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IN THE
COURT OF APPEALS OF INDIANA

JAMES A. NELSON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 26A01-1011-PC-568
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE GIBSON SUPERIOR COURT
The Honorable Earl G. Penrod, Judge
Cause No. 26D01-1004-PC-1

March 23, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner James A. Nelson appeals the denial of his petition for post-conviction relief. He raises seventeen arguments, which we partially restate as follows: (1) the post-conviction court erroneously denied Nelson's motion to require the State to obtain and file the trial record; (2) the post-conviction court erroneously ruled on his petition by affidavit rather than holding a hearing; and (3) the post-conviction court erroneously found that Nelson did not receive ineffective assistance of trial and appellate counsel. Nelson also attempts to raise approximately thirteen claims of freestanding error. Finding no error, we affirm.

FACTS

The underlying facts herein, as described by this court in Nelson's direct appeal, are as follows:

> In August 2007, the Oakland City Police Department was conducting an investigation of Nelson for possible illegal drug activity. On August 29, 2007, Officer Michael Collins conducted a routine traffic stop of Mike Marvel, who was driving a semi-truck with a nonfunctioning taillight and had a suspended license. Officer Collins recognized Marvel as an associate of Nelson. Officer Collins asked to search the vehicle, and Marvel consented. During the search, Officer Collins found pseudoephedrine pills, glass pipes, and lithium batteries. Marvel informed Officer Collins that he was taking the pseudoephedrine to Nelson in exchange for methamphetamine. Marvel agreed to assist the police by wearing a recording device, making the delivery, and attempting to pinpoint the time Nelson would be manufacturing the methamphetamine. Officer Collins observed Marvel enter and exit Nelson's home. During the visit, Marvel delivered the pills and learned that Nelson planned to "cook" the methamphetamine the next day.
>
> At 8:30 a.m. on August 30, 2007, Officer Collins and Conservation Officer Duane Englert began surveilling Nelson's

> house. During this time, Nelson exited his home and walked the perimeter of the property. He then went inside and came back out with a gas can and tool box. He went inside and emerged again with a laundry basket, which he carried into the barn. He then emerged from the barn with the laundry basket, which now contained a tank and a hose covered by a blanket. He took the basket inside the house and came out with a cup with "frosting" on it.
>
> Officer Englert continued to surveil the property while Officer Collins obtained a search warrant. During this time, Officer Englert observed a man and woman enter Nelson's home. Officer Collins returned, and he, Officer Englert, and other officers executed the search warrant. During the search, Officer Collins observed a piece of burnt aluminum on the coffee table and smelled camp fuel and anhydrous ammonia. He found methamphetamine under the couch where Nelson had been sitting and various jars of flammable solvents around the house. After the officers placed Nelson and his two guests in custody, Nelson showed them hydrochloric acid generators, "pill dough," and a tank containing anhydrous ammonia. Police also found acetone and two bags containing a total of 8.26 grams of methamphetamine.
>
> On August 31, 2007, the State charged Nelson with class A felony dealing in methamphetamine, class C felony possession of methamphetamine, class D felony possession of chemical reagents or precursors, class D felony possession of anhydrous ammonia with intent to manufacture, class A misdemeanor illegal storage or transport of anhydrous ammonia, class B felony manufacturing methamphetamine, and class D felony possession of a controlled substance. . . . On May 29, 2008, the State dismissed the class A felony dealing in methamphetamine count and the class C felony possession of methamphetamine count, and a jury found Nelson guilty on all remaining counts. On June 19, 2008, the trial court sentenced Nelson to an eighteen-year aggregate term.

Nelson v. State, No. 26A05-0809-CR-515, *1 (May 15, 2009) (internal citations and footnotes omitted), trans. denied. Nelson appealed, raising arguments regarding an expert witness, the admission of certain test results, and an inappropriate sentence. This court affirmed, and our Supreme Court later denied transfer.

On April 15, 2010, Nelson filed a petition for post-conviction relief. On July 12, 2010, he moved for an evidentiary hearing. The same day, the post-conviction denied the motion, ordering the case submitted by affidavit. On August 30, 2010, Nelson filed his affidavit in support of his petition. He also filed a motion for an order directing the State to obtain the trial record from this court and file it as an exhibit in the post-conviction record. The post-conviction court denied Nelson's motion, and on October 19, 2010, the post-conviction court denied Nelson's petition for post-conviction relief. Nelson now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Perry, 904 N.E.2d at 307. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Perry, 904 N.E.2d at 307; see also P-C.R. 1(1).

II. Provision of the Trial Record

Nelson first argues that the post-conviction court erred by denying his motion to require the State to obtain and file the trial record as an exhibit in the post-conviction proceedings. He offers no authority for the proposition that he was entitled to this requested action, nor for the proposition that the post-conviction court was obligated to grant the request.

Nelson, as the petitioner, has the burden of providing the evidence to establish his claims. Ind. Post-Conviction Rule 1(5). And pro se litigants are held to the same standard as trained legal counsel and must follow the same procedural rules. Evans v. State, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004). It is simply not the prosecutor's duty to obtain and present Nelson's evidence for him. Consequently, we decline to reverse on this basis.

III. Disposition by Affidavit

Next, Nelson argues that the post-conviction court erred by ordering the post-conviction proceedings to be conducted by affidavit and refusing to hold an evidentiary hearing. When a petitioner chooses to proceed pro se, the post-conviction court has the discretion to order the cause submitted upon affidavit. P-C.R. 1(9)(b). The post-conviction court need not hold a hearing or order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing. Smith v. State, 822 N.E.2d 193, 201 (Ind. Ct. App. 2005).

Affidavits are sworn testimony and constitute competent evidence in post-conviction proceedings. Gould v. State, 578 N.E.2d 382, 384 (Ind. Ct. App. 1991).

Here, Nelson had the opportunity to present evidence supporting his claims, including affidavits and the trial record. He submitted only his own self-serving affidavit and two hundred pages of "authentic exhibits" that did not support his post-conviction claims. Nelson failed to submit affidavits of trial or appellate counsel, nor did he submit the trial record. Under these circumstances, Nelson has failed to establish that his presence was required for a full and fair determination of the issues raised at an evidentiary hearing, and we find that the post-conviction court did not abuse its discretion by ordering the cause submitted by affidavit.

IV. Assistance of Counsel

Nelson also argues that he received ineffective assistance of trial and appellate counsel. As has already been noted herein, however, Nelson failed to file affidavits from his trial or appellate attorneys. Consequently, we may infer that counsel would not have corroborated his allegations of ineffective assistance. Dickson v. State, 533 N.E.2d 586, 589 (Ind. 1989).

Even more compelling, Nelson failed to submit the trial record, including the transcript. Our Supreme Court has observed that "[i]t is practically impossible to gauge the performance of trial counsel without the trial record . . . ." Tapia v. State, 753 N.E.2d 581, 588 n.10 (Ind. 2001). Claims of ineffective assistance of counsel are highly fact-sensitive determinations, and we simply cannot evaluate Nelson's claims without the trial

record. Under these circumstances, Nelson has failed to meet his burden of proving his claims of ineffective assistance. Consequently, the post-conviction court did not err by finding that Nelson did not receive the ineffective assistance of trial and appellate counsel.

V. Freestanding Claims of Error

Finally, Nelson raises approximately thirteen freestanding claims of error, including prosecutorial misconduct, admission of hearsay statements into evidence, contradictory witness statements, failure to receive notice of enhancements, and the fact that he was entrapped into committing the crimes in question. All of these claims were known and available for inclusion in his direct appeal, and he is not entitled to raise them at this juncture. Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001); see also Bunch v. State, 778 N.E.2d 1285, 1289 (Ind. 2002) (cautioning that allegations of fundamental error are not cognizable in post-conviction proceedings). Consequently, we decline to review these freestanding claims of error.

The judgment of the post-conviction court is affirmed.

VAIDIK, J., and MATHIAS, J., concur.