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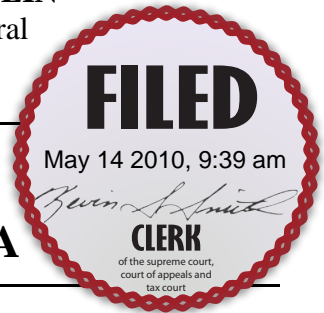
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**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS HODSON,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 35A02-0909-PC-884

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas H. Hakes, Judge
Cause No. 35C01-0804-PC-2

May 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Thomas Hodson appeals the denial of his petition for post-conviction relief. We affirm.

FACTS AND PROCEDURAL HISTORY

On April 12, 2000, Hodson was charged with Class A felony child molesting and Class B felony sexual misconduct with a minor. On the State's motion for a trial setting, Judge Mark A. McIntosh set the matter for a jury trial on October 11, 2001 before Judge Jeffery Heffelfinger. On October 3, 2001, Hodson filed an "Objection to Appointment of Special Judge," arguing that "the exclusive method for the appointment of a special judge is governed by Ind.R.Crim.P. 13. Further, neither the State nor the Defendant have requested a special judge be appointed." (App. at 132.)¹

On October 4, 2001, the State filed a response, which stated:

1. On September 26, 2001, Circuit Court Judge Mark A. McIntosh appointed [Superior Court] Judge Jeffery Heffelfinger as Judge pro tempore, pursuant to Indiana Rule of Trial Procedure 63(E), in this matter. Judge McIntosh did not recuse himself or appoint Judge Heffelfinger as a special judge.
2. Judge Mark A. McIntosh is on vacation from October 1 through October 15, 2001.
3. Because of Judge McIntosh's absence, Judge Jeffery Heffelfinger has been appointed as Judge Pro Tempore pursuant to Indiana Rule of Trial Procedure 63(E) for the trial that is scheduled to commence on October 11, 2001.
4. Pursuant to Indiana Criminal Rule 4 the State must bring the defendant to trial within one year.
5. The time period in which the State must bring the defendant to trial expires on October 12, 2001, therefore, the trial must be conducted by a Judge pro tempore because Judge McIntosh will be on vacation.

¹ We will refer to the Appendix submitted with the direct appeal as "App." and the Appendix prepared for this appeal as "PC App."

(*Id.* at 89.)

The chronological case summary entry for October 4, 2001 states:

Defendant's Objections to Appointment of Special Judge overruled. Judge Heffelfinger appointment was made under I.C. 33-5-25.3-10. Judge Heffelfinger agreed to try the cause herein with Judge McIntosh's consent. Counsel for Defendant was informed that Judge Heffelfinger would be Judge as the date of trial was changed to meet Counsel's schedule at a time when Judge McIntosh would be unavailable.

(*Id.* at 5.)

The trial commenced as scheduled before Judge Heffelfinger. The jury found Hodson guilty as charged, and Hodson was sentenced to an aggregate term of fifty years. On direct appeal, Hodson raised three issues: (1) whether the trial court committed reversible error by denying his motion to suppress his confession; (2) whether the trial court erred in the finding and weighing of aggravating and mitigating factors; and (3) whether his sentence was manifestly unreasonable. We affirmed. *Hodson v. State*, No. 35A02-0201-CR-25 (Ind. Ct. App. Aug. 15, 2002), *trans. denied*.

On April 7, 2008, Hodson filed a petition for post-conviction relief, raising three issues:

a. Mr. Hodson was prosecuted under a statute that was promulgated by a penal code adopted by the State in violation of Article 1, § 18 of the Indiana Constitution and, thus, also violated his rights to due process under both the United States Constitution and the Indiana Constitution.

* * * * *

b. Counsel provided ineffective assistance of counsel in one (1) or more of the following ways:

1. Failed to offer impeachment evidence regarding testimony of important witnesses who testified for the State.
2. Failed to adequately investigate.

3. Failed to move to correct testimony that he knew was false and/or misleading.
 4. Failed to present, at sentencing, evidence of mitigating circumstances.
- c. Mr. Hodson was subjected to prosecutorial misconduct insofar as the prosecutor sought and obtained a change of judge without notice to Movant or his counsel.

(PC App. at 12-13.)

At the post-conviction hearing, Hodson acknowledged that, subsequent to the filing of his petition, we ruled against a similar claim under Art. 1, § 18.² He also indicated he wanted to argue the change of judge issue as both prosecutorial misconduct and “lack of subject matter of personal [sic] jurisdiction.” (PC Tr. at 6.) Hodson presented testimony from his trial counsel, who indicated he did not remember the circumstances surrounding the change of judge and did not have a tactical reason for not pursuing the issue on appeal.³

On August 13, 2009, the court denied Hodson’s petition for post-conviction relief. The court found Hodson had not presented evidence to support his claim of ineffective assistance of counsel. The court found Hodson’s claim of prosecutorial misconduct was procedurally defaulted because the issue was available, but not raised, on direct appeal. The court also found Hodson’s claim of prosecutorial misconduct would fail on the merits:

Petitioner has not presented any credible evidence to prove his claim of prosecutorial misconduct. The time period in which the state was required to bring the defendant to trial pursuant to Indiana Criminal Rule 4 expired during a time in which Judge Mark McIntosh was scheduled to be on vacation. As a result, Judge McIntosh appointed Judge Jeffery Heffelfinger as Judge pro tempore in response to the State’s Motion to Set Hearing. Because it was the

² It appears he was referring to *Lindsey v. State*, 888 N.E.2d 319 (Ind. Ct. App. 2008), *trans. denied*. Hodson has not pursued this claim on appeal.

³ The same attorney represented Hodson at trial and on direct appeal.

Court who appointed Judge Heffelfinger as Judge pro tempore and the State did not seek the change of judge, Petitioner has failed to show by a preponderance of the evidence that there was misconduct by the prosecutor or that the misconduct placed the defendant in grave peril. Further, Petitioner has shown no prejudice from Judge Heffelfinger presiding over his case.

(PC App. at 60.)

DISCUSSION AND DECISION

Hodson bore the burden of establishing the grounds for relief by a preponderance of the evidence. *See Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *reh'g denied, cert. denied*. He now appeals from a negative judgment, and to the extent his appeal turns on factual issues, he must convince us that “the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the postconviction court.” *Id.* “We will disturb the decision only if the evidence is without conflict and leads only to a conclusion contrary to the result of the postconviction court.” *Id.*

Postconviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the postconviction rules. If an issue was known and available, but not raised on direct appeal, it is waived. If it was raised on appeal, but decided adversely, it is res judicata. . . . As a general rule . . . most free-standing claims of error are not available in a postconviction proceeding because of the doctrines of waiver and res judicata.

Id. at 597-98 (citations omitted).

Hodson appears to have abandoned his free-standing claim of prosecutorial misconduct. Instead, he argues Judge Heffelfinger lacked jurisdiction and counsel was ineffective for not raising the issue on direct appeal. Although Hodson raised the issue of ineffective assistance of counsel to the post-conviction court, failure to appeal the change of

judge was not one of the grounds asserted.⁴ An issue may not be raised for the first time on appeal; therefore, Hodson has waived this argument by not presenting it to the postconviction court. *See Koons v. State*, 771 N.E.2d 685, 691 (Ind. Ct. App. 2001), *trans. denied*.

Hodson asserts his jurisdictional issue may be raised at any time. *See Beanblossom v. State*, 637 N.E.2d 1345, 1349 (Ind. Ct. App. 1994), *trans. denied*. Nevertheless, Hodson has not established jurisdictional error. Both the trial court and the post-conviction court found Judge Heffelfinger was acting as a judge *pro tempore*, not as a special judge. Hodson presented no evidence to the contrary. Thus, Judge Heffelfinger's appointment was proper under Ind. Trial Rule 63(E) (titled "Judge pro tempore when judge is unable to attend") and Ind. Code § 33-5-25.3-10 (2001) (titled "Authority of circuit and superior court judges to sit in either court").⁵ The judgment of the post-conviction court is affirmed.

Affirmed.

BAILEY, J., and BARNES, J., concur.

⁴ Hodson has not challenged on appeal the post-conviction court's judgment on any of the ineffective assistance of counsel issues that he did raise in his petition.

⁵ That section, which was in effect at the time of Hodson's trial but has since been repealed, provided:

The judge of the Huntington circuit court may, with the consent of the judge of the court, sit as a judge of the court in any matter as if an elected judge of the court. The judge of the court may, with consent of the judge of the circuit court, sit as a judge of the circuit court in any matter as if an elected judge of the circuit court.

Ind. Code § 33-5-25.3.1 (2001) indicated that "the court" referred to Huntington Superior Court.