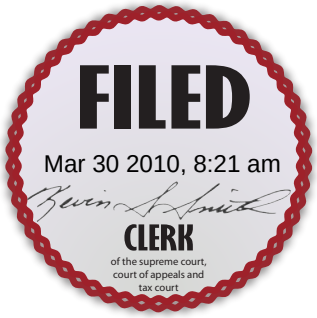

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IN THE
COURT OF APPEALS OF INDIANA

JERRY D. ASHLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A03-0908-PC-391
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0904-PC-66

March 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Jerry D. Ashley, pro se, appeals the post-conviction court's denial of his petition for post-conviction relief. Ashley raises two issues for our review:

1. Whether he knowingly, voluntarily, and intelligently pleaded guilty.

2. Whether he received ineffective assistance from his trial counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 4, 2007, Ashley pleaded guilty to two counts of dealing in cocaine, one as a Class A felony and one as a Class B felony. See Ind. Code § 35-48-4-1. While admitting the material elements of the Class B felony allegation in court, Ashley stated that "[t]he address" at which the State alleged he had dealt the cocaine was "wrong." Pet. Exh. 1 at 9.[1] Nonetheless, Ashley insisted that "he made a delivery of cocaine as alleged" in the Class B felony allegation. Id. In exchange for his guilty pleas, the State dismissed its additional allegation that Ashley was an habitual offender.

Thereafter, but before the trial court had accepted his guilty pleas, Ashley's probation officer described the following conversation with Ashley in the presentence investigation report:

> While [Ashley] would not take full responsibility for dealing the cocaine, he did say he was guilty of "aiding and abetting" it.
>
> When asked how he felt about the plea, he told this officer that the only reason he did not go to [t]rial was because he did not have a private attorney. He said that he did not mind "paying his debt to society," but the only reason he was getting all the time in the plea was due to his past

[1] We thank the State for identifying where in the appellate record the guilty plea hearing and the sentencing hearing transcripts are located.

> record. He said, "I think it sucks, I didn't sell anything, the police wanted Ashley [sic]." But, he added, "I made my own bed."

Appellant's App. at 9-10. The trial court accepted Ashley's guilty pleas on November 1 and sentenced him accordingly.

On February 6, 2009, Ashley filed his pro se petition for post-conviction relief. The court held a hearing on the petition on June 12, at which Ashley asserted that he did not knowingly, voluntarily, and intelligently plead guilty because he had simultaneously protested his innocence. Ashley also argued that his trial counsel rendered ineffective assistance by not adequately preparing for trial. On July 14, the court entered findings of fact and conclusions of law denying Ashley's petition. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

Ashley appeals the post-conviction court's denial of his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Saylor v. State, 765 N.E.2d 535, 547 (Ind. 2002). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Saylor, 765 N.E.2d at 547. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). "A post-conviction court's findings and

judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." Id.

Issue One: Guilty Plea

Ashley first asserts that his guilty plea was not entered into knowingly, voluntarily, and intelligently because, while pleading guilty, he simultaneously protested his innocence. A guilty plea entered after the trial court has reviewed the various rights being waived by the defendant and has made the inquiries called for by statute is unlikely to be found wanting in a collateral attack. Cornelious v. State, 846 N.E.2d 354, 357-58 (Ind. Ct. App. 2006), trans. denied. However, defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor, or defense counsel will present colorable claims for relief. Id. In assessing the voluntariness of a plea, we review all of the evidence before the post-conviction court, including testimony given at the post-conviction hearing, the transcript of the petitioner's original sentencing, and any plea agreements or other exhibits that are a part of the record. Id.

Ashley did not simultaneously plead guilty and protest his innocence. It is true that "a plea of guilty tendered by one who in the same breath protests his innocence . . . is no plea at all." Carter v. State, 739 N.E.2d 126, 128-29 (Ind. 2000) (emphasis original; quotations omitted). However, during his guilty plea hearing, Ashley refuted the location at which the State alleged he had dealt cocaine. This was not a protestation of innocence. To the contrary, after noting that the State's identified location was "wrong," Ashley expressly clarified that he was still admitting that he committed the crime of Class B

felony dealing in cocaine. See Pet. Exh. 1 at 9. Thus, the post-conviction court did not clearly err in rejecting Ashley's argument on this issue.

Neither did the trial court improperly disregard Ashley's post-plea statements to his probation officer. "A credible admission of guilt, contradicted at a later date by a general and unpersuasive assertion of innocence, may well be adequate for entering a conviction." Carter, 739 N.E.2d at 130. Here, Ashley admitted his guilt after having been fully advised of his rights, the crimes with which the State had charged him, and the potential penal consequences of those crimes. And he pleaded guilty pursuant to a written plea agreement that he had reviewed with his trial counsel. On a later date, Ashley made vague and generalized assertions of having "aid[ed] and abett[ed]" the charged conduct. See Appellant's App. at 9-10. Assuming those later statements were contradictory to his guilty plea, it was within the trial court's discretion to disregard Ashley's subsequent statement. See Carter, 739 N.E.2d at 130. The post-conviction court again did not clearly err in denying Ashley's petition on this issue.

Issue Two: Effective Counsel

Ashley also contends that he was denied the effective assistance of trial counsel. There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption. Gibson v. State, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. To make a successful ineffective assistance claim, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the

lack of reasonable representation prejudiced him. Mays v. State, 719 N.E.2d 1263, 1265 (Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans. denied. Even if a defendant establishes that his attorney's acts or omissions were outside the wide range of competent professional assistance, he must also establish that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. See Steele v. State, 536 N.E.2d 292, 293 (Ind. 1989). "[I]n order to establish that the guilty plea would not have been entered if counsel had performed adequately, the petitioner must show that a defense was overlooked or impaired and that the defense would likely have changed the outcome of the proceeding." Segura v. State, 749 N.E.2d 496, 499 (Ind. 2001).

Here, Ashley argues that his "attorney made a very limited effort to acquire information or even to investigate Ashley's case and Ashley was mislead [sic] because he lacked information about his case." Appellant's Br. at 4-5. Had his trial counsel more adequately examined the background of his case, Ashley continues, his counsel might not have advised him to plead guilty and he might not have chosen to plead guilty. Ashley does not further develop this argument on appeal.

Ashley's argument is not supported by cogent reasoning or citations to the appendix or parts of the record on appeal. Ashley has not demonstrated any favorable evidence that could have been discovered by a more thorough examination by his counsel. Indeed, Ashley acknowledges that his attorney possessed a witness list (provided by Ashley), police reports, photographic evidence, and video surveillance. Neither does Ashley allege that his counsel failed to advise him of the penal

consequences of his plea or failed to properly advise him of an available defense. See Segura, 749 N.E.2d at 499. Finally, Ashley's suggestion that a different result might have been achieved is not persuasive. Thus, Ashley's argument on this issue is waived. Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, the post-conviction court did not clearly err in denying Ashley's petition on this issue.

Affirmed.

VAIDIK, J., and BROWN, J., concur.