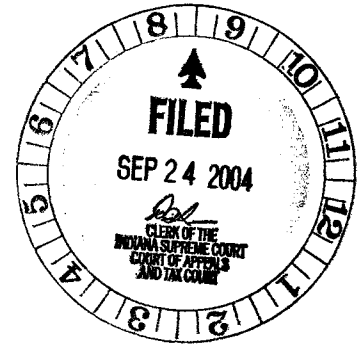


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**IN THE
COURT OF APPEALS OF INDIANA**

HOWARD FRANK STREET, JR.,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 84A04-0401-CR-14

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0110-CF-2474

September 24, 2004

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Howard Frank Street, Jr. appeals the denial of his petition for post-conviction relief. Street claims that the post-conviction court should have granted his petition because the trial court erred by determining that he was competent to stand trial despite two mental health professionals' opinions to the contrary. Based upon the limited evidence before the trial court, we find that the trial court erred in its determination that Street was competent to stand trial. Consequently, we reverse the denial of his petition for post-conviction relief and reverse his convictions based upon our finding that Street's lack of competency renders his guilty pleas involuntary, unknowing, and unintelligent.

Facts and Procedural History

In 1993, Street shot his mother and father as they returned home from shopping. Street's father managed to escape after being shot, but Street fatally wounded his mother. Before this incident, Street had not had any run-ins with the law, other than traffic offenses. In fact, he was described as "a good decent kid." Tr. p. 59. Street's behavior, however, deteriorated following his involvement in a traffic accident in May of 1986, in which his skull was fractured and he suffered a debilitating leg injury.

Based on the shooting incident, the State charged Street with Murder and Attempted Murder. In response, Street filed a Notice of Intent to Interpose the Defense of Mental Disease or Defect. The trial court then appointed two mental health professionals to examine Street: Dr. Dinesh Mehta, a psychiatrist, and Dr. Michael Murphy, a psychologist. Street also filed a Motion for Competency Determination, and

the trial court appointed Dr. Mehta and Dr. Murphy to evaluate Street's competency to stand trial.

The trial court conducted a competency hearing, during which Dr. Murphy testified:

[Street] lacks the capacity to testify relevantly and lacks the capacity to realistically challenge prosecution witnesses. The difficulty in assessing this, because not only am I observing his unwillingness to provide me information and to cooperate with his attorney, he is not providing sufficient information for me to make a [determination] as to whether or not this is a substantial mental illness which interferes with his capacity to participate or is a malingering or some other motivated effort to avoid the proceedings.

Exhibits Vol. II, p. 69. After relaying this information and informing the trial court that further observation of Street was necessary, Dr. Murphy ultimately opined that he would "err on the side of saying that the best information that I have is that he is not competent" *Id.* at 74.

Dr. Mehta interviewed Street on July 2, 1993, and then performed a one and a half hour clinical psychiatric examination on July 29, 2003. While Dr. Mehta did not testify at the competency hearing, the trial court did have letters from Dr. Mehta before it. The first letter, dated July 23, 1993, expressed a concern about Street's depression and uncooperativeness and requested that Street be transferred to the psychiatric unit at Terre Haute Regional Hospital.¹ The trial court issued an Order the same day granting this request. The second letter, dated July 29, 1993, opined: "I have noticed a significant

¹ The letter also stated, "If it turned out that he needed longer term psychiatric care, [then] one could consider [commitment] to a State Facility, under the Indiana Department of Mental Health's jurisdiction." Appellant's App. p. 55. Although we do not know when Street was released from Terre Haute Regional, we do know that the Sheriff was ordered to return him to the Vigo County Jail following his appointment with Dr. Mehta on July 29, 1993.

change in [Mr. Street's] cognitive processing and mood, and at present, he does not appear capable of assisting his attorney in his defense." Appellant's App. p. 58. The letter continued by stressing the need for additional psychiatric observations and a battery of tests including a cat-scan and electroencephalogram. These recommended observations and tests were never conducted. The third letter, dated August 5, 1993,² was less equivocal, stating, "Based on my examination, it is my opinion that Mr. Street is not mentally competent at this time to assist his attorney in his defense." *Id.* at 59. Both mental health professionals also submitted full reports to the court; however, they did not do so until after the competency hearing.

After engaging in a brief two to three minute colloquy with Street at the competency hearing—in which Street professed his competency to stand trial and explained to the trial court that he purposefully was not cooperating with the doctors and his attorney because he wished to change his plea to guilty—the trial court determined that Street was competent but urged Street to carefully consider his decision to change his plea. Approximately six weeks later, Street entered a plea of guilty to both counts, which the trial court accepted.

In 1996, Street filed a pro se petition for post-conviction relief, which was amended by counsel in 2000. A second amended petition for post-conviction relief was filed in 2003, raising two issues, which the post-conviction court summarized as follows:

- 1) That Street's guilty plea was involuntary, as Street was incompetent;
and
- 2) The trial court erred in determining that Street was competent, in that it was contrary to the evidence before the Court, and that the trial court

² The August 1993 letter indicates that Dr. Mehta last evaluated Street on July 29, 2003, the same day he sent the first letter based on that same evaluation.

could not make such a finding because it did not follow the mandatory procedures in determining competency as set forth in the Indiana Code.^[3]

Id. at 264. Following a hearing—at which the post-conviction court had before it evidence suggesting Street’s present incompetence⁴ and the reports of the mental health professionals who had evaluated Street for purposes of determining his competency in 1993—the post-conviction court denied Street’s petition. Street now appeals.

Discussion and Decision

Street appeals the denial of his petition for post-conviction relief. At the outset we note that seeking post-conviction relief pursuant to Indiana Post Conviction Rule 1 is the proper vehicle for challenging the validity of a guilty plea. *Collins v. State*, 740 N.E.2d 143, 146 (Ind. Ct. App. 2000). Stated differently, a conviction based upon a guilty plea may not be challenged by motions to correct errors and direct appeals. *Id.* (citing *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996)). This conclusion derives from our supreme court’s ruling that one consequence of pleading guilty is the restriction of the ability to challenge the *conviction* on direct appeal. *Id.*

³ The relevant section of the Indiana Code is 35-36-3-1, which provides:

The court shall appoint two (2) or three (3) competent, disinterested psychiatrists, psychologists endorsed by the Indiana state board of examiners in psychology as health service providers in psychology, or physicians, at least one (1) of whom must be a psychiatrist, who shall examine the defendant and testify at the hearing as to whether the defendant can understand the proceedings and assist in the preparation of the defendant’s defense.

⁴ This evidence consisted of a sampling of several hundreds of letters that Street had sent to court personnel, counsel, family, and others—the subject matter of which called Street’s mental stability into question—and the testimony of the defense expert, Dr. Michael Gelbort, who opined that Street’s conditions had worsened since his competency hearing in 1993.

The petitioner in a post-conviction proceeding must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Wesley v. State*, 788 N.E.2d 1247, 1250 (Ind. 2003). Thus, when appealing from the denial of a petition for post-conviction relief, the petitioner stands in the position of one appealing a negative judgment. *Collins v. State*, 800 N.E.2d 609, 612 (Ind. Ct. App. 2003). As such, the petitioner faces a rigorous standard of review: The petitioner must convince the court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.* In other words, we will disturb a post-conviction court's decision only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Id.* We do not defer to the post-conviction court's legal conclusions, but we do accept its factual findings unless they are "clearly erroneous." *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002), *reh'g denied, cert. denied*, 124 S. Ct. 69 (2003).

We begin our analysis with the State's claim that the doctrine of laches bars Street's delayed request for relief. Although post-conviction relief may be available at any time, the right to relief may also be directly or impliedly waived. *Blunt-Keene v. State*, 708 N.E.2d 17, 19 (Ind. Ct. App. 1999). To this end, the State may raise the affirmative defense of laches, as it did here. *See id.* For the doctrine of laches to bar relief, the State must prove by a preponderance of evidence that the petitioner unreasonably delayed in seeking relief and that the State was prejudiced by the delay. *Id.* The burden of proving laches rests entirely upon the State. *Id.*

For post-conviction laches, the element of prejudice is determined by whether the prejudice-claiming party's opportunity for a fair trial has been detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which it otherwise would have been entitled. *Armstrong v. State*, 747 N.E.2d 1119, 1122 (Ind. 2001). Here, the State fails to establish prejudice. The State argues, "the evidence that [Street] is unlikely to recover his competency quickly renders the chances of a successful re-prosecution less likely as witnesses become unavailable."⁵ Appellee's Br. p. 8. The State makes no showing that all—or even most—of the witnesses are no longer available. To the contrary, at least nine of the ten law enforcement witnesses are still available, as well as Street's father, who was one of the victims. Thus, the State's concern focuses on the hypothetical situation that these now available witnesses may become unavailable before Street would regain competency. First, the State has made no showing that the unavailability of any of the available witnesses is imminent. Second, we note that the State has means of preserving witnesses' testimony through the use of evidentiary depositions. As the State has failed to prove by a preponderance of the evidence that it would be prejudiced, we find the State's laches argument unavailing. Having determined that laches does not bar Street's claims of error, we now turn to the merits of his case.

Street raises two issues, one of which we find dispositive: whether Street was competent to enter a plea of guilty to his charges. Initially we note that "as a matter of due process of law a person who lacks sufficient comprehension to understand criminal proceedings against him and to assist in his defense cannot be put on trial for an offense

⁵ The State also argues that some of the physical evidence has been destroyed. The State, however, failed to establish how it is prejudiced by the destruction of this physical evidence, especially in light of the fact that one of the victims of the crime is available to testify.

until he becomes competent.” *Smith v. State*, 443 N.E.2d 1187, 1188 (Ind. 1983) (relying on *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966); *Dragon v. State*, 270 Ind. 223, 383 N.E.2d 1046 (1979)). As a corollary, we recognize that this rule of law applies not only to competency to stand trial but to competency to plead guilty as well. *See Godinez v. Moran*, 509 U.S. 389, 396 (U.S. 1993) (“A criminal defendant may not be tried unless he is competent, and he may not waive his right to counsel or plead guilty unless he does so ‘competently and intelligently[.]’”) (internal citations omitted); *Brady v. United States*, 397 U.S. 742, 756 (1970) (“In assessing whether a waiver of rights by plea is knowing and intelligent courts consider whether the defendant ‘was incompetent or otherwise not in control of his mental faculties.’”). *See also Davis v. State*, 675 N.E.2d 1097, 1102 (Ind. 1996) (positing that a defendant’s guilty plea is not valid unless it is knowing, voluntary, and intelligent).

Based on the limited evidence before it, we find that the trial court erred in finding that Street was competent to stand trial. It follows then that the post-conviction court also erred in rejecting Street’s argument that his plea was rendered involuntary, unknowing, and unintelligent based on his incompetency. We reach this result for varied reasons. First, we note that Street was described as a “good, decent kid” until he sustained a head injury in a car accident. After this injury, Street’s behavior began to deteriorate. Consequently, the mental health professionals recommended tests, including a cat-scan and electroencephalogram, to evaluate whether this head injury may have impaired Street’s competency. The recommended tests were never performed.

Second, both mental health professionals who evaluated Street's competency opined that he was incompetent. These mental health professionals spent an extended period of time with Street, and based on the observations of these professionals trained in the fields of psychiatry and psychology, the ultimate conclusion reached by both mental health professionals was that Street was not competent to stand trial. Nevertheless, the trial court—after a brief two to three minute encounter with Street—elected to disregard the opinions of the two court-appointed mental health professionals.

While a trier of fact may disregard expert testimony—see *Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004) (“[T]he trier of fact is free to disregard the testimony of experts and rely upon the testimony of lay witnesses.”)—a decision to do so should not be made lightly. The trial court's rejection of the experts' opinions was premised on the “lucidity” exhibited by Street during his colloquy with the trial court and Street's own opinion that he was competent. While generally such a concession by a defendant would carry the day, we cannot say so in this instance where Street's concession may have been the product of a diseased mind.

Because the trial court's opportunity to observe Street was so brief and two mental health professionals who evaluated Street for an extended period of time on more than one occasion ultimately opined that Street was incompetent, the more prudent course to follow would have been to continue the proceedings to allow for the further observations and testing that both mental health professionals had recommended. Such a course was not followed in this case. Instead, the trial court disregarded the experts' opinions and

found Street to be competent. Based on the record before us, we find this conclusion to be erroneous.

Given the evidence that Street was incompetent, we cannot be certain that Street's statements to the contrary were not the product of mental illness. As noted above, a person must be competent in order to plead guilty. Because we cannot say that Street was competent at the time he entered his pleas of guilty, we cannot conclude that Street's pleas of guilty were voluntary, knowing, and intelligent. Therefore, we find that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Consequently, we reverse the denial of Street's petition for post-conviction relief and vacate his pleas of guilty.⁶ Because there is no dispute that Street committed the crimes to which he entered pleas of guilty, we note that double jeopardy does not bar Street from being retried should he regain competency.

Reversed.

SULLIVAN, J., and MAY, J., concur.

⁶ Because we vacate Street's convictions on the grounds that his guilty pleas were not voluntary, knowing, and intelligent, we need not reach the issue of the alleged deficiencies in the competency hearing and whether Street may have waived these procedural deficiencies. We do, however, note that the statute governing competency hearings requires that at least two mental health professionals—one of whom must be a psychiatrist—evaluate the defendant and testify at the competency hearing. See Ind. Code § 35-36-3-1.