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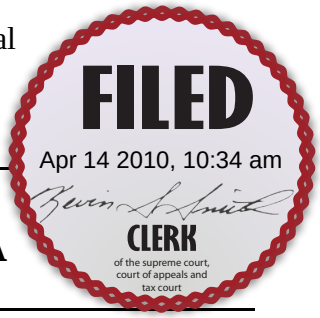

COURT OF APPEALS OF INDIANA

STEVEN D. HALCOMB,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-1001-PC-3
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
The Honorable Jeffrey L. Marchal, Master Commissioner
Cause No. 49G06-0308-PC-136653

April 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Steven D. Halcomb appeals from the denial of his petition for post-conviction relief, claiming ineffective assistance of both trial and appellate counsel following his conviction for Murder,[1] a felony, and the finding that he was a habitual offender.[2] Specifically, Halcomb argues that both attorneys rendered deficient performance because they did not argue that his prior convictions for conspiracy to deal in marijuana and dealing in cocaine did not qualify as prior unrelated felonies under the habitual offender statute. Concluding that the post-conviction court properly denied Halcomb's request for relief, we affirm.

FACTS

On August 13, 2003, the State charged Halcomb with murdering his former wife "on or about" December 27, 2000. Appellant's App. p. 4. Thereafter, on November 24, 2003, Halcomb was charged with being a habitual offender. In support of that count, the State alleged that Halcomb had been convicted and sentenced for the following three felonies: 1) conspiracy to deal in marijuana in 1985; 2) operating a motor vehicle while intoxicated resulting in death in 1987; and 3) dealing in cocaine in 1995.

Following a jury trial that concluded on December 15, 2004, Halcomb was found guilty of murder. He waived his right to a jury trial with regard to the habitual offender count and, following a bench trial, the trial court found that the State had proved beyond a reasonable doubt the existence of the conspiracy to deal in marijuana and the dealing in

[1] Ind. Code § 35-42-1-1.

[2] Ind. Code § 35-50-2-8.

cocaine convictions. However, it was determined that the State failed to prove the 1987 conviction.

Thereafter, Halcomb was sentenced to sixty-five years for murder, which was enhanced by an additional thirty years pursuant to the habitual offender count. Halcomb directly appealed to this court, claiming that the admission of character evidence and hearsay evidence at trial constituted reversible error. On April 12, 2006, we affirmed Halcomb's conviction in an unpublished memorandum decision.[3]

On May 26, 2009, Halcomb filed an amended petition for post-conviction relief,[4] claiming that his trial counsel was deficient for failing "to object to move for judgment on the evidence at the close of the State's evidence on the habitual offender phase of the trial . . . where Halcomb's prior conviction for dealing marijuana and dealing cocaine did not qualify as prior unrelated felonies . . . under the 2001 version of I.C. § 35-50-2-8(d)." Appellant's App. p 97-98. Halcomb also argued that his counsel on direct appeal was deficient for failing to challenge the validity of the habitual offender enhancement.

Following an evidentiary hearing on July 2, 2009, the post-conviction court denied Halcomb's request for relief. In its findings of fact and conclusions of law, the post-conviction court determined that a 2001 amendment to the habitual offender statute was not applicable because Halcomb committed the offense before the legislature amended

[3] Halcomb v. State, No. 49A02-0502-CR-118 (Apr. 12, 2006).

[4] Halcomb originally filed a pro se petition for post-conviction relief on March 29, 2007.

the habitual offender statute to exclude certain felonies from use as prior unrelated felonies. Halcomb now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that a petitioner who has been denied post-conviction relief faces a "rigorous standard of review" on appeal. Dewitt v. State, 755 N.E.2d 167, 170 (Ind. 2001). The post-conviction court's denial of relief will be affirmed unless the petitioner shows that the evidence "leads unerringly and unmistakably to a decision opposite" that reached by the post-conviction court. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). The petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. Id. A petitioner who has been denied post-conviction relief is, therefore, in the position of appealing from a negative judgment. Collier v. State, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999). Thus, we will not disturb the denial of relief unless "the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion." Johnson v. State, 693 N.E.2d 941, 945 (Ind. 1998). We consider only the probative evidence and reasonable inferences therefrom that support the post-conviction court's determination and will not reweigh the evidence or judge the credibility of the witnesses. Bigler v. State, 732 N.E.2d 191, 194 (Ind. Ct. App. 2000).

II. Halcomb's Claims

As set forth above, Halcomb argues that he is entitled to post-conviction relief because neither appellate counsel nor trial counsel challenged the validity of the habitual offender finding. More specifically, Halcomb contends that his prior convictions for conspiracy to deal in marijuana and dealing in cocaine did not qualify as prior unrelated felonies under the habitual offender statute when he was sentenced. Halcomb maintains that the amendments to Indiana Code section 35-50-2-8, which purportedly exclude him from being habitual eligible, are ameliorative and entitle him to have the thirty-year enhancement vacated.

To prevail on an ineffective assistance of counsel claim, the defendant must establish the two components of the test set out in Strickland v. Washington, 466 U.S. 668 (1984). First, the petitioner must establish that counsel's performance was deficient. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). This part of the test requires the petitioner to demonstrate that counsel's representation fell below an objective standard of reasonableness and that counsel's errors were so serious that they resulted in a denial of the right to counsel guaranteed under the Sixth Amendment to the United States Constitution. McCorker v. State, 797 N.E.2d 257, 267 (Ind. 2003). Moreover, counsel's performance is evaluated as a whole. Lemond v. State, 878 N.E.2d 384, 391 (Ind. Ct. App. 2007). The court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. There is a strong presumption that counsel's representation was adequate, and

this presumption can be rebutted only with strong and convincing evidence. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002).

To establish the second part of the test, the petitioner must demonstrate that counsel's deficient performance prejudiced him. Smith, 765 N.E.2d at 585. The petitioner must show that but for counsel's unprofessional errors, there is a reasonable probability that the results of the proceeding would have been different. McCorker, 797 N.E.2d at 267. A reasonable probability for the prejudice requirement is a probability sufficient to undermine confidence in the outcome. Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). We need not even evaluate counsel's performance if the defendant suffered no prejudice from that performance, and most ineffective assistance claims can be resolved by a prejudice inquiry alone. Vermillion v. State, 719 N.E.2d 1201, 1208 (Ind. 1999).

The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel. Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006). There are three basic ways in which appellate counsel may be considered ineffective: 1) when counsel's actions deny the defendant his right of appeal; 2) when counsel fails to raise issues that should have been raised on appeal; and 3) when counsel fails to present claims adequately and effectively such that the defendant is in essentially the same position after appeal as he would be had counsel waived the issue. Grinstead v. State, 845 N.E.2d 1027, 1037 (Ind. 2006).

The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). Thus, we give considerable deference to appellate counsel's strategic decisions and will not find deficient performance in appellate counsel's choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999). To establish deficient performance for failing to raise an issue, the petitioner must show that the unraised issue was "clearly stronger" than the issues that were raised. Bieghler, 690 N.E.2d at 194.

In addressing Halcomb's counsel claims, we initially observe that courts must generally sentence a defendant under the statute in effect at the time of the commission of the offense. Jacobs v. State, 835 N.E.2d 485, 491 n.7 (Ind. 2005). However, in accordance with the narrow doctrine of amelioration, "'a defendant who is sentenced after the effective date of a statute providing for more lenient sentencing is entitled to be sentenced pursuant to that statute rather than the sentencing statute in effect at the time of the commission or conviction of the crime.'" Richards v. State, 681 N.E.2d 208, 213 (Ind. 1997) (quoting Lunsford v. State, 640 N.E.2d 59, 60 (Ind. Ct. App. 1994)). While the amelioration doctrine requires that sentencing occur after a more lenient statutory amendment, these facts alone are insufficient to permit sentencing under the amended statute. Id. at 213. More particularly, Halcomb is permitted to bring his case within the doctrine of amelioration only if he proves that "the legislature intended that the statute as

amended apply to all persons to whom such application would be possible and constitutional." Bell v. State, 654 N.E.2d 856, 858 (Ind. Ct. App. 1995).

Indiana Code section 35-50-2-8(d) provides that

> A conviction does not count for purposes of this section as a prior unrelated felony conviction if:
>
> . . .
>
> (3) all of the following apply:
>
> (A) The offense is an offense under IC 16-42-19 or IC 35-48-4.
>
> (B) The offense is not listed in section 2(b)(4) of this chapter.
>
> (C) The total number of unrelated convictions that the person has for:
>
> (i) dealing in or selling a legend drug under IC 16-42-19-27;
> (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);
> (iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
> (iv) dealing in a schedule IV controlled substance (IC 35-48-4-3); and
> (v) dealing in a schedule V controlled substance (IC 35-48-4-4);
>
> does not exceed one (1).

In considering the above, Halcomb asserts that the two convictions upon which the habitual offender enhancement was based are not sufficient under subsection (d)(3), because both of his prior unrelated offenses are for offenses listed in Indiana Code section 35-48-4. Halcomb asserts that the "triggering offense occurred before the effective date of I.C. § 35-50-2-8 on July 1, 2001, but because he was sentenced after its effective date, the statute is ameliorative." Appellant's Br. p. 17. Thus, Halcomb maintains that the provisions of Indiana Code section 35-50-2-8(d)(3)(A) are satisfied

and the two convictions used to support the habitual offender enhancement were not eligible prior unrelated felonies under the 2001 version of Indiana Code section 35-50-2-8(d). Stated another way, Halcomb contends that

> Subsection (d)(3)(C) inquires whether the total number of unrelated convictions for dealing in certain controlled substances does not exceed one. Halcomb has only one conviction for an offense under (d)(3)(C), as Halcomb's 1995 conviction for Dealing Cocaine is listed under (d)(3)(C)(ii). However, Halcomb's conviction for Conspiracy to Deal Marijuana is not listed in subsections (i) – (v), because he was prosecuted and convicted under I.C. § 35-48-4-10; this statute is not listed in this subsection (d)(3)(C)(ii). Halcomb's 1985 conviction for Dealing Marijuana was not actionable under I.C. § 35-48-4-2, Dealing in Schedule I, II, or III Controlled Substance, because that statute explicitly excluded Dealing Marijuana as a crime. Therefore Halcomb's convictions for offenses listed within I.C. § 35-50-2-8(d)(3)(C), total one: his 1995 conviction for Dealing Cocaine, [a] class B felony.

Appellant's Br. p. 12.

We note that the version of Indiana Code section 35-50-2-8 that Halcomb seeks to apply to his case is the product of two bills that our Legislature passed in 2001. The first, Senate Bill 358, was passed in the Senate on April 12, 2001. The Senate concurred with various amendment proposed by a House Bill on April 18, 2001. And that bill was signed into law by Governor O'Bannon on May 7, 2001, as Public Law 166-2001. The Senate bill excluded defendants from liability with regard to a habitual offender sentencing enhancement if their underlying felony was "a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction" or if defendants were charged with operating while suspended as a class D or class C felony. Senate Enrolled Act 358. That bill also

excluded certain prior unrelated felonies from serving as triggering offenses.[5] The felonies excluded were operating while suspended as a class D or a class C felony, designated by their present codifications and by earlier codifications that had been repealed and replaced. Finally, the Senate bill contained an un-codified provision that stated "IC 35-50-2-8, as amended by this act, applies only if the offense for which the state seeks to have the person sentenced as a habitual offender was committed after June 30, 2001." Senate Enrolled Act 358, Public Law 166-2001 § 5 (emphasis added).

The second bill that contributed to the present version of Indiana Code section 35-50-2-8 was House Bill 1001—a budget bill that also included amendments to the habitual offender statute. The proposed amendments to the habitual offender statute in Section 226 of the House Bill are identical to the Senate Bill, except that the House Bill exempted additional crimes from qualifying as underlying or triggering offenses under the habitual-offender statute. Section 226 of the House Bill defined these crimes as ones to which:

> (3) all of the following apply:
>
> (A) The offense is an offense under IC 16-42-19 or IC 35-48-4.
>
> (B) The offense is not listed in section 2(b)(4) of this chapter.

[5] Specifically, the bill provided that

> A prior unrelated felony conviction may be used under this section to support a sentence as a habitual offender even if the sentence for the prior unrelated offense was enhanced for any reason, including an enhancement because the person had been convicted of another offense. However, a prior unrelated felony conviction under IC 9-30-10-16, IC 9-30-10-17, IC 9-12-3-1 (repealed), or IC 9-12-3-2 (repealed) may not be used to support a sentence as a habitual offender.

(C) The total number of unrelated convictions that the person has for:

(i) Dealing in or selling a legend drug under IC 16-42-19-27.

(ii) Dealing in cocaine or a narcotic drug (IC 35-48-4-1);

(iii) Dealing in a schedule I, II, III controlled substance (ICC 35-48-4-2);

(iv) Dealing in a schedule IV controlled substance (IC 35-48-4-3); and

(v) Dealing in a schedule V controlled substance (IC 35-48-4-4);

does not exceed (1).[6]

The House Bill inserted the above provisions into subsection (b) of the Senate Bill, P.L. 166-2001, which also dealt with underlying offenses not subject to habitual offender enhancement—and into subsection (d) of the Senate Bill, which also listed offenses that could not trigger the enhancement. The House Bill passed in the House on March 29, 2001. On April 29, 2001, the House received a report from Senate advisors and conferees and passed the House Bill, which became P.L. 291-2001. This law was filed without the Governor's signature on May 11, 2001. Moreover, the House Bill contained an un-codified limiting section that related to the treatment of placement in community transition programs, and section (b) contained the following:

> IC 35-50-2-8 (b)(3), as amended by this act, applies only if the last offense for which the state seeks to have the person sentenced as a habitual offender was committed after June 30, 2001. IC 35-50-2-10, as amended by this act, applies only if the last offense for which the state seeks to have the person

[6] House Enrolled Act 1001.

> sentenced as a habitual substance offender was committed after June 30, 2001. However, a prior unrelated conviction committed before, on, or after July 1, 2001, may be used to qualify an offender as a habitual offender under IC 35-50-2-8 or as a habitual substance offender under IC 35-50-2-10.

House Enrolled Act 1001.

Section 226 of the House Bill, which amended the habitual offender statute, was to become effective July 1, 2001. Moreover, Section 226 of the House Bill, P.L. 291-2001, expressly states that it is intended to amend the habitual-offender statute "AS AMENDED BY SEA 358-2001 [P.L. 166-2001]."

When considering these amendments, it is apparent that the first bill—P.L. 166-2001—specifically provided that its changes to the statute were to apply "only if the offense . . . was committed after June 30, 2001. Senate Enrolled Act 358, Public Law 166-2001 § 5 (emphasis added). The second bill did not separately amend the habitual-offender statute as evidenced by the specific statement that the bill was only intended to amend "IC 35-50-2-8 as amended by SEA 358. . . ." P.L. 291-2001, § 226 (emphasis added).

Given these circumstances, we cannot say that the House and Senate haphazardly passed a statute that coincidentally considered the same subject matter. Rather, it can be gleaned from the above that the House Bill was deliberately intended only to add to the Senate Bill's amendment of the habitual offender statute. See Simmons v. State, 773 N.E.2d 823, 826 (Ind. Ct. App. 2002) (observing that there is a presumption that the legislature in enacting a particular piece of legislation has in mind existing statutes

covering the same subject). Moreover, repeals by implication are disfavored, and where two acts are seemingly repugnant, they should be construed, if possible, so that the later will not operate as a repeal or modification of the former. State ex rel. Davenport v. International Harvester Co., 216 Ind. 463, 466, 25 N.E.2d 242, 244 (Ind. 1940). We will deem a statute repealed by implication only where a later statute is so repugnant to and inconsistent with an earlier statute that it must be assumed the legislature did not intend both statutes to stand. Simmons, 773 N.E.2d at 826. Even more compelling, the presumption against finding two acts to be repugnant so that one must override the other "is especially strong against an implied repeal of an act by another act of a later date at the same session of the legislature." Davenport, 25 N.E.2d at 244. However, in instances where two inconsistent acts are passed in the same legislative session, "the one subsequently passed prevails." Smith v. State, 675 N.E.2d 693, 696-97 (Ind. 1996).

In this case, the amendments to the habitual offender statute were unlike those in Smith, where the passage of two different presumptive sentences for murder were irreconcilable because they both could not govern the same subject and instead forced the courts to "arbitrarily choose between the two statutes." Id. at 697; see also Baldwin v. Reagan, 715 N.E.2d 332, 340 (Ind. 1999) (where our Supreme Court applied the "last passed bill" rule to resolve various challenges to the seatbelt law when two acts conflicted as to whether a police officer could stop a vehicle if the children in the vehicle were not restrained with seatbelts).

Here, the legislative history of the 2001 amendments shows that the legislature was aware of existing habitual offender law and wished to continue the application of the general rule that offenders, who choose the timing of their offenses, remain liable to the habitual offender laws in effect when their crimes were committed. In short, we conclude that the amendments to the habitual offender statute apply only to offenses committed on or after July 1, 2001. Therefore, Halcomb has failed to demonstrate that he was erroneously sentenced under the habitual offender statute, and we conclude that trial and appellate counsel were not ineffective. As a result, the post-conviction court properly denied Halcomb's request for relief.[7]

The judgment of the post-conviction court is affirmed.

MATHIAS, J., and VAIDIK, J., concur.

[7] As an aside, we note that Halcomb directs us to Owens v. State, 911 N.E.2d 18 (Ind. Ct. App. 2009), in support of his contention that he was improperly sentenced under the habitual offender statute. Owens was convicted of dealing in cocaine within 1,000 feet of a youth program center and was found to be a habitual offender. On appeal, we affirmed Owens's conviction and determined, among other things, that a prior conviction for conspiracy to commit dealing "is, for purposes of [Indiana Code section 35-50-2-8], a prior conviction for dealing in cocaine." Id. at 25. Our Supreme Court has granted transfer in Owens, but no opinion has been issued. Nonetheless, in light of our discussion above, we disagree with Halcomb's assertion that his conviction "does not count irrespective of the result in Owens because dealing marijuana is not included in (d)(3)(C)." Appellant's Br. p. 19 n.4.