

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

John J. Kennelly,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

August 25, 2021

Court of Appeals Case No.
21A-PC-102

Appeal from the Hamilton
Superior Court

The Honorable Gail Z. Bardach,
Judge

Trial Court Cause No.
29D06-1912-PC-10076

Najam, Judge.

Statement of the Case

- [1] John J. Kennelly appeals following the post-conviction court's denial of his petition for post-conviction relief. Kennelly raises one issue for our review, namely, whether the post-conviction court erred when it denied Kennelly's motion to amend his petition.
- [2] We affirm.

Facts and Procedural History

- [3] On September 27, 2017, a student at Lantern Road Elementary School reported to a teacher during recess that Kennelly was watching the students from outside the school's playground and taking pictures. *Kennelly v. State*, No. 18A-CR-412, 2018 WL 4291573 at *1 (Ind. Ct. App. Sept. 5, 2018). The teacher contacted the principal, who in turn contacted Lieutenant Mike Johnson with the Fishers Police Department. *Id.* Lieutenant Johnson arrived, but Kennelly had already left. *Id.* A short while later, Lieutenant Johnson discovered Kennelly again near the school's playground. *Id.* Lieutenant Johnson asked Kennelly to leave and warned him not to return. Kennelly left but again returned, and officers found him trying to enter the school. *Id.* Officers arrested Kennelly, and the State charged him with criminal trespass, as a Class A misdemeanor. *Id.* Following a bench trial, the court found Kennelly guilty, entered judgment of conviction, and sentenced him accordingly. *Id.* We affirmed Kennelly's conviction on direct appeal. *Id.* at *3.

[4] On December 3, 2019, Kennelly filed a petition for post-conviction relief. In that petition, Kennelly asserted that there “existed evidence of material fact, not previously presented and heard, that requires vacation” of his conviction. Appellant’s App. Vol. 2 at 16 (emphasis removed). In particular, Kennelly asserted that, at his bench trial, his defense counsel “mistakenly played and introduced the wrong video” of an encounter between Kennelly and the officers. *Id.* at 17. According to Kennelly, the original video that he had recorded was over twenty-nine minutes long and included over three minutes of footage of the police encounter, but the exhibit submitted by his defense counsel was only one minute and thirty-four seconds long. Kennelly maintained that the remaining video footage was newly discovered evidence “that was not presented and heard during the bench trial.” *Id.*

[5] In response, on January 7, 2020, the State filed a motion for summary dismissal of Kennelly’s petition for post-conviction relief. In that motion, the State contended that Kennelly had failed to state a claim upon which relief could be granted. Specifically, the State asserted that the video was not newly discovered evidence since it “was created by [Kennelly] and [Kennelly] was aware of its existence at the time of trial.” *Id.* at 24. The post-conviction court granted the State’s motion and summarily dismissed Kennelly’s petition for post-conviction relief the same day.

[6] Thereafter, Kennelly filed a motion to set aside the summary dismissal of his motion. In addition, on February 6, Kennelly filed a motion for leave to amend his petition for post-conviction relief. In that motion, Kennelly sought to

“correct the original petition” and to “clarify the existence of newly discovered evidence[.]” *Id.* at 28. On February 12, the court denied Kennelly’s motion to amend his petition for post-conviction relief. Then, on February 21, the court granted Kennelly’s motion to set aside and vacated its prior summary dismissal of Kennelly’s petition.¹

[7] The court ultimately set Kennelly’s petition for a hearing on December 18.² During the hearing, Kennelly testified extensively about the full length of the video recording that was not shown during his trial that he contended depicted the entire encounter with police officers and constituted newly discovered evidence. In addition, Kennelly questioned two police officers regarding their encounter with Kennelly prior to his arrest.

[8] Following the hearing, the court entered findings of fact and conclusions thereon. In particular, the court concluded that the entire video recording was not newly discovered evidence because the video was known to Kennelly prior to trial as he was the person who had recorded it, because Kennelly had provided the entire video to the State during discovery, and because Kennelly was present at the trial when his counsel only admitted a portion of the video.

¹ The post-conviction court signed the order denying Kennelly’s motion to amend on February 7, but the order was not file stamped until February 12. Similarly, the court signed the order vacating its prior summary dismissal of Kennelly’s petition on February 7, but it was not file stamped until February 21.

² Three days prior to the scheduled hearing date, Kennelly filed a second motion to amend his petition. In that petition, he again asserted that there was newly discovered evidence. But he additionally alleged that his trial counsel had been ineffective for failing to admit the entire video recording as evidence. *See* Appellant’s App. Vol. 2 at 55. The post-conviction court initially granted Kennelly’s motion but subsequently reversed its order and denied Kennelly’s request as untimely. Kennelly does not challenge that order on appeal.

As such, the court denied Kennelly's petition for post-conviction relief. This appeal ensued.

Discussion and Decision

- [9] Kennelly contends that the post-conviction court erred when it denied his motion to amend his petition. Indiana Post-Conviction Rule 1(4)(c) provides, in relevant part, that a "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." Kennelly asserts that, because the post-conviction court had not set a hearing date for his petition at the time he filed the amendment, the court was required to allow him to amend his petition.
- [10] In particular, Kennelly contends that the court erred when it denied his motion to amend because he was "entitled" to amend his petition pursuant to the post-conviction rules. Appellant's Br. at 10. In addition, he asserts that he had a "right" under Indiana Trial Rule 15 to amend his filing "without leave of court" because the State had failed to properly serve him with its motion to summarily dismiss his petition. *Id.* at 11. And he contends that he had a discretionary right to amend his petition because the amendment "would not have delayed the case" and because there "was no indication that the State would have been prevented from asserting any defenses." *Id.* at 12.
- [11] In response, the State contends that Kennelly has failed to preserve for appeal his argument regarding an automatic right to amend his petition because he did

not discuss Post-Conviction Rule 1(4)(c) or Trial Rule 15 in his motion to amend but, rather, only argued that he was entitled to amend his petition pursuant to Trial Rule 60 and a local rule. The State also asserts that Trial Rule 15 is inapplicable to Kennelly's motion because the modification of a petition for post-conviction relief is covered by the post-conviction rules. And the State maintains that the court properly denied Kennelly's motion to amend because the court had already summarily dismissed Kennelly's petition when he filed his motion.

[12] However, we need not address those arguments by Kennelly or the State because we hold that any error in the court's denial of Kennelly's motion to amend was harmless. "An error is harmless when it results in no prejudice to the substantial rights of a party." *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018) (quotation marks omitted). "At its core, the harmless-error rule is a practical one, embodying the principle that courts should exercise judgment in preference to the automatic reversal for error and ignore errors that do not affect the essential fairness of the trial." *Id.* (quotation marks omitted).

[13] Here, in his petition for post-conviction relief, Kennelly asserted that he was entitled to have his conviction vacated because of newly discovered evidence. Specifically, he contended that his defense counsel "mistakenly played and introduced" a video that was only one minute and thirty-four seconds long while the original video "that should have been submitted into evidence was twenty-nine minutes and 38 seconds" with "three minutes and 19 seconds of the video showing the police officer giving [Kennelly] the trespass warning."

Appellant's App. Vol. 2 at 17. He then presented several pages of argument outlining why the portion of the video that was not played qualified as newly discovered evidence. *See id* at 17-22.

[14] Then, in his motion to amend, Kennelly stated, without more, that he was seeking to amend his petition in order “to correct the original petition” and “to clarify the existence of newly discovered evidence[.]” *Id.* at 28. Kennelly did not include in his motion any new claims or facts that he sought to add to his petition. Nor did he include an amended petition for post-conviction relief as an attachment to his motion.³ In other words, Kennelly did not provide any specific information to the post-conviction court that would inform the court about the substance of his proposed amendment.

[15] Further, and importantly, the court held a hearing on Kennelly's petition for post-conviction relief. During that hearing, Kennelly presented his evidence regarding the alleged newly discovered evidence. Indeed, Kennelly testified about the full video recording that was not shown to the court during his trial, including the fact that the part of the video that was not shown depicted more of his interaction with the officers.⁴ He also called as witnesses two police officers and questioned them regarding their encounter with him. And

³ We note that Kennelly did include an amended petition with his second motion to amend. *See* Appellant's App. Vol. 2 at 48-57.

⁴ Kennelly failed to explain how any part of the full-length video would have altered the outcome of his trial if it had been offered as an exhibit.

Kennelly makes no argument on appeal that he was denied the opportunity to present any evidence regarding his claims.

[16] Because Kennelly failed to include an amended petition with his motion to amend and because he has failed to explain what additional evidence he would have submitted, Kennelly has not demonstrated that, had the court granted his motion to amend, the result of the proceedings would have been different. We therefore hold that, if there were any error in the court's denial of Kennelly's motion to amend his petition for post-conviction relief, such error would be harmless. We affirm the post-conviction court.

[17] Affirmed.

Riley, J., and Brown, J., concur.