MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Charles Hardin, Jr.,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

May 10. 2023

Court of Appeals Case No. 22A-PC-1913

Appeal from the Whitley Circuit Court

The Honorable James R. Heuer, Senior Judge

Trial Court Cause No. 92C01-2204-PC-309

Memorandum Decision by Chief Judge Altice
Judges Riley and Pyle concur.

Altice, Chief Judge.

Case Summary

[1] Charles Hardin, Jr., pro se, appeals the trial court's summary denial of his petition for post-conviction relief (PCR). The State concedes, on appeal, that the trial court erred by summarily disposing of the PCR petition.

[2] Additionally, Hardin contends that the trial court erred by denying his motion for change of judge. Finding that Hardin failed to establish that the judge has a personal bias or prejudice against him, we conclude that the trial court did not err in this regard. Therefore, we remand this case to the trial court for further proceedings.

[3] We affirm in part, reverse in part, and remand.

Facts & Procedural History

[4] On September 22, 2005, a jury found Hardin guilty of Class A felony burglary, Class A felony robbery, and Class B felony aggravated battery. Thereafter, Hardin waived his right to a jury trial on the habitual offender enhancement and admitted to being a habitual offender.

[5] On October 10, 2005, the trial court sentenced Hardin to concurrent sentences of forty years for burglary, forty years for robbery, and fifteen years for aggravated battery. The trial court enhanced the Class A felony sentences by thirty years for the habitual offender enhancement, resulting in an aggregate sentence of seventy years in the Indiana Department of Correction. Hardin did not pursue a direct appeal.

[6] On April 20, 2022, Hardin filed his pro-se PCR petition, along with a motion to change judge supported by an affidavit. The lengthy PCR petition alleged many grounds for relief, including seventeen detailed claims of ineffective assistance of trial counsel.[1] In seeking a change of judge, Hardin averred that the judge had presided over his trial and sentencing and that certain alleged errors and abuses of discretion at the sentencing hearing established that the judge had personal bias or prejudice against Hardin.

[7] The trial court denied the motion for change of judge on May 2, 2022. Thereafter, on May 16, the State responded to the PCR petition and moved for summary dismissal pursuant to Indiana Post-Conviction Rule 1(4)(g). In the meantime, Hardin sought certification for interlocutory appeal of the order denying the motion for change of judge and filed a motion for an order directing his trial counsel, Brad Volez, to deliver the client file to Hardin. On June 6, Hardin moved for an order of default, as he had apparently not been served and was unaware of the State's timely response to his PCR petition.[2]

[8] On June 27, 2022, the trial court issued an order denying each of Hardin's pending motions and granting the State's request for summary dismissal. Hardin filed a timely motion to correct error (MTCE), arguing that he had not

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[1] Curiously, Hardin asserted claims of ineffective assistance of appellate counsel, but the record reveals he never had appellate counsel.

[2] The certificate of service on the State's response reveals that the incorrect inmate number was used for Hardin.

been able to respond to the State's request for summary dismissal because he was never served with this pleading. Regardless, Hardin argued that summary dismissal was improper in light of, among other things, his various claims of ineffective assistance of counsel and the fact that discovery was pending. The trial court summarily denied the MTCE on July 25, 2022.

[9] Hardin now appeals. Additional information will be provided below as needed.

Discussion & Decision

1. Summary Disposition

[10] P-C.R. 1(4) provides two different subsections under which a trial court may summarily deny a PCR petition without a hearing – subsection (f) and subsection (g) – and each one has a different applicable standard of review. *Osmanov v. State*, 40 N.E.3d 904, 908 (Ind. Ct. App. 2015).

[11] Subsection (f) allows for summary dismissal if "the pleadings conclusively show that petitioner is entitled to no relief," and we review a dismissal under this subsection as we would a judgment on the pleadings. *Id*. at 909. That is, if the petition alleges only errors of law, then the claims may be determined without a hearing, but if the facts pled raise "an issue of possible merit," then the petition should not be disposed of under section (f) – even if the petitioner has only a remote chance of establishing his claim. *Id*.

[12] Subsection (g), akin to summary judgment under Indiana Trial Rule 56, provides in relevant part:

> The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The initial burden is on the moving party to "prove each element of its claim by admissible evidence and to establish that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Trueblood v. State*, 715 N.E.2d 1242, 1260 (Ind. 1999). Only then must the opponent "respond by setting forth specific facts showing a genuine issue for trial." *Id*.

[13] Here, for summary dismissal, the trial court and the State below purportedly relied on subsection (g). The State's motion for summary dismissal, however, amounted to a cursory denial of claims alleged by Hardin in the PCR petition. The State did not submit any affidavits or refer to other evidence in support of its motion but, instead, relied exclusively on the pleadings in arguing that it was entitled to judgment as a matter of law. Accordingly, we consider whether the pleadings conclusively show that Hardin is not entitled to relief.

[14] The State concedes on appeal that summary dismissal was improper in this case in light of Hardin's multiple claims of ineffective assistance of trial counsel. Indeed, we have consistently held that the issue of ineffective assistance of trial counsel is fact sensitive, turning on the particular facts of each case. *See Osmanov*, 40 N.E.3d at 909; *Binkley v. State*, 993 N.E.2d 645, 650 (Ind. Ct. App.

2013). "Consequently, when a petitioner alleges ineffective assistance of counsel, and the facts pled raise an issue of *possible* merit, the petition should not be summarily denied." *Osmanov*, 40 N.E.3d at 909 (emphasis in original and internal quotations omitted).

[15] Hardin's PCR petition alleges many fact-specific claims of ineffective assistance of counsel that present issues of possible merit based on the facts pled.[3] To name a few, the petition alleges that counsel was ineffective in failing to: (1) challenge the admission of specific evidence and make other objections during trial; (2) preserve Hardin's right to a direct appeal; and (3) challenge Hardin's convictions on state double jeopardy grounds, as each of the three counts was apparently elevated based on the same bodily injury to the victim.

[16] We agree with the State and Hardin that the trial court erred in summarily disposing of the PCR petition as a matter of law. Accordingly, we reverse the denial of relief and remand for further proceedings and for the issuance of specific findings of fact and conclusions of law consistent with P-C.R. 1(6) on Hardin's PCR claims.

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[3] Of course, Hardin's freestanding claims of trial and sentencing error are not cognizable on post-conviction review. *See Stephenson v. State*, 864 N.E.2d 1022, 1029 (Ind. 2007), *cert. denied*; *see also Robinson v. State*, 175 N.E.3d 859, 866 (Ind. Ct. App. 2021) (observing that a PCR petitioner may allege a freestanding claim of fundamental error only if the issue was demonstrably unavailable to him at the time of trial and direct appeal; otherwise the claim must be presented in the context of ineffective assistance of counsel), *trans. denied*. To avoid this, Hardin asks us to "hear his freestanding claims under the standard of review for a belated appeal pursuant to Ind. Post-Conviction Rule 2 for judicial economy." *Appellant's Amended Brief* at 28. This we cannot do because Hardin never petitioned the trial court for permission to file a belated notice of appeal pursuant to P-C.R. 2(1). In fact, he expressly indicated in his MTCE that he had not sought such relief because he would be ineligible due to his lack of diligence over the years to pursue a belated appeal.

2. Change of Judge

[17] Hardin also challenges the trial court's denial of his motion for change of judge. In this regard, he asserts that "[i]t gives the appearance of impropriety for Judge Heuer to rule on claims of his own abuses by presiding over this cause when he had a specific interest in the subject matter." *Appellant's Amended Brief* at 24.

[18] P-C.R. 1(4)(b) provides that a post-conviction petitioner "may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner." The court shall grant the motion "if the historical facts recited in the affidavit support a rational inference of bias or prejudice." *Id*.; *see also Pruitt v. State*, 903 N.E.2d 899, 939 (Ind. 2009) (observing that the rule requires the court to treat the historical facts recited in the affidavit as true and determine whether they support a rational inference of personal bias or prejudice). Our Supreme Court has explained:

> A change of judge is neither automatic nor discretionary, but calls for a legal determination by the trial court. It is presumed that the PC court is not biased against a party and disqualification is not required under the rule unless the judge holds a personal bias or prejudice. Typically, a bias is personal if it stems from an extrajudicial source – meaning a source separate from the evidence and argument presented at the proceedings.

Pruitt, 903 N.E.2d at 939 (internal quotations, brackets, and citations omitted); *see also Lambert v. State*, 743 N.E.2d 719, 729-30 (Ind. 2001), *cert. denied*.

[19] Here, Hardin's short affidavit alleged that the motion should be granted "to avoid the appearance of impropriety" due to several abuses of discretion

allegedly committed by the judge at the sentencing hearing, which Hardin claimed trampled on his constitutional rights. *Appellant's Appendix* at 77. The historical facts recited in Hardin's affidavit are not the sort to support a rational inference of personal bias or prejudice. *See Pruitt*, 903 N.E.2d at 939 (holding that appellant's affidavit showed no historical facts that demonstrated personal bias or prejudice where he merely cited the judge's trial rulings against him); *Harrison v. State*, 707 N.E.2d 767, 790 (Ind. 1999) ("A trial court's adverse rulings on judicial matters do not indicate a personal bias toward a defendant that calls into question the trial court's impartiality."), *cert. denied*. Based on our review of the affidavit, we conclude that the trial court did not err by denying the motion for change of judge.

[20] Affirmed in part, reversed in part, and remanded for further proceedings.

Riley, J. and Pyle, J., concur.