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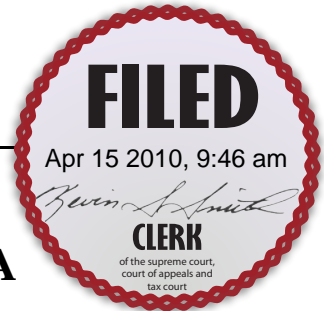
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**IN THE
COURT OF APPEALS OF INDIANA**

RANDALL SHIPP, JR.,
Appellant-Petitioner,

VS.

STATE OF INDIANA,

Appellee-Respoondent.

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No. 55A01-0908-PC-416

APPEAL FROM THE MORGAN SUPERIOR COURT 2
The Honorable G. Thomas Gray, Special Judge
Cause Nos. 55D03-0712-PC-333 and 55D02-0605-FB-121

April 15, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Randall Shipp, Jr. (Shipp), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUE

Shipp raises one issue on appeal, which we restate as: Whether he received effective assistance of trial counsel.

FACTS AND PROCEDURAL HISTORY

In early 2006, Julia Benifel (Benifel) contacted the Indiana State Police to report that someone had used her identity to purchase items at an electronics store in Fishers, Indiana. The officers could not locate the individual who had purchased the items. In March of 2006, Benifel contacted the Indiana State Police again because someone had attempted to open an account in her name at Indianapolis Power and Light (IPL). Investigating officers discovered that Traci Cazee (Cazee) had tried to open the IPL account. The officers obtained a search warrant for Cazee's residence, which she shared with her boyfriend, Christopher Powell (Powell). During the execution of the search warrant, the officers found the item that was purchased at the Fishers' electronics store under Benifel's name. Inside the residence, the officers also found documents bearing the name Glendola Beals (Beals) and inside the garage they found Beals' stolen vehicle. Looking in Beals' vehicle, the officers found a receipt from CVS, which bore Shipp's fingerprint.

Detective Robert Townsend with the Martinsville Police Department (Detective Townsend) interrogated Cazee and learned that Shipp had brought the car to her house and had asked her if he could park the vehicle at her residence. However, Cazee did not allow Shipp to park the car in front of her house and never gave him permission to park the vehicle inside her garage. Based on this information, Shipp was arrested.

On May 5, 2006, the State filed an Information charging Shipp with Count I, burglary, a Class B felony, Ind. Code § 35-43-2-1 and Count II, theft, a Class D felony, I.C. § 35-43-4-2(a). On January 9-10, 2007, a jury trial was held. At the close of the evidence, the jury found Shipp guilty as charged. On February 8, 2007, during a sentencing hearing, the trial court sentenced Shipp to twenty years on the burglary charge and to three years on the theft charge, with sentences to run consecutively. Thereafter, on February 22, 2007, Shipp filed his notice of direct appeal. However, on May 11, 2007, we granted Shipp leave to conduct a *Davis/Hatton*¹ post-conviction relief proceeding and dismissed the direct appeal without prejudice.

On June 7, 2007, Shipp filed his petition for post-conviction relief. On December 31, 2007, the State filed its response to Shipp's petition. On April 14, 2008, the post-conviction court conducted a hearing on the petition. At the post-conviction hearing, Shipp called his trial counsel as his sole witness. Shipp questioned why he had failed to object to Detective Townsend's testimony that Powell and Cazee identified him during a photo lineup and to the

¹ The *Davis/Hatton* procedure involves a termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court. *Slusher v. State*, 823 N.E.2d 1219, 1222 (Ind. Ct. App. 2005).

Detective's statements to the jury that Powell and Cazee had told him that Shipp had driven Beals' car to their house. Shipp's trial counsel responded that he failed to see any objectionable grounds to the testimony. Trial counsel was also asked why he did not object to the Detective's statement that Cazee had told him that Shipp had committed prior burglaries. Trial counsel replied that the information came as a surprise to him and testified that he did not know why he failed to move to strike. During cross-examination, Shipp's trial counsel explained that his trial strategy was to show that Powell and Cazee were the perpetrators. He added that

that was the sort of thing where I did not see where that the depositions at that time, at the time I was making the decision, was going to be that beneficial. Now, looking back, sure. Twenty/twenty hindsight, I wish I had taken depositions. But I just could not believe that . . . that with everything that . . . that Powell and Cazee had against them as far as all the materials that were found, and the only thing that was really convicting or that . . . that pointed a finger at . . . at [Shipp] was a receipt with his thumbprint on it that could have been put in [Beals'] . . . her car by anybody.

(Post-conviction Transcript p. 30).

Having received no ruling on the matter for almost seven months, on December 31, 2008, Shipp filed a motion in accordance with Indiana Trial Rule 53.2. Upon withdrawing the case from the post-conviction judge, the supreme court appointed a special judge. On July 10, 2009, the appointed post-conviction court denied Shipp's petition. The post-conviction court concluded, in pertinent part

[Trial counsel] represented Shipp at trial. [Trial counsel] articulated at the PCR hearing that he had a specific trial strategy. [Trial counsel] believes that two witnesses that were called to testify, [Powell] and [Cazee] were the culprits of the burglary. At trial, [trial counsel] conducted an extensive *voir dire*, made lengthy and well articulated opening and closing arguments,

formulated a strategy, cross-examined witnesses, and objected to various statements and evidence. [Shipp] argues that [trial counsel] was ineffective because he made several errors during trial. A defendant is not entitled to a PERFECT [sic] trial but a fair one. [Shipp] hired [trial counsel] based on previous experiences with counsel. [Shipp] points to roughly 20 pages out of 375 pages of testimony in the trial and alleges that [trial counsel] was ineffective based on failure to object to statements made during that very brief time period. Isolated errors are not sufficient for an ineffective assistance claim. [Shipp] fails as to the first prong of the *Strickland* test.

3. [Shipp] is also unable to satisfy the second prong of the *Strickland* test. [Shipp] would need to show that he was prejudice [sic] by the alleged errors of counsel and that the result would have been different. [Shipp] believes that absent the testimony of [Detective] Townsend there is a high probability that the jury would have acquitted [Shipp]. However, [Cazee] DID testify as to [Shipp] showing up with [Beals'] car. That along with the receipt bearing [Shipp's] fingerprint is sufficient evidence for a jury to determine that [Shipp] was involved in the burglary.

4. [Shipp] gave conflicting statements to the officer that very likely impacted the jury. Initially, [Shipp] denied even knowing [Cazee] and [Powell] but later admitted to a relationship with the two. [Shipp] is unable to satisfy the requirement that he was prejudice [sic] by the VERY limited number of error[s] by trial counsel.

(Appellant's App. pp. 531-32).

Shipp now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1, § 5; *Strowmatt v. State*, 779 N.E.2d 971, 974-75 (Ind. Ct. App. 2002). To succeed on appeal from the denial of relief, the post-conviction petitioner must show that the evidence is without conflict and leads

unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 975. The purpose of post-conviction relief is not to provide a substitute for direct appeal, but to provide a means for raising issues not known or available to the defendant at the time of the original appeal. *Id.* If an issue was available on direct appeal but not litigated, it is waived. *Id.*

II. *Ineffectiveness of Trial Counsel*

Shipp contends that his trial counsel was ineffective. Specifically, Shipp claims that his trial counsel's performance was defective when he repeatedly failed to object to hearsay statements.

A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Counsel is afforded considerable discretion in choosing strategy and tactics and we will accord those decisions deference. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *reh'g denied, cert. denied*, 537 U.S. 839 (2002). A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* The *Strickland* Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. *Id.* Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.* The two prongs of the *Strickland* test are separate and independent inquiries. *Id.* Thus, “[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.* (quoting *Strickland*, 466 U.S. at 697).

Shipp’s main contention focuses on the testimony of Detective Townsend. Specifically, he claims that his trial counsel was ineffective when he failed to object to numerous hearsay statements made by the Detective. During his direct examination, Detective Townsend informed the jury that: (1) both Powell and Cazee had picked Shipp out of a photo lineup; (2) both Powell and Cazee stated that Shipp had brought the vehicle to Cazee’s residence; and (3) Cazee indicated that Shipp had committed prior burglaries.

With respect to Powell’s and Cazee’s identification of Shipp in a photo lineup and their statements that Shipp had brought the vehicle to Cazee’s house, we note that Powell and Cazee testified at trial. During their respective direct examinations, Powell and Cazee both informed the jury that they had chosen Shipp out of a photo lineup. Cazee also testified that

she saw Shipp drive the vehicle that was found in her garage. Therefore, Detective Townsend's disputed statements were merely cumulative to the testimony of Cazee and Powell. Thus, even if trial counsel had objected to Detective Townsend's testimony and the objection would have been sustained, the same evidence would still have been placed in front of the jury through the testimony of Cazee and Powell. As a result, we fail to see how Detective Townsend's statements prejudiced Shipp and that its exclusion would have produced a different result.

Turning to Detective Townsend's testimony of Cazee's statement to him that Shipp had committed prior burglaries, we reach the same result. To establish ineffective assistance for counsel's failure to object, a defendant must establish that the trial court would have sustained the objection had one been made and that he or she was prejudiced by the failure to object. *Jones v. State*, 847 N.E.2d 190, 198 (Ind. Ct. App. 2006), *reh'g denied, trans. denied*. As stated above, we give deference to counsel's strategy and tactics. *Timberlake*, 753 N.E.2d at 603. We also presume competence on the part of the lawyer, such that an action or omission that is within the range of reasonable attorney behavior can only support a claim of ineffective assistance if that presumption is overcome by specific evidence as to the performance of the particular lawyer. *Morgan v. State*, 755 N.E.2d 1070, 1074 (Ind. 2001). Shipp has not met this burden.

During the post-conviction hearing, Shipp's trial counsel testified that his trial strategy was to place the blame on Powell and Cazee. He indicated his plan was to persuade the jury that a sole CVS receipt bearing Shipp's fingerprint was not sufficient evidence to convict his

client beyond a reasonable doubt. This testimony was corroborated by trial counsel's closing argument at trial where he extensively focused on Cazee's credibility and motive to lie. Thus, objecting to Detective Townsend's statement that Cazee had informed him that Shipp had committed prior burglaries would have brought unwanted attention to Cazee's statement and could have undermined trial counsel's trial strategy.

In sum, we agree with the trial court. Shipp is not entitled to a perfect trial, only to a fair trial, free of errors so egregious that they, in all probability, caused the conviction. *Oliver v. State*, 843 N.E.2d 581, 586 (Ind. Ct. App. 2006), *trans. denied*. Based on the evidence before us, Shipp received a fair trial. His trial counsel conducted an extensive *voir dire*, made lengthy opening and closing arguments which formulated his strategy, cross-examined witnesses and made objections to various statements and evidence. Even if his failure to object to Detective Townsend's recitation of Cazee's statement amounted to an error, an isolated mistake is not sufficient to declare trial counsel's performance ineffective. *See id.* Therefore, we find that trial counsel's performance was effective.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err when it found that Shipp's trial counsel had offered effective assistance of counsel and denied his petition for post-conviction relief.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.