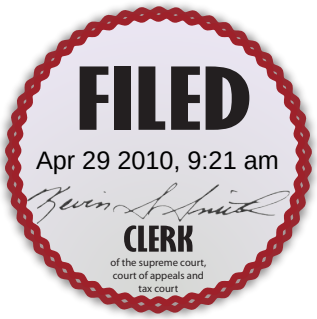

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IN THE
COURT OF APPEALS OF INDIANA

KENNETH L. THOMAS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 71A03-0907-PC-330
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D03-0206-PC-14

April 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Kenneth L. Thomas, pro se, appeals the denial of his petition for post-conviction relief. We affirm.

Issues

Thomas raises two issues on appeal:

I. Whether he was denied the effective assistance of trial counsel in counsel's choice not to tender jury instructions for lesser-included crimes; and

II. Whether he was denied the effective assistance of appellate counsel for purportedly utilizing the incorrect standard of review as to a Spradlin claim.

Facts and Procedural History

The facts underlying Thomas's conviction for Attempted Murder[1] were recited by this Court on direct appeal as follows:

> The facts most favorable to the jury verdict reveal that on the evening of August 16, 1999, LaShawn McGee and his friend were outside Thomas's residence visiting with the daughter of Thomas's girlfriend, who also lived at the residence. McGee placed a bottle of beer that he was carrying on the front porch in order to look for a tobacco pipe that he had dropped on the lawn. While McGee searched for the pipe, Thomas exited the residence and knocked over the beer bottle. Although the exact nature of the ensuing argument is disputed, McGee and Thomas began to argue, whereupon Thomas pointed a handgun at McGee and shot him in the neck.

Thomas v. State, No. 71A04-0012-CR-518, slip op. at 2 (Ind. Ct. App. Aug. 23, 2001). Thomas was subsequently arrested, charged and convicted by a jury of attempted murder. Id. On direct appeal, Thomas raised issues of (1) sufficiency of the evidence; (2) adequacy of jury instructions as to the specific intent to kill element; (3) denial of a fair trial due to a

[1] Ind. Code §§ 35-42-1-1; 35-41-5-1.

denial of a request to continue; and (4) failure of the charging information to include all essential elements for attempted murder. Id. This Court affirmed Thomas's conviction. Id. at 10.

On June 3, 2002, Thomas filed a petition for post-conviction relief. Thomas proceeded pro se with support of standby counsel. After hearings conducted in 2008 on the petition, the petition was denied. Thomas now appeals.

Discussion and Decision

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.

Ineffectiveness claims for both trial and appellate counsel are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). Pruitt v. State, 903 N.E.2d 899, 927-28 (Ind. 2009), reh'g denied. 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. Strickland, 466 U.S. 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 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.

I. Trial Counsel

First, Thomas asserts that he was denied effective assistance of trial counsel in his counsel's failure to offer instructions for lesser-included offenses. The Indiana Supreme Court has stated:

> A reviewing court will not second-guess the propriety of trial counsel's tactics. It is well established that trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. This is so even when such choices may be subject to criticism or the choice[s] ultimately prove detrimental to the defendant.

Davidson v. State, 763 N.E.2d 441, 446 (Ind. 2002) (internal citations and quotations omitted). The tactical decision not to tender lesser included offense instructions does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense. Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). Thus, trial counsel making a reasonable tactical decision to pursue an all or nothing strategy is a choice of trial strategy and is not subject to attack in an ineffective assistance of counsel claim. Id.

Thomas did not have his trial counsel testify at the post-conviction hearing. However in the trial record, it is clear that trial counsel for Thomas chose an all or nothing strategy by arguing that Thomas was not guilty by reason of the affirmative defense of self-defense and that the State only charged attempted murder and that it could not prove the element of intent. This can be seen in trial counsel's closing remarks:

> In this particular case, the State filed a charge, not of battery with a deadly weapon, not of inflicting serious bodily injury in a rude[,] insulant [sp] or angry manner. They charged the crime of attempted murder. And the fact that there is somebody that has hurt, Mr. McGee, a very bi[g] hurt, does not necessarily establish that a crime was committed.
>
> . . . .
>
> What shows up? Yes, there was a beer, and it apparently got knocked over where everybody was on an August night, out there in the front of the house. Nothing untoward, nothing nefarious going on.
>
> . . . . Sheneka testified as to Mr. McGee coming from out where he was looking, coming up to Mr. Thomas.
>
> And what happens is, when I walk towards you, what's your reaction? What's your reaction? Is it anger? Is it apprehension? Is it fright? And now let's get

> things moving really quick.
>
> . . . .
>
> Well, you are a hundred and some pounds. You're 5'10". Here's a young man. He's 6'. . . . What's he going to do? He's hit you once. Is he going to continue? . . . . Instead, he acts in the panic of that moment and [Thomas] fires twice. He was in a place where he had a right to be. There doesn't appear to be any question that there was some physical contact, tussling.
>
> . . . .
>
> And the second issue that we think is dispositive of it, is that there is a [] lack of evidence, that he intended to kill him. Because he didn't take steps to kill him. . . . [The State has the burden to prove intent to kill;] Not to wound, not to inflict serious bodily injury, but a specific intent to kill. That is the critical element of the crime of attempted murder.
>
> What went on may have been a crime, but it was not the crime of attempted murder, as defined by statute.

Tr. 524, 527-30 and 532-33. It was clear that trial counsel was aware of the lesser included offenses that might have been supported by the evidence by his closing statements as well as his refusal to tender such instructions when suggested by the prosecutor. Clearly, the decision not to tender lesser included offenses was a tactical decision. See Autrey, 700 N.E.2d at 1142. Thus, this decision is not subject to attack as a claim of ineffective assistance of trial counsel.

II. Appellate Counsel

Claims of ineffective assistance of appellate counsel generally fall into three categories: (1) denying access to the appeal; (2) waiver of issues; and (3) failure to present issues well. Perry v. State, 904 N.E.2d 302, 308 (Ind. Ct. App. 2009), trans. denied.

Thomas's claim falls into the third category as he contends that his appellate counsel failed to competently present the issue of the trial court's alleged erroneous instructions as to the elements for attempted murder. Specifically, Thomas contends that his appellate counsel induced the appellate court to apply a higher standard of review for his Spradlin claim. A Spradlin[2] claim is an allegation that the jury instructions for the mens rea requirement for attempted murder included "knowingly" as opposed to the required "intent to kill." See Ramsey v. State, 723 N.E.2d 869, 872 (Ind. 2000).

However, Thomas concedes that his appellate counsel included the correct standard of review on appeal for the alleged incorrect instruction as to the requirements of attempted murder. His appellate counsel specifically emphasized that due to Thomas's trial counsel lodging a contemporaneous objection at trial the standard of review was reversible error as opposed to fundamental error. Appellant's Brief at 7-8. Thomas contends that his appellate counsel did not present the issue competently due to using the phrase "the instructions as a whole," which is part of the fundamental error analysis, leading this Court to use the incorrect standard of review. We disagree as the correct standard of reversible error was stated in Thomas v. State, No. 71A04-0012-CR-518, slip op. at 5 (Ind. Ct. App. Aug. 23, 2001) ("In *Spradlin v. State*, 569 N.E.2d 948, 950 (Ind. 1991), the court determined that an attempted murder instruction 'must include the required mens rea of specific intent to kill'

[2] Spradlin v. State, 569 N.E.2d 948, 950, 951 (Ind. 1991) (holding "an instruction which purports to set forth the elements which must be proven in order to convict of the crime of attempted murder must inform the jury that the State must prove beyond a reasonable doubt that the defendant, with intent to kill the victim, engaged in conduct which was a substantial step toward such killing").

and that reversible error occurs when the jury is instructed that a mens rea of 'knowingly' is sufficient to establish the intent element of attempted murder."). Furthermore, this Court determined that there was no error as the instruction that set forth the elements for attempted murder specifically required the intent to kill.[3] Therefore, Thomas's claim of ineffective assistance of appellate counsel fails. The post-conviction court properly denied the petition

Affirmed.

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

[3] "To convict the defendant of Attempted Murder, a Class A felony, the State must prove each of the following essential elements beyond a reasonable doubt:

1. the defendant, Kenneth L. Thomas,
2. did attempt intentionally to kill LaShawn McGee[,]
3. by means of shooting LaShawn McGee with a handgun,
4. with the intent to commit the crime of murder,
5. which constituted a substantial step toward the crime of murder."

Tr. at 113.