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IN THE COURT OF APPEALS OF INDIANA

LEONARD LAMONT FRYE, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 82A01-0909-PC-469
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D03-0609-PC-7

January 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issue

Leonard Lamont Frye, Jr., appeals the denial of his petition for post-conviction relief, asserting that the post-conviction court committed clear error in finding that he did not receive ineffective assistance of trial counsel. We affirm.

Facts and Procedural History

On the evening of December 6, 2003, Vernon and Margaret Ballew were watching television in their Evansville home. They lived next door to Linda Walker. Just before 9:25 p.m., Margaret heard glass breaking outside. She went to the back door, turned on the back light, and saw someone walking east through Walker's driveway toward Kentucky Avenue. Margaret called the police at 9:24 or 9:25 p.m. and reported a burglary. She described the person she saw in Walker's driveway as a black male wearing blue jeans, a sock cap or ski cap, and a jacket. She also stated that he had a television set under his right arm and two laden Walmart sacks on his left. As she talked, she watched the man walk down an alley toward Kentucky Avenue. At 9:30 p.m., after he had walked at least two blocks, she lost sight of him.

Evansville Police Officer Joseph Dickenson received Margaret's description of the suspected burglar. At 9:35 p.m., he approached the intersection of Covert and Kentucky Avenues and saw Frye, wearing a puffy coat and a maroon sock hat, standing near a bus stop with a large trash bag full of goods next to him. Officer Dickenson parked his vehicle and approached Frye. Officer Dickenson told Frye that he matched the description of a man suspected of a burglary in the area. Another officer performed a patdown search and found a

beer can in Frye's coat pocket. The officers noted that Frye emitted the odor of alcohol. Frye did not have any identification and told the officers that his name was James Farmer. The officers ran a check on that name and learned that it was an alias that Frye had used before. The officers asked Frye about the large trash bag of goods, and he said that he was helping his girlfriend move. The officers looked inside the bag and saw a television set, a sword, jewelry, and a package of bacon. The officers arrested Frye for public intoxication. The following day, Walker identified most, but not all, of the items that were found in Frye's trash bag as hers.[1] However, some items that were stolen were not in Frye's possession.[2]

The State charged Frye with class B felony burglary, class D felony theft, and class B misdemeanor false informing and filed a habitual offender enhancement. Frye was appointed a public defender. At trial, defense counsel attempted to show that Frye could not have committed the burglary because he could not have traveled, while intoxicated and carrying a bag of stolen goods, the distance between the crime scene and the bus stop where he was arrested in the timeframe testified to by the police. To demonstrate that Frye had insufficient time to commit the burglary and travel by foot to the bus stop, defense counsel offered Defense Exhibit Q, an Evansville Police Department supplemental report. Defense counsel also tried to show that Frye was not the perpetrator by comparing the items reported stolen to

[1] Walker identified the following items as hers: two packages of bacon, a two-liter bottle of Pepsi, a tape measure, a jewelry box, a jewelry case, a musical rocking horse, a sword, videos, perfume, a jade-handled mirror, a television, and a small amount of jewelry. The items in Frye's possession that did not belong to Walker were a ceramic cat, a wall plaque, and a pair of earrings.

[2] Frye did not have the following items: a gold and black chain, a silver cross and chain, a hematite ring, two pearl rings, a sapphire ring, a herringbone chain, a gold and red necklace, an etched pewter cross necklace, and a pewter brooch.

the items discovered in Frye's possession. To prove this theory, defense counsel offered Defense Exhibit P, the Evansville Police Department preliminary investigation report. Each exhibit contained two references to a warrant for Frye's arrest. The references indicated only that there was an outstanding warrant. No other details were provided.

Frye's first jury trial ended in a mistrial when it was discovered that a juror knew one of the State's witnesses. The case was retried, and the jury found Frye guilty as charged and to be a habitual offender.

Frye was sentenced to an aggregate term of forty years. On direct appeal, he challenged only his sentence. In a memorandum decision, this Court found (1) that the trial court erred when it used the same habitual offender finding to enhance Frye's sentences for both burglary and theft and (2) that Frye's sentence was not inappropriate. *Frye v. State*, No. 82A05-0405-CR-245 (Ind. Ct. App. Jan. 18, 2005). On transfer, our supreme court concluded that Frye's sentence was inappropriate and revised it to twenty-five years. *Frye v. State*, 837 N.E.2d 1012, 1015 (Ind. 2005).

On September 29, 2006, Frye filed a pro se petition for post-conviction relief, which was amended by counsel on March 16, 2009. Frye contended that his trial counsel was ineffective in introducing Defense Exhibits P and Q, which were harmful to his case because they suggested that he had a criminal record. Following a hearing, on August 6, 2009, the post-conviction court issued an order denying Frye's petition. The order provided in relevant part as follows:

> Moreover, it is unlikely the word "warrant" subjected [Frye] to improper jury speculation regarding his record. The word "warrant", though

> contained in the first line of Exhibit Q's narrative, was in regular type and occurred at the end of a sentence describing [Frye's] arrest. There were a number of inferences the jury could have made that were not unfairly prejudicial to [Frye], including that the warrant might have related to the subject crime. The focus of the report was clearly the times of certain events and these items were written in boldface type, tending to draw attention away from items in regular typeface. In Exhibit P, the word "warrant" occurs twice, and both times the terms are buried in a single paragraph of a detailed, five-page report. In light of the fact that two witnesses heard the burglary in progress, a witness saw the burglar leaving the residence with the stolen items, and that [Frye], matching the description of the burglar, was located a short time later with the majority of the stolen goods in his possession, the jury would have found that [Frye] was guilty of burglary beyond a reasonable doubt regardless of the presence of the references to warrants. Thus, the Court finds that [Frye] has failed to establish that he was prejudiced by counsel's representation.

Appellant's Br. at 21. Frye appeals.

Discussion and Decision

Frye appeals the denial of his petition for post-conviction relief. We observe that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. *Timberlake v. State*, 753 N.E.2d 591, 597-98 (Ind. 2001) (citing Ind. Post-Conviction Rule 1(1)), *cert. denied* (2002). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

On appeal, we accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. *Martin v. State*, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). To obtain reversal of a negative judgment, as is the case here, Frye must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction

court. *See Willoughby v. State*, 792 N.E.2d 560, 562 (Ind. Ct. App. 2003), *trans. denied*. In reviewing Frye's claim, we will not reweigh the evidence or reassess the credibility of the witnesses. *See McCarty v. State*, 802 N.E.2d 959, 963 (Ind. Ct. App. 2004), *trans. denied*.

Frye contends that he received ineffective assistance of trial counsel. We review his claim using the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance, a petitioner must show that "(1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.'" *Lambert v. State*, 743 N.E.2d 719, 730 (Ind. 2001) (quoting *Strickland*, 466 U.S. at 694). "'Unless a defendant makes both showings, it cannot be said that the convictions … resulted from a breakdown in the adversary process that renders the result unreliable.'" *Smith v. State*, 511 N.E.2d 1042, 1043 (Ind. 1987) (quoting *Strickland*, 466 U.S. at 687).

Regarding counsel's performance, our supreme court has noted that "[c]ounsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *State v. Holmes*, 728 N.E.2d 164, 172 (Ind. 2000) (citation omitted). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render

representation ineffective. *Douglas v. State*, 800 N.E.2d 599, 607 (Ind. Ct. App. 2003), *trans. denied* (2004).

"'Although the two parts of the *Strickland* test are separate inquires, a claim may be disposed of on either prong.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 697). If a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002).

In this case, an assessment of whether the admission of exhibits P and Q resulted in prejudice to Frye resolves his claim. Specifically, the focal point of our inquiry is whether there is a reasonable probability that, but for the admission of exhibits P and Q, the result of the proceeding would have been different. *See Lambert*, 743 N.E.2d at 730.

First, we examine the exhibits themselves. We observe that exhibits P and Q were two of seventeen exhibits introduced by defense counsel during trial, and the State introduced sixteen. Exhibits P and Q each contained two references that Frye was wanted on a warrant or warrants. The parties vigorously dispute whether these references to "warrant" or "warrants" were prominently presented and drew the jury's attention. Exhibit P, the preliminary investigation report, contains four handwritten paragraphs describing the preliminary investigation. In the third paragraph, the writer states that Frye was "wanted on a warrant" and that the officer "arrested Mr. Frye on the warrant." Addendum to Appellant's Br. at 3. Although any person reading the report would note the references, the focus of the report is on the events immediately following the burglary of Walker's home.

As to Exhibit Q, the supplemental police report, the first sentence of the half-page report states, "I was advised that the suspect was arrested at Covert and Kentucky for warrants." *Id*. at 1. What follows is something of a brief timeline with the time in bold. As part of the timeline, the supplemental report states, "**at 2147 hrs**, officers called in route to booking with Frye because of the warrants." *Id*. The focus of the report is on what happened and *when* it happened.

Indeed, the warrants are not the subject of either exhibit; the references are background information only. More importantly, in the course of the entire trial there was no other mention of "warrant" or "warrants." Neither the prosecutor nor the defense counsel referred to the "warrant" or "warrants" in opening or closing argument. The State called seven witnesses, and the defense called three. This utter lack of emphasis on the warrants significantly downplays any importance the jury might have attached to them. Further, we agree with the post-conviction court that the jurors could have concluded that the warrant(s) referred to the charged offenses.

Second, the evidence of Frye's guilt is decisive. Walker's neighbor, Margaret, heard the sound of glass breaking and spotted a man walking away from Walker's home holding a TV and filled bags. She called the police at about 9:25 p.m. and watched the man walk down an alley until 9:30 p.m. In five minutes, the man walked at least two blocks. This evidence supports an inference that the man could walk four blocks in ten minutes. At 9:35, ten minutes after Margaret had called the police and approximately four blocks from Walker's home, police spotted a man that fit the description Margaret had provided. He had Walker's

TV and most of the other items that were stolen. Although Frye did not run from police, he provided a false name. The use of a false name is evidence of guilt. *See Bennett v.* State, 883 N.E.2d 888, 892 (Ind. Ct. App. 2008) ("The giving of a false name is a form of flight and thus evidence of consciousness of guilt."), *trans. denied*. Additionally, his statement to police that he was helping his girlfriend move is inconsistent with defense counsel's theory at trial that Frye found the items in an alley and is additional circumstantial evidence of guilt. *See Butcher v. State*, 597 N.E.2d 357, 359 (Ind. Ct. App. 1992) (knowledge that property was stolen may be inferred from evidence that defendant changed his story about how the property came into his possession), *trans. denied*; *Griffin v. State*, 175 Ind. App. 469, 476, 372 N.E.2d 497, 502 (1978) (knowledge may be inferred from possession together with evasive answers at time of arrest and lying about manner of acquisition).

Based on the scant attention paid to the references about the "warrant" or "warrants" during trial and the strength of the evidence against Frye, we conclude there is not a reasonable probability that, but for the admission of Defense Exhibits P and Q, the result of Frye's trial would have been different. As such, Frye has failed to carry his burden to show that the post-conviction court clearly erred, and therefore, we affirm the denial of his petition for post-conviction relief.

Affirmed.

RILEY, J., and VAIDIK, J., concur.