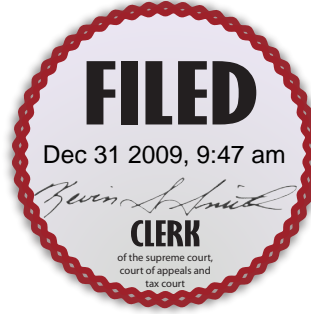


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RAPHAEL ISRAEL MILES,)

Appellant-Defendant,)

vs.)

No. 82A01-0711-PC-529

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE VANDERBURGH CIRCUIT COURT

The Honorable Carl A. Heldt, Judge

Cause No. 82C01-0004-CF-472

December 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Raphael Israel Miles (“Miles”), acting pro-se, appeals the dismissal, with prejudice, of his petition for post-conviction relief, contending that he is entitled to a review of his allegations that he received ineffective assistance of trial and appellate counsel. We reverse and remand.

Facts and Procedural History

On June 4, 2001, Miles was found guilty of two counts of Dealing in Cocaine, as Class B felonies,¹ and one count of Dealing in Marijuana, as a Class A misdemeanor,² and was adjudicated an habitual offender. He received an aggregate sentence of thirty-five years. Miles’ convictions were affirmed on direct appeal. Miles v. State, 764 N.E.2d 237 (Ind. Ct. App. 2002), trans. denied.

On July 22, 2002, Miles filed a pro-se petition for post-conviction relief, alleging that he was deprived of the effective assistance of trial and appellate counsel. He subsequently filed a document entitled “Petition for Post-conviction Relief Underlyings” and an amended petition for post-conviction relief.³ (App. 84.) The State requested that the post-conviction court order the submission of affidavits in lieu of a hearing, and the motion was granted over Miles’ objection. Miles submitted an affidavit, which the State challenged as being so deficient that Miles had failed to pursue his claim for relief. The post-conviction court, at the

¹ Ind. Code § 35-48-4-1.

² Ind. Code § 35-48-4-10.

³ Although Miles was at times represented by the Indiana Public Defender’s Office, each of the pleadings was filed pro-se.

State's request, dismissed Miles' petition for post-conviction relief, with prejudice.⁴

Miles appealed, and this Court issued an order directing him to show cause as to why the appeal should not be dismissed as untimely. On May 15, 2008, this Court dismissed the appeal. Miles sought transfer, and the Indiana Supreme Court vacated the order of dismissal and remanded the cause to this Court.

Discussion and Decision

Post-conviction Rule 1(9)(b) provides in relevant part: "In the event petitioner elects to proceed pro se, the court at its discretion may order the cause submitted upon affidavit." When directed by the post-conviction court to submit his case via affidavit, Miles submitted a typewritten affidavit disclosing his name, citizenship, and residency, and containing additional handwritten language as follows:

I hereby swear, under the penalties of perjury [sic], that all P.C. issues are true and accurate to the best of my abilities and knowledge.

(App. 109.) The State contends that Miles' post-conviction petition was properly dismissed because his affidavit "stated nothing about the facts surrounding his claims." Appellee's Brief at 6. Miles contends that he has a meritorious petition, which was erroneously denied without an evidentiary hearing.

Indiana Trial Rule 41(E) provides in relevant part:

Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court,

⁴ The trial court did not specifically reference a trial or post-conviction rule. However, it appears that the post-conviction court granted the State the remedy available under Indiana Trial Rule 41(E), dismissal for failure to prosecute a civil action or comply with rules, albeit without scheduling a T.R. 41 hearing.

on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution.

A dismissal pursuant to Trial Rule 41(E), unless otherwise specified by the trial court, acts as an adjudication on the merits. Olson v. Alick's Drugs, Inc., 863 N.E.2d 314, 321 (Ind. Ct. App. 2007), trans. denied. We review a dismissal under an abuse of discretion standard. Id. at 319.

Although "courts appear to use the terms 'denial' and 'dismissal' interchangeably in the context of post-conviction relief, they are not synonymous." Joseph v. State, 603 N.E.2d 873, 876 (Ind. Ct. App. 1992). The difference lies in how each arises. Id. A petition for post-conviction relief may be "summarily denied when the pleadings conclusively show the petitioner is entitled to no relief." Id. (emphasis added) (citing Ind. Post-Conviction Rule 1(4)(f)); see Godby v. State, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), trans. denied. "The petition may be dismissed when the petitioner has failed to comply with the trial rules or when he has failed to take action for a period of 60 days." Id. (emphasis added) (citing T.R. 41(E)).

We disagree with the State that Miles' affidavit was so wholly inadequate that it amounted to a lack of response to the post-conviction court's order to submit affidavits. Although the affidavit was not artfully drafted, it can reasonably be construed as incorporating by reference the factual allegations contained within the post-conviction

pleadings. Therein, Miles had asserted that his trial attorney's performance was deficient in several respects, including failure to aggressively pursue an alibi defense. Moreover, Trial Rule 41(E) contemplates a hearing prior to dismissal. See also Perigo v. State, 646 N.E.2d 372, 373 (Ind. Ct. App. 1995) (holding that, where there has been a failure to timely act upon a petition but counsel has entered an appearance, the post-conviction court is to order a hearing and require the petitioner to show cause why his petition should not be dismissed).

The post-conviction court erred in summarily dismissing, with prejudice, Miles' post-conviction petition. However, we do not agree with Miles' contention that he has an absolute entitlement to a post-conviction hearing at which he might present pertinent evidence. As previously observed, Post Conviction Rule 1(9)(b) provides for the submission of affidavits, in the discretion of the post-conviction court. See also Smith v. State, 822 N.E.2d 193, 201 (Ind. Ct. App. 2005) ("if the PCR court orders the cause submitted by affidavit under Rule 1(9)(b), it is the court's prerogative to determine whether an evidentiary hearing is required"), trans. denied. We reverse and remand for further proceedings consistent with this opinion and with the Indiana Post-Conviction Rules.

Reversed and remanded.

NAJAM, J., and MATHIAS, J., concur.