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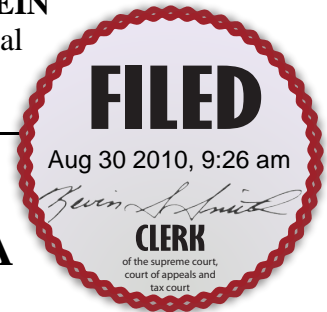
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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES B. PERIGO,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 87A04-0911-PC-636

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No. 87D01-0710-PC-219

August 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

James B. Perigo appeals the denial of his petition for post-conviction relief raising the following restated issues:

- I. Whether the post-conviction court erred when it found that the doctrine of laches barred Perigo from obtaining post-conviction relief ; and
- II. Whether the post-conviction court erred when it found that the State had exercised due diligence in its investigation of the availability of witnesses and exhibits for a potential re-prosecution.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 1985, Perigo was convicted of murder, Class C felony feticide, and two counts of Class A felony attempted murder. Following his conviction, the trial court sentenced Perigo to consecutive sentences of fifty years for murder, five years for feticide, and thirty years each for attempted murder. On direct appeal in 1989, the Indiana Supreme Court affirmed all of Perigo's convictions, and found the following underlying facts:

Perigo pursued a romantic relationship with Kathy Evans for several years. Perigo testified that they were engaged to be married, though the relationship was sometimes tumultuous. One altercation led Perigo to remove all of his possessions from Evans' apartment. On another occasion, Perigo pointed a shotgun at two of Evans' friends, Jon Cates and Donna Madden. This led to Perigo's arrest for criminal recklessness. He was released on bond from that charge when he committed the crimes at bar. Evans became pregnant while she was seeing Perigo and told him that he had impregnated her.

On April 13, 1985, Perigo phoned Evans at 5 a.m. Evans told Perigo that she had been on a date with another man. Perigo had some previous knowledge of Evans' relationship with the other man. Perigo went to Evans' apartment and confronted her about the relationship.

Evans told Perigo their relationship was finished. When he asked about her pregnancy, she told him she was going to give up the child for adoption. He then accused her of having sexual intercourse with the other

man, who had been at the apartment earlier. Evans made several denials but when Perigo continued to pressure her, she finally responded: “Yes, I did just [have intercourse with] him and his cum is still inside me. Do you want to see?” She then pointed to her groin. She also added that she did not know by whom she was pregnant.

Perigo reacted by rushing into another room where Cates and Madden were asleep. He stabbed Cates in the chest with a knife, and then slashed Madden’s neck superficially and sliced off one of her fingertips when she put her hand between his knife and her neck. Cates and Madden escaped and ran to a nearby house, but Perigo trapped Evans and beat her head and abdomen with a baseball bat. Evans died and her fetus was terminated.

Perigo v. State, 541 N.E.2d 936, 937-38 (Ind. 1989).

In 1995, Perigo requested and received a copy of his trial transcript. In 2007, Perigo filed a pro se petition for post-conviction relief, claiming fundamental error in the attempted murder jury instructions, ineffective assistance of counsel, and ineffective assistance of appellate counsel. In reply, the State asserted the defense of laches. The post-conviction court found that Perigo’s claims were barred by laches and denied the petition. Perigo now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The State had the burden of proving laches as an affirmative defense, and we must affirm the judgment of the post-conviction court unless we find the judgment to be clearly erroneous. *Armstrong v. State*, 747 N.E.2d 1119, 1120 (Ind. 2001). We neither reweigh the evidence nor judge the credibility of witnesses when reviewing a claim that evidence is insufficient to establish laches. *Sanders v. State*, 733 N.E.2d 928, 930 (Ind. 2000). We consider only the evidence most favorable to the judgment and all reasonable

inferences to be drawn therefrom. *Id.* Finally, we will affirm the post-conviction court's finding if it is supported by substantial evidence of probative value. *Id.*

II. Prejudice Prong of Laches Defense

Perigo argues that the post-conviction court erred in finding that his petition for post-conviction relief was barred by laches. While conceding that the delay in this case “may be deemed unreasonable,” Perigo maintains that the State failed to show prejudice or that it would be impossible or extremely difficult to reconstruct its case for trial. *Appellant's Br.* at 7-8. Therefore, concludes Perigo, the post-conviction court erred in finding that laches applied in the subject case. We disagree.

Laches is the neglect for an “unreasonable or unexplained length of time, under circumstances permitting diligence, to do what in law should have been done.” *Mahone v. State*, 742 N.E.2d 982, 985 (Ind. Ct. App. 2001). In a post-conviction relief setting, the State must prove by a preponderance of the evidence that the petitioner unreasonably delayed in seeking relief¹ and that the State has been prejudiced by the delay. *Id.* In post-conviction relief proceedings, “[i]f reasonable likelihood of successful prosecution is materially diminished by the passage of time attributable to the defendant's neglect, such may be deemed a sufficient demonstration of prejudice.” *Id.* The passage of time may, by itself, be enough to establish prejudice because witnesses are dispersed, memories fade, and records are lost. *Lile v. State*, 671 N.E.2d 1190, 1196 (Ind. Ct. App. 1996). Generally, the inability to reconstruct a case is established by a showing that evidence is

¹ Perigo does not challenge the post-conviction court's finding that in the present case there was unreasonable delay in seeking post conviction relief. *Appellant's Br.* at 7-8.

unavailable, such as destroyed records, deceased witnesses, or witnesses who have no independent recollection of the event. *McCollum v. State*, 671 N.E.2d 168, 171-72 (Ind. Ct. App. 1996).

Here, there is substantial evidence of probative value to support the post-conviction court's finding that the State was prejudiced by Perigo's delay. Specifically, the record shows that because of Perigo's delay the State would have been unable to reconstruct its attempted murder case against Perigo. Only nineteen of the original thirty-nine witnesses could be located. *Post-Conviction ("PC") Tr.* at 48-49. Only seven of the nineteen could remember the case in any detail, another seven remembered some but not all, and five could not remember anything. *Id.* at 48-50; *PC App.* at 104. Of the twenty unavailable witnesses, several would be essential to a re-prosecution of Perigo for the attempted murder of Madden and Cates: Michael Frank (Emergency Medical Technician who treated the victims); Dr. Peter Evers (physician who treated the victims); Dr. Wei Lee (surgeon who reattached Madden's fingertip); Mary Williams (nurse who treated Madden); Janice Lacey (serologist); Greg Goodman (murder victim's boyfriend and motive for the offenses); and Cates (one of the two attempted murder victims). *PC Tr.* at 50-52. Furthermore, thirty-one exhibits (Exhibits 20-51) from the original trial were missing, which included the original photographs of the scene and the victims' injuries. *Id.* at 57-58. Therefore, the post-conviction court properly found prejudice to the State because of Perigo's delay. *See McCollum*, 671 N.E.2d at 172 (finding that evidence of faded memories and missing witnesses was sufficient to show that State was prejudiced by Petitioner's twelve-year delay).

III. Due Diligence

Perigo also argues that the State failed to exercise due diligence in its investigation of the availability of witnesses for a potential re-trial. Specifically, Perigo contends that the State failed to conduct a nationwide search for witnesses and failed to determine whether any of the witnesses were in prison. *Appellant's Br.* at 8. Relying on *Sanders v. State*, 733 N.E.2d 928, 931 (Ind. 2000), Perigo maintains that the mere fact that a witness lives outside the state does not prejudice the State in a determination of laches where that witness is willing to return to testify. So, concludes Perigo, the post-conviction court erred when it found that the State had exercised due diligence in its investigation of the availability of witnesses for a potential re-trial so that laches barred Perigo from obtaining post-conviction relief. We again disagree.

The State has an obligation to use due diligence in its investigation of the availability of evidence and witnesses. *Oliver v. State*, 843 N.E.2d 581, 586 (Ind. Ct. App. 2006) (citing *Kirby v. State*, 822 N.E.2d 1097, 1100 (Ind. Ct. App. 2005)), *trans. denied*. The record here supports the post-conviction court's finding that the State fulfilled this obligation. Detective McKain attempted to locate all thirty-nine witnesses by going to the addresses on the original subpoenas and searching the phone book, county dispatch records, and the Boonville Police Department's central files. *PC Tr.* 48-53. He found and interviewed nineteen of the witnesses. *Id.* Therefore, the State showed that it exercised due diligence in its investigation of the availability of witnesses and the defense of laches did bar Perigo from obtaining post-conviction relief.

The post-conviction court did not err when it found that the State was prejudiced

by Perigo's unreasonable delay in seeking post-conviction relief, and that the State exercised due diligence in investigating the availability of witnesses and exhibits in the event of a re-trial of Perigo's case. The post-conviction court did not err when it denied Perigo's petition.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.