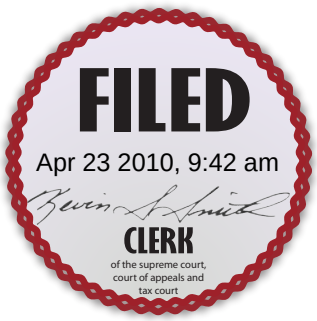

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IN THE
COURT OF APPEALS OF INDIANA

BILLY J. FREEMAN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 89A01-0908-PC-404
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE WAYNE CIRCUIT COURT
The Honorable Darrin M. Dolehanty, Special Judge
Cause No. 89C01-0805-PC-3

April 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Billy J. Freeman appeals the denial of his petition for post-conviction relief. We affirm.

Issue

Freeman presents a single issue for review: whether he was denied the effective assistance of trial counsel due to counsel's failure to challenge for cause two allegedly biased prospective jurors.

Facts and Procedural History

The facts underlying Freeman's conviction for Possession of a Schedule III Controlled Substance[1] were recited by this Court on direct appeal as follows:

> In the early morning of May 25, 2007, Richmond Police Officer Patrick Tudor observed Freeman and another man outside a bar "kind of arguing and being loud." Tr. p. 119. Officer Tudor followed them as they walked away from the bar. The two men continued arguing and began yelling at one another. The two men "locked up" to fight and "had their hands on each other and were kind of like in a hockey fight, were throwing blows at each other and kind of maneuvering back and forth trying to avoid being hit." *Id.* at 122. Officer Tudor called for back up, and Officer David Glover arrived soon thereafter.
>
> The officers got out of their patrol cars and approached the two men. Officer Tudor immediately observed that the men were intoxicated based on a strong odor of alcohol, their unsteadiness, their loud, abusive attitudes, their slurred speech, and their bloodshot eyes. The officers arrested the two men for public intoxication and patted down the men. Officer Glover found a cellophane package containing pills, later determined to be hydrocodone, in Freeman's pocket.

Freeman v. State, No. 89A04-0711-CR-628, slip op. at 1 (Ind. Ct. App. April 25, 2008). The

[1] Ind. Code § 35-48-4-7.

State initially charged Freeman with Possession of Schedule III Controlled Substance and alleged that he was a Habitual Substance Offender. Id. A jury found Freeman guilty as charged, and Freeman admitted to his status as a Habitual Substance Offender. Id. The trial court sentenced him to three years imprisonment with an enhancement of seven years for being a Habitual Substance Offender. Id.

On direct appeal, Freeman raised issues of (1) whether the trial court properly admitted evidence obtained during the search of his pocket; (2) whether the trial court properly entered judgment of conviction for possession of a schedule III controlled substance when the amended charges alleged his possession of a schedule II controlled substance; and (3) whether he was properly sentenced. Id. This Court affirmed the conviction and sentence. Id. at 5.

On May 22, 2008, Freeman filed a pro-se petition for post-conviction relief, alleging ineffective assistance of counsel and listing numerous purported failures on the part of his trial counsel. After a hearing on May 7, 2009, the post-conviction court took the matter under advisement and later issued an order denying the petition.

Discussion and Decision

I. Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). Post-conviction proceedings are civil in nature, and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v.

State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief appeals from a negative judgment, and to the extent that his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.

II. Analysis

On appeal, Freeman only seeks review of the denial of his post-conviction petition on the basis of ineffective assistance of trial counsel for failure of counsel to challenge two prospective jurors for implied bias. Ineffectiveness claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must show two things: (1) the lawyer's performance fell below an objective standard of reasonableness; and (2) 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. The two prongs of the Strickland test are separate and independent inquiries. Id. at 697. 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.

We will presume that a trial counsel's performance has met the standard of reasonableness, and a defendant must overcome this presumption with strong and convincing evidence to prevail on his claim. Coleman v. State, 694 N.E.2d 269, 272-73 (Ind. 1998).

"Allegations that counsel failed adequately to consult with the appellant or failed to investigate issues and interview witnesses do not amount to ineffective assistance absent a showing of what additional information may have been garnered from further consultation or investigation and how that additional information would have aided in the preparation of the case." Id. at 274.

Implied Juror Bias

At the post-conviction hearing, Freeman argued that he received ineffective assistance of trial counsel because his attorney failed to challenge two prospective jurors for cause due to their relationship to individuals connected to Freeman's case. Freeman did not call any witnesses and the only evidence presented was limited pages from the voir dire transcript. One of these prospective jurors upon which Freeman makes his challenge is referred to in the voir dire transcript excerpts as Prospective Juror Spurrier. However, there is no evidence that Spurrier was actually selected as a juror. Therefore, there is no evidentiary basis upon which Freeman can allege that his trial counsel's performance fell below an objective standard of reasonableness.

The second venire member Freeman alleges was biased was referred to as Prospective Juror Goble. During voir dire, Goble noted that she knew one of the State's potential witnesses, Wayne Loudy of the Richmond Police Department, as he was a friend of her husband. When asked if this would make it more difficult to be a juror, Goble replied in the negative. Goble also stated that she had previously been a paralegal and worked for a personal injury law firm. When asked if she had ever dealt with the Prosecutor's Office,

Goble replied that she had interned at the Tippecanoe County Prosecutor's Office when she was in college and commented that it was a positive experience. Shortly after this comment, the trial court indicated that Goble has been selected to sit on the jury.

Based on Goble's relationship with Loudy and her positive experience at a prosecutor's office as a paralegal intern, Freeman alleges that his trial counsel should have made a challenge for cause due to implied bias. Generally, proof that a juror was biased, either actual or implied, against the defendant entitles a defendant to a new trial. Alvies v. State, 795 N.E.2d 493, 499 (Ind. Ct. App. 2003), trans. denied. "Implied bias may be attributed to a juror upon a finding of a certain relationship between the juror and a person connected to the case, regardless of actual partiality." Kimbrough v. State, 911 N.E.2d 621, 629 (Ind. Ct. App. 2009).

As to Goble's prior college internship and civil law paralegal career, these experiences alone cannot rise to the level of implied bias as they do not directly relate to the case being tried. Regarding Goble's relationship with Loudy, we first note that there is no evidence in the post-conviction record that Loudy actually testified at Freeman's trial. Reviewing our opinion for Freeman's direct appeal, we find no reference to Loudy in the recitation of the facts regarding Freeman's arrest and trial. Nevertheless, the Indiana Supreme Court has held that "timely disclosure of a juror's casual relationship with a witness or a party, coupled with an assertion that the juror will remain impartial, adequately protect a defendant's right to an impartial jury." McCants v. State, 686 N.E.2d 1281, 1285 (Ind. 1997). Thus, even if Loudy testified at Freeman's trial, Goble's timely disclosure of her husband's casual relationship

with Loudy and her assertion that she would remain impartial does not raise a presumption of implied bias. See Williams v. State, 891 N.E.2d 621, 629 (Ind. Ct. App. 2008) (holding that the trial court did not abuse its discretion in denying motion for mistrial when juror acknowledged past friendship with a State witness and acknowledged that she would remain fair and impartial despite past relationship).

Based on the foregoing, Freeman has not demonstrated that his trial counsel was ineffective. Therefore, his petition for post-conviction relief was properly denied.

Affirmed.

MAY, J., and BARNES, J., concur.