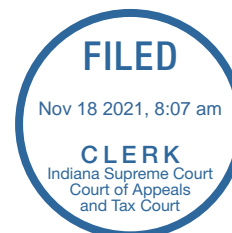


MEMORANDUM DECISION

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

Anthony Padgett,
Appellant-Plaintiff,

v.

State of Indiana,
Appellee-Defendant

November 18, 2021

Court of Appeals Case No.
21A-CR-519

Appeal from the Sullivan Superior
Court

The Honorable Hugh R. Hunt,
Judge

Trial Court Cause No.
77D01-2005-MI-230

May, Judge.

- [1] Anthony Padgett appeals following the trial court's order granting the State's motion for summary disposition. Padgett presents two issues for our review,

which we consolidate and restate as whether the trial court erred in granting summary disposition for the State. We reverse and remand because genuine issues of material fact remain regarding whether Padgett received adequate due process at his parole revocation hearing.

Facts and Procedural History

[2] This case was previously before us after the Henry Circuit Court denied Padgett’s petition for writ of habeas corpus. We then summarized the facts as follows:

Padgett has a long and storied history with the criminal justice system. He was convicted of Class C felony child molesting in March 1987 and again in August 1995. In October 2005, he was once again convicted of Class C felony child molesting and was sentenced to an aggregate term of twenty years.

On July 30, 2014, Padgett was released to parole and was required to sign a conditional parole release agreement. Per the agreement’s stipulations, Padgett was not allowed to have contact with any minors and was not allowed to engage in an intimate relationship without prior approval. *See generally* Appellant’s App. Vol. II p. 10-11. Additionally, Padgett agreed to allow his “supervising officer or other authorized officials of the Department of Correction to visit [his] residence and place of employment at any reasonable time.” *Id.* at 9.

On December 30, 2016, two parole officers and the Indiana State Police conducted a search of Padgett’s home and discovered “a calendar with infants on it, over a dozen condoms and 2 bottles of personal lubricant[.]” *Id.* at 91. The officers then searched through Padgett’s phone and found numerous text messages sent

by Padgett to a woman, telling her to “bring themself [sic] and their kids to his house.” *Id.* The officers called the woman, who told them that she and her children had been at Padgett’s home a few times. They then confiscated the phone and took Padgett into custody.

On January 3, 2017, the State alleged that Padgett had violated two conditions of his parole - namely, that Padgett had been in contact with minors and that he had engaged in an intimate relationship without prior approval. That same day, Padgett waived his right to a preliminary hearing and admitted to both parole violations. Padgett then changed his mind. After allowing Padgett to change his admission to a denial, the parole board conducted a final parole revocation hearing on February 9, 2017, following which it made findings of fact:

Rule #10(4): Contact with Minors

[Padgett’s] Phone was searched and it was discovered on 12/30/2016 that a female friend per her own admittance had brought her children around [Padgett], not knowing his crime. Text messages on [Padgett’s] phone show [Padgett] asking her to bring the kids over with her.

Rule #10(19): Unapproved Relationship

Per search of [Padgett’s] phone, [Padgett] had started a relationship with a female co-worker, giving her money for her kids [sic] Christmas and telling her that he loves her and could not be happier than he is with her. [Padgett’s] co-worker also has children under the age of 18 living with her.

All of the above occurred while [Padgett] was a parolee.

Id. at 17-18 (emphases omitted). On February 17, 2017, the parole board found that Padgett had violated the conditions of his parole and ordered that he be reincarcerated. His earliest possible release date is January 27, 2021.

Padgett v. Butts, Case No. 19A-MI-1092, 2020 WL 485936 at *1-*2 (Ind. Ct. App. Jan. 30, 2020). The Henry Circuit Court denied Padgett's petition for writ of habeas corpus, and Padgett appealed. *Id.* at *2. We held that, while Padgett labeled his petition as a petition for writ of habeas corpus, it was actually a petition for post-conviction relief. *Id.* at *4. We therefore remanded the case back to the Henry Circuit Court with instructions to transfer the matter to the Sullivan Superior Court, where Padgett's latest conviction took place. *Id.*

[3] Padgett alleged in his converted petition for post-conviction relief that the revocation of his parole was unlawful and that various witnesses would have testified to his innocence of the alleged parole violations. The State filed a motion for summary disposition in the Sullivan Superior Court on June 16, 2020. The State argued the Parole Board afforded Padgett sufficient due process and sufficient evidence supported the Board's decision to revoke his parole. In support of its motion, the State filed Parole Agent Travis Carter's Parole Case Notes related to his search of Padgett's residence and cell phone. The State also designated a notification of parole violation hearing, which stated Padgett was accused of violating two conditions of his parole release agreement and his parole violation hearing was set for February 9, 2017. The notification went on to explain:

At the Parole Violation Hearing, you have the following rights (IC 11-13-3-9 and IC 11-13-3-10):

1. You may appear and speak on you [sic] own behalf.
2. You may call witnesses and present evidence.
3. If witnesses testify against you, you may question and cross-examine these witnesses.
4. You will receive a written notification of the Parole Board's decision.

(App. Vol. II at 32.) The State also designated in support of its motion a form signed by Padgett waiving his right to a preliminary hearing, a notice of disposition finding Padgett guilty of violating the conditions of his parole, and a written statement from the parole board with findings of fact. The State did not submit in support of its motion for summary disposition a recording or transcript of Padgett's hearing before the parole board.

[4] On September 25, 2020, Padgett filed his response to the State's motion for summary disposition. Padgett submitted an affidavit in support of his response to the State's motion, in which he averred that he was not allowed to fully testify before the parole board "because [he] was abruptly closed out of [his] remote audio/video feed without any indication the board was finished with [his] opportunity to be heard." (*Id.* at 66.) Padgett also claimed in his affidavit that he wished to question Parole Agent Carter at the hearing before the parole board, but he did not have the opportunity to do so.

[5] The post-conviction court held a hearing on the State’s motion for summary disposition on February 10, 2021.¹ At the beginning of the hearing, Padgett stated:

I did bring some -I have witnesses available, if it were to please the Court, but actually, I maybe, technically, if the Court were to deny the Motion for Summary Judgment on the PCR relief requested, and then allow this to go forward to a hearing on the PCR, then that may actually be the better or may -technically appropriate venue to hear witnesses amplify on the affidavits filed.

(Tr. Vol. II at 4-5.) The post-conviction court then heard argument on the State’s motion for summary disposition. Toward the end of the hearing, the post-conviction court explained:

If I deny the Motion for Summary Disposition and the Court would certainly, I mean, you’re basically entitled to a court trial

¹ Padgett was released from incarceration and returned to parole on January 27, 2021. Ind. Dep’t of Correction, Offender Database [<https://perma.cc/N4TS-NPFC>]. The post-conviction court raised the issue of mootness at the hearing, and Padgett asserted the case was not moot because, even though he was no longer incarcerated, he still sought a judicial finding that his parole had been unlawfully revoked. We recognize that Padgett’s interest in such a judicial finding remains because of the collateral consequences which may stem from his parole revocation. See *Bennett v. State*, 119 N.E.3d 1057, 1059 n. 1 (Ind. 2019) (remanding case back to the trial court to correct defendant’s record because “to the extent that violating probation is now part of Bennett’s record and has future impact on him, we remand to correct that.”); see also Ind. Code 35-38-1-7.1(a)(6) (“In determining what sentence to impose for a crime, the court may consider the following aggravating circumstances: . . . (6) The person has recently violated the conditions of any probation, **parole**, pardon, community corrections placement, or pretrial release granted to the person.”) (emphasis added). Further, because the State does not ask us to dismiss the appeal on mootness grounds and acknowledges it has not demonstrated that the case is moot, we decline to dismiss the appeal. *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 98 (1993) (“If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result.”).

where you can call what witness [sic] you will or desire, but I think for purposes of this -unless you think that there's some witness whose testimony just is really indispensable for me to decide this Motion for Summary Disposition.

(*Id.* at 33.) Padgett agreed that witness testimony was not necessary for the hearing, “[b]ut maybe for convenience of” the witness, Padgett asked to call Kelley Akers, the female friend and co-worker referenced in Parole Agent Carter’s Parole Case Notes, to testify. (*Id.* at 34.) Both Padgett and the State questioned Akers, and Padgett did not call any other witnesses.

[6] On February 25, 2021, the post-conviction court entered an order granting the State’s motion. The order indicated:

1. The Petitioner’s due process rights were not violated.
2. The Parole Board had discretion and sufficient evidence to revoke.
3. Assessing the balance of Petitioner’s sentence was appropriate.
4. Additional parole stipulations for sex offenders were reasonably related to Petitioner’s reintegration into society and not unduly restrictive of a fundamental right.

(App. Vol. II at 14.)

Discussion and Decision

[7] A petition for post-conviction relief is a civil proceeding in which an offender is allowed to advance certain collateral attacks regarding the offender's conviction and sentence. *Jones v. State*, 151 N.E.3d 790, 796 (Ind. Ct. App. 2020), *trans. denied*. Indiana Post-Conviction Rule 1, section 1(a)(5) allows an offender to file a petition for post-conviction relief if the offender believes the offender's parole was unlawfully revoked, and Post-Conviction Rule 1, section 4(g) provides:

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. The court may ask for oral argument on the legal issue raised. If an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible.

[8] Padgett contends genuine issues of material fact precluded the post-conviction court from granting the State's motion for summary disposition, and therefore, his petition should have proceeded to an evidentiary hearing. The State initially asserts "Padgett was not denied a post-conviction hearing." (Appellee's Br. at 8.) The State argues the post-conviction court "had all the necessary evidence on which to decide whether to grant Padgett post-conviction relief" and Padgett "had the opportunity to fully present his case at the February 10 hearing." (*Id.* at 9.) However, this argument misrepresents the nature of the February 10, 2021, hearing. The order granting the State's motion for summary disposition characterizes the February 10 hearing as a "hearing on Respondent's Motion

for Summary Disposition,” not a final hearing on Padgett’s petition. (App. Vol. II at 14.) The colloquy before Akers testified indicates her testimony was primarily for preservation of evidence purposes as Padgett indicated he “had some problems with contact with her.” (Tr. Vol. II at 34.) Therefore, we will not hold the hearing on the State’s motion for summary disposition was actually a full evidentiary hearing on Padgett’s petition for post-conviction relief.

[9] Thus, we move to whether the post-conviction court correctly concluded the State was entitled to judgment as a matter of law. We use the same standard of review to evaluate a trial court’s order on a motion for summary disposition in a post-conviction relief proceeding as we use to assess a trial court’s order on a motion for summary judgment. *Norris v. State*, 896 N.E.2d 1149, 1151 (Ind. 2008). “Thus summary disposition, like summary judgment, is a matter for appellate de novo determination when the determinative issue is a matter of law, not fact.” *Id.* As our Indiana Supreme Court has explained, “[s]ummary judgment is precluded by any ‘genuine’ issue of material fact—that is, any issue requiring the trier of fact to resolve the parties’ differing accounts of the truth.” *Hughley v. State*, 15 N.E.3d 1000, 1002 (Ind. 2014). While summary judgment is a useful tool to resolve cases where only issues of law exist, it is not a summary trial. *Id.* at 1003-04. “Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims.” *Id.* at 1004. Therefore, a plaintiff’s self-serving affidavit may be sufficient to raise a genuine issue of material fact. *Id.* (holding civil

forfeiture defendant's "perfunctory and self-serving" affidavit, which averred seized currency was not used in connection with criminal activity, raised a genuine issue of material fact precluding summary judgment).

[10] Parole revocation is generally a two-step procedure: "(1) a preliminary hearing to determine whether there is probable cause to believe that the parolee has committed acts that would constitute a violation of parole conditions; and (2) a final revocation hearing prior to the final decision on revocation to consider whether the facts as determined warrant revocation." *Komyatti v. State*, 931 N.E.2d 411, 416 (Ind. Ct. App. 2010). At both the preliminary hearing and the parole revocation hearing, a parolee is entitled to:

- (1) appear and speak in his own behalf;
- (2) call witnesses and present evidence;
- (3) confront and cross-examine witnesses, unless the person conducting the hearing finds that to do so would subject the witness to a substantial risk of harm; and
- (4) a written statement of the findings of fact and the evidence relied upon.

Ind. Code § 11-13-3-9(a) (preliminary hearing) & Ind. Code § 11-13-3-10(a) (parole revocation hearing).

[11] The State contends Padgett was afforded adequate due process before the parole board.² However, with respect to Padgett’s claim that “he was cut short before being permitted to contest the allegations tabled against him fully,” (Appellant’s Br. at 13), the State argues:

This claim arguably implicates the due process right to ‘an opportunity to be heard in person and to present evidence.’ *Komyatti*, 931 N.E.2d at 416. Padgett’s affidavit refers to this claim, but the affidavit was in the record before the trial court (App. 62). The trial court gave it little weight, finding “The Petitioner’s due process rights were not violated” (App. 14).

(Appellee’s Br. at 12.)

[12] The State’s concession that the post-conviction court was required to weigh the credibility of Padgett’s affidavit is fatal to its claim that it is entitled to summary disposition. “Ultimately, it is the role of the fact-finder, and not the court in summary judgment proceedings, to determine issues of credibility or relative weight of the evidence[.]” *Pierson ex rel. Pierson v. Service Am. Corp.*, 9 N.E.3d 712, 719 (Ind. Ct. App. 2014). Padgett averred his testimony before the parole

² The State also argues Padgett waived any claim that he was denied due process before the parole board by failing to present cogent argument supported by citations to authorities and statutes, as required by Indiana Appellate Rule 46(A)(8)(a). However, while we recognize Padgett’s brief contains sparse citations to authority and is not particularly well organized, it is adequate for us to conduct a meaningful review of his claims. *In re Moeder*, 27 N.E.3d 1089, 1097 n.4 (Ind. Ct. App. 2015) (addressing the merits of appellant’s claims even though her noncompliance with the appellate rules “comes dangerously close to impeding our review”), *reh’g denied, trans. denied*.

board was cut short and he was not allowed to question Parole Agent Carter as a witness.

[13] Because the State did not submit a recording of what occurred before the parole board, we do not know how long Padgett was allowed to testify or to what he testified. We also do not know what conversation occurred between Padgett and the parole board regarding witness testimony. Thus, genuine issues of material fact remain regarding whether Padgett was afforded sufficient time to speak on his own behalf before the parole board and call witnesses. Consequently, we reverse the trial court's grant of summary disposition for the State and remand for further proceedings consistent with this opinion. *See Laboa v. State*, 131 N.E.3d 660, 665 (Ind. Ct. App. 2019) (reversing and remanding post-conviction court's summary denial of a petition for post-conviction relief).

Conclusion

[14] The post-conviction court's February 10, 2021, hearing on the State's motion for summary disposition was not converted to a full evidentiary hearing on Padgett's petition for post-conviction relief simply because Padgett called a witness to testify. The post-conviction court reiterated the hearing was on the State's motion for summary disposition, and the court's order following the hearing specified it was granting the State's motion for summary disposition. However, the post-conviction court's order granting the State's motion was error because genuine issues of material fact related to Padgett's opportunity to

testify on his own behalf and call witnesses preclude summary judgment. Therefore, we reverse the post-conviction court and remand for further proceedings consistent with this opinion.

[15] Reversed and remanded.

Vaidik, J., and Molter, J., concur.