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APPELLANT, PRO SE

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IN THE  
COURT OF APPEALS OF INDIANA

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Timothy Roberts,  
*Appellant-Defendant*

v.

State of Indiana,  
*Appellee-Plaintiff.*

January 31, 2023

Court of Appeals Case No.  
22A-PC-613

Appeal from the Wayne Superior  
Court

The Honorable Charles Todd, Jr.,  
Judge

Trial Court Cause No.  
89D01-1512-PC-19

**Pyle, Judge.**

### Statement of the Case

- [1] Timothy Roberts (“Roberts”), pro se, appeals the post-conviction court’s denial of his petition for post-conviction relief. Roberts argues that the post-conviction court erred in its post-conviction rulings. Specifically, Roberts contends that the

post-conviction court erred by denying him post-conviction relief on his claim of ineffective assistance of trial and appellate counsel and that the post-conviction court abused its discretion when it failed to issue subpoenas to his trial and appellate counsel. The State concedes that the post-conviction court abused its discretion when it failed to issue subpoenas to Roberts' trial and appellate counsel. Concluding that Roberts' argument regarding the issuance of subpoenas is dispositive and further concluding that the post-conviction court abused its discretion by failing to issue subpoenas to Roberts' trial and appellate counsel after granting his requests for those subpoenas, we reverse the post-conviction court's judgment and remand for a new hearing.

[2] We reverse and remand.

### **Issue**

Whether the post-conviction court abused its discretion by failing to issue subpoenas to Roberts' trial and appellate counsel.

### **Facts**

[3] In 2013, the State charged Roberts with Class A felony child molesting. Attorney Thomas Kemp ("Trial Counsel Kemp") represented Roberts in his jury trial, during which a jury found Roberts guilty as charged. After Trial Counsel Kemp was suspended for disciplinary reasons, the trial court appointed Attorney Patrick Ragains ("Sentencing Counsel Ragains") to represent Roberts during his sentencing hearing. The trial court imposed a thirty-eight (38) year sentence.

- [4] Roberts filed a direct appeal and challenged the sufficiency of the evidence to support his conviction. Attorney Mark Cox (“Appellate Counsel Cox”) represented Roberts in his direct appeal. Our Court affirmed Roberts’ conviction. *See Roberts v. State*, 89A05-1410-CR-500, 2015 WL 1816896 (Apr. 21, 2015).
- [5] In December 2015, Roberts filed a pro se petition for post-conviction relief, which he later amended in August 2020. Roberts raised claims of ineffective assistance of trial and appellate counsel.<sup>1</sup> In May and July 2021, Roberts filed requests to have subpoenas issued to Trial Counsel Kemp and Appellate Counsel Cox. He also filed affidavits in support of his requests and included the addresses for both attorneys.
- [6] On August 26, 2021, Roberts filed a motion for extension of time. Within that motion, Roberts advised the post-conviction court that he had filed subpoena requests for trial and appellate counsel but had not yet received a ruling from the court.
- [7] On August 31, 2021, the post-conviction court issued an order granting Roberts’ requests for the issuance of subpoenas to Trial Counsel Kemp and Appellate Counsel Cox. Specifically, the post-conviction court ordered that “subpoenas

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<sup>1</sup> Roberts alleged that Trial Counsel Kemp rendered ineffective assistance of counsel by failing to conduct a reasonable pre-trial investigation, failing to impeach the child victim and her mother, and failing to properly introduce evidence. Roberts alleged that Appellate Counsel Cox rendered ineffective assistance of counsel by failing to raise sentencing issues challenging the trial court’s determination of aggravating and mitigating circumstances and a challenge that his sentence was inappropriate.

for both [Trial Counsel Kemp and Appellate Counsel Cox] should be permitted to be issued requiring the attendance of said persons at [a] hearing scheduled in this cause for October 25, 2021[.]” (App. Vol. 2 at 58).<sup>2</sup> The subpoenas, however, were not issued.

[8] In September 2021, Roberts filed an additional request for the issuance of a subpoena to counsel.<sup>3</sup> Thereafter, on September 17, 2021, the post-conviction court issued a docket entry, finding that Roberts’ most recent subpoena request was moot because the court had already granted, in its August order, Roberts’ requests for subpoenas to trial and appellate counsel. The post-conviction court entry also advised Roberts as follows:

The Court advises Petitioner that since Petitioner is proceeding pro se, it is Petitioner’s responsibility to provide appropriate documents and/or request to the Wayne County Clerk for the proper issuance of said authorized subpoenas for the hearing scheduled in this cause, pursuant to Indiana Rules of Trial Procedure. It is not the responsibility of the Court to issue such subpoenas.

(App. Vol. 2 at 60).

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<sup>2</sup> Roberts’ PDF pagination in Volume 2 of his Appendix is not aligned with the written pagination on the bottom of the documents contained in the appendix. When citing to this appendix volume, we will cite to the PDF page number.

<sup>3</sup> Roberts submitted this request on August 19, 2021—before the post-conviction court issued its order granting Roberts’ requests for subpoenas—but this request was filed by the court clerk on September 14, 2021.

[9] Subsequently, on September 27, 2021, Roberts filed a “Request [for] Clerk to Issue Subpoenas[,]” in which Roberts advised the clerk that the post-conviction court had authorized and ordered subpoenas to be sent to Trial Counsel Kemp and Appellate Counsel Cox for their attendance at the upcoming October 25 hearing. Roberts also included the addresses of both counsels. Additionally, Roberts sent a letter to the court clerk requesting that the clerk send out the subpoenas to Trial Counsel Kemp and Appellate Counsel Cox. In response to Roberts’ request, the court clerk sent Roberts a letter, stating as follows: “Both have been filed, I am now and must wait on further instruction from the court. Once I receive an order on what to do[,] I will get it taken care of.” (App. Vol. 2 at 65).

[10] On October 20, 2021, Roberts filed a “Request to Wayne County Clerk for Issuance of Subpoenas.” (App. Vol. 2 at 64). Roberts referred to the post-conviction court’s entry in which it noted that it had authorized and ordered for subpoenas to be issued to Trial Counsel Kemp and Appellate Counsel Cox to require their attendance at the post-conviction hearing on October 25. Roberts again requested the court clerk to issue the subpoenas and again included counsels’ addresses. Roberts asked the clerk to send him a copy of the two subpoenas in a self-addressed, stamped envelope that he had included. Roberts also provided the Clerk with “an envelope for each subpoena with postage for Registered Mail w[ith] Return Receipt prepaid.” (App. Vol. 2 at 68).

[11] On October 25, 2021, the post-conviction court held a post-conviction evidentiary hearing. Trial Counsel Kemp and Appellate Counsel Cox did not

appear for the hearing. At the beginning of the hearing, Roberts informed the post-conviction court that he did not believe that his witnesses were present. The post-conviction court told Roberts that “what the post-conviction relief rules provide is that before you can issue a subpoena, it has to have a court approval and you have to do certain things.” (Tr. Vol. 2 at 5). Roberts told the court that, after the court had issued the entry stating that it was Roberts’ responsibility and not the court’s responsibility to provide necessary information to the clerk, Roberts had provided the clerk with that information. Roberts asked the court for an extension so that he could secure his witnesses’ attendance to testify.

[12] The State informed the post-conviction court that “there’s nothing in the record indicating that subpoenas had been served[.]” (Tr. Vol. 2 at 7). The State told the court that it had reviewed Roberts’ documents, which showed that he had paid for the subpoenas to be sent on October 19, and that it had informed Roberts that he had not submitted the necessary information in time for the subpoenas to be sent. The State also indicated that Roberts had had “more than adequate time to have this matter addressed” and requested that the court move forward with the evidentiary hearing. (Tr. Vol. 2 at 7).

[13] The post-conviction court declined Roberts’ request to delay the hearing. The court noted that it had authorized the subpoenas almost two months prior and stated that Roberts should have had adequate time to arrange for the subpoenas. During the hearing, Roberts testified and introduced some

exhibits.<sup>4</sup> Following the hearing, the post-conviction court issued an order denying Roberts' petition for post-conviction relief.

[14] Roberts now appeals.

## Decision

[15] In regard to the dispositive issue in this appeal, Roberts argues that the post-conviction court abused its discretion by failing to issue subpoenas to Roberts' trial and appellate counsel after granting his requests for those subpoenas. The State concedes that the post-conviction court abused its discretion because the "post-conviction court's clerk should have issued subpoenas for trial and appellate counsel to testify at the evidentiary hearing" when the post-conviction court had already authorized the issuance of the subpoenas under Post-Conviction Rule 1(9)(b). (State's Br. 6). The State further asserts that "remand is necessary for subpoenas to be issued and a new evidentiary hearing to be held." (State's Br. 6). We agree.

[16] A post-conviction court has discretion to determine whether to grant or deny the petitioner's request for a subpoena. *Allen v. State*, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003), *trans. denied*. An abuse of discretion has occurred if the court's

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<sup>4</sup> One exhibit was a letter to Roberts from Sentencing Counsel Ragains. In this letter, Sentencing Counsel Ragains informed Roberts that Trial Counsel Kemp had done "a terrible job of representing [Roberts] with little to no work done on investigating the case." (App. Vol. 2 at 41; Ex. at 34).

decision is against the logic and effect of the facts and circumstances before the court. *Id.*

[17] Post-Conviction Rule 1(9)(b), which governs the issuance of subpoenas in a post-conviction proceeding, provides, in relevant part:

If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued.

Ind. Post-Conviction Rule 1(9)(b). Additionally, Trial Rule 45(A)(2) provides that the court clerk "shall issue a subpoena . . . signed and sealed but otherwise in blank, to a party requesting it or his or her attorney, who shall fill it in before service[.]" and Trial Rule 45(E) provides, in part, that "[a]t the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of court of the county in which the action is pending when requested[.]"

[18] Both Roberts and the State cite *Medlock v. State*, 547 N.E.2d 884 (Ind. Ct. App. 1989) in support of their agreed argument that this Court should remand this case for a new evidentiary hearing. In *Medlock*, this Court reversed a post-conviction court's denial of post-conviction relief and remanded for a new post-conviction hearing when a post-conviction court clerk failed to subpoena a witness. See *Medlock*, 547 N.E.2d at 887 (clerk's failure to subpoena witnesses for post-conviction hearing following petitioner's pro se request for subpoenas



was not harmless error where the petitioner needed the witness to help prove his post-conviction claim).

[19] Here, Roberts filed a subpoena request and accompanying affidavit, asking the post-conviction court to issue subpoenas to his trial counsel and appellate counsel. The post-conviction court, finding that testimony from these witnesses would be relevant and probative, granted Roberts' request for these subpoenas. *See* P-C.R. 1(9)(b). However, the court clerk did not issue the subpoenas. Even after Roberts filed two requests with the clerk and advised the clerk that the post-conviction court had authorized and ordered subpoenas to be issued to Trial Counsel Kemp and Appellate Counsel Cox for their attendance at the upcoming October 25 hearing, the subpoenas were still not issued. Both Roberts and the State agree that these two witnesses were necessary for Roberts' post-conviction claims of ineffective assistance of trial and appellate counsel. Because the subpoenas should have been issued and the clerk's failure to subpoena trial and appellate counsel witnesses for Roberts' post-conviction hearing was not harmless error, we reverse the post-conviction court's judgment and remand for a new post-conviction hearing. *See Medlock*, 547 N.E.2d at 887.

[20] Reversed and remanded.

Altice, C.J., and Riley, J., concur.