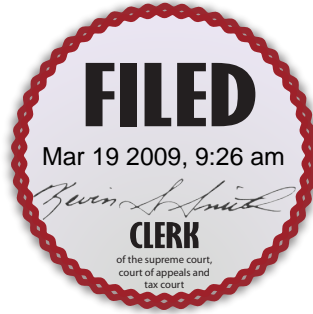


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

EDWARD MURRELL)
)
 Appellant-Petitioner,)
)
 vs.) No. 49A02-0807-PC-657
)
 STATE OF INDIANA,)
)
 Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 20
The Honorable William E. Young, Judge
Cause No. 49G20-0302-FA-23168

March 19, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Edward Murrell (Murrell), appeals the denial of his petition for post-conviction relief.

We reverse and remand for further proceedings.

ISSUE

Murrell raises one issue, which we restate as: Whether the trial court erred by summarily denying Murrell's petition for post-conviction relief without holding a hearing.

FACTS AND PROCEDURAL HISTORY

On February 11, 2003, the State charged Murrell with dealing cocaine, as a Class A felony; possession of cocaine, as a Class C felony; dealing marijuana, as a Class D felony; and possession of marijuana, as a Class D felony. A jury trial was held on January 8 through 9, 2004. The jury found Murrell guilty as charged. The trial court sentenced Murrell to thirty years for Class A felony dealing cocaine; four years for Class C felony possession of cocaine; 545 days for Class D felony dealing marijuana; and 545 days for Class D felony possession of marijuana, and ordered all sentences to run concurrently. Murrell appealed his convictions, arguing that the trial court erred by denying his request for an elected judge to preside over his jury trial, as opposed to a commissioner. See *Murrell v. State*, Case No. 49A04-0403-CR-155 (Ind. Ct. App. Dec. 23, 2004). On appeal, we concluded that Murrell had failed to lodge an appropriate objection when the commissioner "assumed to act," thereby waiving his objection, and we affirmed his convictions. *Id.* at 8.

On March 17, 2006, Murrell filed a *pro-se* petition for post-conviction relief alleging in part that he had received ineffective assistance of trial and appellate counsel. On April 19, 2006, an attorney from the Indiana State Public Defender Agency entered his appearance on behalf of Murrell. On March 26, 2008, the trial court permitted the attorney to withdraw his appearance. On June 11, 2008, the trial court convened for what was to be a hearing on the petition for post-conviction relief. However, none of the witnesses Murrell had subpoenaed appeared to testify. The trial court stated that it was going to summarily deny his petition.

The trial court explained:

[T]he issues raised in your Post Conviction Relief [P]etition were review[ed] by the [S]tate [P]ublic Defender's [O]ffice. They have filed a certification that all of the issues raised ---- that none of the issues raised in your Post Conviction Relief Petition merit having a hearing. And that there would be no opportunity for any positive finding based upon that. I then asked you if you had any additional issues other than what you had in your petition. You said no. I said based upon the certification of the State Public Defender's [O]ffice, that they had fully and totally review[ed] this, that there are no issues of material fact and therefore the petition is denied.

(Transcript pp. 14-15). Murrell offered the trial court one more issue that the attorney from the State Public Defender's Office may not have addressed, but the trial court still denied his petition without the entry of findings of fact or conclusions of law.

Murrell now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Murrell contends that the trial court erred by denying his petition for post-conviction relief without permitting him to put on evidence, and the State agrees. In *Evolga v. State*, 722 N.E.2d 370, 372 (Ind. Ct. App. 2000), we addressed a situation where a trial court had

summarily denied, without an evidentiary hearing, a post-conviction relief petitioner's claim of ineffective assistance of trial counsel and fundamental error. We relied, in part, upon *Sherwood v. State*, 453 N.E.2d 187, 189 (Ind. 1983), where our supreme court explained: "As this [c]ourt has stated many times, 'Incompetency of counsel revolves around the particular facts of each case.'" *Id.* (quoting *Tillman v. State*, 432 N.E.2d 407, 408 (Ind. 1982)). We concluded that although it seemed unlikely that Evolga would be able to prove his claims, it was error for the trial court to deny those claims without the benefit of a hearing. *Evolga*, 722 N.E.2d at 374.

Our review of the record discloses that the trial court relied upon the Notice of Withdrawal of Appearance by the attorney from the State Public Defender's Office to conclude that none of Muller's claims had merit. The trial court is correct in assuming that by requesting to withdraw as counsel the State Public Defender's Office has likely determined that the petition for post-conviction relief does not have merit. *See* Ind. Post-Conviction Rule 1(9). However, this determination by the State Public Defender's Office is only for the purpose of determining whether counsel will be provided, and Post-Conviction Rule 1 specifically reserves the right of a petitioner to proceed *pro se* after counsel withdraws. P-C.R. 1(9)(c). Essentially, the trial court has abdicated the decision on the

merits of the case to a state agency's decision fulfilling another purpose without hearing or receiving any evidence; this, our trial courts should not do.

CONCLUSION

Based on the foregoing, we conclude that the trial court erred when it denied Muller's petition for post-conviction relief without a hearing.

Reversed and remanded for further proceedings.

DARDEN, J., and VAIDIK, J., concur.