

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.



APPELLANT PRO SE:

GARY L. GREEN
Carlisle, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

GARY L. GREEN,

Appellant,

vs.

STATE OF INDIANA,

Appellee.

)
)
)
)
)
)
)
)
)
)

No. 49A02-1103-CR-248

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-9807-PC-106349

November 4, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Gary L. Green (“Green”) appeals from the denial of his motion to compel an attorney to return documents and unearned fees. We reverse and remand for proceedings consistent with this opinion.

Facts and Procedural History

In 1999, Green pleaded guilty to murder and was sentenced to an executed term of fifty-five years in the Department of Correction. Green filed a pro se petition for post-conviction relief in 2007, and attorney Ryan Frasher (“Frasher”) eventually filed an appearance on Green’s behalf on February 10, 2010. According to Green, Frasher was paid \$1,000 “as payment for representation at Green’s post-conviction relief hearing.” Appellant’s Br. at 3.

Sometime thereafter, Green decided not to pursue post-conviction relief any further. Green wrote Frasher a letter, dated September 20, 2010, informing Frasher of his wish to discontinue the post-conviction relief proceedings and requesting that Frasher withdraw his appearance so that Green could file his own motion to withdraw his petition for post-conviction relief. The letter also requested that Frasher return unearned fees in his possession and any documents Green had provided. Green then filed a pro se motion to withdraw his petition for post-conviction relief on October 13, 2010, and Frasher filed a motion to withdraw appearance on October 27, 2010. Both motions were granted.

Then, on February 4, 2011, Green filed a “Motion to Compel Counsel to Return Unearned Money and Documents to Petitioner” with the post-conviction court. Appellant’s App. pp. 41, 51. The petition alleged that Frasher had been paid \$1,000 to

represent Green at a post-conviction relief hearing and that Frasher had received documents from Green in connection with the post-conviction proceedings. The motion alleged further that Frasher had failed to return the documents and unearned fees in his possession and requested that the court compel Frasher to do so. The post-conviction court denied the motion without a hearing, concluding that it had “no authority in this matter.” Id. at 41. Green now appeals.

Discussion and Decision

As an initial matter, we note that no appellee’s brief has been filed in this matter. Accordingly, we apply a less stringent standard of review and may reverse if the appellant establishes prima facie error. Aiken v. Stanley, 816 N.E.2d 427, 430 (Ind. Ct. App. 2004). Prima facie means “at first sight, on first appearance, or on the face of it.” Id. (quoting Parkhurst v. Van Winkle, 786 N.E.2d 1159, 1160 (Ind. Ct. App. 2003)). However, this rule is not intended to benefit the appellant, but rather to relieve this court of the burden of developing arguments on the appellee’s behalf. State v. Moriarty, 832 N.E.2d 555, 558 (Ind. Ct. App. 2005). The burden of demonstrating trial error remains with the appellant. State v. Combs, 921 N.E.2d 846, 850 (Ind. Ct. App. 2010).

Green argues that the trial court erred in concluding that it had no authority to compel Frasher to return Green’s documents or the allegedly unearned fees, and we agree. In support of his argument, Green cites Indiana Code section 33-43-1-9 (2004), which provides that:

If, on request, an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them, in the

course of the attorney's professional employment, the attorney may be required, after reasonable notice, on motion of any party aggrieved, *by an order of the court in which an action, if any, was prosecuted . . .* to deliver the money or papers within a specified time, or show cause why the attorney should not be punished for contempt.

(emphasis added). By its terms, this statute vests the court in which an action was prosecuted with jurisdiction to consider a motion made pursuant to the statute's terms. Thus, the post-conviction court erred in concluding that it lacked authority to consider Green's motion. See Smith v. State, 426 N.E.2d 402, 404 (Ind. 1981) (reasoning that a motion to compel an attorney to return documents is "ancillary" to an underlying criminal action); Ferguson v. State, 733 N.E.2d 877, 880 (Ind. Ct. App. 2002) (holding that trial court erred in denying defendant's motion to compel attorney to return documents and unearned fees).

In McKim v. State, 528 N.E.2d 484, 486 (Ind. Ct. App. 1988), this court held that the delivery of papers by an attorney to a former client was not subject to the discretion of the trial court, but rather required under Indiana Code section 33-43-1-9 and Indiana Professional Conduct Rule 1.16(d), which provides that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." In Ferguson, this court extended the holding in McKim to unearned fees held by an attorney. 733 N.E.2d at 880. Thus, where an attorney has retained unearned fees, a

trial court lacks discretion to deny a client's motion to compel the attorney to return them.
Id.

It does not necessarily follow, however, that Green is automatically entitled to the relief he seeks. In Smith, our supreme court held that when a motion to compel delivery of money or papers pursuant to Indiana Code section 33-43-1-9 is presented, the trial court should provide reasonable notice to the attorney, hold a hearing on the matter, and then rule on the motion. 426 N.E.2d at 404; see also Ferguson, 773 N.E.2d at 881. Thus, the post-conviction court should hold a hearing on remand to determine whether Frasher actually has possession of any documents to which Green is entitled and whether the fees allegedly retained by Frasher were, in fact, unearned.

For all of these reasons, we conclude that the trial court erred in denying Green's motion to compel Frasher to return documents and allegedly unearned fees. On remand, a hearing will be necessary to determine whether Green is entitled to the relief sought.

Reversed and remanded for proceedings consistent with this opinion.

BAILEY, J., and CRONE, J., concur.