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IN THE
COURT OF APPEALS OF INDIANA

SHAVAUGHN C. WILSON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-1002-PC-326
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G20-9712-PC-175225

October 13, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Shavaughn C. Wilson appeals the denial of his petition for post-conviction relief. Wilson argues that he received the ineffective assistance of trial and appellate counsel and that the post-conviction court erred by refusing to permit him to make two freestanding claims of error. Finding no error, we affirm.

FACTS

The underlying facts, as reported in Wilson's direct appeal, are as follows:

> [O]n November 29, 199[7], Officers Michael Mitchell and Carol Johnson heard a loud stereo when they were on bike patrol in an Indianapolis residential area. Shortly thereafter, the police officers discovered that the noise was emanating from a vehicle which was traveling down an alley. Consequently, the police officers stopped the vehicle and informed the driver, later determined to be Wilson, that he had been stopped because the volume of his stereo violated the municipal noise ordinance.
>
> When he was asked for his driver's license, Wilson informed the two police officers that he did not have one. Officer Mitchell then asked Wilson for his name and date of his birth. Wilson responded that his name was "Shawn Wilson" and gave the month and day of his birth, but not the year. After four requests, Wilson ultimately gave Officer Mitchell his birth year. Thereafter, Officer Johnson ran a driver's license check and Officer Mitchell issued a citation to Wilson for the municipal noise ordinance violation.
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> During the stop, Officer Mitchell observed that Wilson appeared nervous and was trembling and sweating profusely. Based upon concerns for officer safety, Officer Mitchell asked Wilson to step from the vehicle whereupon he performed a pat-down search for weapons. No evidence was discovered during the pat-down search.
>
> Officer Johnson's inquiry revealed that Wilson's driver's license was suspended. Consequently, Officer Mitchell placed Wilson under arrest for driving while his license was suspended. A subsequent search of Wilson's person revealed: (1) several large chunks of cocaine in a plastic baggie and eleven individual "bindles" of cocaine, totaling 25 grams; (2) Philly blunt cigar box which contained two

> cigars and one "bindle" of marijuana; (3) box of plastic baggies; (4) a razor blade; (5) $1280.00 in cash; and (6) two pagers.

Wilson v. State, 754 N.E.2d 950, 953 (Ind. Ct. App. 2001) (internal footnote omitted). On December 21, 1997, the State charged Wilson with class A felony dealing in cocaine, class C felony possession of cocaine, and class A misdemeanor possession of marijuana. The State later added a habitual offender allegation.

On September 24, 1998, Wilson filed a motion to suppress the drug evidence, arguing that the traffic stop had been invalid. Following a hearing, the trial court denied the motion on February 8, 1999. That same day, Wilson filed a pro se motion to participate in his defense as co-counsel, and the judge made a handwritten note on the motion that Wilson subsequently withdrew the request and asked for a public defender.[1] Appellant's App. p. 175.

Following Wilson's February 10, 1999, jury trial, the jury found Wilson guilty as charged. He waived jury trial on the habitual offender allegation, and on February 11, 1999, the trial court found Wilson to be a habitual offender. On March 5, 1999, the trial court imposed a twenty-year sentence for class A felony dealing in cocaine, enhanced by thirty years for the habitual offender allegation, and concurrent sentences of four years for class C felony possession of cocaine and one year for class A misdemeanor possession of marijuana.

[1] No transcript of the hearing is available.

Wilson directly appealed, arguing that the traffic stop was invalid, the subsequent search was invalid, and the evidence was insufficient. This court affirmed. Wilson, 754 N.E.2d at 958.

On April 28, 2009, Wilson filed an amended petition for post-conviction relief,[2] arguing that trial counsel was ineffective for failing to argue that the municipal noise ordinance was unconstitutional.[3] He also argued that appellate counsel was ineffective for failing to argue that the noise ordinance was unconstitutional and that he was unconstitutionally denied his right to self-representation. Finally, Wilson contended that these two claims were available as freestanding claims of error. Following an August 7, 2009, hearing, the post-conviction court denied relief on these issues on January 29, 2010. Wilson now appeals.

DISCUSSION AND DECISION

I. Standard of Review

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); Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Perry, 904 N.E.2d at 307. Thus, we will not

[2] Wilson's original petition was filed on October 25, 2004.

[3] He also argued that trial counsel was ineffective for advising the trial court that it was required to impose a thirty-year habitual offender enhancement on the class A felony conviction. The post-conviction court agreed and granted relief on this basis, remanding for resentencing.

reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

II. Assistance of Trial Counsel

Wilson first argues that trial counsel was ineffective for failing to argue that the municipal noise ordinance that led to the traffic stop is unconstitutional. When making a claim of ineffective assistance of counsel, the defendant must first show that counsel's performance was deficient. Strickland v. Washington, 466 U.S. 668, 687 (1984); Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). 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—in other words, 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. 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).

Initially, we note that trial counsel raised a vigorous challenge to the traffic stop, filing a motion to suppress the evidence and again objecting to the admission of the evidence at trial. Among other things, counsel argued that there was no reasonable suspicion for the traffic stop because the State failed to prove a violation of the ordinance and because a violation of a non-traffic ordinance should not constitute sufficient grounds

for a stop. It can certainly not be said, therefore, that trial counsel failed to address the propriety of the traffic stop or the admission of the drug evidence at trial.

Wilson, however, argues that trial counsel should have included another basis for the invalidity of the traffic stop—the constitutionality of the ordinance. The primary reason that Wilson contends his trial counsel should have raised this issue is this court's decision six years after his trial in Lutz v. City of Indianapolis, in which we found the ordinance to be unconstitutionally vague. 820 N.E.2d 766 (Ind. Ct. App. 2005).

It is black letter law that an attorney will not be deemed ineffective for failing to anticipate "or effectuate a change in the existing law." Harrison v. State, 707 N.E.2d 767, 776 (Ind. 1999) (emphasis added). In other words, Wilson cannot argue that his attorney was ineffective either because he failed to anticipate that six years later the ordinance would be held unconstitutional or because he failed to raise that argument himself. See Concepcion v. State, 796 N.E.2d 1256, 1262-63 (Ind. Ct. App. 2003) (rejecting ineffective assistance claim for failing to argue that specific intent is required for attempted murder even while recognizing that a later decision showed that this claim would have been successful had it been made). Therefore, Wilson has failed to establish that trial counsel performed deficiently on this basis.

In any event, Wilson cannot establish prejudice. Indiana Code section 35-37-4-5 provides that evidence may not be suppressed if it is obtained by a law enforcement officer in good faith. Among other ways, evidence is obtained in good faith if it is obtained pursuant to "a state statute, judicial precedent, or court rule that is later declared

unconstitutional or otherwise invalidated." I.C. § 35-37-4-5(b)(1)(B). Although ordinances are not included in that list, the same reasoning would almost certainly apply. Thus, even if trial counsel had argued successfully that the ordinance was unconstitutional, the evidence would not have been suppressed on that basis, inasmuch as it was obtained in good faith. Therefore, Wilson has failed to establish prejudice on this basis.

III. Assistance of Appellate Counsel

Wilson next argues that appellate counsel was ineffective for failing to raise the constitutionality of the noise ordinance and for failing to argue that he was denied his constitutional right to represent himself at trial. Claims of ineffective assistance of appellate counsel are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). Ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id.

As for the constitutionality of the noise ordinance, for all the reasons enumerated above, we find that Wilson has failed to establish that his appellate counsel was ineffective for failing to raise the issue. See Concepcion, 796 N.E.2d at 1263 (holding that "the failure to anticipate or effectuate a change in existing law cannot support an ineffective assistance of appellate counsel claim"). Furthermore, we note that the argument would have been found to have been waived on appeal, inasmuch as trial counsel had not raised it; we cannot say that appellate counsel was ineffective for likely

determining that the uphill attempt to meet the very rigorous burden of fundamental error would not have served his client well. Therefore, we decline to reverse on this basis.

Wilson also argues that appellate counsel should have raised an argument regarding his request to represent himself. He first contends that appellate counsel was ineffective for failing to visit him personally before filing his appellate brief, arguing that had the visit occurred, Wilson would have informed his counsel about this issue. Appellate counsel testified, however, that he communicated with Wilson via letter, per his usual practice, and asked for any information Wilson might have about issues to raise on appeal. That communication would have given Wilson every opportunity to bring this issue up with his appellate counsel.

Wilson made the request to represent himself at the suppression hearing. As noted above, there was no transcript made of this hearing; therefore, appellate counsel used Appellate Rule 31 procedures to certify the evidence presented at that hearing. Had Wilson informed appellate counsel of the self-representation issue in response to the letter, appellate counsel certainly would have included that topic in the certification. We can only conclude, therefore, that Wilson failed to avail himself of the opportunity to communicate this issue to his counsel, and decline to find that counsel was deficient for failing to visit with Wilson personally.

Furthermore, we note that Wilson testified at the post-conviction hearing that he requested to serve as co-counsel and the trial court denied his request because of Wilson's lack of legal training. Tr. p. 28-31. Initially, we observe that it is well

established that there is no constitutional right to hybrid representation. Myers v. State, 510 N.E.2d 1360, 1363 (Ind. 1987) (holding that "[g]ranting or denying hybrid representation is within the trial court's discretion"). Moreover, the record reveals that the trial court made a notation on Wilson's motion that he later withdrew the request and asked for a public defender. In light of this conflicting evidence and the fact that he was not entitled to hybrid representation, Wilson cannot establish that there is a reasonable probability that if counsel had raised the issue, the result would have been different. In other words, Wilson has failed to show prejudice. Therefore, we decline to reverse on this basis.

IV. Freestanding Claims of Error

Finally, Wilson argues that the constitutionality of the noise ordinance and the denial of his request to represent himself are freestanding claims of error that were unavailable at the time of his trial and appeal. See Bailey v. State, 472 N.E.2d 1260, 1263 (Ind. 1985) (holding that in the limited situation where an allegation of error was demonstrably unavailable at the time of trial and direct appeal, such claims may be raised and addressed in the post-conviction process).

We cannot agree. Just because an attorney is not required to raise a particular issue, and is not ineffective for not doing so, does not mean that the issue was unavailable to be raised. The language of the ordinance was known at the time of his trial and appeal, and nothing would have prevented Wilson from attacking its constitutionality. Similarly, the fact of his request for hybrid representation and the trial court's alleged denial of that

request were known at the time of his trial and appeal, and Wilson could have used the Appellate Rule 31 process to certify the evidence in that regard for his appeal. That he and his attorneys did not do so does not mean that his attorneys were ineffective—but it also does not mean that the issues were unavailable. These claims were not demonstrably unknown and, consequently, they are procedurally defaulted and not available for post-conviction review.

The judgment of the post-conviction court is affirmed.

ROBB, J., and MAY, J., concur.