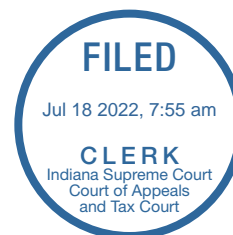


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

James Stephens,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

July 18, 2022

Court of Appeals Case No.
21A-PC-2933

Appeal from the Marion Superior
Court

The Honorable Cynthia L. Oetjen,
Judge

Trial Court Cause No.
49G04-9805-PC-76033

Robb, Judge.

Case Summary and Issues

- [1] In 1999, James Stephens was convicted of two counts of burglary, theft, and attempted theft. Stephens later filed a petition for post-conviction relief which was denied. This court affirmed the denial on appeal. Stephens filed a successive petition for post-conviction relief in 2019 which was also denied. Stephens now appeals that denial, raising multiple issues for our review which we consolidate and restate as: (1) whether the post-conviction court erred by denying Stephens' motion for default judgment; and (2) whether the post-conviction court erred by denying Stephens' successive petition for post-conviction relief. Concluding the post-conviction court did not err by denying either Stephens' motion for default judgment or his successive petition for post-conviction relief, we affirm.

Facts and Procedural History

- [2] On September 2, 1999, Stephens pleaded guilty to two counts of burglary, Class B felonies, and two counts of theft,¹ Class D felonies, under cause number 49G02-9805-CF-076033. The trial court, by Master Commissioner Amy Barnes, sentenced Stephens to an aggregate of forty years to be served in the Indiana Department of Correction. Stephens did not appeal from this judgment, but in 2001, he filed a petition for post-conviction relief, alleging in part that the

¹ One of the theft counts was attempted theft.

trial court erred when it concluded he was competent to stand trial. The post-conviction court, by Commissioner Nancy Broyles, denied Stephens' petition and a panel of this court affirmed that decision in an unpublished decision. *See Stephens v. State*, No. 49A02-0704-PC-355 (Ind. Ct. App. Feb. 27, 2008), *trans. denied*. In 2009, our supreme court issued an opinion finding the judge of the court in which Stephens' post-conviction proceeding was heard had violated the code of judicial conduct by, in part, permitting unreasonable delays in post-conviction cases and failing to review orders issued by Commissioner Broyles. *In re Hawkins*, 902 N.E.2d 231, 240-41 (Ind. 2009). Stephens' post-conviction case was referenced as one of the affected cases. *Id.* at 238.

[3] In 2019, Stephens requested permission to pursue a successive post-conviction petition, explaining he was raising new grounds which had not been included in his prior petition because he had only just learned of the *Hawkins* decision and Commissioner Broyles' actions. This court authorized the filing of a successive petition. On July 24, 2019, Stephens filed his successive petition for post-conviction relief raising three challenges, all related to his 1999 conviction: (1) whether Master Commissioner Barnes issued a final order without proper authority; (2) whether Master Commissioner Barnes was biased and had ex parte communications with Stephens' attorneys; and (3) whether Stephens' consecutive sentences were mandatory. Appellant's Appendix, Volume 2 at 56-57.

[4] Stephens' successive petition was assigned to a magistrate. On December 13, 2019, Stephens filed a motion for the "Elected Judge" to decide his post-

conviction case which the magistrate granted. *Id.* at 170. Subsequently, Stephens filed a motion for default judgment arguing the State “failed to file an [a]nswer to [Stephens’] Successive Petition for Post-Conviction Relief within thirty (30) days as required by Post-Conviction Rule 1, Section 4[.]” *Id.* at 172. Stephens’ motion was denied by the magistrate. On October 12, 2020, the State filed its answer which the post-conviction court accepted. On March 12, 2021, an evidentiary hearing was held in front of the sitting judge where Stephens neither called witnesses nor testified on his own behalf.

[5] Following the hearing, the post-conviction court issued findings of fact and conclusions of law and stated that “Stephens seeks to raise new grounds in his successive PCR petition which were known and available at the time of his original PCR. These new grounds are technically waived.” *Id.* at 39. Further, the post-conviction court concluded that “Stephens has waived his right to challenge the consecutive sentences by not pursuing a direct appeal of his sentence or filing a petition for belated appeal.” *Id.* at 40. However, the post-conviction court examined Stephens’ remaining claims on the merits and concluded, in relevant part, the following:

3. Claim challenging authority of judicial officer. . . . The PCR evidence shows that Stephens did not object to being sentenced by the master commissioner or request that the presiding judge sentence him. . . . This claim fails.

4. Claim challenging the impartiality of judicial officer. . . . [Stephens] has presented no successive post-conviction evidence of judicial bias or prejudice to Stephens. The evidence instead

shows that the trial court was patient, thorough, and fair. It is also clear from the successive post-conviction evidence that the trial court's observations about Stephens' lies were based upon events during court proceedings and upon court documents, not ex parte communications. . . . This claim fails.

Id. at 41-42.

- [6] The post-conviction court denied Stephens' successive petition for post-conviction relief. Stephens now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Motion for Default Judgment

- [7] Stephens argues that the post-conviction court erred by denying his motion for default judgment. The decision to deny a default judgment is within the discretion of the post-conviction court and is reviewable only for abuse of that discretion. *Kindred v. State*, 514 N.E.2d 314, 317 (Ind. Ct. App. 1987), *trans. denied*. An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Southern v. State*, 878 N.E.2d 315, 323 (Ind. Ct. App. 2007), *trans. denied*.
- [8] Stephens contends the magistrate had no authority to rule on his motion for default judgment. "A party to a superior court proceeding that has been assigned to a magistrate . . . may request that an elected judge of the superior

court preside over the proceeding instead of the magistrate[.]” Ind. Code § 33-33-49-32(c). Upon a timely request made under this subsection by either party, the magistrate *shall* transfer the proceeding back to the superior court judge. *Id.* Here, on December 13, 2019, Stephens filed a motion for the “Elected Judge” to decide his post-conviction case and the motion was granted on December 17. Appellant’s App., Vol. 2 at 170. Stephens thereafter filed his motion for default judgment and the magistrate, despite having previously granted Stephens’ motion for the elected judge to preside over his case, denied the motion for default judgment. Stephens argues that by doing so, “[t]he magistrate effectively denied Stephens a ruling on the default motion by failing to transfer the cause back to the Judge.” Brief of Appellant at 26. We disagree.

[9] Stephens’ motion for default judgment argues the State “failed to file an answer to [Stephens’] Successive Petition for Post-Conviction Relief within thirty (30) days as required by Post-Conviction Rule 1, Section 4[.]” Appellant’s App., Vol. 2 at 172. When a party fails to answer a complaint, the non-defaulting party is not entitled to a judgment by default as a matter of right. *See Progressive Ins. Co. v. Harger*, 777 N.E.2d 91, 95 (Ind. Ct. App. 2002); Ind. Trial Rule 55(A) (“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise comply with these rules . . . the party *may* be defaulted[.]”) (emphasis added). This is because a “default judgment is not generally favored, and any doubt of its propriety must be resolved in favor of the defaulted party.” *Harger*, 777 N.E.2d at 94 (citation omitted). And default is

“an extreme remedy[.]” *Allstate Ins. Co. v. Watson*, 747 N.E.2d 545, 547 (Ind. 2001) (citation omitted).

[10] We conclude Stephens has failed to show that his motion for default would have been granted by the superior court judge. Further, Stephens fails to show that had the motion for default been granted, he was entitled to relief as a matter of law. *See Shoulders v. State*, 462 N.E.2d 1034, 1035 (Ind. 1984) (stating the effect of the default judgment is that the facts as alleged in the petition are deemed admitted; however, the court must still determine whether the petitioner is entitled to relief as a matter of law). Therefore, he fails to show he was prejudiced by the magistrate’s failure to transfer his case to the judge prior to ruling on his motion to default.² *See Hurt v. Polak*, 397 N.E.2d 1051, 1053 (Ind. Ct. App. 1979) (finding that the denial of default judgment was harmless where appellant failed to show prejudice to substantial rights). Accordingly, the magistrate’s denial of Stephens’ motion for default judgment does not constitute reversible error.

II. Successive Post-Conviction Relief

A. Standard of Review

[11] Post-conviction procedures provide a narrow remedy for collateral challenges to convictions based on grounds enumerated in the post-conviction rules. *Wrinkles*

² Further, we note that Stephens was afforded a hearing regarding his successive petition for post-conviction relief and the elected judge decided his petition on the merits; thus, Stephens was not prejudiced by the denial. *See Custer v. Mayfield*, 138 Ind. App. 575, 579, 205 N.E.2d 836, 838 (1965).

v. State, 749 N.E.2d 1179, 1187 (Ind. 2001), *cert. denied*, 535 U.S. 1019 (2002).

Generally, one convicted of a crime in an Indiana state court can seek collateral review of that conviction and sentence in a post-conviction proceeding only once. *See Baird v. State*, 831 N.E.2d 109, 114 (Ind. 2005), *cert. denied*, 546 U.S. 924 (2005); Ind. Post-Conviction Rule 1. To proceed with each “successive” post-conviction claim, petitioners need court permission, P-C.R. 1(12)(a), which will be granted if they establish a “reasonable possibility” of entitlement to post-conviction relief, P-C.R. 1(12)(b). This court granted Stephens permission to proceed on his successive post-conviction petition.

[12] Stephens appeals from the denial of his successive petition for post-conviction relief, which is a negative judgment. *See Wrinkles*, 749 N.E.2d at 1187. As a result, he must convince this court that the evidence “as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.” *Id.* at 1187-88. “[T]his Court will disturb a post-conviction court’s decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion.” *Id.* at 1188 (quotation and citation omitted). In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Polk v. State*, 822 N.E.2d 239, 244 (Ind. Ct. App. 2005), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.*

B. Waiver by Procedural Default

- [13] Stephens argues that the post-conviction court erred by denying his successive petition for post-conviction relief. Stephens' petition contained three challenges, all related to his 1999 conviction: (1) whether Master Commissioner Barnes issued a final order without proper authority; (2) whether Master Commissioner Barnes was biased and had ex parte communications with Stephens' attorneys; and (3) whether Stephens' consecutive sentences were mandatory. *See* Appellant's App., Vol. 2 at 56-57.
- [14] Stephens did not raise any of these challenges in his first petition for post-conviction. Pursuant to Indiana Post-Conviction Rule 1(8), all grounds for relief must be raised in the original petition for post-conviction relief and cannot be the basis for a subsequent petition. Successive post-conviction relief "exists for those cases in which an issue was unascertainable or unavailable at the time of the original post-conviction petition." *Arthur v. State*, 663 N.E.2d 529, 531-32 (Ind. 1996); *see also Kirk v. State*, 632 N.E.2d 776, 779 (Ind. Ct. App. 1994) (stating claims known and available yet not asserted on first petition for post-conviction relief are waived on successive post-conviction petition).
- [15] Stephens seemingly argues that he did not receive notice of these claims until discovering *In re Hawkins* in 2019. In *Hawkins*, our supreme court addressed various violations of the Code of Judicial Conduct arising out of excess delays in issuing rulings on prisoners' petitions for post-conviction relief, including the following instance:

Stephens v. State, Cause No. 49G05-9805-PC-076033, nine-month delay. A note in the file by Commissioner Broyles states: “[S]how file lost causing delay in ruling.” She issued the ruling without the file ever having been found.

902 N.E.2d at 238.

[16] Although the conduct highlighted in *Hawkins* is concerning, there is no connection between it and the actual issues Stephens attempts to raise in his successive petition. Stephens’ challenges all relate to the trial court’s conduct during his initial conviction and sentencing. He does not attempt to challenge the first post-conviction court’s conduct, nor does he attempt to renew his initial post-conviction claim that the trial court erred when it concluded he was competent to stand trial on the basis the post-conviction court decided it wrongly. Therefore, Stephens’ discovery of *Hawkins* is irrelevant to the issues he attempts to raise now. Stephens fails to show that the issues were “unascertainable or unavailable” at the time of his first petition for post-conviction relief. *Arthur*, 663 N.E.2d at 532.³

³As stated above, Stephens attempts to challenge his consecutive sentences in his successive petition for post-conviction relief. Our supreme court has held that the proper procedure for challenging a sentence imposed under an “open plea” agreement is to file a direct appeal or, if the time for filing a direct appeal has run, to seek permission to file a belated direct appeal under Post-Conviction Rule 2. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004). Stephens contends that he “was never told that he could appeal [and] did not know that he could file an appeal after a guilty plea was entered.” Br. of Appellant at 19. However, even if Stephens did not know a direct appeal was available to him, he failed to raise any sentencing issue in his first petition for post-conviction relief and failed to show any such claim was “unascertainable or unavailable” to him at the time. *Arthur*, 663 N.E.2d at 532.

[17] We conclude the post-conviction court did not err by denying Stephens' successive petition for post-conviction relief because his claims had been waived.

Conclusion

[18] We conclude the post-conviction court did not err by denying Stephens' motion for default judgment or denying his successive petition for post-conviction relief. Accordingly, we affirm.

[19] Affirmed.

Pyle, J., and Weissmann, J., concur.