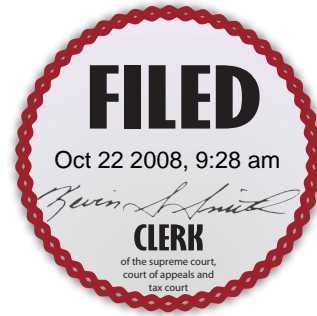


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WAYMAN H. LYONS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 48A02-0804-PC-352

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 11947

October 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Wayman Lyons was convicted of Murder following a jury trial. Lyons did not file a direct appeal, but he subsequently petitioned for post-conviction relief, which the post-conviction court denied. Lyons now appeals, challenging the post-conviction court's judgment. He raises several issues for our review, which we consolidate and restate as whether the post-conviction court abused its discretion when it concluded that Lyons' post-conviction petition was barred under the doctrine of laches.

We reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On August 6, 1966, Lyons, Ed Harris, and Phillip Curts broke into the National Guard Armory in Elwood. After the men were unsuccessful in trying to open a locked door inside the Armory, Lyons found the night watchman, Virgil Arehart, and Lyons rendered Arehart unconscious before taking a set of keys from him. Lyons, Harris, and Curts then stole two radios and left the premises. Arehart sustained serious injuries and was hospitalized. A few days later, while still hospitalized, Arehart died as a result of pneumonia.

The State charged Lyons with murder. A jury found him guilty as charged, and the trial court entered judgment and sentence accordingly. Lyons' trial counsel filed a Motion for New Trial, alleging several trial errors, but the trial court denied that motion. Lyons believed that his counsel would file a direct appeal on his behalf thereafter, but no appeal was filed. In August 1978, Lyons filed a pro se petition for post-conviction relief, and the trial court appointed a public defender to represent Lyons in October 1978. Lyons' public defender filed an amended petition for post-conviction relief on October

10, 1978, and it was amended a second time on October 21, 2007.¹ Following a hearing, the post-conviction court denied Lyons' petition. This appeal ensued.

DISCUSSION AND DECISION

The petitioner bears the burden of establishing his grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Harrison v. State, 707 N.E.2d 767, 773 (Ind. 1999), cert. denied, 529 U.S. 1088 (2000). To the extent the post-conviction court denied relief in the instant case, Lyons appeals from a negative judgment and faces the rigorous burden of showing that the evidence as a whole “leads unerringly and unmistakably to a conclusion opposite to that reached by the [] court.” See Williams v. State, 706 N.E.2d 149, 153 (Ind. 1999) (quoting Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993)), cert. denied, 529 U.S. 1113 (2000). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. Bivins v. State, 735 N.E.2d 1116, 1121 (Ind. 2000).

Lyons contends that the post-conviction court abused its discretion when it concluded that the doctrine of laches bars his post-conviction petition. The question of laches is to be determined by the trial court in the exercise of its sound discretion. Day v. State, 483 N.E.2d 745, 746 (Ind. 1985). The equitable doctrine of laches operates to bar consideration of the merits of a claim or right of a person who has neglected for an unreasonable time, under circumstances permitting due diligence, to do what in law should have been done. Sweeney v. State, 886 N.E.2d 1, 6 (Ind. Ct. App. 2008). In order

¹ The record does not reveal a reason for the delay between amended petitions.

for laches to apply, the State must prove by a preponderance of the evidence that the petitioner unreasonably delayed in seeking relief and that the State is prejudiced by the delay. Id. While the delay in this case may be deemed unreasonable, nevertheless we must conclude that the State has not satisfied its burden to prove that the delay is attributable to Lyons and not his attorney.

In Edwards v. State, 676 N.E.2d 1087, 1090 (Ind. Ct. App. 1997), we observed that the mere passage of time alone is not enough to constitute laches. For instance, “[w]here a defendant is diligent in maintaining contact with the public defender, continually expressing his desire for assistance, laches will not lie, especially when he is continuously promised assistance.” Id. Here, there is no evidence in the record to explain whether the almost thirty-year delay in Lyons’ post-conviction proceedings was due to a lack of diligence on Lyons’ part. The Chronological Case Summary shows that a public defender entered an appearance on behalf of Lyons in October 1978 and moved to stay the post-conviction proceedings, which motion was granted. There is no further mention of the post-conviction proceedings in the CCS until 2005.

In its brief on appeal, the State acknowledges that it does not know whether the delay was the fault of Lyons or his public defender. See Brief of Appellee at 5 (“either Petitioner or his attorney failed to pursue his post-conviction claims”). The post-conviction court excused Lyons for the delay until 1988, when he was released from prison, but found that Lyons is “chargeable with a nineteen year delay as he was a free man” after that. Appellant’s App. at 116. We cannot agree. While, at first blush, it would appear that laches applies here, Lyons was represented by a public defender during

the interim,² and the State has not shown a lack of diligence on Lyons' part. Thus, we are compelled to hold that the doctrine of laches does not bar his post-conviction petition. See Twyman v. State, 459 N.E.2d 705, 712 (Ind. 1984) (holding State bears burden of proving affirmative defense of laches in post-conviction proceeding). We therefore remand to the post-conviction court for a determination on the merits of the petition. See Sweeney, 886 N.E.2d at 6 (noting appropriate remedy where post-conviction court has applied laches defense in error is to remand).

On remand, the post-conviction court need only rule on Lyons' claims of ineffective assistance of trial and appellate counsel.³ Lyons' other claims, namely, that he was placed in a position of grave peril as the result of alleged prosecutorial misconduct and that the State presented insufficient evidence to support his conviction, are not available as freestanding claims. See Lindsey v. State, 888 N.E.2d 319, 324 (Ind. Ct. App. 2008), trans. denied. Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001), cert. denied, 537 U.S. 839 (2002). Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. Id. If

² In Horton v. State, 510 N.E.2d 648, 649 (Ind. 1987), our Supreme Court noted, in dicta, that a defendant should not be charged with a delay after having contacted the public defender's office. Here, the CCS shows that the trial court appointed a public defender to represent Lyons in his petition for post-conviction relief in 1978, and there is no entry showing that the public defender's office ever withdrew its representation. The trial court again appointed a public defender to represent Lyons on his 1984 Motion for Days Spent in Presentence Confinement, which suggests that he was unrepresented at some point between 1978 and 1984. But the record is silent on the question of whether Lyons was unrepresented by counsel and, if so, for what period of time. It is the State's burden to prove its affirmative defense of laches. See Twyman v. State, 459 N.E.2d 705, 712 (Ind. 1984). In this close case, we hold that the State has not met its burden on appeal.

³ In its conclusions, the post-conviction court's denial of Lyons' claims of ineffective assistance of counsel appears to be intertwined with its conclusion that his petition is barred by the doctrine of laches. On remand, we instruct the post-conviction court to address the merits of those claims.

an issue was known and available, but not raised on direct appeal, it is waived. Id.; see also Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) (noting claims of fundamental error raised in post-conviction petition but known and available on direct appeal are waived).

Lyons' attempts to frame his freestanding claims as fundamental error do not preclude waiver. Our Supreme Court has clarified that

any issue set forth in a post-conviction petition must be raised within the purview of the post-conviction rules, e.g., deprivation of the Sixth Amendment right to effective assistance of counsel, or be an issue demonstrably unavailable to the petitioner at the time of his trial and direct appeal. Therefore, in a post-conviction petition an allegation of the denial of the petitioner's due process rights may not be raised in the "freestanding" form of an allegation of fundamental error.

Bailey v. State, 472 N.E.2d 1260, 1263 (Ind. 1985).⁴

Reversed and remanded with instructions.

MAY, J., concurs.

ROBB, J., dissents with separate opinion.

⁴ There has been some dispute whether Bailey is still good law. But in Canaan v. State, 683 N.E.2d 227, 235 n.6 (Ind. 1997), our Supreme Court stated:

It is true that we have acknowledged an exception to the waiver rule in circumstances where the trial court committed "fundamental error." But we view this exception as an extremely narrow one, available only "when the record reveals clearly blatant violations of basic and elementary principles [of due process], and the harm or potential for harm [can]not be denied." Warriner v. State, 435 N.E.2d 562, 563 (Ind. 1982). While concerns over due process do sometimes merit invocation of a fundamental error exception to the contemporaneous rule on direct appeal, we think its availability as an exception to the waiver rule in post-conviction proceedings is generally limited to those circumstances we set forth in Bailey v. State].

(Emphasis and alterations original). See also Lindsey, 888 N.E.2d at 324 (holding fundamental error doctrine is not applicable in post-conviction proceedings absent circumstances listed in Bailey).

**IN THE
COURT OF APPEALS OF INDIANA**

WAYMAN H. LYONS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 48A02-0804-PC-352
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

ROBB, Judge, dissenting

I respectfully dissent from the majority’s conclusion that laches does not bar Lyons’s post-conviction petition. The post-conviction court denied Lyons’s petition. I do not believe that Lyons has shown that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court, a standard that the majority acknowledges is a “rigorous burden.” Slip op. at 3.

Lyons was convicted and sentenced in 1967. Lyons’s motion for new trial was denied that same year. The record shows that nothing further happened in Lyons’s case until he filed a pro se petition for post-conviction relief in 1978, over eleven years after his conviction. Counsel entered an appearance for Lyons several months later and counsel’s request that the post-conviction proceedings be stayed pending further investigation was granted. In 1984, Lyons filed a pro se motion for days spent in

presentence confinement and counsel was thereafter appointed at his request to represent him in the matter. After the trial court granted Lyons's motion in part (granting Lyons credit for 250 of the 774 days he requested), Lyons filed a pro se motion for jail time credit seeking credit for the remaining days. That motion was denied. Lyons was apparently released from prison in 1988. In August of 2005, Lyons sent a letter to the Madison County Clerk asking for a copy of the CCS and the 1978 post-conviction pleadings in his case. In October of 2005, counsel filed an appearance on Lyons's behalf and sought permission to file a belated notice of appeal. When permission was denied, counsel filed in October of 2007 an amended post-conviction petition.

Although I agree with the majority that the mere passage of time is insufficient to prove laches, see slip op. at 4 (citing Edwards v. State, 676 N.E.2d 1087, 1090 (Ind. Ct. App. 1997), trans. denied), I do not consider a near forty-year delay the "mere passage of time." Unlike the defendant in Edwards, who was convicted in 1976 and within two weeks of his direct appeals being exhausted, contacted the State Public Defender's Office, remaining in constant contact with the Public Defender's Office and complying with every request made of him until he finally filed a pro se petition for post-conviction relief in 1990 when his attempts to solicit help had yet to yield results, Lyons did not initially seek post-conviction relief until eleven years after his conviction. He had the assistance of counsel on at least two occasions prior to the petition for post-conviction relief being amended nearly thirty years later. Judge Hoffman, concurring in the Edwards result, noted the "unique circumstances" prompting his concurrence: Edwards immediately contacted the Public Defender's Office after his direct appeal, remained in

contact with the Public Defender's Office, was never told that he would not be represented, was informed that he should not initiate further communications with the office, and "of paramount importance[,] the neglect was by an arm of the State." Edwards, 676 N.E.2d at 1090. The facts of this case are not of the same caliber so as to overcome the factors weighing in favor of a laches finding.

Moreover, I note, as the majority does, see slip op. at 5 n.2, that our supreme court stated in Horton v. State, 510 N.E.2d 648, 649 (Ind. 1987), that the defendant "can hardly be charged with any delay which occurred following his contacting of the Public Defender's Office." However, the delay in Horton from conviction to post-conviction filing was only four and a half years, and the court did hold the defendant chargeable with the delay which occurred after his receipt of the transcript of his trial and prior to his contacting the Public Defender, a period of one year. Id. There was a lengthy delay between Lyons's conviction and his initial post-conviction filing and it does not appear that Lyons was represented by the Public Defender's Office continuously from 1978 to the present, nor did he think that he was, as evidenced by his pro se filings and requests for appointment of counsel in the interim.

Under the circumstances of this case, I do not believe Lyons has made the required showing for us to reverse the determination of the post-conviction court.⁵

⁵ Lyons's brief focuses on the merits of his post-conviction claims and does not specifically challenge the post-conviction court's determination regarding laches. It is only in his reply brief that Lyons addresses the laches argument. Because the majority has focused on the delay element of laches, I, too, have focused on that element. As for the prejudice element, however, the State must prove that the unreasonable delay materially diminishes a reasonable likelihood of successful re-prosecution. Oliver v. State, 843 N.E.2d 581, 586 (Ind. Ct. App. 2006), trans. denied. The State alleged that many of its witnesses were now deceased or unavailable and the post-conviction court found that the State was prejudiced by Lyons's delay. I see no compelling argument for reversing the post-conviction court's finding on this element, either.