

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.

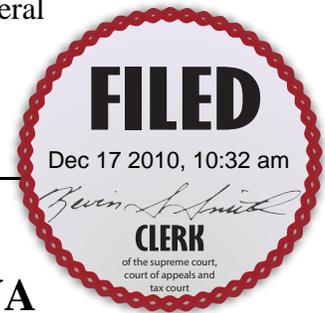
APPELLANT PRO SE:

RODNEY WAYE
Pendleton, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

RODNEY WAYE,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 85A02-1003-PC-393

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen, III, Judge
Cause No. CR-76-48

December 17, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Rodney Wayne (Waye), appeals the post-conviction court's denial of his petition for post-conviction relief following his 1977 conviction of safe burglary and second degree burglary, both Class C felonies.

We affirm.

ISSUE

Waye raises three issues on appeal, one of which we find dispositive and which we restate as follows: Whether the post-conviction court erred in concluding that Waye's claims were barred by the doctrine of laches.

FACTS AND PROCEDURAL HISTORY

On June 25, 1976, Waye and four accomplices removed a safe from a bar. A jury convicted Waye of safe burglary and second degree burglary, both Class C felonies. In March 1977, the trial court sentenced Waye to five to ten years for safe burglary and two to five years for second degree burglary, with sentences to run concurrently. This court affirmed his convictions on direct appeal. *See Waye v. State*, No. 2-977-A-353 (Ind. Ct. App. Aug. 2, 1979).

In 1993, after Waye had served the sentence in this case, the burglary conviction was used as one of the prior convictions in an habitual offender adjudication. Waye received a thirty-year habitual offender enhancement. On January 9, 2001, Waye filed a *pro se* petition for post-conviction relief. On January 22, 2001, the State Public Defender filed an appearance for Waye. In July 2001, the Public Defender withdrew her appearance, and in

August 2001, Waye filed a motion to proceed *pro se*, which the post-conviction court granted. The post-conviction court scheduled a hearing on the petition for February 11, 2002. That hearing was indefinitely continued at Waye's request. In September 2009, Waye filed a motion to amend his post-conviction petition, which the post-conviction court granted. On November 13, 2009, the State filed an answer to the amended petition wherein it alleged that the relief sought by Waye was barred by the doctrine of laches.

On November 23, 2009, the post-conviction court held an evidentiary hearing. Testimony at the hearing revealed that Waye believed his trial/appellate counsel was going to file a post-conviction petition for him after his direct appeal. At the time of the post-conviction hearing, the trial court's file on the case no longer existed, and the tapes of the opening and closing arguments were so old that the court reporter could not transcribe them. In addition, trial/appellate counsel was deceased. Waye presented no evidence in support of his claims at the hearing.

On March 2, 2010, the post-conviction court issued an order denying Waye's petition.

The order provides in relevant part as follows:

The original PCR was filed on January 9, 2001, almost 24 years after [Waye] was convicted in this cause of action. A public defender was appointed to represent [Waye]. On July 20, 2001, the public defender withdrew. On August 23, 2001, [Waye] filed his Motion to Proceed Pro Se, which motion was granted. A hearing on [Waye's] PCR was scheduled for February 11, 2002. That hearing was indefinitely continued at [Waye's] request. No further action was taken by [Waye] on his PCR until April 13, 2009. [Waye's] explanation for taking no action for more than seven (7) years was that he didn't know what he was doing. More than 30 years have now elapsed since [Waye] was convicted.

Both the State of Indiana and the [c]ourt are unable to address most of the contentions made by [Waye], on the merits, due to the unavailability of the original file and the inability to transcribe portions of the trial.

[Waye's] delay in proceeding is unreasonable and has substantially prejudiced the [c]ourt's ability to fairly address the issues presented.

The State's defense of laches is well taken.

[Waye] has failed to carry his burden on the issues raised in his Petition for Post-Conviction Relief and therefore his Petition for Post-Conviction Relief is denied.

(Appellant's App. p. 89).

Waye now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

At the outset we note that *pro se* appellants, such as Waye, are held to the same standard as trained counsel and are required to follow procedural rules. *See Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. This has consistently been the standard applied to *pro se* litigants, and the courts of this State have never held that a trial court is required to guide *pro se* litigants through the judicial system. *Id.* One of the risks that a defendant takes when he decides to proceed *pro se* is that he will not know how to accomplish all of the things that an attorney would know how to accomplish. *Hill v. State*, 773 N.E.2d 336, 346 (Ind. Ct. App. 2002).

We now turn to the merits of the appeal. Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002), *cert. denied*, 540

U.S. 830 (2003). Post-conviction procedures do not afford the convicted an opportunity for a “super appeal.” *Sims v. State*, 771 N.E.2d 734, 737 (Ind. Ct. App. 2002). Rather, such procedures create a narrow remedy for a subsequent collateral challenge to convictions that must be based on grounds enumerated in the post-conviction rules. *Id.* Petitioners must establish their grounds for relief by a preponderance of the evidence. *Id.*

A petitioner who has been denied post-conviction relief faces a rigorous standard of review on appeal. *Dewitt v. State*, 755 N.E.2d 167, 170 (Ind. 2001). The post-conviction court’s denial of relief will be affirmed unless the petitioner shows that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.* We consider only the probative evidence and reasonable inferences therefrom that support the post-conviction court’s determination and we will not reweigh the evidence or judge the credibility of witnesses. *Bigler v. State*, 732 N.E.2d 191, 194 (Ind. Ct. App. 2000), *trans. denied*.

Waye argues that the post-conviction court erred in determining that his petition was barred by the doctrine of laches. Because the State has the burden of proving laches as an affirmative defense, the applicable standard of review requires that we affirm unless we find that the judgment was clearly erroneous. *Kirby v. State*, 822 N.E.2d 1097, 1100 (Ind. Ct. App. 2005), *trans. denied*. This is a review for sufficiency of the evidence. *Id.* As with other sufficiency of the evidence claims, we do not reweigh the evidence or judge the credibility of witnesses. *Id.* Rather, we consider only the evidence most favorable to the judgment, together with all reasonable inferences to be drawn therefrom. *Id.* If the post-

conviction court's finding is supported by substantial evidence of probative value, the judgment will be affirmed. *Id.*

The doctrine of laches operates to bar consideration of the merits of a claim or right of one who has neglected for an unreasonable time, under circumstances permitting due diligence, to do what in law should have been done. *Id.* For laches to apply the State must prove by a preponderance of the evidence that the petitioner unreasonably delayed in seeking relief and that the State was prejudiced by the delay. *Id.*

In order to prove unreasonable delay, the State must show that the petitioner unreasonably delayed in seeking relief by sitting on his rights without pursuing a remedy. *Mahone v. State*, 742 N.E.2d 982, 985 (Ind. Ct. App. 2001), *trans. denied*. A long delay in filing for post-conviction relief may be sufficient to infer that the delay was unreasonable. *Id.* In addition, prejudice exists when the unreasonable delay operates to materially diminish a reasonable likelihood of re-prosecution. *Kirby*, 822 N.E.2d at 1100. The inability to reconstruct a case against a petitioner is demonstrated by unavailable evidence such as destroyed records, deceased witnesses, or witnesses who have no independent recollection of the event. *Id.*

Here, our review of the record of the proceedings reveals that Wayne was convicted in 1977. This court affirmed his conviction in 1979. Wayne thought his trial/appellate counsel was going to file a post-conviction petition for him after his direct appeal. Wayne's burglary conviction was used as the underlying conviction in an habitual offender adjudication in 1993. Despite his knowledge of the post-conviction process, Wayne did not file a petition for

post-conviction relief until 2001, twenty-four years after his conviction and eight years after his habitual offender adjudication. We further note that Waye's post-conviction hearing initially scheduled for February 2002 was continued for more than seven years at Waye's request. The total time from conviction to post-conviction hearing was thirty-two years. This evidence supports the post-conviction court's finding that the delay in the proceeding was unreasonable.

In addition, during this thirty-two-year delay, the audiotapes of opening and closing arguments have deteriorated and are no longer transcribable, and trial/appellate counsel is deceased. Although Waye claimed that witnesses to the crime were still alive, Waye did not subpoena them for the post-conviction hearing. This evidence supports the trial court's finding that the State was prejudiced by Waye's delay. We find sufficient evidence to support the post-conviction court's conclusion that Waye's claims are barred by the doctrine of laches.¹

CONCLUSION

Based upon the foregoing, we conclude that the post-conviction court did not err in concluding Waye's claims were barred by the doctrine of laches.

Affirmed.

ROBB, J., and BROWN, J., concur.

¹ We further note that Waye presented no evidence at the post-conviction hearing. The total absence of evidence on any of his claims also supports the post-conviction court's conclusion that Waye did not meet his burden of proof. *See Tapia v. State*, 753 N.E.2d 581, 588 (Ind. 2001).