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IN THE COURT OF APPEALS OF INDIANA

LESTER ROWE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0911-PC-1061
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Judge
Cause No. 49G02-0401-PC-193996

August 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Lester Rowe appeals the post-conviction court's denial of his petition for post-conviction relief. Rowe raises two issues for our review, which we restate as the following single issue: whether Rowe received ineffective assistance of sentencing counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

The facts underlying Rowe's convictions were stated by this court in his direct appeal:

> On September 14, 2004, Rowe entered an O'Charley's restaurant, armed with a nine-millimeter handgun, and demanded money from the establishment's safe. The employees yielded to Rowe's demand, giving him over a thousand dollars. On October 16, 2004, Rowe entered a PayLess Shoe Store with a gun and demanded the money in the cash register. Although Rowe had a gun, no one in the store saw it. Again, Rowe was given money, which amounted to approximately one hundred dollars. Finally, on October 17, 2004, Rowe walked into a Popeye's Chicken restaurant and asked the cashier whether their chicken fingers were fresh. After receiving an affirmative answer, Rowe demanded the money in the cash register, telling the cashier that he had a gun and "didn't want it to be a murder." Due to someone either recognizing Rowe or realizing that he was under the influence of drugs, some customers were able to make Rowe leave the store without incident. All of these crimes occurred in Marion County.
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> The State filed charges against Rowe for each incident under separate cause numbers. Based on the September 14th incident, Rowe was charged with Robbery as a Class B felony, Criminal Confinement, as a Class B felony, Carrying a Handgun Without a License, as a Class A misdemeanor, Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony and alleged to be a Habitual Offender. For the October 16th incident, Rowe was charged with Robbery, as a Class C felony, Theft, as a Class D felony and alleged to be a Habitual Offender. In the third cause, Rowe was charged with Attempted Robbery, a Class B felony, and alleged to be a Habitual Offender. The three causes were later consolidated.

> Rowe and the State entered into a plea agreement where Rowe agreed to plead guilty to two counts of Robbery, one as a Class B felony and the other as a Class C, Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony, Attempted Robbery, a Class C felony, and one of the Habitual Offender allegations. In exchange, the State agreed to dismiss the four other charges and two additional Habitual Offender allegations. Pursuant to the plea agreement, the State would also recommend an executed sentence of between sixteen and thirty years.
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> The trial court accepted the plea agreement. In fashioning the sentence to be imposed, the trial court noted:
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> > The risk that the Defendant will commit another crime: Court believes that if the Defendant continues to use and abuse substances that that risk will be great. And the Court has also looked at the Defendant's prior character, conduct and criminal history, as stated before, when he's in Court, he's very respectful, when he's sober my guess is he's a different kind of man when he's out on the street and he's under the influence, so anyway, the Court has considered all that. The Court's considered the Defendant's prior criminal history which is likewise extensive, however, in that regard he's pleading guilty to several counts, which he's already taken that into account, that being a habitual offender and the serious violent felon.
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> The trial court then sentenced Rowe to ten years for Robbery, as a Class B felony, ten years for Possession of a Firearm, four years for Robbery, as a Class C felony, and four years for Attempted Robbery. Based on Rowe pleading guilty to the Habitual Offender allegation, the trial court enhanced the Class B Robbery conviction by ten years. The sentences were ordered to be served concurrently, resulting in an executed sentence of twenty years.

Rowe v. State, No. 49A02-0702-CR-129 at *1-*2 (Ind. Ct. App. Aug. 22, 2007) (footnotes and citations to the record omitted), trans. denied ("Rowe I").

On direct appeal, Rowe's appellate counsel raised a single issue for our review, namely, whether his sentence was inappropriate under Indiana Appellate Rule 7(B). Reviewing the nature of Rowe's offenses, we noted that the trial court "imposed the

presumptive sentence for each conviction, ordered the sentences to be served concurrently and added the minimum possible enhancement due to the Habitual Offender finding." Id. at *2. And reviewing the character of the offender, we stated, among other things, that we were not convinced that Rowe's decision to plead guilty "warrants a lesser sentence because he received a significant benefit in the State dismissing the three other felony charges, one misdemeanor charge and two additional Habitual Offender allegations." Id. at *3. Accordingly, we affirmed Rowe's twenty-year sentence.

On March 6, 2008, Rowe filed his petition for post-conviction relief, alleging that he had received ineffective assistance from his counsel during sentencing. Specifically, Rowe asserted that "his sentence represents an improper double enhancement[] because he was sentenced as a Serious Violent Felon in Possession of a Firearm[] and . . . his sentence was also increased by the Habitual Offender [s]entence enhancement." Appellant's App. at 58. On July 15, 2009, the post-conviction court held an evidentiary hearing on Rowe's petition. On September 4, the court entered its findings of fact and conclusions of law denying the petition. In relevant part, the post-conviction court concluded as follows:

> [Rowe's] Serious Violent Felon conviction was not enhanced under the habitual offender statute. In sentencing [Rowe], the Court attached the habitual offender enhancement to Count I, Robbery as a class B felony, and not to Count III[,] the Serious Violent Felon Count. That is, the Court sentenced [Rowe] to ten years on Count I, Robbery[,] and enhanced this by [ten] years because of the habitual. The Court then sentenced on the other counts required by the plea agreement, and ran all of these other sentences concurrent[] with the sentence for Count I.
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> This sentencing scheme presents no legal problems. In Sweatt v. State, 887 N.E.2d 81 (Ind. 2008)[,] the Supreme Court specifically held that, "[W]here a defendant is convicted of multiple felonies, one of which is

> possession of a firearm by a serious violent felon, and is found to be an habitual offender, the Court is not precluded from the use of one felony both to prove the defendant was a serious violent felon and an habitual offender, where the sentence for a felony conviction other than possession of a firearm by a serious violent felon is the sentence that is enhanced under the general habitual offender statute." Sweatt at 84. The Court must run the sentences concurrently to avoid double enhancement. Then, "the enhancements, though duplicative in name, operate just once to increase the defendant's term of imprisonment." Id. The Court concluded that this rule is fair and appropriate "because the enhancements operate on separate counts." Id. Consequently, [Rowe's] sentence was entirely proper[] and within the law.
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> This conclusion obviates the need for a lengthy discussion of the specifics of Rowe's individual claims. Since a finding of ineffective assistance of counsel requires a finding that the Petitioner was prejudiced, . . . in a situation where no error was found in the issues[] this Court cannot find ineffectiveness of counsel based on them. . . .

Id. at 59-60 (some alterations original). The court then denied Rowe's petition for post-conviction relief. This appeal ensued.

DISCUSSION AND DECISION

Rowe asserts that the post-conviction court erred when it denied his petition for relief. Our standard of review from the post-conviction court's denial of a petition for post-conviction relief is well settled:

> The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment, Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004), and we will not reverse the judgment unless the evidence unerringly and unmistakably leads to the opposite conclusion, Patton v. State, 810 N.E.2d 690, 697 (Ind. 2004). We also note that the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006). Such deference is not given

> to conclusions of law, which we review de novo. Chism v. State, 807 N.E.2d 798, 801 (Ind. Ct. App. 2004).

Taylor v. State, 882 N.E.2d 777, 780-81 (Ind. Ct. App. 2008).

Further:

> Postconviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Rouster v. State, 705 N.E.2d 999, 1003 (Ind. 1999). Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the postconviction rules. P C.R. 1(1); Rouster, 705 N.E.2d at 1003. If an issue was known and available, but not raised on direct appeal, it is waived. Rouster, 705 N.E.2d at 1003. If it was raised on appeal, but decided adversely, it is res judicata. Id. (citing Lowery v. State, 640 N.E.2d 1031, 1037 (Ind. 1994)). If not raised on direct appeal, a claim of ineffective assistance of trial counsel is properly presented in a postconviction proceeding. Woods v. State, 701 N.E.2d 1208, 1215 (Ind. 1998). A claim of ineffective assistance of appellate counsel is also an appropriate issue for postconviction review. As a general rule, however, most free-standing claims of error are not available in a postconviction proceeding because of the doctrines of waiver and res judicata.

Timberlake v. State, 753 N.E.2d 591, 597-98 (Ind. 2001).

Rowe contends that he was denied the effective assistance of sentencing counsel. Generally, a claim of ineffective assistance of counsel must satisfy two components. Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Id. at 687-88. Second, the defendant must show prejudice: a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694. For example, "[t]o succeed on a claim that counsel was ineffective for failure to make an objection, the defendant must demonstrate that if such objection

had been made, the trial court would have had no choice but to sustain it." Little v. State, 819 N.E.2d 496, 506 (Ind. Ct. App. 2004), trans. denied. Otherwise, any error in not objecting cannot meet Strickland's requirement of prejudice.

Rowe argues that his sentencing counsel rendered ineffective assistance "by failing to challenge the improper double enhancements of [the] Robbery Count and [the] Possession of a [H]andgun Count." Appellant's Br. at 8. That is, Rowe asserts that his counsel failed to raise a proper objection to the alleged double enhancement. To establish ineffective assistance for counsel's failure to object, a petitioner must show that the trial court would have sustained the objection had it been made and that the petitioner was prejudiced by the failure to object. Jones v. State, 847 N.E.2d 190, 197-98 (Ind. Ct. App. 2006) (citing Wrinkles v. State, 749 N.E.2d 1179, 1192 (Ind. 2001)), trans. denied. Stated another way, the petitioner must demonstrate that had the objection been made, the trial court would have had no choice but to sustain it. Oglesby v. State, 515 N.E.2d 1082, 1084 (Ind. 1987).

Again, Rowe argues that he impermissibly received a double enhancement to his sentence. As the post-conviction court correctly identified, our Supreme Court's recent opinion in Sweatt v. State is controlling authority over Rowe's claim and mandates upholding his twenty-year aggregate sentence:

> The question here is whether a given felony conviction can be the basis for an SVF count and also serve as grounds for an habitual offender finding.
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> * * *
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> We conclude that a court may avoid double enhancement by attaching the habitual to some offense other than the SVF, but, when counts

> are ordered served consecutively this is a distinction without a difference. . . .
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> The aggregate sentence, however, is a different matter. In sentencing an offender who has committed multiple crimes, trial courts face a decision as to whether the sentence on each count should run consecutively or concurrently, or a combination of both. In a case where separate counts are enhanced based on the same prior felony conviction, ordering the sentences to run consecutively has the same effect as if the enhancements both applied to the same count. This result is different only in form from the multiple enhancements the Court of Appeals found improper in Conrad [v. State, 747 N.E.2d 575 (Ind. Ct. App. 2001)]. On the other hand, if the trial court orders the sentences to run concurrently, the enhancements, though duplicative in name, operate just once to increase the defendant's term of imprisonment.

887 N.E.2d 81, 83-84 (Ind. 2008) (emphasis added; footnote and citation omitted).

According to Rowe, the sentencing transcript here is ambiguous as to which count the trial court attached the habitual offender enhancement. But any ambiguity was clarified by this court on direct appeal. In affirming Rowe's sentence, we expressly noted that, "[b]ased on Rowe pleading guilty to the Habitual Offender allegation, the trial court enhanced the Class B Robbery conviction by ten years." Rowe I at *2. Thus, Rowe's interpretation of the record is without merit.

In any event, any "double enhancement" was obviated by the trial court's order that the sentence for each count run concurrent with the enhanced robbery conviction. See Sweat, 887 N.E.2d at 84. Thus, the post-conviction court correctly concluded that "[t]his sentencing scheme presents no legal problems." Appellant's App. at 59. Any objection made by Rowe's sentencing counsel would not have been sustained, and Rowe's counsel did not perform deficiently by refusing to raise an unsustainable

objection. As such, we affirm the post-conviction court's denial of Rowe's petition for post-conviction relief.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.