

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as binding precedent, but it may be cited for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Xavier D. Jones,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

January 27, 2023

Court of Appeals Case No.
22A-PC-1922

Appeal from the
Madison Circuit Court

The Honorable
David A. Happe, Judge

Trial Court Cause No.
48C04-2001-PC-8

Vaidik, Judge.

Case Summary

- [1] Xavier D. Jones appeals the post-conviction court's dismissal of his petition for failure to prosecute under Indiana Trial Rule 41(E). Finding no error in the dismissal, we affirm.

Facts and Procedural History

- [2] In 2017, Jones was convicted of two counts of Level 1 felony attempted child molesting and one count of Level 4 felony child molesting and sentenced to forty years. He appealed, and this Court affirmed his convictions. *See Jones v. State*, No. 18A-CR-406, 2018 WL 6332474 (Ind. Ct. App. Dec. 5, 2018).
- [3] On January 28, 2020, Jones filed a pro se petition for post-conviction relief. He waived representation by the Indiana Public Defender. Exactly one year later, on January 28, 2021, attorney Jonathan D. Harwell filed a motion with this Court asking to withdraw the direct-appeal record. *See* No. 18A-CR-406. Attorney Harwell said Jones had hired him for assistance in petitioning for post-conviction relief. We granted the motion, and the record was released to Attorney Harwell on February 9. Attorney Harwell, however, did not enter his appearance or file anything in the post-conviction case.
- [4] Over eight months later, on October 27, the State moved to dismiss the post-conviction case for failure to prosecute under Trial Rule 41(E). On November 24, Attorney Harwell entered his appearance for Jones and filed a response to

the State’s motion to dismiss in which he claimed he needed “additional time to investigate and review the record.” Appellant’s App. Vol. II p. 56.

[5] Nothing happened in the case from November 24 to April 13, 2022, when the post-conviction court set a hearing on the State’s motion to dismiss for the next day. Attorney Harwell requested a continuance, and the court rescheduled the hearing to July 8.

[6] Attorney Harwell did not appear at the July 8 hearing but sent another attorney from his office, Harlan L. Vondersaar. The State argued that the post-conviction court should dismiss the case because Jones hadn’t “offered anything to the Court to show . . . a good reason for the delay.” Tr. p. 5. Attorney Vondersaar said they had “recently just finished getting all the discovery, all the documents, [and] all the records” and would be filing the amended petition “within the next sixty (60) days.” *Id.* at 6-7, 8. Later that same day, the court dismissed the case for failure to prosecute under Trial Rule 41(E):

5. Roughly 30 months have elapsed since the original petition was filed initiating this case. During the roughly seven months since shortly after the motion to dismiss was filed, Petitioner has had counsel.

6. Petitioner’s counsel has indicated that at some future point, an amended petition may be filed. At today’s hearing, Petitioner did not establish why an amended petition is necessary, what steps have been taken to prepare to file such amended petition, nor what preparation remains to be completed before it could be filed. There was no indication of what work Petitioner has done

to prepare the case for evidentiary hearing, nor any obstacles to such preparation.

* * * * *

11. Petitioner has not established any reason for the lengthy delay in moving forward, nor cause why this action should not be dismissed. Petitioner was offered the opportunity for a hearing today to establish such cause and he failed to avail himself of that opportunity.

Appellant's App. Vol. II p. 60.

[7] On August 14, Attorney Harwell moved to set aside the judgment alleging that he couldn't file the amended petition any sooner because COVID-19 restrictions in the Department of Correction prevented him from meeting with Jones until October 2021.¹ Although the motion generally cited Trial Rule 60(B), it did not specify any of the grounds listed under (B)(1)-(8). In addition, the motion was the first time COVID-19 and DOC restrictions had been mentioned. Attorney Harwell further alleged that he "did not finally finish gathering all the evidence and files for review until March 2022." *Id.* at 62. He did not, however, explain why he couldn't file an amended petition between March 2022 and the July 8, 2022 hearing, a period of four months. The post-conviction court denied the motion to set aside because "Petitioner had an opportunity at the 41(E) dismissal hearing to show cause why the matter should

¹ Attorney Harwell also filed an amended petition for post-conviction relief on August 14.

not be dismissed, and failed to do so. The grounds alleged in the Motion to Set Aside Judgment were available for presentation at the 41(E) hearing, and were not.” *Id.* at 77.

[8] Jones, represented by Attorney Harwell, now appeals.

Discussion and Decision

[9] Jones contends the post-conviction court erred in dismissing the case for failure to prosecute under Trial Rule 41(E).² We will reverse a Trial Rule 41(E) dismissal for failure to prosecute “only for a clear abuse of discretion.” *Caruthers v. State*, 58 N.E.3d 207, 210 (Ind. Ct. App. 2016) (quotation omitted). “An abuse of discretion occurs if the decision of the trial court is against the logic and effect of the facts and circumstances before it.” *Id.* (quotation omitted).

[10] 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

² Jones briefly asserts the trial court erred in denying his motion to set aside, which alleged that COVID-19 restrictions in the DOC impacted his ability to file the amended petition any sooner. Jones, however, does not cite the relevant rule—Trial Rule 60(B)—much less offer an analysis under any of the subsections. The only trial rule he cites is Trial Rule 41. He has therefore waived any argument regarding the trial court’s denial of his motion to set aside.

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.

Before dismissing a case for failure to prosecute under this rule, the court must hold a hearing to give the party a chance to explain the reasons for the delay. *Caruthers*, 58 N.E.3d at 211. Dismissals are disfavored and should be granted only under limited circumstances. *Id.*

[11] The State argues the post-conviction court did not abuse its discretion in dismissing the case. We agree. Jones filed a pro se petition for post-conviction relief in January 2020. One year later, in January 2021, Attorney Harwell requested the direct-appeal record from this Court because Jones had hired him to prepare a petition for post-conviction relief. Attorney Harwell received the record in February. Nothing, however, happened in the case until October, when the State sought to dismiss the case for failure to prosecute under Trial Rule 41(E). This motion put Jones on notice that the case was in jeopardy of being dismissed if he didn't show cause at or before the hearing. *See Appellant's App. Vol. II p. 52* (State's motion to dismiss citing the relevant language of Trial Rule 41(E)).³ Attorney Harwell filed a response to the motion to dismiss in November, and the hearing was eventually set for July. Despite this notice,

³ Citing *Colvin v. State*, 501 N.E.2d 1149 (Ind. Ct. App. 1986), Jones claims the post-conviction court should have issued a rule to show cause before dismissing the case. But as the post-conviction court explained in its dismissal order, this case is unlike *Colvin*. There, the petitioner wasn't given an opportunity to explain why the case should not be dismissed. As explained above, Jones had such an opportunity here.

Attorney Harwell filed nothing before the hearing and sent Attorney Vondersaar to the hearing in his place. The court told Attorney Vondersaar that now was the time to show cause for the delay. The only reason Attorney Vondersaar gave was that they had just “recently” finished getting all the documents and would be filing the amended petition within sixty days. Tr. p. 6. The court found this reason was not good enough:

Petitioner’s counsel has indicated that at some future point, an amended petition may be filed. At today’s hearing, Petitioner did not establish why an amended petition is necessary, what steps have been taken to prepare to file such amended petition, nor what preparation remains to be completed before it could be filed. There was no indication of what work Petitioner has done to prepare the case for evidentiary hearing, nor any obstacles to such preparation.

Appellant’s App. Vol. II p. 60. We recognize that dismissals under Trial Rule 41(E) are disfavored. But given the lack of action taken from October 2021, when the State filed the motion to dismiss and put Jones on notice that the case was in danger of being dismissed if he did not show cause at or before the hearing, to July 2022, when the hearing was held at which Attorney Vondersaar presented a general and non-detailed reason for the delay, we cannot say that

the post-conviction court abused its discretion in dismissing the case for failure to prosecute under Trial Rule 41(E).⁴

[12] Affirmed.

Tavitas, J., and Foley, J., concur.

⁴ On October 13, 2022, while this appeal was pending, Jones asked this Court for permission to file a successive petition for post-conviction relief. *See* 22A-SP-2417. On November 3, we found that “Petitioner’s request to file a Successive Petition for Post-Conviction Relief is premature because the proceedings regarding his initial petition for post-conviction relief are not complete.” Appellant’s App. Vol. II pp. 78-79. Now that we have affirmed the post-conviction court’s dismissal of the original petition for failure to prosecute, Jones can renew his request for permission to file a successive petition.