

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Troy A. Briscoe,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 8, 2023

Court of Appeals Case No.
22A-PC-1987

Appeal from the Madison Circuit
Court

The Honorable Andrew R.
Hopper, Judge

Trial Court Cause No.
48C03-1602-PC-5

Memorandum Decision by Judge Tavit
Judges Vaidik and Foley concur.

Tavit, Judge.

Case Summary

- [1] Troy Briscoe filed a post-conviction relief (“PCR”) petition and, over the next five and one-half years, took no action to prosecute his case. Consequently, the post-conviction court, on the State’s motion, dismissed the PCR petition pursuant to Trial Rule 41(E). Briscoe argues that the post-conviction court abused its discretion by dismissing his petition. We disagree and affirm.

Issue

- [2] Briscoe raises one issue on appeal, which we restate as whether the post-conviction court abused its discretion by dismissing Briscoe’s PCR petition pursuant to Trial Rule 41(E).

Facts

- [3] In September 2012, Briscoe pleaded guilty to and was convicted of robbery, a Class B felony; theft, a Class D felony; and unlawful possession of a firearm by a serious violent felon, a Class B felony. He was sentenced to an aggregate sentence of fifteen years in the Indiana Department of Correction.
- [4] On March 2, 2016, Briscoe filed a PCR petition in which he alleged that his trial counsel was ineffective. On March 8, 2016, Briscoe sent a letter to the county clerk requesting a copy of the chronological case summary (“CCS”) “to see if [his petition had] been filed with [the] [c]ourt.” Appellant’s App. Vol. II p. 21. On March 18, 2016, the State filed a response to Briscoe’s PCR petition.

- [5] On January 14, 2020, Briscoe requested another copy of the CCS. On December 14, 2021, the State filed a motion to dismiss Briscoe’s PCR petition for failure to prosecute pursuant to Trial Rule 41(E). On April 21, 2022, Briscoe sent a letter to the post-conviction court and discussed the State’s motion to dismiss. Briscoe stated, “I’ve been waiting on a court date. In the meantime, I’ve written county clerks to obtain chronological case summar[ies], researching my issues. . . . I want to amend my PCR.” *Id.* at 24.
- [6] The post-conviction court held a hearing on the State’s motion to dismiss on May 19, 2022. When asked to explain why his PCR petition should not be dismissed for failure to prosecute, Briscoe stated, “I just [sic] been waitin[g] on a court date, that’s all. I thought when I filed a [petition,] I’d get a court date.” Tr. Vol. II p. 7.
- [7] The post-conviction court took the matter under advisement and, on July 19, 2022, dismissed Briscoe’s PCR petition pursuant to Trial Rule 41(E). Briscoe now appeals.

Discussion and Decision

- [8] Briscoe argues that the post-conviction court abused its discretion by dismissing his PCR petition pursuant to Trial Rule 41(E).¹ We disagree.

¹ We note at the outset that Briscoe proceeds in this appeal pro se. It is well established that, in Indiana, “[a]n appellant who proceeds pro se is held to the same established rules of procedure that a trained legal counsel is bound to follow and, therefore, must be prepared to accept the consequences of his or her action.” See, e.g., *McCullough v. CitiMortgage, Inc.*, 70 N.E.3d 820, 825 (Ind. 2017).

[9] Trial Rule 41(E) provides:

Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution.

[10] We have explained that:

The purpose of this rule is to ensure that plaintiffs will diligently pursue their claims. The rule provides an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution. The burden of moving the litigation forward is upon the plaintiff, not the court. It is not the duty of the trial court to contact counsel and urge or require him to go to trial, even though it would be within the court's power to do so. Courts cannot be asked to carry cases on their dockets indefinitely[,] and the rights of the adverse party should also be considered. [The adverse party] should not be left with a lawsuit hanging over his head indefinitely.

Sharif v. Cooper, 141 N.E.3d 1258, 1261 (Ind. Ct. App. 2020) (internal citations omitted). “We will reverse a Trial Rule 41(E) dismissal for failure to prosecute only in the event of a clear abuse of discretion, which occurs if the trial court’s discretion is against the logic and effect

of the facts and circumstances before it.” *Id.* (citing *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003), *trans. denied*).

[11] “In Indiana, courts must balance nine factors when determining whether to dismiss a case for failure to prosecute: (1) the length of delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff’s part.” *Id.* at 1262 (quoting *Belcaster*, 785 N.E.2d at 1167).

[12] “Although Indiana does not require trial courts to impose lesser sanctions before applying the ultimate sanction of dismissal, we view dismissals with disfavor, and dismissals are considered extreme remedies that should be granted only under limited circumstances.” *Id.* (citing *Caruthers v. State*, 58 N.E.3d 207, 211 (Ind. Ct. App. 2016)). Nonetheless, “‘a lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay.’” *Id.* (quoting *Deutsche Bank Nat’l Tr. Co. v. Harris*, 985 N.E.2d 804, 814 (Ind. Ct. App. 2013)).

- [13] Here, more than five and one-half years elapsed between the filing of Briscoe's PCR petition and the State's motion to dismiss. During that time period, Briscoe requested copies of the CCS for his PCR petition but otherwise took no action to prosecute his case. *See id.* ("Although there is no bright line rule indicating exactly how long of a delay justifies dismissal, it would appear from a jurisprudential review that a one-year delay is on the excessive side.").
- [14] Briscoe does not argue that the post-conviction court's dismissal was improper based on the nine factors listed above. Instead, Briscoe argues that the trial court should have sua sponte scheduled an evidentiary hearing on the merits of Briscoe's PCR petition. The trial court, however, was not required to hold an evidentiary hearing if it determined that Briscoe lacked "sufficient cause" for his failure to prosecute and that dismissal was warranted. T.R. 41(E). Briscoe's only justification for failing to prosecute his case was that he was waiting on the court to schedule a hearing, but it was Briscoe's responsibility to prosecute his case, not the trial court's. *See id.* at 1261 ("The burden of moving the litigation forward is upon the plaintiff, not the court.").
- [15] Briscoe relies on *Caruthers*, 58 N.E.3d 207, but that case is distinguishable. *Caruthers* only held that the post-conviction court was required to hold a hearing on whether the case should have been dismissed pursuant to Trial Rule 41(E) before dismissing the case; *Caruthers* did not hold that the post-conviction court was required to hold an **evidentiary** hearing before dismissing the case. *Id.* at 214. Here, the post-conviction court properly held a hearing on the State's motion to dismiss and found that Briscoe lacked sufficient cause for failing to

prosecute his case. The post-conviction court, thus, did not abuse its discretion by finding that dismissal was warranted.

Conclusion

[16] The post-conviction court did not abuse its discretion by dismissing Briscoe's PCR petition pursuant to Trial Rule 41(E). Accordingly, we affirm.

[17] Affirmed.

Vaidik, J., and Foley, J., concur.