

Gerald Stokes appeals the post-conviction court's denial of his petition for post-conviction relief. Stokes raises one issue, which we revise and restate as whether the post-conviction court erred by summarily denying his petition for post-conviction relief. We reverse and remand.

The relevant facts follow. On November 26, 2002, Stokes was sentenced for conspiracy to commit dealing in cocaine as a class A felony¹ and dealing in cocaine as a class A felony.² On direct appeal, Stokes argued that the trial court erred by allowing the jury to view exhibits after deliberation began and that the evidence was insufficient to sustain his convictions. Stokes v. State, 801 N.E.2d 1263, 1266 (Ind. Ct. App. 2004), trans. denied. We affirmed Stokes's convictions. Id. at 1274.

On September 13, 2004, Stokes filed a pro se petition for post-conviction relief alleging that he received ineffective assistance of trial counsel because trial counsel "failed to get a suppression hearing." Appellant's Appendix at 41. Stokes also alleged that he received ineffective assistance of appellate counsel because appellate counsel "failed to raise issues preserved for appeal." Id. The State filed an answer denying Stokes's allegations of ineffective assistance.

Stokes requested representation by the State Public Defender, and a public defender filed an appearance. Stokes then filed a substitution of counsel. Stokes's

¹ Ind. Code § 35-41-5-2 (1998); Ind. Code § 35-48-4-1 (Supp. 2001) (subsequently amended by Pub. L. No. 151-2006, § 22 (eff. July 1, 2006)).

attorney then filed a motion to withdraw appearance pursuant to Ind. Post-Conviction Rule 1(9)(c), which the trial court granted. The trial court also summarily denied Stokes's petition for post-conviction relief.³ Stokes filed a motion to reinstate his petition for post-conviction relief, which the trial court denied.

The issue is whether the post-conviction court erred by summarily denying Stokes's petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

Ind. Post-Conviction Rule 1(4)(f) provides: "If the pleadings conclusively show that petitioner is entitled to no relief, the court may deny the petition without further proceedings." "When a court disposes of a petition under subsection f, we essentially review the lower court's decision as we would a motion for judgment on the pleadings."

² I.C. § 35-48-4-1.

³ The following handwritten notation appears on the motion to withdraw appearance: "granted Court, having re-reviewed the PCR now finds that, based on that review and counsel's certificate, said PCR is dismissed summarily, pursuant to Ind. Trial rules." Appellant's Appendix at 32.

Allen v. State, 791 N.E.2d 748, 752 (Ind. Ct. App. 2003), trans. denied. “The court errs in disposing of a petition in this manner unless ‘the pleadings conclusively show that petitioner is entitled to no relief.’” Id. at 752-753 (citing Ind. Post-Conviction Rule 1(4)(f)). “If the petition alleges only errors of law, then the court may determine without a hearing whether the petitioner is entitled to relief on those questions.” Id. “However, if the facts pled raise an issue of possible merit, then the petition should not be disposed of under section 4(f).” Id. “This is true even though the petitioner has only a remote chance of establishing his claim.” Id. “[T]he trial court should accept the well-pled facts as true and determine whether the petition raises an issue of possible merit.” Id. at 756.

The issue of the effectiveness of counsel is an evidentiary question. Sherwood v. State, 453 N.E.2d 187, 189 (Ind. 1983). As such, resolution of the issue revolves around the particular facts of each case. “Thus some factual determinations must be made.” Id. Consequently, when a petitioner alleges ineffective assistance of counsel, and the facts pled raise an issue of possible merit, the petition should not be summarily denied. Allen, 791 N.E.2d at 756.

Here, Stokes’s petition for post-conviction relief alleged that he received ineffective assistance of trial counsel because trial counsel “failed to get a suppression hearing.” Appellant’s Appendix at 41. Stokes also alleged that he received ineffective assistance of appellate counsel because appellate counsel “failed to raise issues preserved for appeal.” Id. Stokes’s petition alleged ineffective assistance of counsel, and the facts pled raise an issue of possible merit. Thus, we conclude that the post-conviction court

erred by summarily denying Stokes’s petition for post-conviction relief.⁴ See, e.g., Sherwood, 453 N.E.2d at 189-190 (holding that the trial court erred by summarily denying a petition and remanding to the post-conviction court); Clayton v. State, 673 N.E.2d 783, 786 (Ind. Ct. App. 1996) (holding that the post-conviction court erred by summarily denying petitioner’s claim of ineffective counsel).

For the foregoing reasons, we reverse the post-conviction court’s grant of summary disposition and remand for further proceedings.

Reversed and remanded.

NAJAM, J. and DARDEN, J. concur

⁴ The State argues that the fact that Stokes’s public defender withdrew from the case “has some bearing on the merits of the case.” Appellee’s Brief at 6. The State points to Ind. Post-Conviction Rule 1(9)(c), which provides, in part:

In the event that counsel determines the proceeding is not meritorious or in the interests of justice, before or after an evidentiary hearing is held, counsel shall file with the court counsel’s withdrawal of appearance, accompanied by counsel’s certification that 1) the petitioner has been consulted regarding grounds for relief in his pro se petition and any other possible grounds and 2) appropriate investigation, including but not limited to review of the guilty plea or trial and sentencing records, has been conducted. Petitioner shall be provided personally with an explanation of the reasons for withdrawal. Petitioner retains the right to proceed pro se, in forma pauperis if indigent, after counsel withdraws.

The State argues that “[i]f it is the policy of the rules to allow counsel to unilaterally make such determinations consistent with his or her ethical obligations, it is not clear why the trial court would be held to a higher standard.” Appellee’s Brief at 6. The State argues that the trial court inferred from the public defender’s withdrawal that the petition does not raise a genuine issue of fact. We disagree with the State. Ind. Post-Conviction Rule 1(9)(c) provides that a “[p]etitioner retains the right to proceed pro se . . . after counsel withdraws.” Thus, we conclude that the post-conviction court cannot infer from the public defender’s review of the merit of the proceeding that the petitioner’s claims have no merit. The State concedes that if the post-conviction court cannot infer a lack of merit from the public defender’s review of the case under Ind. Post-Conviction Rule 1(9)(c), then “there is no choice but to remand this case for further proceedings.” Appellee’s Brief at 7.

