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IN THE COURT OF APPEALS OF INDIANA

ANDRE V. POWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A04-0909-PC-539
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan S. Roberts, Judge
Cause No. 20D01-0012-CF-298

JUNE 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF CASE

Petitioner-Appellant Andre V. Powell appeals the denial of his petition for post-conviction relief. We affirm.

ISSUES

Powell, who narrowed the number of issues before the post-conviction court in his "Motion to Reamend [sic] Amended Petition for Post-Conviction Relief Under Good Cause," raises eight issues for our review. Using the aforementioned motion as our guide, we consolidate, restate, and renumber the issues as:

I. Whether the post-conviction court committed reversible error when it failed to make detailed findings of fact and conclusions of law.

II. Whether the post-conviction court erred in concluding that Powell received effective assistance of counsel.

III. Whether Powell's decision to plead guilty was erroneously influenced by the guilty plea judge.

IV. Whether the post-conviction court erred in concluding that Powell's guilty plea was established by a factual basis.

V. Whether the post-conviction court erred in concluding that Powell understood the charge against him.

VI. Whether Powell was improperly denied assistance of counsel.

VII. Whether Powell was prejudiced by a biased judge.

FACTS AND PROCEDURAL HISTORY

On or about November 28, 2000, Powell broke into and entered the residence of Arvilla Miller and removed various items of jewelry. The State charged Powell with the

burglary of Miller's residence and the same-day burglary of the homes of Georgia Hardin and Charles Dyson. All three burglaries were charged as Class B felonies. Powell pled guilty to the Miller burglary, and the other charges were dismissed.

Powell subsequently filed a petition for post-conviction relief, and amended his petition a number of times before ultimately basing his claim for post-conviction relief on five grounds. The petition was denied after a hearing, and Powell now appeals.

DISCUSSION AND PROCEDURAL HISTORY

For the most part, completion of Indiana's direct appellate process closes the door to a criminal defendant's claims of error in conviction or sentencing. However, our law allows defendants to raise a narrow set of claims through a petition for post-conviction relief. See Ind. Post-Conviction Rule 1(1). The scope of the relief provided for in these procedures is limited to "issues that were not known at the time of the original trial or that were not available on direct appeal." *Allen v. State*, 749 N.E.2d 1158, 1163 (Ind. 2001), *cert. denied*, 535 U.S., 122 S.Ct. 1925, 152 L.Ed.2d 832 (2002). Issues available but not raised on direct appeal are waived, while issues litigated adversely to the defendant are *res judicata. Id.*

I. FINDINGS AND CONCLUSIONS

In an entry on its chronological case summary, the trial court stated, "Defendant's Petition for post-conviction relief is hereby denied." (Appellant's App. at 185). Powell contends that the post-conviction court erred in not issuing findings of fact and conclusions of law in support of its denial of his petition.

We agree that the trial court erred in not complying with the requirement that "a court shall make specific findings of fact and conclusions of law on all issues presented…." Ind. Post-Conviction Rule 1(6). However, the rule functions more for the benefit of the appellate court than as a ground for automatic reversal of a post-conviction court's denial of a petition. *Carpenter v. State*, 501 N.E.2d 1067, 1068 (Ind. 1986); *Kruckeberg v. State*, 465 N.E.2d 1126, 1128 (Ind. 1984).[1] While the post-conviction court's failure significantly slowed the review process, and we do not encourage the court's practice, we find that the issues have been sufficiently presented for review and addressed by the parties. See *Davis v. State*, 263 Ind. 327, 330 N.E.2d 738, 743 (1975) (holding that even though the lack of specific findings and conclusions make appellate review "more tedious," review is possible where there is no harm to the petitioner). Accordingly, the post-conviction court's error is harmless. See *Shelburne v. State*, 540 N.E.2d 146, 147 (Ind. Ct. App. 1989).

II. EFFECTIVENESS OF TRIAL COUNSEL

Powell contends that the post-conviction court erred in not concluding that his trial counsel was ineffective. A petitioner must satisfy two components to prevail on his ineffective assistance claim. *Curtis v. State*, 905 N.E.2d 410, 414 (Ind. Ct. App. 2009), *trans. denied*. He must demonstrate both deficient performance and prejudice resulting from it. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance is "representation that fell below an objective standard of

[1] Indeed, neither the State nor Powell requests that we remand with instructions that the trial court issue findings and conclusions.

reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Curtis, id* (quoting *Brown v. State,* 880 N.E.2d 1226, 1230 (Ind. Ct. App. 2008)). "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Id.* (quoting *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind.2007)). Prejudice occurs when a reasonable probability exists that, but for counsel's errors the result of the proceeding would have been different. *Curtis, id.* We can dispose of claims upon failure of either component. *Id.*

Powell first claims that his trial counsel was ineffective for failure to raise a timely objection to the use of a police report to refresh the memory of an officer who did not write the report. As a general rule, a defendant waives a suppression ruling by pleading guilty to the charges against him. *Alvey v. State*, 911 N.E.2d 1248, 1250 (Ind. 2009). However, an exception to the general rule applies when, as here, the person pleading guilty questions the voluntariness of his confession. *Id*. at 520.

In essence, Powell claims that he would not have pled guilty if trial counsel would have informed him of the alleged error in the suppression hearing and the possibility of raising the error as an issue in an interlocutory appeal.

We conclude that any error would have been harmless, as a favorable ruling on appeal would have, at best, forced the author of the report to testify. Thus, Powell would have been facing the same circumstances as he did when he pled guilty—a confession to the offenses, witnesses to the offenses, and a highly desirable offer of twelve years instead of a possible sixty years of incarceration. Under the circumstances, any error by trial

counsel did not cause prejudice to Powell. Accordingly, Powell has failed to show ineffective assistance of trial counsel on this issue.

Powell also contends that he was denied effective assistance of counsel when his trial counsel allegedly advised him that pleading guilty would not prevent him from raising the suppression-hearing evidentiary issue in a petition for post-conviction relief. First, we note that at the post-conviction hearing Powell's counsel testified that she did not recall "even discussing PCR with you, Mr. Powell." (Appellant's App. at 139). The post-conviction court apparently believed trial counsel's assertion; therefore, there is no evidence to support this claim of ineffective assistance of counsel.[2]

III. JUDICIAL INVOLVEMENT IN PLEA NEGOTIATIONS

Powell contends that his plea is involuntary because the guilty plea judge became involved in the negotiations. Powell failed to raise this issue in his petition for post-conviction relief, and it may not be raised for the first time on appeal. See *Walker v. State*, 843 N.E.2d 50, 57 (Ind. Ct. App. 1006). Waiver notwithstanding, our examination of the record reveals no indication of the alleged involvement by the guilty plea judge.

IV. FACTUAL BASIS FOR GUILTY PLEA

[2] Powell makes much of the fact that the waiver of rights to a direct appeal was not mentioned in his plea agreement and that immediately after he orally acknowledged that he waived these rights, the guilty plea court court stated that appointed counsel would represent him on appeal. First, as Powell admits, he was advised by the court that his guilty plea would result in the waiver of the right to appeal. Second, the court's subsequent statement did not contradict the court's previous explanation of the waiver; indeed, it reinforced it. The court initially said, "You understand that *if you were to have a trial and you were found guilty by a jury that you'd have a right to appeal that conviction* to the Indiana Supreme Court or Appellate Court *and that by pleading guilty you're giving up that right to appeal?* (Appellant's Appendix at 99) (Emphasis supplied). Powell responded, "Yes, Your Honor." *Id*. The court then further emphasized waiver by stating, "That you have the right to be represented by an attorney at all stages in these proceedings, including *trial* or appeal…." *Id*. (Emphasis supplied).

Powell contends that there is no factual basis to support his plea of guilty to burglary, a Class B felony. He argues that that "'unlawful (or felonious) entry' had to be independently proven irregardless [sic] to whether or not there was a theft." (Appellant's Brief at 13). A person commits burglary as a class B felony when he breaks and enters a dwelling with intent to commit a felony in the dwelling. Ind. Code § 35-43-2-1.

During the plea hearing, the factual basis was established through the questioning of Powell's counsel. Powell agreed that on November 28, 2000, he "knowingly and intentionally enter[ed] a residence of another individual … with the intent to commit a felony, to wit: a theft within the premises of the house." (Appellant's Appendix at 102). He further agreed that he took jewelry from the house, put it inside his pocket, and left the residence. *Id.* He also agreed that he had no legal authority to take items from this residence. *Id.*

We conclude that it can be inferred from the factual basis that when Powell "knowingly and intentionally" entered the residence, he broke and entered without the permission of the residence's owner. Furthermore, even if the inference could not be made, Powell failed to show any prejudice. Prejudice must be established before post-conviction relief can be granted on grounds of failure to establish a factual basis for a guilty plea. *State v. Eiland*, 723 N.E.2d 863, 864-65 (Ind. 2000). "Evidence proving that the petitioner did not commit the crime to which [he] pled guilty would, of course, meet this burden. Any other evidence establishing that the petitioner would not have pled guilty had a factual basis inquiry been undertaken would also be relevant." *State v. Eiland*, 707 N.E.2d 314, 317 (Ind. Ct. App. 1999), *summarily affirmed*, 723 N.E.2d 863.

Here, there is no evidence that Powell is innocent or that he would have otherwise chosen to proceed to trial had a different factual basis inquiry been undertaken. Powell has, therefore, failed to support his claim, and it was properly denied.

V. MISUNDERSTOOD CHARGE

Powell contends that he pled guilty because he misunderstood the charge against him. Powell argues that his trial counsel could not specifically remember advising him as to the elements of the offense.

Our review of the record reveals that the following post-conviction hearing exchange between Powell (appearing pro se) and his guilty plea counsel:

A. [Y]ou knew what the elements of burglary were.

Q. Okay. That's true. But even—is it possible that even a defendant like myself, even in knowing the elements, would understand in entirety the required proof of each element?

A. And you were told that by me. We had talked about each and every element that had to have been—be proven by the State of Indiana. And we talked about that.

Q. Okay.

A. We had gone over the elements, each and every element of burglary and the burden that the State of Indiana would have had to have proven against you.

Q. Okay. I could be—I could be wrong, but I recall, it was about maybe—it was a few questions ago—it wasn't that many questions ago, that I asked you if you recalled any conversation that had taken place prior to my pleading guilty. And I think you said something to the effect that it was, like—that it was nine years ago and that you couldn't

recall. But—so are you basing your question—I mean, your answer that just answered, on your specific recollection or on—or on an assumption that you would have done so?

A. I'm basing my statement on the fact of how I've practiced for the last 25 years and defending defendants like yourself.

Q. Okay.

(Post-Conviction Hearing Transcript at 151-52).

Powell confessed to the burglary in 2000, pled guilty in 2002, served his entire six-year executed term, and then, after being convicted of another offense, filed his petition for post-conviction relief. We are not surprised that his guilty plea counsel could not remember the exact words spoken to him over nine years before the post-conviction hearing. Her testimony, however, was sufficient to warrant the conclusion that he had been informed of and knew the elements of Class B felony burglary.

VI. SERVICE OF THE STATE PUBLIC DEFENDER

Powell contends that he was denied counsel when the State Public Defender determined not to pursue his post-conviction proceeding and consequent appeal. It is well-settled that the right to counsel in a post-conviction proceeding is not required under the Sixth Amendment to the United States Constitution or Article I, Section 13 of the Indiana Constitution. *Daniels v. State*, 741 N.E.2d 1177, 1190 (Ind. 2004); *Curry v. State*, 643 N.E.2d 963, 982 (Ind. Ct. App. 1995)), *trans. denied.* Here, the Public Defender withdrew because Powell had been released from prison, a reason sanctioned by Post-Conviction Rule 1(9)(a). There is no issue here.

VII. ALLEGED BIAS OF THE POST-CONVICTION JUDGE

Powell contends that the post-conviction judge showed partiality because of his bias against Powell. The record shows, however, that Powell knew, and waived objection to the post-conviction judge's involvement in the case. Indeed, Powell recognized and did not object to the post-conviction judge's status as a deputy prosecutor in the guilty-plea judge's court, especially since the post-conviction judge had no involvement of the case. Powell's contention primarily stems from the post-conviction judge's action as the sentencing judge concerning a separate conviction., a contention that can be addressed in an appeal of that conviction and sentence.

When the impartiality of a judge is challenged on appeal, this Court will presume that the judge is unbiased and unprejudiced. *Smith v. State*, 770 N.E.2d 2d 818, 823 (Ind. 2002). To rebut that presumption, a defendant or appellant must establish from the judge's conduct that there was actual bias or prejudice that placed the defendant or appellant in jeopardy. *Id*. Such bias and prejudice exists "only where there is an undisputed claim or where the judge expressed an opinion of the controversy over which the judge was presiding." *Id*. To assess whether the judge "has crossed the barrier into partiality, [this court] will examine the judge's actions and demeanor." *Timberlake v. State*, 690 N.E.2d 243, 256 (Ind. 1997). Adverse rulings are insufficient to show bias per se. *Moore v. Liggins*, 685 N.E.2d 57, 63 (Ind. Ct. App. 1997). Moreover, bias will rarely, if ever be found on the face of rulings alone because the defendant who makes such a claim must show an improper or extra-judicial factor or such a high degree of favoritism that a fair judgment is impossible. *Crawford v. State*, 634 N.E.2d 86, 87 (Ind. Ct. App. 1994).

Our examination of the record shows that the post-conviction judge was extremely patient with Powell during the post-conviction hearing. Furthermore, even though he ultimately ruled against Powell on the merits, the post-conviction judge did not derive his decision from an improper source or hostility. In short, there is no showing of bias.

Affirmed.

BAILEY, J., and CRONE, J., concur.