

MEMORANDUM DECISION

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*

Lamarr T. Crittenden
New Castle, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

George P. Sherman
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Lamarr T. Crittenden,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

March 2, 2021

Court of Appeals Case No.
20A-CR-1749

Appeal from the Marion Superior
Court

The Honorable Lisa F. Borges,
Judge

The Honorable Anne M. Flannelly,
Magistrate

Trial Court Cause No.
49G04-0810-FA-227401

Bailey, Judge.

Case Summary

- [1] Lamarr T. Crittenden (“Crittenden”) appeals the summary denial of his motion to compel surrender of his client file. He presents the sole issue of whether the denial without a hearing is erroneous. We reverse and remand for proceedings consistent with this opinion.

Facts and Procedural History

- [2] Following a bench trial, Crittenden was convicted of one count of child molesting as a Class A felony and one count of child molesting as a Class C felony.¹ He was originally sentenced to an aggregate term of thirty-five years, with five years suspended. His convictions and sentence were affirmed on direct appeal. *Crittenden v. State*, No. 49A05-0906-CR-355 (Ind. Ct. App. Jan. 21, 2010), *trans. denied*.
- [3] In August of 2010 Crittenden filed a pro se petition for post-conviction relief. On February 27, 2012, a Deputy in the Office of the Indiana Public Defender (“Public Defender”) filed a memorandum of non-representation. Crittenden pursued his appeal pro se and argued, in part, that his trial and appellate counsel rendered ineffective assistance with regard to sentencing. The post-conviction court agreed and remanded for a new sentencing hearing. Crittenden appealed, challenging several of the post-conviction court’s

¹ Ind. Code § 35-42-4-3.

procedural rulings as well as its denial of his remaining claims of ineffective assistance of trial and appellate counsel. In a memorandum decision, this court affirmed the post-conviction court's rulings and decision. *Crittenden v. State*, 49A05-1405-PC-227 (Ind. Ct. App. June 30, 2015).

[4] At the resentencing hearing on November 18, 2015, the trial court again sentenced Crittenden to an aggregate term of thirty-five years, with five years suspended. Crittenden appealed, pro se, challenging the sentence imposed on several grounds. This court affirmed the sentence. *Crittenden v. State*, 49A04-1512-CR-2183 (Ind. Ct. App. Mar. 13, 2017).

[5] On May 29, 2020, Crittenden filed a motion to compel surrender of his attorney-client file allegedly held by the Public Defender. He attached to his motion a copy of a demand letter addressed to attorneys Victoria Christ and Stephen Owens, which he had purportedly mailed April 20, 2020. The motion to compel was denied on June 2, 2020, but Crittenden did not receive notice until August 10, 2020. He filed, on August 21, 2020, his "Verified Motion for Re-Issuance of Service of Order Pursuant to Trial Rule 5(A)(1) due to Clerk's Failure to Serve Petitioner Order." (App. Vol. II, pg. 22.) On the same day, the trial court re-issued its order. The order stated that Crittenden had failed to demonstrate that he had requested his file or that the agency had refused to surrender it. Crittenden now appeals.

Discussion and Decision

[6] Indiana Code section 33-43-1-9 (2004) provides that:

If, on request, an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them, in the course of the attorney's professional employment, the attorney may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted ... to deliver the money or papers within a specified time, or show cause why the attorney should not be punished for contempt.

[7] In *Smith v. State*, 426 N.E.2d 402, 404 (Ind. 1981), our Indiana Supreme Court concluded that a motion to compel an attorney to return documents is “ancillary” to an underlying criminal action. In *McKim v. State*, 528 N.E.2d 484, 486 (Ind. Ct. App. 1988), a panel of this Court held that the delivery of papers by an attorney to a former client was not subject to the discretion of the trial court. Rather, delivery was required under Indiana Code Section 33-43-1-9 and Indiana Professional Conduct Rule 1.16(d), which provides that:

[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

In *Ferguson v. State*, 773 N.E.2d 877, 880 (Ind. Ct. App. 2002), this Court extended the holding in *McKim* to unearned fees held by an attorney.

[8] It does not necessarily follow, however, that Crittenden is automatically entitled to the relief he seeks. As the State points out, many years have passed since the Public Defender withdrew representation, and a complete client file may not exist. In *Smith*, our Supreme Court held that when a motion to compel delivery of money or papers pursuant to Indiana Code Section 33-43-1-9 is presented, the trial court should provide reasonable notice to the attorney, hold a hearing on the matter, and then rule on the motion. 426 N.E.2d at 404; *see also Ferguson*, 773 N.E.2d at 881. Here, the trial court found that Crittenden failed to satisfy his burden of proof but there has been no hearing and thus Crittenden has had no opportunity to establish his factual contentions.

[9] The State claims that Crittenden suffered no prejudice from the summary denial. According to the State, Crittenden “didn’t indicate what he hoped to glean” and was not harmed “as he had already litigated his petition for post-conviction relief.” Appellee’s Brief at 7-8. But Indiana Code Section 33-43-1-9 and Conduct Rule 1.16 do not require a showing of prejudice. Nor is Crittenden required to establish grounds for a successive post-conviction petition. The court should hold a hearing on remand to determine whether the Public Defender actually has possession of any documents to which Crittenden is entitled.

Conclusion

[10] The trial court erred in summarily denying Crittenden's motion to compel surrender of his client file. On remand, a hearing will be necessary to determine whether Crittenden is entitled to relief.

[11] Reversed and remanded.

Robb, J., and Tavitas, J., concur.