

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Shawn McMullin,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

April 21, 2023

Court of Appeals Case No.
22A-PC-443

Appeal from the Dearborn
Superior Court

The Honorable Jonathan N.
Cleary, Judge

Trial Court Cause No.
15D01-1905-PC-5

Memorandum Decision by Judge Kenworthy
Judges Bradford and Pyle concur.

Kenworthy, Judge.

Case Summary

- [1] Shawn McMullin, acting *pro se*, filed a petition for post-conviction relief following his conviction for child molesting. The post-conviction court ordered the cause submitted upon affidavit. On the date set for filing affidavits, McMullin instead moved for permission to amend his petition, a continuance, and discovery from the State. The court denied McMullin's motions and his petition, finding McMullin had not demonstrated he was entitled to post-conviction relief. McMullin appeals the post-conviction court's rulings. We conclude the post-conviction court did not err in ordering the cause submitted upon affidavit, ruling on McMullin's motions, or deciding McMullin failed to prove his post-conviction claims. We affirm.

Facts and Procedural History

- [2] McMullin pleaded guilty to child molesting and was sentenced in January 2019 pursuant to the terms of a plea agreement. In May, McMullin filed a *pro se* petition for post-conviction relief, alleging (1) his due process rights and rights under the American with Disabilities Act ("ADA") were violated in the underlying proceedings, (2) the trial court erred in refusing to grant a change of venue, (3) he signed the plea agreement under duress, and (4) the trial court erred by refusing to allow him to withdraw his guilty plea. The State filed an answer, entering a general denial to the allegations.
- [3] The post-conviction court appointed the State Public Defender to represent McMullin. Counsel from the Public Defender's office entered an appearance,

notified the court of the present inability to investigate, and requested transcripts of McMullin’s guilty plea and sentencing hearings. The court stayed the proceedings pending further action and ordered the transcripts to be prepared. The transcripts were filed on July 25, 2019.

- [4] In May 2021, counsel filed a notice of withdrawal of appearance pursuant to Indiana Post-Conviction Rule 1(9)(c), certifying counsel had consulted McMullin regarding possible grounds for relief, made an appropriate investigation, and determined the proceeding was not meritorious. Several months later, McMullin filed a Status Report and Notice with the court stating he wished to proceed with his petition and would represent himself.
- [5] On October 18, 2021, the post-conviction court ordered McMullin to submit affidavits supporting his petition by December 1, 2021. On that date, however, McMullin filed a motion for continuance alleging he was “without proper documents to show his evidence.” *Appellant’s App. Vol. 2* at 80. The post-conviction court granted McMullin’s motion, extending the time for him to submit affidavits to February 1, 2022.
- [6] On February 1, 2022, McMullin filed several motions but did not file affidavits or evidence. He filed another motion for continuance, again alleging “the absence of important documents[.]” *Id.* at 83. He also filed a motion for leave to amend his post-conviction petition to allege different grounds for relief, including whether his guilty plea was knowingly and voluntarily made and

whether his counsel was ineffective. And he filed several discovery requests seeking to obtain the “further documents” he claimed he needed. *Id.* at 84.

[7] A week later, the post-conviction court entered an order denying McMullin’s motion to continue, denying “all of the other motions received by the Court on February 1, 2022[,]” and denying the petition for relief because McMullin “has the burden of proof and . . . has not demonstrated that he is entitled to any Post-Conviction Relief.” *Id.* at 95.

[8] McMullin now appeals.

Discussion and Decision

Standard of Review

[9] Post-conviction proceedings are civil proceedings in which a person may present limited challenges to a criminal conviction or a sentence. *See* Ind. Post-Conviction Rule 1; *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *cert. denied*. “The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence.” P-C.R. 1(5). A petitioner who has been denied post-conviction relief appeals from a negative judgment and faces a “rigorous standard of review.” *Wesley v. State*, 788 N.E.2d 1247, 1250 (Ind. 2003). To prevail on appeal, “the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court.” *Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006).

[10] McMullin proceeds on appeal *pro se*, as he did in the post-conviction proceedings. We hold *pro se* litigants to the same standard as trained attorneys and offer them no inherent leniency because of their self-represented status. *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). “A defendant who proceeds *pro se* . . . must accept the burdens and hazards of self-representation.” *Carter v. State*, 512 N.E.2d 158, 162 (Ind. 1987). One of the risks a *pro se* litigant takes “is that he will not know how to accomplish all of the things that an attorney would know how to accomplish.” *Smith v. Donahue*, 907 N.E.2d 553, 555 (Ind. Ct. App. 2009), *trans. denied, cert. denied*.

Submission by Affidavit

[11] McMullin claims the post-conviction court erred by ordering the cause to be submitted upon affidavit and failing to hold a hearing.

[12] Indiana Post-Conviction Rule 1(9)(b) states:

In the event petitioner elects to proceed *pro se*, the court at its discretion may order the cause submitted upon affidavit. It need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing.

The purpose of this rule is “to allow for more flexibility in both the presentation of evidence and the review of post-conviction claims where the petitioner proceeds *pro se*.” *Smith v. State*, 822 N.E.2d 193, 201 (Ind. Ct. App. 2005), *trans. denied*.

[13] Whether to order a cause submitted upon affidavit is left to the sound discretion of the post-conviction court and we review only for abuse of that discretion. *Id.* We reverse a court’s exercise of discretion only when the court reached a decision that is “against the logic and effect of the facts and circumstances before the court.” *Hale v. State*, 54 N.E.3d 355, 357 (Ind. 2016) (quoting *Jacobs v. State*, 22 N.E.3d 1286, 1288 (Ind. 2015)). McMullin elected to proceed *pro se*, and the post-conviction court was well within its discretion to order the cause submitted upon affidavit under this rule. McMullin’s claim to the contrary fails.

[14] Moreover, when the post-conviction court orders the cause submitted upon affidavit, “it is the court’s prerogative to determine whether an evidentiary hearing is required, along with the petitioner’s personal presence, to achieve a ‘full and fair determination of the issues raised[.]’” *Smith*, 822 N.E.2d at 201 (quoting P-C.R. 1(9)(b)). Therefore, we also review the court’s decision that an evidentiary hearing is not required under an abuse of discretion standard. *Id.* Here, McMullin did not file any affidavits upon which to hold an evidentiary hearing. The post-conviction court did not abuse its discretion in ruling on the petition without a hearing.

Other Requests

[15] McMullin claims he was entitled to amend his petition pursuant to Post-Conviction Rule 1(4)(c) and the post-conviction court should have granted his motion to continue and his requests for discovery to allow him the opportunity to gather evidence in support of his proposed claims.

[16] These types of motions “are primarily matters of trial court discretion, and appellate courts should review those matters only for an abuse of that discretion.” *Tapia v. State*, 753 N.E.2d 581, 584 (Ind. 2001) (addressing motions to continue and to amend); *see also Hale*, 54 N.E.3d at 357 (addressing discovery matters). “[E]mploying an abuse of discretion standard gives the post-conviction court the ability to curtail attempts by petitioners . . . to delay final judgment on their petitions.” *Tapia*, 753 N.E.2d at 584.

[17] With respect to amending a petition for post-conviction relief, Post-Conviction Rule 1(4)(c) states:

At any time prior to entry of judgment the court may grant leave to withdraw the petition. The 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. Any later amendment of the petition shall be by leave of the court.

As we decided above, the post-conviction court acted within its discretion in ordering McMullin to submit this cause upon affidavit. Therefore, the date set for filing affidavits is the functional equivalent of a trial date in this case. McMullin’s request to amend was not made more than sixty days prior to the date set for filing affidavits; rather, it was made *on* that date. Pursuant to the language of Rule 1(4)(c), the post-conviction court had discretion to decide whether to allow McMullin to amend his petition. Here, the court had already granted McMullin a sixty-day continuance for submitting his cause upon affidavit. The requested amendment would have delayed the proceedings further by transforming the substance of the petition. McMullin did not explain

why the proposed claims were not offered sooner or what he had done to diligently pursue those claims since the last continuance. The post-conviction court did not abuse its discretion in denying McMullin's motion to amend.

[18] Along with his motion to amend, McMullin filed a motion to continue the deadline for filing affidavits. He also made requests for discovery, seeking the State of Indiana's case file, the Clerk's Record, and transcripts of police interviews. As the post-conviction court noted in its order denying these requests, McMullin did not provide "sufficient reasons for the extensive discovery requests and how they would relate to his [original post-conviction] claims concerning the ADA, due process, change of venue, and plea agreement." *Appellant's App. Vol. 2* at 95; see Ind. Trial Rule 53.5 (stating a request for a continuance due to the absence of evidence "may be made only upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it"). McMullin argues on appeal he needed the extra time and documents he requested "to *look for* these [proposed] claims." *Appellant's Br.* at 8 (emphasis added). In essence, McMullin was seeking additional time and discovery "to investigate possible claims rather than vindicate actual claims[,] a practice our Supreme Court has declared "an abuse of the post-conviction process" in most circumstances. *Roche v. State*, 690 N.E.2d 1115, 1133 (Ind. 1997).

[19] By the time McMullin moved to amend his petition and sought additional time to explore possible claims, his petition had been pending for almost three years. During that time, the transcripts of his guilty plea and sentencing hearings were

prepared and McMullin had the assistance of the State Public Defender in evaluating potential claims. After counsel withdrew, five months passed before McMullin notified the court he wished to proceed with his petition as originally filed and nearly four more months passed before McMullin was required to submit his evidence. Yet McMullin did not move to amend his petition or seek discovery until the date set for filing affidavits in support of his claims. Any difficulty McMullin had in developing his claims due to his inexperience in legal matters was part of the risk he took in representing himself. *See Smith*, 907 N.E.2d at 555. The post-conviction court was not required to allow McMullin additional time and resources to pursue potential claims. The court acted within its discretion in denying McMullin’s motions.

Denial of Post-Conviction Relief

[20] Finally, McMullin argues the post-conviction court erred in denying him relief.¹

[21] It is well-settled that the petitioner bears the burden of proving he is entitled to post-conviction relief. P-C.R. 1(5); *see Hall*, 849 N.E.2d at 472. Here, the post-conviction court exercised its discretion by ordering McMullin to submit his cause upon affidavit pursuant to Rule 1(9)(b). But McMullin did not submit affidavits despite having nearly four months to do so. As a result, McMullin

¹ McMullin’s brief primarily focuses on the claims he would have asserted if his motion to amend his petition had been granted. As the post-conviction court properly denied his motion to amend, we do not address those arguments. And to the extent we have not explicitly addressed a particular issue, we deem it too poorly developed to be understood and consider it waived for failure to present a cogent argument. *See Ind. Appellate Rule 46(A)(8)(a)*.

did not offer any evidence to the post-conviction court in support of his claims.² The total absence of evidence on any of McMullin's claims supports the post-conviction court's conclusion that McMullin did not satisfy his burden of establishing grounds for relief.

Conclusion

[22] The post-conviction court did not abuse its discretion by ordering McMullin to submit his cause upon affidavit or in denying his last-minute motions to amend, for a continuance, and for discovery. Further, because McMullin failed to file affidavits in the post-conviction court, there is no evidence in the record supporting his claims for relief. McMullin has therefore failed to meet his burden on appeal of showing the evidence leads to a conclusion opposite that reached by the post-conviction court. We affirm the post-conviction court's judgment denying McMullin's petition.

[23] Affirmed.

Bradford, J., and Pyle, J., concur.

² McMullin's appendix contains transcripts of his guilty plea and sentencing hearings. However, he did not offer these as evidence to the post-conviction court for its consideration in ruling on his petition.