APPELLANT PRO SE:

CHARLES E. PERKINS
Pendleton, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE

COURT OF APPEALS OF INDIANA

CHARLES E. PERKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0802-PC-53
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William T. Means, Judge
Cause No. 71D04-0010-CF-466

July 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Charles E. Perkins appeals the post-conviction court's denial of his pro se petition for post-conviction relief. Perkins raises two issues, which we consolidate 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 October 5, 2000, the State charged Perkins with: (1) Count I, robbery as a class B felony; (2) Count II, theft as a class D felony; and (3) Count III, criminal confinement as a class B felony. On July 10, 2001, the State moved to add Count IV, an habitual offender enhancement, which the trial court granted at a hearing on July 16, 2001. On October 1, 2001, Perkins pled guilty to all counts, including the habitual offender enhancement. After a hearing on December 19, 2001, the trial court sentenced Perkins to twenty years for the robbery conviction, three years for the theft conviction, and twenty years for the criminal confinement conviction and ordered that these sentences be served concurrently. The trial court further sentenced Perkins to twenty years on the habitual offender enhancement and ordered that this sentence be served consecutive to the other sentences. Thus, Perkins received an aggregate sentence of forty years in the Indiana Department of Correction.

On October 8, 2002, Perkins filed a pro se petition for post-conviction relief alleging that: 1) his trial counsel was ineffective for failing to investigate the case or interview Perkins; 2) the State failed to prove that he was an habitual offender; and 3) his guilty plea was not knowing, voluntary, or intelligent. On April 28, 2006, Perkins's

verified motion for permission to file a belated direct appeal was granted and his petition for post-conviction relief was held in abeyance pending his direct appeal.

On his direct appeal, Perkins argued that the trial court erred by: 1) identifying his prior criminal convictions, which had also been used to support his habitual offender finding, as an aggravating factor; and 2) failing to identify his guilty plea, drug abuse, and need for treatment as mitigating factors. Perkins v. State, No. 71A04-0606-CR-290, slip op. at 5 (Ind. Ct. App. October 19, 2006). Perkins also argued that his sentence was inappropriate in light of the nature of the offenses and his character and that the trial court erred when it imposed a separate sentence, rather than a sentence enhancement, based on the habitual offender finding. Id. at 8-9. We affirmed his sentence but remanded with instructions for the trial court "to specify to which of the three sentences the habitual offender enhancement applies." Id. at 10. Perkins filed a petition for transfer, which the Indiana Supreme Court denied.

On March 26, 2007, Perkins filed an amended petition for post-conviction relief alleging that: 1) his trial counsel was ineffective for failing to object to the untimely filing of the habitual offender enhancement; and 2) his trial counsel was ineffective for failing to argue that his attempt to plead guilty before the day of the trial and need for drug treatment were mitigating factors, and for failing to object to the trial court's use of an earlier probation violation as an aggravating factor at sentencing. On June 18, 2007, Perkins filed a pro se motion to set his post-conviction relief petition for hearing within ninety days. On August 31, 2007, the post-conviction court denied Perkins's motion and

entered an order denying his amended petition for post-conviction relief without a hearing and without findings. Thus, the post-conviction court summarily denied Perkins's petition for post conviction relief.

The dispositive issue is whether the post-conviction court erred by summarily denying Perkins'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. Fisher, 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." Tyson v. State, 868 N.E.2d 855, 857 (Ind. Ct. App. 2007), 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. (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.

In examining the pleadings, we note that Perkins's amended petition alleged in part that his trial counsel was ineffective for failing to object to the State's untimely filing of the habitual offender enhancement. Perkins also alleged that his trial counsel failed to raise certain mitigating factors and to object to the trial court's reliance on certain aggravating factors at sentencing. These allegations raise issues of possible merit and, thus, Perkins's petition should not have been disposed of under Ind. Post-Conviction Rule 1(4)(f). See, e.g., Hamner v. State, 739 N.E.2d 157, 161 (Ind. Ct. App. 2000) (finding that an evidentiary hearing was necessary where there was a "genuine issue of material fact" as to the voluntariness of defendant's guilty plea and to the effectiveness or adequacy of defendant's counsel); Clayton v. State, 673 N.E.2d 783, 786 (Ind. Ct. App. 1996) (holding that an evidentiary hearing was required where ineffective assistance of counsel was alleged and the facts pled raised an issue of possible merit). Accordingly, we reverse and remand the cause for an evidentiary hearing.

We also note that Post-Conviction Rule 1(6) requires the post-conviction court to "make specific findings of fact and conclusions of law on all issues presented, whether or not a hearing is held." Clayton, 673 N.E.2d at 786 (quoting Post-Conviction Rule 1(6)).

The trial court failed to comply with the rule when it summarily dismissed Perkins's petition. "This failure is an additional reason for remand." Id.

Finally, the State notes that the trial court erroneously ordered that the sentence for the habitual offender enhancement be served consecutively to other sentences. An habitual offender finding does not constitute a separate crime nor does it result in a separate sentence. Barnett v. State, 834 N.E.2d 169, 173 (Ind. Ct. App. 2005). Rather it results in a sentence enhancement imposed upon the conviction of a subsequent felony. Id. Hence, as we noted in Perkins's direct appeal, the trial court erred in imposing a separate, consecutive twenty year sentence for the habitual offender finding. See Perkins, slip op. at 10 (ordering the trial court on remand "to specify to which of the three sentences the habitual offender enhancement applies"). From the chronological case summary, it appears that the trial court's sentencing order has not yet been corrected in accordance with our instructions, and, on remand, we remind the post-conviction court to correct this error.

For the foregoing reasons, we reverse the post-conviction court's denial of Perkins's petition for post-conviction relief and remand for further proceedings consistent with this opinion.

Reversed and remanded.

BAKER, C. J. and MATHIAS, J. concur