Recent Development

Criminal Procedure — INDIANA POST-CONVICTION REMEDY RULE 1—The failure of a defense attorney to conduct voir dire, make an opening statement, cross-examine the prosecution's witnesses, present defense witnesses, and make a closing statement is not sufficient incompetence for obtaining relief under Post-Conviction Remedy Rule 1, if such failure is due to an attorney's misconception of a single rule of law.—*Bucci v. State*, 332 N.E.2d 94 (Ind. 1975).

The Indiana Supreme Court in *Bucci v. State*[1] may effectively have sounded the death knell to a prisoner's hope of obtaining relief by the use of a post-conviction remedy based on incompetence of counsel. The review mechanisms available through the utilization of a post-conviction remedy exist apart from the normal trial-appeal process. In many cases, as in the instant one, the appellant will have been tried, found guilty, and have appealed to the Indiana Supreme Court, or perhaps to the United States Supreme Court, prior to the initial post-conviction hearing. Further, that hearing could conceivably be appealed through the state and federal court hierarchy. Therefore, to assure an understanding of the development of this case, the bizarre facts surrounding the conviction of Fiore Carl Bucci, Salvator Magnasco, and Richard Viccarone, and the appeal process which followed their conviction will be presented in the order in which they occurred.

In late 1965, the defendants were brought to trial on two separate counts: conspiracy to commit a felony and commiting a felony while armed.[2] Prior to trial, the defendants' attorneys, who were chosen by the defendants and who were reputedly experienced criminal lawyers,[3] had conducted discovery and had persuaded the prosecution to drop two of the four counts then lodged against the defendants.[4] As a part of their "paper war"[5] prior to trial, the de-

[1]332 N.E.2d 94 (Ind. 1975).

[2]*Id.*

[3]*Id.* at 95. *See* Record, vol. 1, at 436, Bucci v. State, 332 N.E.2d 94 (Ind. 1975) [hereinafter cited as Record].

[4]Brief for Appellants, *passim*, Bucci v. State, 332 N.E.2d 94 (Ind. 1975).

[5]"Paper war" as used in this context refers to the motions, interrogatories,

fendants' attorneys filed a number of motions, including two motions to quash and two motions for change of venue.[6] However, the attorneys failed to perfect either of the two motions for change of venue because they did not timely strike from the panel of judges as required by Supreme Court Rule 1-12.[7] After the time for striking from the panel of judges had run on each motion, the State twice requested and both times obtained resumption of jurisdiction by the original judge.

The trial began shortly after failure of the second change of venue motion and ended two days later. Neither the defendants nor their attorneys participated during this period. The attorneys did not take part in the voir dire, make either an opening or a closing statement, object to any questions asked by the prosecutor or to the answers of the state's witnesses, cross-examine the state's witnesses, or present any evidence. Further, the defendants did not testify.[8] After conviction by the jury, the defendants appealed to the Indiana Supreme Court, alleging that the trial judge's resumption of jurisdiction after defendants' change of venue motions violated the trial rules and case law. The defendants argued that the trial court, when it granted the original change of venue motion, lost all jurisdiction in the subsequent proceedings. Therefore, the court's later resumption of jurisdiction was incorrect. The Indiana Supreme Court, citing numerous cases on point, held that

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and other procedural and discovery tactics used by an attorney prior to trial. *See* Brief for Appellants at 14.

[6] *Id.* at 11-14.

[7] Pre-1971 Supreme Court Rule 1-12, quoted by the court in Bucci v. State, 250 Ind. 670, 671-72, 237 N.E.2d 87, 88 (1968), provided in pertinent part:

> Hereafter whenever in any proceeding, whether civil, statutory or criminal, in any court except the courts of justice of the peace and magistrates, it shall become necessary to select a special judge, the exclusive manner shall be as follows:
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> . . . .
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> (3) If neither method provided for by paragraphs (1) or (2) for the selection of a special judge be adopted, then the presiding judge . . . shall submit a list of three (3) persons from which, by striking, an appointee may be selected. In an adversary proceeding each party may strike one (1) name. . . . The moving party shall strike first. . . .
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> (6) All of the proceedings hereinunder shall be taken expeditiously.
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> (7) When it becomes necessary to nominate a list under paragraph (3), it shall be the duty of the judge, within three (3) days after his attention has been called to that fact as above provided, to make such nomination and submit the same to the parties in the action, from which the parties within two (2) days thereafter may strike as herein provided.

Rule 1-12 (Supreme Court Rules, 1964).

[8] 250 Ind. at 671-72, 237 N.E.2d at 88.

when a defendant, following a change of venue request, fails to proceed in a timely manner to strike from the panel of judges provided by the court,[9] the original court has the authority to resume jurisdiction.[10]

Five years later, defendants Bucci and Viccarone, alleging incompetency of counsel, filed petitions for post-conviction relief pursuant to Post-Conviction Remedy Rule 1. At the hearing on this petition before the Hendricks County Superior Court, the State argued that the actions of the defendants' attorneys prior to trial demonstrated their competency,[11] and presented evidence tending to establish the strength of the prosecution's case.[12] The prosecutor of the original case testified that the defendants' case had been extremely well defended, considering the evidence against them.[13] The petitioners, Bucci and Viccarone, testified that they had remained mute on instructions of counsel, who had assured them that the trial court did not have jurisdiction and that they would prevail on appeal.[14] The decision of the Indiana Supreme Court on appeal from the conviction and the cases cited therein

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[9]The court stated that "[i]t has been held in Indiana that the time limits contained in Rule 1-12 . . . are mandatory and not merely directive." *Id.* at 672, 237 N.E.2d at 88. *Accord,* State *ex rel.* City of Indianapolis v. Superior Court, 235 Ind. 151, 128 N.E.2d 874 (1955); Trigg v. Criminal Court, 234 Ind. 609, 130 N.E.2d 461 (1955); State *ex rel.* Hosea v. Barger, 231 Ind. 577, 110 N.E.2d 1 (1953). *See also* State *ex rel.* Goins v. Sommer, 239 Ind. 296, 156 N.E.2d 885 (1959).

[10]The *Bucci* court quoted from State *ex rel.* City of Indianapolis v. Superior Court, 235 Ind. 151, 160, 128 N.E.2d 874, 878 (1959).

> "On motion for change of judge the moving party is called upon to strike only once. If a party is sincere in his desire for the appointment of another and unbiased judge, we know of no good reason why he should not personally perform his duty of striking and why he should not do so 'expeditiously' as required by Rule 1-12 or be considered to have waived his right to such change. Furthermore, in the event of the waiver of the right to a change of venue by a moving party *every reason supports the fact that the regular judge should reassume jurisdiction of the matter pending in his court. . . .*"

250 Ind. at 673, 237 N.E.2d at 88 (emphasis supplied by the *Bucci* court).

[11]

> Defense counsel . . . both experienced attorneys in the criminal practice, prior to trial were instrumental in having two (2) of the four (4) charges then against the defendants dropped [Transcript at 437]. Counsel for the defendants conducted normal inquiry into the State's case prior to the trial [Transcript at 433].

Brief for Appellee at 2. However, the transcript of the hearing is less than supportive of the latter statement. The prosecutor, in fact, testified that he did not remember whether the defense attorneys asked for a list of witnesses or conducted any other discovery procedure. He assumed that they must have since this was their regular procedure. Record at 441-43.

[12]332 N.E.2d at 95.

[13]*Id. See also* Brief for Appellee at 2.

[14]Record at 408-10, 423-26.

were presented at the hearing to demonstrate the clear and unambiguous nature of the case law on the jurisdiction question.[15] The Hendricks County Superior Court denied relief to the petitioners on the ground that they had failed to sustain their burden of proof.[16]

On appeal to the Indiana Supreme Court, the petitioners argued alternatively that the facts supported their request for a finding of incompetence of counsel,[17] or for the adoption of a less severe standard for incompetency of counsel. The latter would put Indiana in accord with some recent decisions in the federal courts and a few state courts.[18] The State, in its brief, presented a tripartite argument: First, that the decision appealed from was a "negative judgment";[19] second, that the evidence supported the State's position; and third, that since all of the failures were the result of a tactical plan, they should be treated as strategy,[20] which, according to the Indiana Supreme Court, will not be second guessed.[21]

The supreme court, in a 4-1 decision, affirmed the lower court. However, in reaching this decision, the majority failed to recognize

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[15]*See* note 9 *supra.*

[16]A number of cases have established that the post-conviction remedy is in the nature of a civil action with the petitioner cast in the role of a plaintiff. Therefore, utilizing that analogy, the Indiana courts have held that the petitioner has the burden of proof on the allegation of incompetence of his prior attorney. *See, e.g.*, Hoskins v. State, 302 N.E.2d 499 (Ind. 1973).

[17]Brief for Appellants at 26, 28.

[18]In their brief, appellants cited only Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), but a number of other federal courts and some state courts, California, for example, have adopted this standard. *See* People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963). The specific federal circuits which have adopted the less severe standard are discussed in note 44 *infra.*

[19]The negative judgment or negative verdict approach refers to the situation where the party with the burden of proof on a particular issue lost at the trial court level and appealed from that negative verdict. The Indiana courts have consistently held that the appellant, in such a situation, faces a strong presumption against him. Where the sufficiency of the evidence is questioned on appeal, the court will merely examine the record to determine if there is any evidence, or any legal inference which may be drawn therefrom, which, if believed by the trier of fact, would sustain the verdict or decision. *See, e.g.*, Watson v. Watson, 231 Ind. 385, 108 N.E.2d 893 (1952); Gamble v. Lewis, 227 Ind. 655, 85 N.E.2d 629 (1949). This standard also applies when a post-conviction remedy is used. Hoskins v. State, 302 N.E.2d 499 (Ind. 1973).

[20]It is a general rule of law in Indiana that a court will not look with hindsight at the strategy employed by defense counsel. Hendrickson v. State, 233 Ind. 341, 118 N.E.2d 493 (1954). This is a fairly common concept throughout the states. *See, e.g.*, Application of Tomich, 221 F. Supp. 500 (D. Mont. 1963); United States v. Cariola, 211 F. Supp. 423 (D.N.J. 1962).

[21]Hendrickson v. State, 233 Ind. 341, 118 N.E.2d 493 (1954).

the use by appellants of the alternative argument approach.[22] Instead, the court saw appellants as solely advocating the adoption of a new standard, stating that "[t]he Public Defender, who is representing Defendants in this proceeding, appears to realize that this situation does not approach the threshold of ineffective representation as established by our case law."[23] However, the court then went on to discuss, apparently *arguendo*, the degree of competency present in the case.

The court's concurrence with the State's characterization of the trial defense as a tactical plan enabled it to trace all of the defense attorneys' errors to one mistake of law—the belief that failure to timely strike from the panel of judges did not allow the original judge to resume jurisdiction.[24] Having reduced a multitude of errors to one fatal flaw, the court then turned to *Blackburn v. State*,[25] where the supreme court had stated:

> Isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience does not necessarily amount to ineffective counsel unless, taken as a whole, the trial was a mockery of justice. A reviewing court ought not to second guess matters of judgment or trial strategy or even mistakes.[26]

The *Bucci* court concluded that this was not a situation which could be described as a "mockery of justice" or "shocking to the conscence of the reviewing court."[27]

The court also discussed appellants' plea for the adoption of a less severe standard concerning incompetency. The majority compared the present Indiana "mockery of justice" standard with the "assistance reasonably likely to render and rendering reasonably effective assistance" standard adopted by the United States Court of Appeals for the Sixth Circuit in *Beasley v. United States*.[28]

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[22]That this was in fact an alternative argument is demonstrated in Appellants' Petition for Rehearing at 2, Bucci v. State, 332 N.E.2d 94 (Ind. 1975) (rehearing denied), where appellants stated:

> The Court apparently misinterprets the alternative arguments made in the Brief of Defendants-Appellants if it means to hold, as the majority opinion in this cause appears to hold, that Appellants did not think and argue that the facts in this case are sufficiently gross to meet the standards of "mockery of justice, shocking to the conscience of the court."

[23]332 N.E.2d at 95.

[24]*Id.* It is interesting to note in this respect that this conclusion of the majority is based solely on allegations made during the hearing which were not supported by evidence and, as the dissent suggests, could as easily have been considered a simple mistake as a tactical maneuver. Record at 400-60.

[25]260 Ind. 5, 291 N.E.2d 686 (1973).

[26]*Id.* at 22, 291 N.E.2d at 691.

[27]332 N.E.2d at 96.

[28]491 F.2d 687 (6th Cir. 1974).

The Indiana Supreme Court rejected the Sixth Circuit standard, stating:

> It is argued that such a standard is "objective" whereas the "mockery" standard is "subjective." The search for objectivity should not obscure common-sense analysis. Indeed, if objectivity is thought to be that which excludes relativity, we can not see that the federal standard is objective. From the point of view of a sensible defendant, any and all assistance of counsel which results in a verdict and sentence more severe than he wishes is *ineffective* assistance. We adhere to the standard consistently followed by our courts for many years.[29]

Finally, the court reviewed the evidence presented at the post-conviction hearing and, after noting appellants' failure to allege or demonstrate that some other tactic would have been more successful, concluded that appellants had not met their burden of proof.

Justice DeBruler, dissenting, argued against the "tactic or strategy" approach followed by the majority. He maintained that the defense attorneys found themselves, through a misapprehension of the law, impaled on the horns of a dilemma—between proceeding with the trial and waiving the right to appeal, or saving the right to appeal, by not proceeding with the trial, and thus, in effect, denying their clients effective counsel during the trial. Justice DeBruler clearly illustrated that this dilemma did not in fact exist. He cited cases from 1913 to 1973 holding that full participation at trial is not a waiver of the right to appeal the erroneous denial of a motion for a change of venue.[30] He concluded that while the mistake of the defense attorneys may have been on one point of law, when viewed through the eyes of the defendants, they were denied effective counsel.[31]

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[29]332 N.E.2d at 95 (emphasis supplied by the court). Interestingly, the same reasoning could be used to deny the standard which this same court has used for more than 80 years. *See* text accompanying notes 34-36 *infra*.

[30]Millican v. State, 300 N.E.2d 359 (Ind. 1973); Hanrahan v. State, 251 Ind. 325, 241 N.E.2d 143 (1968); State v. Laxton, 242 Ind. 331, 178 N.E.2d 901 (1961); Beck v. State, 241 Ind. 231, 171 N.E.2d 696 (1961); State *ex rel.* Williams Coal Co. v. Duncan, 211 Ind. 203, 6 N.E.2d 342 (1936); Barber v. State, 197 Ind. 88, 149 N.E. 896 (1925); Woodsmall v. State, 181 Ind. 613, 105 N.E. 155 (1913).

[31]

> I can therefore only conclude that the dilemma upon which trial counsel considered themselves impaled in this case was a mere phantom. Their mistake, while only one, and possibly one which arose from a confusion caused by the existence of two judicial procedures for obtaining review of the same type of error, nevertheless, when

While the potential injustice which inheres in this decision is discernible at this point, the full significance and ramifications of the *Bucci* decision can best be seen in a larger perspective. For that reason, the remainder of this discussion will consider two other approaches which the defendants might have pursued, a civil suit for malpractice and a federal action based on the sixth amendment to the United States Constitution, and will compare the incompetency standards applied to these remedies with the post-conviction remedy standard under Rule 1.

Indiana's post-conviction remedies, at least as they are presently constructed, are of fairly recent origin. They were adopted on August 1, 1969, to obviate constitutional deficiencies found to exist in the prior rules.[32] In a decision less than two years after the adoption of the present rules, the Supreme Court of Indiana said:

> In the name of justice and fair play this court, though its promulgation of our post conviction remedy rules and by case decision, has sought to insure that each defendant will have an avenue available by which he may challenge on appeal the correctness of his conviction.[33]

An exploration of the functional reality of these rules, through the mechanism of comparative law, creates some doubt as to the court's determination to effectuate those sentiments, at least where incompetency of counsel is alleged. Compare, for example, the standard used for determining incompetence in criminal cases, with that used for determining incompetence for purposes of malpractice suits. In malpractice, the standard of competence has not changed significantly since 1890. In *Citizens Loan Fund & Savings Association v. Friedley*,[34] the Indiana Supreme Court established the malpractice standard.

> An attorney who undertakes the management of business committed to his charge, thereby impliedly represents that he possesses the skill, and that he will exhibit the diligence ordinarily possessed and employed by well-informed

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properly viewed, not from the standpoint of courts who disdain being tricked or misled, or of counsel who may take offense at being labelled ineffective in the case, but from that of the person accused of crime, needing and choosing to claim that right to effective representation guaranteed by the Constitutions, served to leave appellants without counsel.

332 N.E.2d at 96 (DeBruler, J., dissenting).

[32]*See* Newland v. Lane, 418 F.2d 143 (7th Cir. 1969); Frazier v. Lane, 282 F. Supp. 240 (N.D. Ind. 1968).

[33]Langley v. State, 256 Ind. 199, 203, 267 N.E.2d 538, 540 (1971).

[34]123 Ind. 143, 23 N.E. 1075 (1890).

> members of his profession, in the conduct of business, such as he has undertaken. *He will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law . . . which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession.*[35]

In the *Bucci* case, the attorneys' failure either to know or accept decisions on jurisdiction and waiver which had existed for at least ten years prior to this case would appear to easily bring them within the definition of incompetence established by the Indiana Supreme Court in 1890. In fact the time factor between the release of the publication and the time an attorney is expected to be aware of it is probably much shorter than even *Friedley* suggests. A more recent case stated in dicta that "good appellate advocacy" requires and, further, demands the regular reading of the advance sheets.[36]

While it is true that the instant defendants in a malpractice suit would face additional hurdles[37] in the successful prosecution of their claim, it does seem somewhat odd that they would have much less difficulty establishing the incompetence of their attorneys in a suit for monetary relief than they would have in establishing the same element in a suit for "justice and fair play."[38]

Another interesting comparison, suggested by the appellants in their brief,[39] is that of the definition of "incompetent counsel" as adopted by the Indiana Supreme Court for the purposes of post-conviction relief, and the definitions used by the federal courts to determine the effectiveness of counsel under a sixth amendment challenge. The appellants pointed to one federal criminal case, *Beasley v. United States*,[40] to support their position. In that case, the alleged incompetence of counsel was based on at least seven failures of the defense attorney.[41] All of these, however, were not

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[35]*Id.* at 146, 23 N.E. at 1075 (emphasis added).

[36]Boss-Harrison Hotel Co. v. Barnard, 148 Ind. App. 406, 408, 266 N.E.2d 810, 811 (1971).

[37]For an excellent discussion of the proof problems in a legal malpractice suit, see Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771 (1968). *See generally* Haughey, *Lawyer's Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888 (1973); Note, *Attorney's Negligence: The Belated Appeal*, 2 VALP. U.L. REV. 141 (1967).

[38]Langley v. State, 256 Ind. 199, 203, 267 N.E.2d 538, 540 (1971).

[39]Brief for Appellants at 28-30.

[40]491 F.2d 687 (6th Cir. 1974).

[41]These failures were: (1) Calling a witness whom defendant had stated was out to get him; (2) advising against a jury trial on the basis that the counsel was too ill; (3) never ordering an independent fingerprint test, al-

as totally devastating as the failures in the *Bucci* case since the attorney in *Beasley* did participate to some extent. In rejecting the "farce and mockery" standard which it had applied previously, the Sixth Circuit stated that "[i]t is a denial of the right to the effective assistance of counsel for an attorney to advise his client erroneously on a clear point of law if this advice leads to the deprivation of his client's right to a fair trial."[42] Further, the court went on to hold that the harmless error test does not apply to the deprivation of a procedural right so fundamental as the effective assistance of counsel.[43]

The Sixth Circuit, in reaching these conclusions, pointed to decisions of two other circuits which had previously rejected the "farce and mockery" standard.[44] In referring to these decisions, the *Beasley* court failed to mention that the Third Circuit also had adopted a less stringent test than the "farce and mockery" test.[45] In fact, the Third Circuit has gone even further. In 1970, that court stated:

> While a distinction might be attempted between attacks on state convictions under the Fourteenth Amendment, and those on federal convictions under the Sixth Amendment, we believe the increased recognition of the constitutional right to the assistance of counsel requires that the standard which prevails in federal cases under the Sixth Amendment should be applied equally to state convictions, to which the same guarantee is made applicable by the Fourteenth Amendment under Gideon v. Wainwright. The standard of normal competency applies equally in each case.[46]

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though the trial judge had ordered the government to pay for it; (4) failure to call several res gestae witnesses who would have testified that they could not identify the defendant as the attempted robber; (5) failure to interview any res gestae witness before trial other than one who gave mildly favorable testimony for the prosecution; and (6) conducting no more than a cursory investigation of the facts prior to trial, thus losing the testimony of defendant's alibi witness who died before trial. *Id.* at 690-91.

[42] *Id.* at 696.

[43] *Id.*

[44] West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967). The action of the *Bruce* court is of particular interest because it was the District of Columbia Circuit which established the "mockery and farce" test in Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

[45] Moore v. United States, 432 F.2d 730 (3d Cir. 1970).

[46] *Id.* at 737 (footnote omitted).

It also appears that the Fourth Circuit has adopted the "reasonably competent" representation standard,[47] and the Eighth Circuit may not be far behind.[48]

From what now appears to be clearly a trend, an illogical dichotomy arises. It appears that defendants, who if originally tried in federal court could obtain relief for incompetency of counsel, will languish in Indiana prisons. The comparisons clearly present a discrepancy in the Indiana judicial system—a discrepancy which favors a defendant's suit to obtain monetary relief over a suit brought to obtain a fair determination of guilt. The federal courts have apparently begun to recognize this discrepancy and are taking steps to alleviate it. The Indiana courts, for whatever reason, do not appear willing to follow. The final determination of the correctness of the Indiana position is up to each reader. The comparison, it seems to this writer, speaks for itself.

DAVID M. HAMACHER

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[47]Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968).

[48]*See* McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).