

## 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.



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## IN THE COURT OF APPEALS OF INDIANA

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Thomas E. Sparks,  
*Appellant-Petitioner,*

v.

State of Indiana,  
*Appellee-Respondent*

October 4, 2022

Court of Appeals Case No.  
21A-PC-2216

Appeal from the Wayne Superior  
Court

The Honorable Gregory A. Horn,  
Judge

Trial Court Cause No.  
89D02-1708-PC-8

**May, Judge.**

[1] Thomas E. Sparks appeals the post-conviction court’s dismissal of his subsequent petition for post-conviction relief. Sparks raises two issues, but we find one dispositive: Whether the post-conviction court erred when it dismissed Sparks’s subsequent petition based on the doctrine of res judicata.<sup>1</sup> We affirm.

## Facts and Procedural History

[2] On October 3, 1986, Sparks pled guilty to Class B felony dealing a Schedule II controlled substance.<sup>2</sup> On November 19, 1986, the trial court sentenced Sparks to twenty years to be served in the Department of Correction. During his guilty plea and sentencing proceedings in Wayne County, Sparks was represented by John Holden, a lawyer from Ohio who was licensed to practice in Ohio but not in Indiana.

[3] On September 14, 1994, Sparks filed a post-conviction petition to challenge his guilty plea and sentence, and he also filed a petition for sentence modification. Sparks’s post-conviction petition alleged his guilty plea was involuntary; his trial attorney rendered ineffective assistance at the guilty plea and sentencing hearings; his attorney was unfamiliar with the procedural and substantive law of Indiana because he was not licensed to practice law in Indiana; and the trial court committed numerous errors at sentencing. On February 16, 1995, the

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<sup>1</sup> Sparks’s second issue was whether the post-conviction court erroneously determined the State had proved the equitable defense of laches. However, we need not address whether the State proved its equitable defense of laches because Sparks is barred from re-asserting the claims he agreed to dismiss with prejudice.

<sup>2</sup> Ind. Code § 35-48-4-2.

State consented to the trial court granting Sparks's petition for sentence modification on the condition Sparks's petition for post-conviction relief would be dismissed with prejudice. The terms of the agreement entailed suspending twelve years and ten days of Sparks's original twenty-year executed sentence and placing him on supervised probation for the suspended portion of his sentence. The trial court accepted the parties' agreement, modified Sparks's sentence accordingly, and dismissed his post-conviction petition with prejudice.

[4] On June 12, 2017, Sparks requested permission to file a successive petition for post-conviction relief. On August 7, 2017, our Court granted Sparks that permission in an order that reminded him that “[a]ny issues raised in the post-conviction petition dismissed in 1995 may not be litigated in Petitioner’s successive petition for post-conviction relief.” (App. Vol. 2 at 22.) On the same day, Sparks filed his successive petition, and therein he claimed he received ineffective assistance from a lawyer who was not admitted to practice law in Indiana. Sparks petition was later amended by counsel. The State asserted res judicata and laches. On September 13, 2021, the post-conviction court dismissed Sparks’s successive petition for post-conviction relief based on res judicata and the court also determined the State had proven the equitable defense of laches should prohibit overturning Sparks’s thirty-five-year-old conviction and sentence.

## Discussion and Decision

[5] Sparks argues the post-conviction court erroneously dismissed his petition for post-conviction relief. Pursuant to Indiana’s Rules for Post-Conviction Relief:

The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

PC Rule 1 § 4(g). On appeal, we review a court’s grant of summary disposition of a post-conviction petition in the same way as a motion for summary judgment in a civil matter. *Brown v. State*, 131 N.E.3d 740, 742 (Ind. Ct. App. 2019), *trans. denied, cert denied*, 140 S. Ct. 2783 (2020). Accordingly, we review the disposition de novo, *id.*, and should affirm dismissal “only if the pleadings conclusively show the petitioner is entitled to no relief as a matter of law.” *Id.* at 743.

[6] The post-conviction court determined Sparks’s claims were barred from consideration under the doctrine of *res judicata*. “The doctrine of *res judicata* bars the litigation of a claim after a final judgment has been rendered in a prior action involving the same claim between the same parties or their privies.” *MicroVote Gen. Corp. v. Ind. Election Com’n*, 924 N.E.2d 184, 191 (Ind. Ct. App. 2010) (*italics in original*). Four essential elements must be met before a court can find that a claim is precluded from being raised in a subsequent action:

- 1) the former judgment must have been rendered by a court of competent jurisdiction;
- 2) the former judgment must have been

rendered on the merits; 3) the matter now in issue was, or could have been, determined in the prior action; and 4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies.

*Indiana Ins. Co. v. Am. Cmty. Serv., Inc.*, 718 N.E.2d 1147, 1155 (Ind. 1999).

[7] Regarding res judicata, the post-conviction court determined, in necessary part:

7. On August 25, 1994, Sparks filed his Final Amended Verified Petition For Post-Conviction Relief, to which the State of Indiana filed its Response in Opposition to Defendant's Final Amended Verified Petition for Post-Conviction Relief on December 2, 1994.

8. On September 14, 1994, in Cause No. S2-86-1867-CR, Sparks filed a Final Amended Verified Petition for Post-Conviction Relief and an accompanying Memorandum of Law in Support, and raised the following issues:

a. Petitioner should be allowed by the Court to withdraw his plea of guilty as it was not entered voluntarily, knowingly, and intelligently;

b. Petitioner was denied the effective assistance of counsel at his sentencing hearing in violation of his rights under the Sixth Amendment to the United States Constitution;

c. Petitioner's attorney, an attorney not licensed to practice law in Indiana, was so unfamiliar with the procedural and substantive law of Indiana that he was unable to provide effective assistance to the Petitioner throughout his representation; and,

d. The Court's aggravation of Petitioner's sentence is in error.

9. In a Memorandum of Law in Support of Petitioner's Amended Verified Petition for Post-Conviction Relief filed on the same date as the Final Amended Verified Petition for Post-Conviction Relief, September 14, 1994, Sparks, through his attorney, Jodie English, clearly states at Paragraph 3 of the Summary of Argument, as follows, to-wit:

“Petitioner's counsel, an attorney not licensed to practice law in Indiana, was so unfamiliar with the procedural and substantive law of Indiana that he was unable to provide effective assistance to Petitioner throughout his representation.”

10. The issue of Sparks' trial counsel not being licensed in Indiana and allegedly providing ineffective assistance of counsel has been raised since at least September 14, 1994, and well prior to the filing of his successive Petition for Post-Conviction Relief as shown below.

11. On February 16, 1995, Sparks then filed a Petition for Sentence Modification and Request for Hearing which resulted in the [post-conviction] petition being dismissed *with prejudice* “to matters asserted therein” in exchange for a modification of sentence providing for all but 12 years and 10 days of the original sentence being suspended.

\* \* \* \* \*

14. On June 21, 2017, Sparks filed a Successive Petition for Post-Conviction Relief and attached a Palladium Item article titled “Police question attorney's work” which references Holden's

continuous practicing as an attorney in Wayne County courts in 38 criminal cases, as well as his license to practice law in both Ohio and Florida, but not Indiana.

15. Thereafter, on August 8, 2017, Sparks filed his pro se Petition for Post-Conviction Relief alleging that his plea of guilty was not entered voluntarily, knowingly, and intelligently based upon (1) his attorney's, John Holden, ineffective assistance of counsel, (2) his belief that Attorney Holden secured a deal for him, (3) threats made by the prosecuting attorney, and, (4) aggravation of his sentence was in error.

\* \* \* \* \*

17. Contained within the Memorandum of Law from the petition filed September 14, 1994, Sparks raised the same issues that he now raises in his present Petition for Post-Conviction Relief captioned above and filed under Cause No. 89D02-1708-PC-000009, as stated in Petitioner's Amended Pre-Trial Statement – Statement of Position.

18. On February 27, 2020, Sparks, by counsel, amended his Successive Petition For Post-Conviction Relief, when counsel asserted that the twenty (20) year sentence was *void ab initio* based on Sparks' trial counsel's, John Holden, lack of an Indiana law license and that Attorney Holden failed to seek or obtain permission to appear *pro hac vice*.

19. Spark's [sic] current counsel stated in his Amended Pretrial Statement of September 8, 2020, that John Holden's failure to hold a law license in the State of Indiana, and other acts of ineffective assistance of counsel, are the grounds for this successive Petition for Post-Conviction Relief. This Pretrial Statement also provided that it is believed that John Holden is now deceased.

20. On February 22, 2021, Sparks filed an Amended [Successive] Petition for Post-Conviction Relief, clarifying claims in paragraphs 8 and 9 of the petition filed February 27, 2020, specifically stating that John Holden did not hold an Indiana License and did not seek or obtain permission to appear pro hac vice, as well as clarifying the ineffective assistance of counsel allegations based on Sparks' plea not being knowingly, intelligently, and voluntarily entered.

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28. In authorizing the filing of the Successive Petition For Post-Conviction Relief, the Indiana Court of Appeals stated that any issues raised in the post-conviction petition dismissed in 1995 *may not* be litigated in Sparks' Successive Petition for Post-Conviction Relief. This includes Sparks' contention that he did not know that his attorney, John Holden, was not licensed in the State of Indiana to practice law.

29. The Court finds that since the Petition for Post-Conviction Relief filed September 14, 1994 was dismissed with prejudice in exchange for a sentence modification, and the issues raised therein were not to be raised further, the current Petition's issues are barred by *Res Judicata*.

30. Res Judicata serves to prevent repetitious litigation of disputes which are essentially the same. [citations omitted]

31. A "petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error." [citations omitted]

32. The Court of Appeals in its entry authorizing Sparks' successive appeal made it clear that the issues raised in

Petitioner's Successive Petition For Post-Conviction Relief are not authorized to be re-litigated and, therefore, are not properly before this Court.

33. Sparks' Petition of Post-Conviction Relief filed under Cause Number 89D02-1708-PC-000008, should be summarily dismissed pursuant to Ind. R. Trial P. 12(B)(6) for failure to state a claim upon which relief can be granted as he is prohibited from re-litigating the issues he previously raised, including Sparks' contention that Attorney John Holden was not properly licensed to practice law in the State of Indiana.

(App. Vol. 3 at 92-7) (*italics in original*).

[8] On appeal, Sparks argues the post-conviction court erred because his subsequent petition raised two issues regarding trial counsel that were not available at the time of his initial post-conviction petition – (1) that his 1986 conviction and sentence are “void *ab initio*” as attorney John Holden did not hold an Indiana license or obtain permission to appear before the trial court, (*Appellant's Reply Br. at 6*) (*italics in original*); and (2) that Holden's representation was “ineffective per se” because Holden was unlicensed in Indiana. (*Id.*) In support of those two arguments, respectively, Sparks cites *Professional Laminate & Millwork, Inc. v. B&R Enters.*, 651 N.E.2d 1153, 1157 (Ind. Ct. App. 1995), which held that “without leave of the court, and absent the signature of local counsel licensed to practice law in this state, any papers filed by [out of state lawyer] were a nullity[,]” and *Butler v. State*, 668 N.E.2d 266, 269 (Ind. Ct. App. 1996), which held that a lawyer from Illinois who was neither “licensed to practice in Indiana nor authorized to appear in the instant

case” provided per se ineffective assistance of counsel. In reaching their respective holdings, both *Professional Laminate* and *Butler* relied on Rule 3 of the Indiana Supreme Court’s Admission and Discipline Rules for lawyers and *Simmons v. Carter*, 576 N.E.2d 1278, 1280 (Ind. Ct. App. 1991),<sup>3</sup> which had held that a judgment entered for a person who had been represented by a non-lawyer is void and must be set aside.

[9] Beginning in 1990, the rules regarding the admission and discipline of lawyers provided, in relevant part:

A member of the Bar of another state or territory of the United States, or District of Columbia, may appear, in the trial court’s sole discretion, in Indiana trial courts in any particular proceeding for temporary period so long as said attorney appears with local Indiana counsel after petitioning the trial court for the courtesy and disclosing in said petition all pending causes in Indiana in which said attorney has been permitted to appear. Local counsel shall sign all briefs, papers and pleadings in such cause and shall be jointly responsible therefor.

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<sup>3</sup> In *Simmons*, a small claims action was instituted in 1990 against Arthur Simmons by Roosevelt Carter, Jr., but the “Notice of Small Claim” form was signed by Earlie Dixon, who was not an attorney admitted to practice law in Indiana or elsewhere. *Simmons*, 576 N.E.2d at 1278. Simmons did not appear in the small claims court and was defaulted. Dixon appeared for Carter and obtained a judgment against Simmons for \$1,550. Simmons filed a motion to set aside the default judgment that challenge the action as void because Dixon was not a licensed attorney. The trial court denied Simmons’s motion and Simmons appealed. On appeal, this court noted Small Claims Rule 8(C) required a person to appear either “pro se or by counsel” but Carter had done neither. *Id.* at 1279 (quoting Small Claims Rule). Citing concern about “the unauthorized practice of law[,]” *id.*, this court followed a line of cases from Illinois that had held legal proceedings instituted on behalf of another by a non-lawyer should be dismissed or, if they had proceeded to judgment, the judgment should be set aside as void. *Id.* at 1280. Accordingly, the Court of Appeals set aside the judgment entered against Simmons. *Id.*

Admission & Discipline Rule 3 (1990). Pursuant to that version of Rule 3, out-of-state lawyers could appear in Indiana’s trial courts only if they first petitioned the trial court and then appeared with local counsel. Without petitioning the trial court, any appearance by an out-of-state lawyer was a nullity, *Professional Laminare*, 651 N.E.2d at 1157, and a null appearance would per se fail to meet the effective assistance required by the Sixth Amendment. *Butler*, 668 N.E.2d at 269.

[10] However, from 1972 through 1989, Admission and Discipline Rule 3 provided:

Any member of the bar of another state in good standing may be permitted, as a matter of courtesy, to appear as an attorney in the trial courts of this state in any particular proceeding and for a temporary period; provided, however, such court may require that local counsel appear with such attorney and also sign all briefs, papers and pleadings in such cause and be jointly responsible therefor.

Admission & Discipline Rule 3 (1986). Pursuant to this version of Rule 3, out-of-state lawyers could appear in Indiana trial courts without the assistance of local counsel and, contrary to Sparks’ insistence otherwise, (*see* Appellant’s Reply Br. at 11), the filing of a petition was not required by the plain text of this version of Rule 3. Support for our reading is found in the next paragraph of the 1986 version of Rule 3, which indicates out-of-state lawyers could appear before the Indiana’s appellate courts only after obtaining “special permission of such court in such proceeding.” Moreover, if the 1986 version had required an out-of-state lawyer to petition a trial court, our Indiana Supreme Court would not

have needed to alter Rule 3 in 1990 to explicitly require “petitioning[.]” Because of these differences between the version of Rule 3 effective in the 1980s and the 1990s, the case law cited by Sparks – which relied on requirements added to the updated version of Rule 3 – is not applicable to Holden’s representation of Sparks in 1986. (*See also* Appellant’s App. Vol. 2 at 114-15) (memorandum filed by Sparks in 1994 in support of his original post-conviction petition, which acknowledges Sparks cannot find support in the modified version of Rule 3 that would have provided him more protection). Taking the facts most favorable to Sparks, we hold, as a matter of law, that Sparks cannot rely on the authority he cites to demonstrate that his counsel in 1986 was per se ineffective or that the judgment entered following Sparks’s 1986 guilty plea is void.

[11] Accordingly, the only remaining claims are those asserted in Sparks’s first petition for post-conviction relief and, as such, are prohibited by res judicata. We therefore affirm the trial court’s dismissal of Sparks’s subsequent petition for post-conviction relief. *See Brown*, 131 N.E.3d at 745 (affirming summary disposition because post-conviction petitioner was “entitled to no relief as a matter of law”).

## Conclusion

[12] The post-conviction court did not err when it dismissed Sparks’s subsequent petition for post-conviction relief because all of his claims failed as a matter of law or were barred by the doctrine of res judicata. Accordingly, we affirm.

[13] Affirmed.

Riley, J., and Tavitas, J., concur.