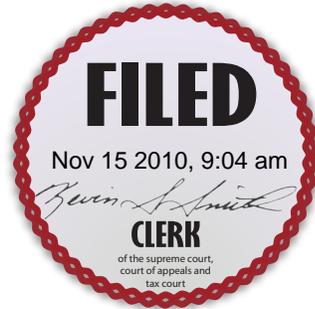


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RAYMOND LEE,)

Appellant-Defendant,)

vs.)

No. 49A04-1001-CR-047

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey L. Marchal, Commissioner
Cause No. 49G06-0908-FC-70453

November 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

A jury convicted Raymond Lee of class C felony burglary and class D felony theft. Following a separate proceeding, the trial court found Lee to be a habitual offender and imposed an aggregate sentence of eighteen years. During that habitual offender and sentencing phase, the State was represented by a deputy prosecutor as well as a legal intern. Shortly after sentencing, the State discovered that the certification of the legal intern, which provided permission for her to appear on behalf of the State in a legal proceeding, had lapsed just short of one week prior. Lee asserts that his habitual offender adjudication and resulting sentence should be reversed because the intern was not a “certified legal intern” as provided by Indiana Admission and Discipline Rules. Finding no prejudice to Lee, we affirm.

Fact and Procedural History

On August 6, 2009, the State charged Lee with class C felony burglary and class D felony theft. The State later charged Lee with being an habitual offender. On December 9, 2009, a jury found Lee guilty of class C felony burglary and class D felony theft. A bench trial was held on the habitual offender charge on January 6, 2010. During that proceeding, Deputy Prosecuting Attorney Patrick McCool and legal intern Jenna Williams appeared on behalf of the State. Under the supervision of Deputy Prosecutor McCool, Williams presented evidence to support the habitual offender finding. All other matters were handled by Deputy Prosecutor McCool. The trial court found Lee to be an habitual offender. Immediately thereafter, the trial court sentenced Lee to six years on the class C felony and two years on the class D felony, with those sentences to be served concurrently. The trial court enhanced

Lee's sentence by twelve years based upon the habitual offender finding, resulting in an aggregate sentence of eighteen years.

On January 11, 2010, the State informed Lee that Williams's certification as a legal intern, which provided permission for her to appear on behalf of the State, had lapsed less than one week prior to trial, on December 31, 2009. Based upon this information, on February 5, 2010, Lee filed a motion to correct error. The trial court denied the motion on February 25, 2010. This appeal ensued.

Discussion and Decision

Lee contends that the trial court erred when it denied his motion to correct error. Specifically, Lee argues that the habitual offender finding and sentence enhancement should be set aside based upon the newly discovered evidence that Williams was not a certified legal intern at the time of the habitual offender proceeding. We disagree with Lee.

Indiana Trial Rule 59(A)(1) provides that a motion to correct error is mandatory when a party seeks to address newly discovered material evidence. A trial court's denial of a motion to correct error based on newly discovered evidence will be reversed only for an abuse of discretion. *Martinez v. State*, 917 N.E.2d 1242, 1247 (Ind. Ct. App. 2009), *trans. denied*. Accordingly, we will give the trial court's decision substantial deference and we will reverse only if the judgment goes against the logic and effect of the facts or the trial court has misinterpreted the law. *Id.* To obtain reversal based upon newly discovered evidence, a defendant must show that (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not

privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced on retrial of the case; and (9) it will probably produce a different result. *Kahlenbeck v. State*, 719 N.E.2d 1213, 1218 (Ind. 1999). The defendant bears the burden to show that the newly discovered evidence meets the standard for a new trial. *Bradford v. State*, 675 N.E.2d 296, 302 (Ind. 1996).

Lee directs us to Indiana Admission and Discipline Rule 2.1, which sets forth the qualifications for legal interns and provides as follows:

(a) A law student may serve as a legal intern when the following requirements are met:

1. The law student is enrolled in a school accredited pursuant to Admission and Discipline Rule 13V(A);

2. The law student has satisfactorily completed one-half of the academic requisite for a first professional degree in law;

3. The law student has received permission of the Dean of the law school to participate in a legal intern program determined to be beneficial to the law student's training pursuant to the guidelines jointly developed by the law schools of this State; and

4. The law student has completed or is enrolled in a legal ethics or professional responsibility course as set forth in Ind. Admission and Discipline Rule 13(V)(C).

(b) A law school graduate may serve as a legal intern when the following requirements are met:

1. The law graduate has received a first professional degree in law from a school accredited pursuant to Admission and Discipline Rule 13(V)(A);

2. The law graduate is eligible to take the Bar examination under Admission and Discipline Rule 13V; and

3. The law graduate has received permission from an attorney who is a member of the Bar of this State to serve as a legal intern under that attorney's direct supervision.

Regarding the scope of conduct, section 4 of the rule goes on to provide:

A legal intern may interview, advise, negotiate for, and represent parties in any judicial or administrative proceeding in this State, provided all activities undertaken are supervised and approved by an attorney who is a member of the Bar of this State. A legal intern shall inform each client of his or her intern status, and that the intern is not a licensed attorney. A legal intern shall not interview any person represented by an attorney without the express permission of such attorney. In no event may a person (including private corporations) be charged for the services of a legal intern acting in a representative capacity. The personal presence of a supervising attorney is required in any proceeding in open court.

Ind. Admission and Discipline Rule 2.1(4).

In the instant case, it is undisputed that it came to light after the habitual offender and sentencing phase that Williams's certification as a legal intern had indeed lapsed. Lee's claim of error amounts to an attack on Williams's authority as a *de facto* prosecutor. We find our supreme court's opinion in *Anderson v. State*, 699 N.E.2d 257 (Ind. 1998), instructive here. In *Anderson*, the defendant moved to set aside a verdict after learning that an unlicensed attorney appeared on behalf of the State and participated in his prosecution. The defendant's claims amounted to an attack on the unlicensed attorney's authority as a *de facto* prosecutor. *Id.* at 259. Our supreme court concluded that the lack of authority of a *de facto* prosecutor must result in prejudicial harm to the defendant in order to constitute reversible error. *Id.* at 260.

Lee makes no claim of wrongdoing by Williams in her presentation of evidence, but merely attacks her authority to appear on behalf of the State. However, Lee directs us to no

evidence that Williams' participation in his habitual offender adjudication resulted in prejudice to him. Williams was supervised at all times by Deputy Prosecutor McCool, whose credentials as a fully licensed attorney in good standing are not in question. Lee has not shown that the result of the habitual offender proceeding would have been different had Williams been properly certified or had she not participated at all. Because Lee has failed to show that the newly discovered evidence of Williams's lack of authority as a de facto prosecutor will probably produce a different result on retrial, we cannot say that the trial court abused its discretion when it denied Lee's motion to correct error.¹

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.

¹ Although Lee suffered no prejudice as a result of the State's error here, we obviously do not condone appearances by uncertified legal interns in criminal prosecutions. The State should be mindful of our Admission and Discipline Rules in order to avoid the needless expenditure of appellate resources such as the case at bar.