to file with the Clerk of the Indiana Supreme Court a request for a successive petition. See Ind. Post-Conviction Rule 12.

On December 17, 2008, Randolph sent a successive petition to Hunter, which he signed on December 22, 2008. Randolph argued in the successive petition, as Hunter had already argued in his direct appeal, that the confidential informant “set up the location for the drug purchase.” Ex. 17 at 3. On January 23, 2009, Randolph wrote Hunter to request a copy of Hunter’s first petition for PCR and stated that such had to be filed with the successive petition. The attorney-client relationship appeared to deteriorate thereafter. Randolph wrote

the following to his client on February 12, 2009:

I did not like nor appreciate the tone of your last letter. I am working my butt off for you in trying to get you a hearing date.

Do not try to intimidate me again. I do not like it and will not stand for it.

The strategy and theory I'm taking in your case is [sic] new avenue. If you or your friends in jail know more than me about helping you, then let them handle your case.

I'll be in touch when the successive petition is filed. My attorney fee balance owed is \$5000 which must be paid before the hearing date once it is acquired.

Ex. 14. Four days later, Hunter wrote Randolph the following:

Concerning my successive petition. I've been waiting since October 20th 2008. I need this file [sic] by the end of this month.

I don't have a lot of time to wait now my mother is dealing with bone cancer. So I need to know step by step what is going on with my case.

Ex. 15. The next week, Hunter terminated Randolph, asserted that Randolph breached their contract, and asked for the return of \$3500. It does not appear that the successive petition was ever filed.

On May 8, 2009, Hunter moved, pro se, to compel the return of unearned attorney fees. Randolph responded and moved to dismiss for lack of jurisdiction, which was denied. After an evidentiary hearing, the post-conviction court granted Hunter's motion to compel the return of unearned attorney fees amounting to \$3500. Randolph filed a motion to correct error, which was denied.

Randolph now appeals.

Discussion and Decision

Randolph challenges the order as being against the “manifest weight of the evidence.” Appellant’s Brief at 5. We will affirm a general judgment on any legal theory supported by the evidence. Splittorff v. Aigner, 908 N.E.2d 669, 671 (Ind. Ct. App. 2009), trans. denied. We neither reweigh the evidence nor reassess the credibility of the witnesses. Id. We will reverse the judgment only if it is clearly erroneous. Id. Hunter did not file an appellee brief.

When the appellee has failed to submit an answer brief we need not undertake the burden of developing an argument on the appellee’s behalf. Rather, we will reverse the trial court’s judgment if the appellant’s brief presents a case of prima facie error. Prima facie error in this context is defined as, “at first sight, on first appearance, or on the face of it.” Where an appellant is unable to meet this burden, we will affirm.

Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006) (citations omitted).

A lawyer’s fee must be reasonable. Ind. Professional Conduct Rule 1.5(a). Upon termination of representation, a lawyer must refund any advance payment that has not been earned. Ind. Professional Conduct Rule 1.16(d). Consideration may be given to the general quality of the attorney’s effort. Galanis v. Lyons & Truitt, 715 N.E.2d 858, 862 (Ind. 1999).

Here, Hunter advanced \$1500 to Randolph in November 2007 and later wrote him to explain some of the details of his case, including the fact that the habitual-offender adjudication had been dismissed. (This fact was also referenced in the Chronological Case Summary.) According to Randolph’s testimony, he reviewed Hunter’s file and docket sometime between November 2007 and February 2008.

On October 31, 2008, rather than filing a request for a successive petition with the Clerk of the Indiana Supreme Court, as required, Randolph filed a petition for PCR that

acknowledged the dismissal of the habitual-offender adjudication, which had been effected through the previous PCR petition. Randolph presented therein arguments that were res judicata, including the habitual-offender adjudication, the effectiveness of trial counsel, and the defense that the confidential informant selected the place of the cocaine transaction.

Randolph forwarded for Hunter's signature a three-page request for permission to file a successive petition for PCR. However, Randolph wrote his client a month later to request a copy of Hunter's original PCR petition, as such was required to be attached to the successive petition. After another month of delay, Randolph sought an additional payment of \$5000. Hunter terminated Randolph two weeks later.

Per the terms of their agreement, Hunter paid Randolph \$1500 to research the case and determine how (and whether) to proceed. Randolph would then be paid an additional \$3500 to "fil[e] the petition and represent[] [Hunter] at a hearing" or "do the sentence modification." Exhibits 4 and 6. After spending \$3500 and communicating with Randolph for sixteen months, Hunter received a three-page request for permission to file a successive petition for PCR that included only issues that were res judicata – the sufficiency of the evidence and the effectiveness of trial counsel. Upon termination, Randolph had a professional obligation to return any unearned fees. He has not established that the post-conviction court clearly erred in ordering him to refund \$3500 to Hunter.

We note that Randolph also argues that the post-conviction court lacked jurisdiction to consider the attorney-fee issue. However, he provides no authority to suggest that a trial court or post-conviction court lacks authority to consider a fee dispute related to the

underlying matter. Randolph has therefore failed to carry the burden of establishing prima facie error.

Finally, Randolph asserts that he should have received a jury trial and that the post-conviction court should have entered special findings pursuant to Indiana Trial Rule 52(A). He fails, however, to present any evidence that he requested a jury trial or that he timely requested special findings. Under Indiana Trial Rule 52(A), a party's written request for special findings must be filed before the admission of evidence. The record suggests that Randolph's earliest request for special findings was in his motion to correct error. His request was therefore untimely.

Conclusion

The post-conviction court did not clearly err in ordering Randolph to return \$3500 in unearned attorney fees to Hunter.

Affirmed.

BAKER, C.J., and ROBB, J., concur.