MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Keenan J.P. Mardis,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 24, 2023

Court of Appeals Case No. 22A-PC-994

Appeal from the Elkhart Circuit Court

The Honorable Michael A. Christofeno, Judge

Trial Court Cause No. 20C01-1607-PC-37

Memorandum Decision by Judge Brown
Judges Bailey and Weissmann concur.

Brown, Judge.

[1] Keenan J.P. Mardis appeals the post-conviction court's denial of his motion to continue and motion to withdraw his petition for post-conviction relief. We affirm.

Facts and Procedural History

[2] The relevant facts as discussed in Mardis's direct appeal follow:

> On December 19, 2014, Mardis and others confronted Lenell Williams and Ontario Brown on Wagner Avenue in Elkhart, near the Washington Gardens apartments. One of Mardis' companions, Zirei Jackson, began to fight with Brown. During the fight, Mardis told Jackson to "take his belt when you knock him out." Brown was wearing a designer belt worth about $300.
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> The fight between Jackson and Brown ended and the two groups began to walk away from each other. But then Mardis "came out of nowhere," "pulled a revolver," and "told [Brown] to give him his belt." Brown refused. Mardis then shot Brown in the head and killed him.

Mardis v. State, 72 N.E.3d 936, 938 (Ind. Ct. App. 2017) (citations to record omitted). Mardis appealed and argued the evidence was insufficient to support his conviction and the trial court committed fundamental error in instructing the jury, and on March 16, 2017, this Court affirmed his conviction.[1] *Id*.

[1] Mardis filed a petition for post-conviction relief in July 2016, which was dismissed in September 2016 so that he could proceed with the direct appeal.

[3] On September 18, 2017, Mardis filed a petition for post-conviction relief alleging he received ineffective assistance of trial and appellate counsel. An entry in the chronological case summary ("CCS") indicates that a public defender filed an appearance in November 2017 and a notice of withdrawal of appearance in December 2018. A CCS entry on September 30, 2019, states: "Petitioner fails to appear either in person or by counsel. Court notes the Petitioner is unavailable for this hearing as a result of having been transferred from the IDOC to the State of Colorado by the IDOC for disciplinary reasons. The Court now sets this matter for status conference Jan. 23, 2020 . . . and orders the Petitioner to arrange to participate in the status conference telephonically . . . ." Appellant's Appendix Volume II at 11. CCS entries in January 2020 indicate a hearing was held on January 23, 2020, and state "[b]y agreement of the parties, status conference held off the record," "Court now sets Petitioner's Petition for Post-Conviction Relief for a half-day evidentiary hearing June 10, 2020," and Mardis "to be transported back to the IDOC from the State of Colorado and then to Elkhart County for said hearing." *Id*. at 12.

[4] On May 12, 2020, Mardis filed a Petition for Later Post-Conviction Evidentiary Hearing Date stating that, due to the pandemic, he did not feel safe being transported and that his immune system was already compromised. The court rescheduled the hearing for October 15, 2020. A CCS entry on October 13, 2020, indicates that, due to a scheduling issue, the court reset the evidentiary hearing for December 17, 2020, and states: "Petitioner to appear for said

hearing by Webex. Colorado DOC to provide the Court with a contact number for Petitioner's participation in said hearing." *Id*. at 13.

[5] On December 17, 2020, the court held the scheduled evidentiary hearing. Mardis stated: "Sunday night, I sent a letter to the clerk . . . of the . . . Circuit Court out there in Elkhart stating that I want to have a lawyer represent me at this hearing. Actually, Ms. Mari Duerring out there in South Bend . . . we just actually retained her . . . as of Tuesday." Transcript Volume II at 10-11. The court noted the attorney had not entered an appearance. Mardis replied "that's why I wrote the . . . clerk stating that I'm gonna need, like, an extra week or something like that for her to file her appearance," "[s]he was telling me that she was gonna go over everything that I had prepared and all that, and then she was gonna have to file her appearance and ask for a continuance right away," and "I guess she hasn't done it yet." *Id*. at 11. He further stated: "I probably won't be able to go forward today if she's not here because . . . I have [sic] her all my material. I was expecting her to file an appearance by now." *Id*. The court asked if Mardis was requesting a continuance, and he answered "[i]f that's possible, yes." *Id*. at 13. The prosecutor objected and stated "this has had a pretty long and not necessarily tortured history, but it's got a long history," the State was ready for the scheduled evidentiary hearing, and no other attorney was hired or entered an appearance. *Id*. The court stated:

> Mr. Mardis, I think I told you this at least a couple times when we had status conferences. I . . . think I'm more lenient than most judges on post-conviction relief matters. You know, if you want to continue status conferences in order to hire an attorney or in order

> to get your case ready for trial or for whatever you want to do -- and this case is no exception; I've given you a number of continuances.
>
> But once the case gets scheduled for trial, and more importantly, once I start the trial, which I have done here, my practice is not to continue it at that time because particularly, as is here, you've had ample opportunity to get your case ready for trial or to hire somebody. . . . I'm going to take judicial notice of the entire record. That includes the appellate record . . . .
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> [E]verything that has occurred as far as transcripts and the like are gonna be available to the Court in rendering a decision on what you and the State of Indiana argue.
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> So I'm denying your motion to continue the trial.

Id. at 14-15. Mardis stated "I'm gonna withdraw my PCR. I'm done with it," "when y'all ask to get a continuance when I was actually expecting y'all to come, y'all never came," and "[s]o now that I'm asking for a continuance, there's a problem." *Id*. at 15-16. The court denied Mardis's motion to withdraw his petition for post-conviction relief.

[6] When asked what evidence he had to present, Mardis stated "my first witness . . . not gonna be able to be here because I had wrote a . . . subpoena for . . . Mr. Peter Todd. But I just now learned about a month, two months ago, he passed." *Id*. at 21. The court asked if he was going to call anyone else, and he replied "No. There's no one else . . . answering my subpoena." *Id*. The court asked Mardis if he wanted the court to consider the trial and appellate record, and Mardis answered affirmatively. The court asked: "What other evidence do you have, if any? If you don't have any other evidence, that's fine." *Id*. at 23.

Mardis replied: "No. That's -- I was just basically -- just all the record." *Id*. Mardis rested his case. He argued in closing that the trial court "allowed jurors to stay . . . on the jury after there was prejudice . . . after certain comments were made . . . that prejudiced the whole jurors, in my opinion – jury." *Id*. at 26. The court asked Mardis if he would prefer to submit his closing argument in written form, and he answered affirmatively. The court stated it would give him ninety days to submit his argument.

[7] The CCS indicates that, in February 2021, Mardis filed correspondence and that the court granted his motion for additional time to file findings of fact and conclusions of law and gave him until April 16, 2021. The CCS further indicates that, in June 2021, he requested an extension of time, and the court granted the request.

[8] On October 14, 2021, the court issued an order denying Mardis's petition for post-conviction relief. The court stated that it had issued an order advising Mardis that he had until August 1, 2021, to file proposed findings of fact and conclusions of law and that none had been filed. The court also found in part that Mardis "averred that he was prejudiced when the trial court permitted jurors to remain after they communicated about the case during jury selection" and "[a] review of the trial record, specifically the trial judge's notes and Trial Order dated August 17, 2015, reveal that [Mardis] is mistaken about those jurors being permitted to remain." Appellant's Appendix Volume II at 45. Mardis filed a motion to correct error arguing the court abused its discretion in denying his motions to continue and to withdraw his petition, and following a

hearing the court denied the motion, noting that Mardis did not present any evidence at trial as to which witnesses he intended to subpoena or to what the witnesses would testify and that, at the January 23, 2020 status conference, Mardis advised the court that he was prepared to proceed to trial.

Discussion

[9] Mardis asserts the post-conviction court abused its discretion when it denied his motions to continue and to withdraw his petition for post-conviction relief. He argues, "[a]t the time of the hearing in December, it should have been no surprise that [he] may move to continue the date, as the court had had no prior input from him prior to setting the matter." Appellant's Brief at 10. He claims the State would not have suffered prejudice if either of his motions were granted. The State maintains that Mardis "did not explain to the post-conviction court what he hoped to gain by delaying the evidentiary hearing" or that "he was missing witnesses or other evidence that would be available at a later hearing." Appellee's Brief at 8.

[10] Ind. Post-Conviction Rule 1(4)(c) provides, "[a]t any time prior to entry of judgment the court may grant leave to withdraw the petition," "[t]he petitioner shall be given leave to amend the petition as a matter of right no later than sixty [60] days prior to the date the petition has been set for trial," and "[a]ny later amendment of the petition shall be by leave of the court." The terms of Ind. Post-Conviction Rule 1(4)(c) give the trial court the discretion, but not a mandate, to allow the petitioner to withdraw the petition without prejudice. *Tapia v. State*, 753 N.E.2d 581, 584 (Ind. 2001). We review a post-conviction

court's denial of a petitioner's motion to withdraw his petition for post-conviction relief and a motion for continuance for an abuse of discretion. *Id*. at 584-586. "Discretion is a privilege afforded a trial court to act in accord with what is fair and equitable in each case." *McCullough v. Archbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind. 1993). An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or if the trial court has misinterpreted the law. *Id*.

[11] While Mardis mentioned retaining an attorney and that he sent a letter to the court clerk, the post-conviction court noted that an attorney had not filed an appearance to represent him, that it had given him a number of continuances, and that he had ample opportunity to prepare for trial or hire counsel. Further, the court noted that it was taking judicial notice of the record including the trial transcript, and Mardis indicated that he had no further evidence to present. Also, he did not submit proposed findings of fact and conclusions of law following the hearing. Under the circumstances, we cannot say the post-conviction court abused its discretion. *See Tapia*, 753 N.E.2d at 586-587 (concluding the post-conviction court did not abuse its discretion when it denied the petitioner's requests to withdraw his petition for post-conviction relief and for a continuance and noting the petitioner "made little effort to explain what he would gain by delaying the proceedings," and while he asserted he recently discovered substantial errors, he "did not explain what

these errors were or why he could not develop evidence to support them in the four years since he filed his petition for post-conviction relief").

[12] For the foregoing reasons, we affirm the post-conviction court.

[13] Affirmed.

Bailey, J., and Weissmann, J., concur.