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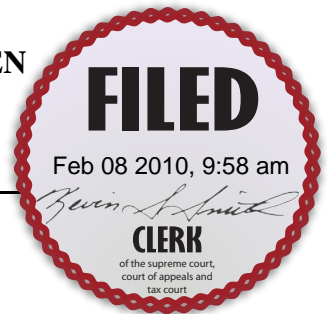
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**IN THE
COURT OF APPEALS OF INDIANA**

KELVIN L. HAMPTON,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

))))))))))

No. 84A01-0908-PC-389

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D01-0611-PC-3468

February 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Kelvin L. Hampton appeals the denial of his amended petition for post-conviction relief.

We affirm.

ISSUE

Whether the post-conviction court erred in denying Hampton's amended petition for post-conviction relief.

FACTS

The pertinent facts underlying Hampton's amended petition for post-conviction relief were described as follows in our memorandum opinion on his direct appeal:

On February 18, 2003, and February 26, 2003, the Vigo County Drug Task Force ("VCDTF") orchestrated controlled cocaine sales via a confidential informant. Agents of the VCDTF searched their informant before and after each transaction, and monitored his activities with audio and video equipment. On both February 18, 2003, and February 26, 2003, Hampton sold cocaine to the VCDTF's informant, who paid \$40 for each transaction. Both controlled buys took place [at Hampton's residence which was located] within 1,000 feet of a school.

After the transactions, police executed a search warrant at Hampton's residence and discovered cocaine, an electronic scale, drug paraphernalia, and evidence of the manufacturing of cocaine. Hampton was arrested. Officer Charles Burris testified that Hampton, upon arrest, admitted to "dealing crack cocaine out of that residence." Hampton's trial commenced on May 10, 2005.

* * *

On May 12, 2005, the jury found Hampton guilty [of two] counts of Class A felony dealing in cocaine.¹ On June 6, 2005, the court sentenced Hampton to concurrent terms of forty (40) years for each count.

¹ Ind. Code § 35-48-4-2(a), (b)(2)(B)(i).

Hampton v. State, Cause No. 84A04-0507-CR-381, slip op. at 2-3 (Ind. Ct. App. May 10, 2006) (internal citations omitted). On November 14, 2006, Hampton, *pro se*, filed a petition for post-conviction relief. On January 20, 2009, he filed, by counsel, an amended petition for post-conviction relief, wherein he raised a claim of ineffective assistance of trial counsel. The post-conviction court conducted an evidentiary hearing on March 27, 2009, and issued findings of fact and conclusions of law, and denied relief in its order of June 25, 2009.

Additional facts will be provided as necessary.

DECISION

Hampton challenges the denial of his petition for post-conviction relief.

The purpose of a post-conviction proceeding is to give a petitioner the limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Such proceedings are not super appeals through which convicted persons can raise issues that they failed to raise at trial or on direct appeal. In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When reviewing the denial of a petition for post-conviction relief, we will neither reweigh the evidence nor judge the credibility of the witness. Thus, to prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. We will disturb the post-conviction court's decision only if the evidence is without conflict and leads to but one conclusion and the post-conviction court has reached the opposite conclusion.

Donnegan v. State, 889 N.E.2d 886, 891 (Ind. Ct. App. 2008) (internal citations and quotations omitted).

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, a claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability arises when there is a probability sufficient to undermine confidence in the outcome.

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (internal citations omitted).

"Although the two parts of the *Strickland* test are separate inquiries, a claim may be disposed of on either prong." *Id.* However, because the "object of an ineffectiveness claim is not to grade counsel's performance, [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.* (citing *Strickland*, 466 U.S. at 697).

Where a claim of ineffective assistance of trial counsel is based on the failure to object at trial, the defendant must show that if a proper objection had been made, it would have been sustained and further, that he was prejudiced by the failure. *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001).

Hampton argues that he received ineffective assistance when counsel failed to make a hearsay objection to State's Exhibit 17 -- an aerial photograph allegedly depicting the location of Hampton's two cocaine deliveries -- upon which super-imposed green

lines and numbers purported to indicate that Hampton had delivered illicit drugs to a place located within 1,000 feet of a school.

The post-conviction court made the following pertinent findings of fact:

4. At trial, the State introduced State's Exhibit #15, an affidavit of self-authentication for "a photograph and statement of a measurement." The affidavit is signed by Amber Hawkins, identifying herself as a custodian of the records, and states the document meets the following criteria:

- (i) Said record is the original record or a duplicate of the original record;
- (ii) Said record was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters;
- (iii) Said record is kept in the course of the regularly conducted activity by this agency;
- (iv) Said record was made by the regularly conducted activity as a regular practice.

5. The State also introduced State's Exhibit #16, a letter from Amber Hawkins, a GIS Technician for the City of Terry [sic] Haute Department of Engineering. The letter indicates when the photograph was taken (April, 2004) and the accuracy of the measurements on the photograph (within plus or minus two feet).

6. The State also introduced State's Exhibit #17, a computer printout depicting an aerial photograph of the area of 1300 South 13th ½ Street, Terre Haute, Indiana, a legend indicating the scale on the photograph being one inch equals one hundred fifty feet, and lines showing the distance from the location of the drug deals to the school property. The photograph indicates the property line closest to the school is 515.62 feet from the school property. The photograph indicates the property line furthest from the school is 555.09 feet from the school property. The photograph and letter indicate the measurements are accurate to within two (2) feet.

7. All three exhibits were moved and admitted into evidence without objection.

8. In addition to the above evidence related to the location of the school and the location of the drug transactions, the State presented further

evidence related to the distance via Terre Haute Police Department Detective Charles Burris. In establishing a foundation for the aerial photograph and lines, the detective was shown State's Exhibit #17. Detective Burris was asked "Does this photograph appear to be a fair and accurate representation of your experience of being in that area?" Detective Burris indicated "It does."

9. Detective Burris further testified as to the distance between the properties when asked if the location of the drug deals were "[w]ell within the thousand feet that we're talking about here?" by responding "Yes sir." He was then asked "[h]ow far away is it, a block and a half?" The detective responded "Yes."

(P-C. App. 74- 75) (internal citations omitted). In concluding that the photograph "would have been properly admitted" under Indiana Evidence Rule 803(8), and further, that the admission of the photograph "was cumulative to other evidence provided regarding the location of the transactions being within one thousand feet of the school property," the post-conviction court analyzed *Tardy v. State*, 728 N.E.2d 904 (Ind. Ct. App. 2000), and *Sparkman v. State*, 722 N.E.2d 1259 (Ind. Ct. App. 2000) -- two cases that Hampton relied upon in support of his claim that trial counsel had rendered ineffective assistance. (P-C. App. 79, 80).

Specifically, the post-conviction court concluded that *Tardy* and *Sparkman* were distinguishable from the instant facts because in each of those cases, the surveyor's map² had been admitted as a certified public record of the Surveyor's Office, pursuant to Indiana Evidence Rule 803(8) -- the hearsay exception for Public Records and Reports. The post-conviction court noted that in the instant case, State's Exhibit 15 -- an affidavit

² The same surveyor's map was at issue in both cases.

of self-authentication pursuant to Evidence Rule 902(9) -- provides that the photograph (State's Exhibit 17) and Hawkins' affidavit (State's Exhibit 16) were admitted pursuant to Indiana Evidence Rule 803(6).³ The post-conviction court also concluded that Hampton had not alleged that trial counsel had rendered ineffective assistance by his failure to object to the admission of State's Exhibit 17 under I.R.E. 803(6), and therefore had not demonstrated deficient performance. Nonetheless, the post-conviction court proceeded to review the evidence "based on whether counsel was ineffective for not objecting to the admission of State's Exhibit 17 under I.R.E. 803(8)." (P-C. App. 78).

The post-conviction court further distinguished the photograph in the instant case from the surveyor's map at issue in *Tardy* and *Sparkman* as follows:

[a.] In the present case, the State offered evidence that the photograph with measurements was a regularly conducted and regularly recorded activity of the Engineering department. The photograph was accompanied by an Affidavit of Self-authentication -- State's Exhibit #15. See Indiana Evid. Rule 902(9). The affidavit indicated the photograph with measurement "is kept in the course of the regularly conducted activity by this agency."

³ Indiana Evidence Rule 803(6) provides as follows:

(6) Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

[b.] The State offered evidence of [the person] who included the lines and who provided the entire exhibit. State's Exhibit #16, the letter, indicates that Amber Hawkins, a GIS Technician with the City of Terre Haute Department of Engineering, authored the letter. This is the same person that signed State's Exhibit #15, the affidavit. These two items of evidence taken together indicate her to be the person that provided the evidence, her qualifications and her employment.

[c.] The letter, State's Exhibit #16, indicates [that] the photography was completed in April 2004 and the measurements to be accurate within plus or minus two feet, allowing the inference that such photographs with associated measurements were regularly conducted and regularly recorded activities of the department and were made well in advance of the jury trial in accordance with the authority granted to that department.

[d.] The aerial photograph includes the scale of the photograph in the legend. The Tardy and Sparkman courts clearly indicate [that] the objection relied upon to preserve the record for appeal was defense counsel's objection that "your typical map doesn't have a thousand foot radius marking on it." Tardy at 906 and Sparkman at 1261. There is no similar objection to be made regarding the scale of the depiction being included upon the legend for the photograph of the area. Such scales are typically included on maps, whether drawn maps or aerial photograph maps, as was the case the State's Exhibit 17.

(P-C. App. 78-79). The post-conviction court further concluded,

This evidence demonstrates the photograph was generated as part of the regularly conducted and regularly recorded activities of the City of Terre Haute Engineering Department and also identifies the individual within the department that provided the record for purposes of evidence. Furthermore, the letter and the legend indicate the accuracy of the distances displayed in the photograph, adding to the trustworthiness of the photograph. Tardy and Sparkman both held the Surveyor's map as presented did not evidence the trustworthiness necessary to keep it within I.R.E. 803(8), the Public Records and Reports exception. The photograph (Exhibit 17) and its characteristics, the supporting documentation and testimony regarding the accuracy of the photograph, and the identification of who was responsible for the record as accepted into evidence overcome the concerns for trustworthiness indicated in Tardy and Sparkman.

Therefore, the exhibit would have been properly admitted under I.R.E. 803(8).

(P-C. App. 79).

Moreover, with respect to the prejudice prong of *Strickland*, the post-conviction court concluded that Hampton could not demonstrate that a reasonable probability existed that, but for trial counsel's failure to object to the photograph, the result of the proceeding would have been different because "[t]he admission of the photograph with the measurement lines was cumulative [of] other evidence provided regarding the location of the transactions being within one thousand feet of the school property." (P-C. App. 80).

Citing *Sparkman* for the proposition that "[a]dmission of hearsay evidence is not grounds for reversal where it is merely cumulative of other evidence admitted," the post-conviction court concluded that Hampton could not satisfy the prejudice prong of the *Strickland* test because the admission of the photograph with the super-imposed lines and measurements, was "cumulative to the statements of Detective Burris and the "one inch equals one hundred fifty feet" scale listed in the legend of the photograph. (P-C. App. 80), State's Exhibit 17. Thus, the post-conviction court concluded that Hampton's amended petition for post-conviction relief should be denied because he had failed to meet his burden under *Strickland*.

We find evidentiary support in the trial record for the post-conviction court's conclusion that the photograph would have been properly admitted under Indiana

Evidence Rule 803(8); and that the admission of the photograph was cumulative of Detective Burris' testimony and the scale listed in the legend of the photograph.

Regarding the admissibility of the photograph pursuant to Indiana Evidence Rule 803(8), we initially note that the Rule provides, in pertinent part, as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(8) Public Records and Reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to a duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

Ind. Evid. R. 803(8) (emphasis added). At trial, the State introduced Exhibit 15 -- an affidavit from City of Terre Haute Department of Engineering GIS Technician Amber Hawkins, who averred that she was "a custodian of the records or another qualified person involved with the maintenance of records of regularly conducted business activity with the City of Terre Haute Engineer's Office." State's Exhibit 15. She averred further that the record (1) "is the original record or a duplicate of the original record"; (2) "was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters"; (3) "is generated and/or kept in the course of regularly conducted activity by [the City of Terre Haute's Engineer's Office]"; and (4) "was made by the regularly conducted activity as a regular practice." State's Exhibit 15. Based upon Hawkins' affidavit, we find no clear error from the post-

conviction court's conclusion that Exhibit 17 was properly admitted pursuant to Indiana Evidence Rule 803(8).

Further, as regards the post-conviction court's conclusion that the admission of the photograph was cumulative of scale listed in the legend and Detective Burris' testimony, the trial record reveals that State's Exhibit 17 bears the following language, "1 inch equals 150 feet." First, ignoring the superimposed measurements and lines on the photograph as the post-conviction court did, we measure the distance from Hampton's residence to the school's property to be approximately three and one-half inches, which pursuant to the scale, corresponds with a distance of approximately five hundred and twenty-five feet, plus or minus two feet; thus, Hampton delivered cocaine to a location that was within one thousand feet of a school. The foregoing fact, coupled with Detective Burris' testimony that (1) the photograph was a fair and accurate representation of geographic area; and (2) that the distance between Hampton's physical residence and the school was approximately the length of one and one-half city blocks, and, by reasonable inference, was therefore considerably less than one thousand feet, is sufficient to support the post-conviction court's conclusions that that the photograph "would have been properly admitted" under Indiana Evidence Rule 803(8); and that the admission of the photograph was cumulative of Detective Burris' testimony and the scale listed in the legend of the photograph.

Based upon the foregoing, Hampton has not demonstrated that his desired objection would have been sustained, had it been made; thus, he has not satisfied his

burden of proof. *Wrinkles*, 749 N.E.2d at 1192. We cannot say that the “evidence as a whole leads unerringly and unmistakably to a conclusion that is opposite of that reached by the post-conviction court”; accordingly, we find no clear error from the post-conviction court’s denial of Hampton’s amended petition for post-conviction relief. *Pruitt v. State*, 903 N.E.2d at 899, 905 (Ind. 2009).

Affirmed.

KIRSCH, J., and MAY, J., concur.