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IN THE COURT OF APPEALS OF INDIANA

WESLEY SMITH,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 55A01-0909-PC-440
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Douglas R. Bridges, Special Judge
Cause No. 55D01-0512-PC-384

July 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Wesley Smith appeals the post-conviction court's denial of his petition for post-conviction relief. We affirm.

Issues

Smith presents several issues for our review, which we consolidate and restate as:

I. Whether the post-conviction court clearly erred when it determined that Smith did not receive ineffective assistance of trial and appellate counsel; and

II. Whether the post-conviction court clearly erred when it determined that Smith was not entitled to a new trial based upon alleged newly discovered evidence.

Facts and Procedural History

In 1986, the State charged Smith with multiple counts of possession of cocaine and marijuana and multiple counts of dealing in cocaine and marijuana revolving around five separate drug-dealing transactions between Smith, confidential informant Mark Stroud ("CI Stroud"), and undercover Indiana State Police Detectives Rick Lang and John Mishler. Four of the transactions occurred in Morgan County on September 2, 11, 19, and 29, 1986. One of the transactions occurred in Hendricks County on September 24, 1986. Smith was first tried in Hendricks County, and the jury acquitted Smith. Smith was then tried by jury in Morgan County and was convicted. Smith, who maintained that he was entrapped by police with

respect to all of the transactions, appealed his Morgan County convictions to this Court. We outlined the basic facts and procedural history on direct appeal as follows:[1]

> On June 5, 1986, Mark Stroud agreed to become a confidential informant for the Indiana State Police to avoid prosecution for selling cocaine. Thereafter, Stroud contacted Smith, with whom he had previously used drugs, to arrange to purchase drugs. In September 1986, Stroud and two undercover police officers purchased marijuana and cocaine from Smith on five separate occasions. One of the cocaine purchases took place in Hendricks County while the remaining four occurred in Morgan County. As a result of these transactions, Smith was charged with various offenses in Hendricks and Morgan Counties.
>
> In February 1987, Smith was tried in Hendricks County for possession and dealing cocaine. Smith raised entrapment as his sole defense. Following trial, the jury acquitted Smith of all charges. Thereafter, the State sought to try Smith in Morgan County for the sale of marijuana and cocaine. Smith moved to dismiss those charges on the basis that by acquitting him, the Hendricks County jury had necessarily found that he had been entrapped and, therefore, that the State was collaterally estopped from prosecuting him in Morgan County for charges which resulted from the same drug sting operation. The trial court denied Smith's motion. Following trial, the Morgan County jury convicted Smith of three counts of dealing in cocaine, all class A felonies, dealing in marijuana, a class D felony, and dealing in marijuana, a class A misdemeanor.

[1] Following his acquittal in Hendricks County, Smith filed a 42 U.S.C. § 1983 action in the United States District Court for the Southern District of Indiana against Detective Lang alleging that Lang had violated his civil rights by entrapping him and arresting him without probable cause. The district court granted Lang's motion for summary judgment, and the Seventh Circuit Court of Appeals affirmed in an unpublished decision. *Smith v. Lang*, 114 F.3d 1192 (1997), *cert. denied*. Smith erroneously relies on a most favorable recitation of facts provided by the federal appellate court to support his various contentions for post-conviction relief. As noted by the State, because the district court granted summary judgment in favor of Lang, the Seventh Circuit was obliged to take the facts alleged by Smith in his § 1983 complaint as true. *See Adusumilli v. City of Chicago*, 164 F.3d 353, 357 (7th Cir. 1998), *cert. denied* (1999). On appeal from the post-conviction court's findings and judgment here, we are not so obliged and instead consider the evidence favorable to the post-conviction court's judgment and all reasonable inferences flowing therefrom. *See Douglas v. State*, 634 N.E.2d 811, 815 (Ind. Ct. App. 1994).

Smith v. State, 670 N.E.2d 360, 361-62 (Ind. Ct. App. 1996), *trans. denied*.[2]

In his direct appeal, Smith maintained that the trial court erred when it failed to dismiss the charges against him because his prosecution in Morgan County was barred by the doctrine of collateral estoppel due to his acquittal in Hendricks County on charges relating to the same drug sting operation. *Id*. Specifically, Smith asserted that the State was estopped from contending that he had not been entrapped while selling cocaine and marijuana in Morgan County because the Hendricks County jury had already determined that Smith was entrapped into selling drugs. *Id*. We disagreed with Smith and concluded that there was no evidence that the Hendricks County jury necessarily determined that Smith was entrapped during the entire drug sting operation and that although Smith may have been entrapped in Hendricks County, he may not have been entrapped in Morgan County. *Id*. Thus, we affirmed Smith's Morgan County convictions, holding that the doctrine of collateral estoppel did not bar Smith's prosecution in Morgan County. *Id*.

Smith subsequently sought post-conviction relief on the Morgan County convictions. Evidentiary hearings were held on September 28, 2006, and May 24, 2007. On February 20, 2009, the post-conviction court entered its findings of fact and conclusions of law denying Smith's petition. This appeal followed.

[2] Smith was originally tried and convicted on the Morgan County charges in April of 1987. Our supreme court reversed those convictions and remanded for a new trial. *See Smith v. State*, 565 N.E.2d 1059 (Ind. 1991) (warrantless entry into locked storage room and seizure of marijuana evidence violated Fourth and Fourteenth Amendments to the U.S. Constitution). After retrial on the Morgan County charges, Smith was again convicted in April 1995. The above-noted direct appeal followed in which we affirmed Smith's Morgan County convictions.

Discussion and Decision

Smith appeals the denial of post-conviction relief. Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002). Rather, post-conviction proceedings provide defendants the opportunity to present issues which were not known at the time of the original trial or that were not available upon direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied* (2002). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When a petitioner appeals the denial of post-conviction relief, he appeals from a negative judgment. *Douglas v. State*, 800 N.E.2d 599, 604 (Ind. Ct. App. 2003), *trans. denied.* Thus, we may not reverse the post-conviction court's judgment unless the petitioner demonstrates that the evidence '"as a whole, leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.'" *Id*. (quoting *Curry v. State*, 674 N.E.2d 160, 161 (Ind. 1996)).

The post-conviction court here entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004) (citation omitted). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not have to give deference to its conclusions of law. *Rowe v. State*, 915 N.E.2d 561, 563 (Ind. Ct. App. 2009), *opinion on reh'g*. The post-

conviction court is the sole judge of the weight of the evidence and credibility of witnesses and therefore, on appeal, we may not reweigh the evidence or reassess witness credibility. *Id.*; *Fisher*, 810 N.E.2d at 679.

I. Effective Assistance of Counsel

Smith contends that the post-conviction court clearly erred when it determined that he did not receive ineffective assistance of both trial and appellate counsel. Claims of ineffective assistance of trial and appellate counsel are appropriate issues for post-conviction review. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). We evaluate claims pertaining to the denial of the Sixth Amendment right to effective assistance of counsel using the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, a defendant must show both that his attorney's performance fell below an objective standard of reasonableness and that the deficiencies in the attorney's performance were prejudicial to the defense. *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002). In order 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. *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), *trans. denied, cert. denied*. An inability to satisfy either prong of this test is fatal to an ineffective assistance claim. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999). The same standard is applicable to claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. *Wieland*, 848 N.E.2d at 81-82. We address each of Smith's contentions in turn.

A. Destruction of Evidence

Smith first contends that his trial counsel was ineffective in failing to move for dismissal of the charges by claiming that the State had intentionally destroyed and/or failed to preserve evidence that was "potentially" exculpatory in nature. Appellant's Br. at 8. Specifically, Smith asserts that the record indicates that the State destroyed or at least failed to properly preserve a tape recording of Smith's September 19, 1986, drug sale. We disagree with Smith.

To establish that counsel was deficient in failing to file a motion to dismiss, the defendant must show that the motion would have been granted. *Sauerheber v. State*, 698 N.E.2d 796, 807 (Ind. 1998). When determining whether a defendant's due process rights have been violated by the State's failure to preserve evidence, a determination must be made as to whether the evidence is "potentially useful evidence" or "material exculpatory evidence." *State v. Durrett*, 923 N.E.2d 449, 453 (Ind. Ct. App. 2010); *Land v. State*, 802 N.E.2d 45, 49 (Ind. Ct. App. 2004), *trans. denied*. Here, Smith concedes that the allegedly destroyed tape recording was merely potentially useful evidence rather than material exculpatory evidence. Evidence is potentially useful if '"no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.'" *Blanchard v. State*, 802 N.E.2d 14, 26 (Ind. Ct. App. 2004) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)). The State's failure to preserve potentially useful evidence does not violate a defendant's due process rights unless the defendant shows bad faith on the part of the police. *Id*. Bad faith is not simply bad judgment or negligence, but

rather implies the conscious doing of wrong because of dishonest purpose or moral obliquity. *Wade v. State*, 718 N.E.2d 1162, 1166 (Ind. Ct. App. 1999) (citations omitted), *trans. denied*.

The transcript of the tape recording of Smith's September 19, 1986, drug sale was admitted into evidence at trial. While the recording included an incriminating pre-sale phone call between Smith and CI Stroud, the remainder of the tape was inaudible as to the actual sale. Accordingly, the undercover officer in charge of the investigation, Detective Lang, testified as to the conversation he heard surrounding the drug sale. While Smith went to great lengths to convince the post-conviction court that the twenty-year-old tape recording was audible at some point prior to the original trial and that it must have been tampered with, Smith presented no credible evidence to the post-conviction court which would indicate that the State intentionally destroyed and/or failed to preserve the tape recording such that trial counsel would have been ineffective in failing to move to dismiss the charges against Smith.

It is evident from our review of the record in its entirety that an audible tape recording of the September 19, 1986, drug sale has never existed. The State's witnesses have consistently maintained that the recording equipment failed in some respect, which resulted in an inaudible recording. Smith directs us to what he believes to be inconsistent explanations offered by Detective Lang during the course of the various proceedings as to why a complete recording of the transaction does not exist. Detective Lang hypothesized that the transmitter may have failed or there may have been a problem in the connection between the receiver and the recording device. Smith makes much of the fact that at certain points

Detective Lang described the tape recording as inaudible or partially unintelligible, while at others he described the tape as blank. During the post-conviction hearing, CI Stroud testified for the defense that he heard the tape recording immediately after the drug sale, and although the sound "came and went," he believed that there was "more on" the tape in 1986 than existed during the post-conviction hearing. PCR Tr. at 63-64. Based upon these alleged inconsistencies, Smith suggests that a more intelligible tape recording of the transaction existed but must have been erased or destroyed and that trial counsel was ineffective in failing to file a motion to dismiss the charges.

The post-conviction court would not engage in such speculation and neither will we. We decline Smith's invitation to second-guess the post-conviction court and reweigh the evidence and reassess witness credibility. What is clear is that some sort of technical malfunction of the recording equipment occurred at the time of the September 19, 1986, drug sale and that the resultant recording was, is, and has always been incomplete and/or inaudible. There is nothing in the record to suggest that the blank or inaudible recording was a result of bad faith on the part of police and, thus, trial counsel could not have successfully argued that Smith's due process rights were violated because the State failed to preserve evidence that was potentially useful. Smith has failed to show that, had trial counsel filed a motion to dismiss the charges against him, such motion would have been granted under the

circumstances. The post-conviction court properly concluded that Smith failed to show that trial counsel rendered ineffective assistance on this issue.[3]

B. Inadmissible Evidence

Smith maintains that trial counsel rendered ineffective assistance by failing to object to certain testimony. Smith's brief on appeal merely contains a bullet-point list of what he contends is inadmissible evidence. Appellant's Br. at 11. Smith fails to put forth a cogent argument or cite to any authority in support of his argument that the testimony was inadmissible or that he was prejudiced by counsel's failure to object to the admission of the evidence. Consequently, his claim of ineffective assistance of counsel regarding this testimony is waived. *See Cooper v. State*, 854 N.E.2d 831, 834 n. 1 (Ind. 2006) (finding argument waived based on failure to comply with Indiana Appellate Rule 46(A)(8)(a) which requires argument be supported by coherent reasoning with citations to authority).

C. Collateral Estoppel

Smith next claims that his trial counsel was ineffective in failing to properly preserve the issue of collateral estoppel for his direct appeal. Collateral estoppel operates to bar relitigation of the same fact or issue where that fact or issue was necessarily adjudicated in a former suit and the same fact or issue is presented in the subsequent lawsuit. *Bonham v.*

[3] Smith also suggests that trial counsel should have filed a motion to dismiss the charges because Smith and CI Stroud had additional contacts and conversations that were not monitored or recorded and those contacts may have provided exonerating evidence. Smith cites no authority, and we are aware of none, that places an affirmative obligation on the State to record all contacts between a confidential informant and a defendant. Moreover, Stroud was available at trial and fully permitted to relay the content of any alleged unrecorded contacts to the jury. Smith's argument on this point is unavailing.

State, 644 N.E.2d 1223, 1226 (Ind. 1994). Smith's criminal charges involved five separate drug transactions. One transaction occurred in Hendricks County, and the other four occurred in Morgan County. Smith was tried first in Hendricks County and raised the defense of entrapment. The Hendricks County jury acquitted Smith. Thereafter, Smith proceeded to trial in Morgan County. Because Smith was acquitted in Hendricks County on charges relating to the same drug sting operation, Smith's trial counsel moved to dismiss the Morgan County charges on the basis that the Hendricks County jury must have found that the police entrapped Smith during the entire series of drug transactions, not just the transaction that occurred in Hendricks County, and thus the State should be collaterally estopped from prosecuting him in Morgan County.

In support of his motion to dismiss, trial counsel submitted five pages of the transcript from the Hendricks County trial which referenced the fact that Smith had admitted his possession and sale of drugs but had asserted an entrapment defense. The trial court denied Smith's motion to dismiss. In his motion to reconsider the trial court's denial of the motion to dismiss, counsel additionally supplied an affidavit from a member of the Hendricks County jury in which the juror attested that the jury had found that Smith was entrapped while selling the drugs. Again, the trial court denied the motion to reconsider. At no time did trial counsel submit the entire transcript from Smith's Hendricks County trial.

On direct appeal, we recognized that our review was limited to the evidence presented by trial counsel in our determination of whether Smith had proved that the Hendricks County jury necessarily determined that he had been entrapped during the entire sting operation,

which included the Morgan County transactions. *Smith*, 670 N.E.2d at 362. While we may not have been presented with the Hendricks County transcript in its entirety, we were nevertheless able to determine from the record before us that the doctrine of collateral estoppel did not bar Smith's prosecution in Morgan County. We specifically concluded that even assuming the Hendricks County jury determined that Smith was entrapped during the drug sale on September 24, 1986, he may not have been entrapped during the Morgan County transactions which occurred on September 2, 11, 19, and 29, 1986. *Id*. at 363. Indeed, we noted that a person's propensity to commit a crime can change over time. *Id.* Contrary to Smith's contention, we had an adequate record before us to determine the issue of collateral estoppel raised on direct appeal.[4]

Smith baldly asserts that had counsel presented the trial court with the entire Hendricks County trial transcript, the trial court would have granted his motion to dismiss based on the doctrine of collateral estoppel, or, at the very least, this Court on direct appeal would have reversed his convictions. Smith, however, fails to compare the limited Hendricks County transcript originally supplied by trial counsel with the entire Hendricks County

[4] We note that our supreme court has recently concluded that jury verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable. *Beattie v. State*, 924 N.E.2d 643, 649 (Ind. 2010). Why we need not determine the issue here as Smith's direct appeal occurred in 1996, we question the continued vitality of the doctrine of collateral estoppel as a basis for appellate review of jury verdicts in criminal cases in light of *Beattie*. If we are not permitted to interfere with logically inconsistent verdicts rendered in the same proceeding, as a practical matter, jury verdicts rendered in separate proceedings attacked as being inconsistent due to collateral estoppel would necessarily also be insulated from review. *But see Coleman v. State*, 924 N.E.2d 659, 664 (Ind. Ct. App. 2010) (decided before *Beattie,* majority applied collateral estoppel to vacate attempted murder conviction because inconsistent with prior acquittal for murder; Darden, J., dissented, explaining that application of collateral estoppel by majority to reconcile inconsistent verdicts impermissibly impinged on jury's role), *trans. pending*.

transcript to indicate what omitted information would have changed the trial court's denial of his motion to dismiss or our determination on direct appeal that the doctrine of collateral estoppel did not bar Smith's prosecution in Morgan County. Smith has directed us to no evidence which, had it been included in the original trial record, would have demonstrated that the Hendricks County jury necessarily determined that he was entrapped during the entire drug sting operation, including the Morgan County transactions. Accordingly, Smith has not met his burden to show that he was prejudiced by trial counsel's failure to submit the entire Hendricks County transcript.

D. Entrapment Defense

Smith's sole argument as to the representation provided by appellate counsel is contained in a single sentence stating that his direct appeal counsel "failed to preserve the defense of entrapment[.]" Appellant's Br. at 18. Our supreme court has recognized three types of ineffective assistance of appellate counsel claims, specifically: (1) counsel denied the defendant access to appeal; (2) counsel waived issues; and (3) counsel failed to present issues well. *Bieghler v. State*, 690 N.E.2d 188, 193-95 (Ind. 1997), *cert. denied* (1998). None of these categories is applicable here, as Smith does not develop an argument or explain what appellate counsel should have done differently. Accordingly, Smith's challenge to the post-conviction court's denial of his claim of ineffective assistance of appellate counsel is waived. *See Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (failure to make cogent argument results in waiver), *trans. denied*.

Waiver notwithstanding, as best we can discern, Smith appears to question his

counsel's decision not to assert on direct appeal that the State had failed to present sufficient evidence to rebut Smith's entrapment defense. "[T]he decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Reed v. State*, 856 N.E.2d 1189, 1196 (Ind. 2006). For countless years, experienced advocates have "emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues." *Bieghler*, 690 N.E.2d at 194 (citation and quotation marks omitted). Thus, when reviewing these types of claims, we should be particularly deferential to appellate counsel's strategic decision to exclude certain issues in favor of other issues more likely to result in a reversal. *Id.* As a result, ineffective assistance "is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal." *Reed*, 856 N.E.2d at 1196.

Smith's appellate counsel raised the issue of collateral estoppel on direct appeal and chose not to couple it with a sufficiency of the evidence challenge regarding the State's rebuttal of Smith's entrapment defense. Once a defendant has indicated an intent to rely on the affirmative defense of entrapment and has established government participation, the burden shifts to the State to show the defendant's predisposition to commit the crime beyond a reasonable doubt. *Scott v. State*, 772 N.E.2d 473, 474-75 (Ind. Ct. App. 2002), *opinion on reh'g, trans. denied*. Whether a defendant is predisposed to commit the crime charged is a question for the trier of fact, assuming evidence both of predisposition and a lack thereof. *Id.*

The evidence of entrapment in this case was equivocal, as there was ample evidence that Smith was predisposed to commit his crimes as well as evidence that he lacked such

predisposition. The jury heard and weighed that evidence in favor of the State, and, because we do not reweigh evidence on appeal, a challenge to the sufficiency of the evidence on this point by Smith's appellate counsel would not have been successful. *See Ferge v. State*, 764 N.E.2d 268, 270 (Ind. Ct. App. 2002) (we review of claim of entrapment under same standard as applies to other challenges to sufficiency of the evidence). Appellate counsel's decision not to raise the issue was both strategic and reasonable. Smith has not shown a reasonable probability that the outcome of the direct appeal would have been different if the issue had been presented by counsel. The post-conviction court appropriately did not second-guess appellate counsel's strategic decision. We find no clear error.

II. Newly Discovered Evidence

Finally, Smith contends that the post-conviction court erred in determining that he failed to establish the existence of newly discovered evidence which would require a new trial. New evidence mandates a new trial only when a defendant demonstrates that: (1) the evidence has been discovered since trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) it is worthy of credit; (8) it can be produced on retrial of the case; and (9) it will probably produce a different result at trial. *Taylor v. State*, 840 N.E.2d 324, 329-30 (Ind. 2006). We analyze these nine factors with care, as '"the basis for newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized.'" *Id*. at 330 (citations omitted). The burden of

showing that all nine requirements are met rests with the petitioner for post-conviction relief. *Id*.

Smith's claims of newly discovered evidence are the alleged destruction of the September 19, 1986, drug sale tape recording that we discussed earlier, CI Stroud's testimony to the post-conviction court that he was directed by police to lie about some of his contacts with Smith, and Debbie Wernky's testimony to the post-conviction court that she did not know Smith and had never been to his house contrary to the trial testimony of witness Tina Bartley.[5] As we concluded above, Smith has failed to present any credible evidence to support his allegation that the September 19, 1986, tape is in any condition but the same condition it has been since it was made. Thus, the inaudible condition of the tape is hardly "newly" discovered.

Regarding the post-conviction testimony of CI Stroud and Debbie Wernky, which contradicts testimony at trial, our review of the record indicates that the post-conviction testimony would be merely impeaching of prior trial testimony and, therefore, does not meet the criteria for newly discovered evidence. Additionally, whether a witness's testimony at a post-conviction hearing is worthy of credit is a factual determination to be made by the trial judge, who has the opportunity to see and hear the witness testify. *McVey v. State*, 863 N.E.2d 434, 446 (Ind. Ct. App. 2007), *trans. denied*. It is not within our province to replace the post-conviction judge's assessment of credibility with our own. *Id*. The post-conviction

[5] During Smith's 1995 Morgan County trial, Tina Bartley testified that she and Debbie Wernky (misspelled as "Warnakey" in record) went to Smith's residence in order to buy cocaine. Tr. at 2287-88. At Smith's PCR hearing, Debbie Wernky testified that she did not know Smith and had never been to his residence. PCR Tr. at 5.

court here specifically concluded that Smith failed to present credible evidence of "newly discovered evidence" at all, let alone evidence that would merit a different result on retrial. Appellant's App. at 124-26. Therefore, we affirm the judgment of the post-conviction court.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.