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**IN THE  
COURT OF APPEALS OF INDIANA**

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JONATHAN D. MOORE,  
Appellant-Petitioner,

vs.

STATE OF INDIANA,  
Appellee-Respondent.

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No. 30A05-0704-PC-219

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APPEAL FROM THE HANCOCK SUPERIOR COURT  
The Honorable Dan E. Marshall, Judge  
Cause No. 30D02-0210-CM-1680

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**October 18, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Jonathan D. Moore appeals the denial of his petition for post-conviction relief (“PCR”) contending that the trial court erred in summarily denying his claim without entering findings of fact to support its decision.<sup>1</sup>

We vacate and remand.

### **FACTS AND PROCEDURAL HISTORY**

On November 22, 2002, Moore pled guilty to operating a motor vehicle while intoxicated<sup>2</sup> as a Class A misdemeanor. The trial court sentenced him to 365 days, which it suspended to probation, and imposed a thirty-day suspension of Moore’s license followed by placing a 180-day restriction on his license. On October 20, 2006, attorney Brent Eaton entered an appearance on Moore’s behalf, and filed his petition for post-conviction relief.<sup>3</sup> On November 17, 2006, the State filed an answer to Moore’s petition. Four days later, Moore filed a motion for summary disposition and a memorandum of law.

The post-conviction court denied Moore’s motion for summary disposition on November 28, 2006, and set a hearing on the PCR petition for December 21, 2006. When Moore failed to appear for the hearing, the court continued the matter and set a second hearing for January 26, 2007. On January 16, 2007, Moore filed a motion to strike the State’s November 17 answer as untimely, and requested that the petition for post-conviction

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<sup>1</sup> In his brief, Moore also “prays for . . . the appointment of a new judge on this cause as well as all other relief just and proper.” *Appellant’s Br.* at 7. Moore offers no argument or legal authority to support his basis for requesting a new judge. As Moore has failed to make a cogent argument on this issue, he has waived the allegation of error on appeal. *See* Ind. Appellate Rule 46(A)(8).

<sup>2</sup> *See* IC 9-30-5-2.

<sup>3</sup> By the time Moore filed his PCR petition, he had already served his sentence.

relief be set for hearing. Moore failed to appear for the January 26, 2007 hearing.<sup>4</sup> In the chronological case summary, under a January 26, 2007 entry, the court entered the following notation: “CAUSE CALLED FOR PCR HEARING. STATE APPEARS. RESPONDENT FAILED TO APPEAR. PETITION FOR POST CONVICTION RELIEF DENIED.” *Appellant’s App.* at 10. The trial court did not hold a hearing or make findings of fact or conclusions thereon. Moore now appeals.

### DISCUSSION AND DECISION

Moore contends that it was error for the post-conviction court to deny his petition for post-conviction relief when the State submitted no evidence to refute the allegations in the petition. The State counters that it was irrelevant whether the issues raised in Moore’s PCR petition were refuted because the petition was not denied; instead, the “procedural facts show the court dismissed the petition” for failure to prosecute. *Appellee’s Br.* at 2. Citing Indiana Trial Rule 41(E), the State maintains, “Indiana trial courts may dismiss a case for failure to prosecute if no action is taken within sixty (60) days.” *Id.* at 3.

While “courts appear to use the terms ‘denial’ and ‘dismissal’ interchangeably in the context of post-conviction relief, they are not synonymous.” *Joseph v. State*, 603 N.E.2d 873, 876 (Ind. Ct. App. 1992). The difference lies in how each arises. *Id.* A petition for post-conviction relief may be “summarily *denied* when the pleadings conclusively show the petitioner is entitled to no relief.” *Id.* (emphasis added) (citing Ind. Post-Conviction Rule 1(4)(f)); see *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*. “The

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<sup>4</sup> Moore contends he failed to attend the hearings on his PCR petition because he did not receive notice. We need not address this issue because, based on our holding, his attendance at those meetings is

petition may be *dismissed* when the petitioner has failed to comply with the trial rules or when he has failed to take action for a period of 60 days.” *Id.* (emphasis added) (citing T.R. 41(E)).

The State argues that while the post-conviction court used incorrect terminology, it properly dismissed the petition for failure to prosecute pursuant to T.R. 41(E). Moore’s petition for post-conviction relief was twice set for hearing. On neither occasion did Moore or his counsel appear. Thereafter, the post-conviction court denied his petition.

T.R. 41(E) provides in pertinent part:

[W]hen no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff’s costs if the plaintiff shall not show sufficient cause at or before such hearing.

The purpose of T.R. 41(E) “is ‘to ensure that plaintiffs will diligently pursue their claims,’ and to provide ‘an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution.’” *Olson v. Alick’s Drugs, Inc.*, 863 N.E.2d 314, 319 (Ind. Ct. App. 2007), *trans. denied* (quoting *Benton v. Moore*, 622 N.E.2d 1002, 1006 (Ind.Ct.App.1993)). Dismissal pursuant to T.R. 41(E), unless otherwise specified by the court, acts as an adjudication on the merits. T.R. 41(B); *Olson*, 863 N.E.2d at 319.

The post-conviction court attempted just such a dismissal in *Perigo v. State*, 646 N.E.2d 372, 373 (Ind. Ct. App. 1995). In *Perigo*, the petitioner was convicted of a Class A felony and, thereafter, filed a *pro se* petition for post-conviction relief. *Id.* Five months later, in October 1991, the State filed a motion to dismiss the petition. Around that same date, a

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irrelevant.

private attorney filed an appearance on the petitioner's behalf and filed a motion requesting the post-conviction court to defer a ruling on the petition. *Id.* The trial court granted the motion. *Id.* However, no action was taken on the petition until May 1993, at which time the post-conviction court gave the petitioner until June 1993 to respond or amend his petition. *Id.* Finding the petitioner had not responded or amended his petition by June 1993, the post-conviction court dismissed the petition. *Id.*

On appeal, the petitioner claimed that the petition had been improperly dismissed. Our court agreed, and "finding nothing in the record to explain either the reasons for or the circumstances surrounding Perigo's failure to act on his petition," our court reversed the trial court's entry of summary dismissal and remanded with instructions that the trial court issue an order requiring the petitioner to show cause, pursuant to T.R. 41(E), why the petition should not be dismissed. *Id.* at 374.

Assuming without deciding that the post-conviction court dismissed Moore's petition pursuant to T.R. 41(E), we must reverse the post-conviction court's decision and remand the case for further action. While T.R. 41(E) allows a post-conviction court to dismiss a petition without regard to its merits, this rule requires the court to follow proper procedures. Where "petitioner's counsel has entered an appearance but has not responded or amended the post-conviction petition for a lengthy period of time," the trial court must order a hearing and require "the petitioner to show cause why his petition should not be dismissed." *Perigo*, 646 N.E.2d at 373; *see also Holliness v. State*, 496 N.E.2d 1281, 1282 (Ind. 1986) (sixty-one days

between date of appearance and dismissal); *Colvin v. State*, 501 N.E.2d 1149, 1150 (Ind. Ct. App. 1986) (six months between date of appearance and dismissal).<sup>5</sup>

Here, the post-conviction court, like the court in *Perigo*, failed to follow the proper procedure—it held no hearing and made no findings in the record to support its decision as required by Indiana Post-Conviction Rule 1(6).<sup>6</sup> *Allen v. State*, 749 N.E.2d 1158, 1164 (Ind. 2001), *cert. denied*, 535 U.S. 1061 (2002). Pursuant to T.R. 41(E), the trial court should have allowed Moore to show cause why his petition should not be dismissed for failure to prosecute just three months after the petition was filed and just two weeks after Moore filed his motion to strike the State’s November 17, 2006 answer. Because the post-conviction court held no hearing pursuant to T.R. 41(E), we reverse its decision and remand for further action consistent with this opinion.

Vacated and remanded.

ROBB, J., and BARNES, J., concur.

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<sup>5</sup> From the briefs, it appears that Moore’s counsel is a private attorney. Although *Holliness* and *Colvin* both dealt with the failure of a public defender to prosecute rather than a private attorney, the *Perigo* court concluded that the result is the same. *Perigo*, 646 N.E.2d at 373.

<sup>6</sup> P-C.R.1(6) provides in pertinent part, “The court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held.”