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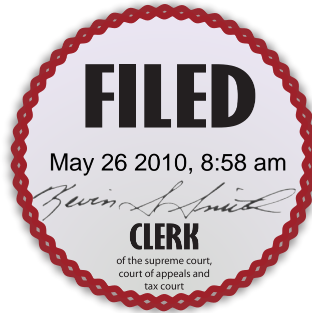

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IN THE COURT OF APPEALS OF INDIANA

SALVADOR A. PEREZ,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 20A03-1001-CR-35

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David Bonfiglio, Judge
Cause No. 20D06-0808-FD-303

May 26, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Salvador A. Perez appeals his conviction and sentence for Failure to Register as a Sex Offender,[1] a class D felony. Specifically, Perez argues that his trial counsel was ineffective and that the evidence was insufficient to convict him. Additionally, Perez contends that his eighteen-month sentence is inappropriate in light of the nature of the offense and his character. Finding that Perez's trial counsel was not ineffective, that the evidence was sufficient, and that the eighteen-month sentence is not inappropriate, we affirm the judgment of the trial court.

FACTS

On December 14, 1999, Perez was convicted in Illinois of criminal sexual abuse of a person unable to consent. Shortly after this conviction, Perez moved to Indiana, where he is required to register as a sex offender for life.[2] Perez registered as a sex offender upon his arrival in Elkhart County.

In January 2008, Perez moved to Goshen, and he registered his new address on January 9, 2008. In April 2008, Detective Brian Holloman of the Elkhart County Sheriff's Department mailed Perez an address verification[3] which was returned to Detective Holloman on April 14, 2008.

[1] Ind. Code § 11-8-8-17.

[2] It is undisputed that criminal sexual abuse of a person unable to consent is equivalent to sexual battery in Indiana. A defendant who has been convicted of sexual battery in Indiana is required to register as a sex offender for life. Ind. Code § 11-8-8-19.

[3] Indiana Code section 11-8-8-13 requires that law enforcement mail periodic address verifications to sexual or violent offenders living within their jurisdiction.

Detective Holloman sent another address verification on July 1, 2008, but it was returned to the Sheriff's Department with a postal notation that Perez was not known at that address. The envelope also had a handwritten notation that read, "Does not live here!" Tr. p. 12, 16.

On July 29, 2008, Officer Brandon Denesek of the Elkhart County Sheriff's Department took a pre-written Affidavit of Non-Compliance to Perez's last registered address. He spoke to Ana Lara, Perez's relative and former roommate, who told him that Perez had moved out on June 15, 2008. Officer Denesek wrote the date into a blank on the affidavit and gave it to Lara to sign. Lara signed the affidavit in the presence of Officer Denesek, but, at trial, Lara denied having seen the affidavit or signing it.

When Detective Holloman arrived at work on July 31, 2008, he had three voice messages from Perez explaining that he had moved from his registered address four days earlier, that an emergency with his father had arisen in Mexico, and that he intended to leave the country to tend to his father. Perez did not give a new address; however, he appeared in person on August 4, 2008, to register his new address.

On August 26, 2008, Perez was charged with failure to register as a sex offender, a class D felony. On July 1, 2009, Perez requested a bench trial, which was conducted on October 2, 2009. At the conclusion of the trial, the trial court took the matter under advisement and on October 7, 2009, the trial court issued findings of fact and found Perez guilty as charged.

On December 9, 2009, the trial court sentenced Perez to eighteen months imprisonment, all executed. Perez now appeals.

DISCUSSION AND DECISION

I. Ineffective Assistance of Trial Counsel

Perez argues that his conviction should be vacated because his trial counsel was ineffective. When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. 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 to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. at 687. 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. If a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

Perez argues that his trial counsel was ineffective for introducing into evidence an envelope with hearsay notations written on it and for failing to object to hearsay

testimony. The Indiana Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Generally, hearsay is not admissible. Evid. R. 802. Nevertheless, some out-of-court statements are either specifically excluded from the definition of hearsay or are considered exceptions to the general rule excluding hearsay evidence. Furthermore, "out-of court statements that are offered for a purpose other than to prove the truth of the matter stated are not hearsay." Patton v. State, 725 N.E.2d 462, 464 (Ind. Ct. App. 2000). Moreover, a defendant is not prejudiced by the erroneous admission of hearsay evidence if it is cumulative of other, properly admitted evidence. Robinson v. State, 693 N.E.2d 548, 553 (Ind. 1998).

A. Introduction of Hearsay

Perez maintains that his trial counsel was ineffective for introducing an envelope[4] with hearsay notations written on it. During Perez's cross-examination of Detective Holloman, counsel offered an envelope addressed to Perez's last registered address on Lucerne Drive and postmarked July 2, 2008. After showing Detective Holloman the envelope, counsel asked him the following questions:

> Q. And in it there's a notation that– at the top of that– above Mr.'s– there's Mr. Perez's name Salvador Perez, appears on that envelope?
>
> A. Yes, sir.
>
> Q. Okay. And then above it there's a notation that says "'Does not live here!'" Correct?

[4] This court has not been provided with the actual exhibits. Nevertheless, from the parties' briefs and the trial transcript, we are able glean the content of the notations on the outside of the envelope.

> A. Yes, sir.
>
> Q. Okay. Would that have been what triggered you to make—have somebody from your office make a trip to his home?
>
> A. Actually the fact that it was returned from the postal service was all it would have taken.

Tr. p. 16. From this colloquy, we can reasonably conclude that the envelope was not offered for the truth of the matter asserted—that Perez no longer lived at that residence—but rather, was offered to explain why Detective Holloman sent a Officer Denesek to Perez's last registered address. "'Out-of-court statements introduced primarily to explain why a particular course of action was taken during a criminal investigation are not offered for the truth of the matter asserted and are not hearsay statements.'" Patton, 725 N.E.2d at 464 (quoting Clark v. State, 648 N.E.2d 1187, 1192 (Ind. Ct. App. 1995)). Consequently, Perez has failed to prove that his trial counsel was ineffective for introducing the envelope.

B. Failure to Object to Hearsay

In a related argument, Perez contends that his trial counsel was ineffective for failing to object to hearsay testimony. When a defendant argues that his trial counsel was ineffective for failure to object, the defendant must show that a proper objection, if made, would have been sustained. Jackson v. State, 683 N.E.2d 560, 563 (Ind. 1997).

Perez maintains that his trial counsel was ineffective for failing to object to Detective Holloman's testimony describing the notations on the envelope. During direct examination, Detective Holloman testified as follows:

> Q. What is your next contact after that point?
>
> A. Around the first of July 2008. We send out the address verification mailings about every three months based off of the last month they were physically in—at the Sheriff's Department to register.
>
> Q. So you sent one out July first?
>
> A. Yes, sir.
>
> Q. What happened with that?
>
> A. I received it back from the United States Postal Service still in the envelope indicating that it was attempted at his last registered address . . . , that he was not known at the address and there was—somebody had written on the outside of the envelope near Mr. Perez's address block on the outside of the envelope that he does not live there.
>
> Q. And as a result of that information, what did you do?
>
> A. I forwarded the information to then the afternoon shift Sargent [sic] who assigned Patrolman Denesek to go out to Mr. Perez's last registered address . . . to try to make contact with Mr. Perez.
>
> Q. And as a result of that investigation what did you find out?
>
> A. Information was received that he had moved from his last registered address on or prior to June 15, 2008.

Tr. p. 12-13.

Like the envelope discussed above, Detective Holloman's statements regarding the notations on the envelope were not offered to prove that Perez had moved from his last

known address. Rather, they were offered to explain the sequence of events in his investigation. Accordingly, Perez has failed to show that a hearsay objection would have been sustained, and this argument fails.

Perez also contends that his trial counsel was ineffective for failing "to object to Officer Denesek's hearsay evidence that [Perez] had moved from the premises on June 15, 2008." Appellant's Br. p. 7. Perez directs us to the following portion of Officer Denesek's testimony:

> Q. Could you identify what I handed you?
>
> A. Yes. It is a[n] Affidavit of Non-compliance for a registered sex offender.
>
> Q. Okay. And you talked Ms. Lara in regards to that?
>
> A. Yes, sir.
>
> Q. And what was the result of that conversation?
>
> A. She advised that Salvadore Perez had not resided at the residence for a pre-determinate time. I believe that it was since June 15 of 2008.
>
> Q. And then did you sign that affidavit?
>
> A. Yes, sir I did.
>
> Q. And did anybody else sign that affidavit?
>
> A. She signed the affidavit.
>
> Q. And she represented the date to you?
>
> A. Yes, sir.
>
> Q. Did she seem to have any trouble understanding you?

A. No, sir.

Tr. p. 33.

In the instant case, Officer's Denesek's testimony regarding what Lara had told him was inconsistent with Lara's trial testimony that she did not sign the affidavit, that Perez was still living with her when she spoke with Officer Denesek, and that she was unsure of exactly when Perez had moved out. Therefore, it is reasonable to conclude that Officer's Denesek's testimony was offered to impeach Lara's trial testimony. And when a prior inconsistent statement is used to impeach a witness, it is not hearsay because the statement is not offered for the truth of the matter asserted. Martin v. State, 736 N.E.2d 1213, 1217 (Ind. Ct. App. 2000). Consequently, Perez has failed to show that if his trial counsel would have objected to Officer Denesek's testimony, it would have been sustained, and his claim that his trial counsel was ineffective fails.

C. No Prejudice

Even assuming solely for argument's sake that trial counsel's performance was deficient, Perez has failed to establish that but for his counsel's unprofessional errors, the result of the proceeding would have been different. As will be fully discussed below, there was other evidence introduced from which the trial court could reasonably conclude that Perez failed to register as a sex offender.

II. Insufficient Evidence

Perez argues that there was insufficient evidence to convict him. In reviewing a challenge to the sufficiency of the evidence, an appellate court will not reweigh the

evidence or judge the credibility of witnesses. Baumgartner v. State, 891 N.E.2d 1131, 1137 (Ind. Ct. App. 2008). This court considers only the evidence most favorable to the verdict, and we will affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. McHenry v. State, 820 N.E.2d 124, 126-27 (Ind. 2005).

To convict Perez of failure to register as a sex offender, the State was required to prove beyond a reasonable doubt that Perez had moved to a new address and that he failed to register it in person within seventy-two hours. Ind. Code § 11-8-8-11, -17. Here, Detective Holloman testified that when he arrived at work on July 31, 2008, he had three voice messages from Perez explaining that he had moved four days prior but that he could not register his new address in person because he had an emergency in Mexico. In addition, Detective Holloman and Perez stated that Perez registered his new address in person on August 4, 2008.

Furthermore, Officer Denesek testified that he watched Lara sign the affidavit, attesting that Perez had moved from her residence on June 15, 2008, and that Lara had no trouble understanding Officer Denesek's explanation of the information contained in the affidavit. From this evidence, the trial court could reasonably conclude that, at best, Perez waited eight days to register his new address and, at worst, he waited one and one-half months to register his new address. In any event, there was sufficient evidence for

the trial court to conclude that Perez did not register his new address in person within seventy-two hours as required.

III. Inappropriate Sentence[5]

Perez argues that his eighteen-month sentence is inappropriate in light of the nature of the offense and his character and requests that this court revise it pursuant to Indiana Appellate Rule 7(B). When reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Indiana Code section 35-50-2-7 provides that "[a] person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years with the advisory sentence being one and one-half (1½) years." Here, Perez was sentenced to the advisory term, which is the starting point that the General Assembly has selected as the appropriate sentence for the crime committed. Childress, 848 N.E.2d at 1081. Additionally, when a defendant is sentenced to the advisory term, he bears a heavy burden in convincing this court that his sentence is inappropriate. Lewis v. State, 898 N.E.2d 1286, 1291 (Ind. Ct. App. 2009), trans. denied.

As for the nature of the offense, Perez failed to register his new address in person and within seventy-two hours as required by statute. As for Perez's character, he admitted that he illegally entered the United States in 1993. During his first six and one-

[5] This court was not provided with the transcript from the December 9, 2009, sentencing hearing. Therefore, we have conducted a Rule 7(B) analysis on the trial transcript and the PSI.

half years in the United States, Perez lived in Illinois, where he was convicted of sexual abuse and attempted obstruction of justice. Under these circumstances, we cannot say that the advisory sentence of eighteen months is inappropriate in light of the nature of the offense and Perez's character, and we decline to revise his sentence.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.