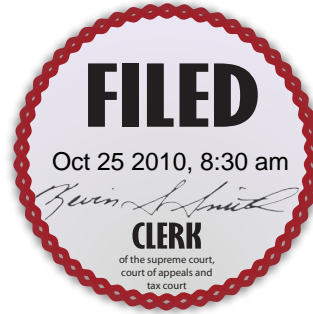


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JOSEPH M. CLEARY
Collignon & Dietrick
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANGELA N. SANCHEZ
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

WILLIE FERRELL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 49A02-1004-PC-514

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
Cause No. 49G01-9409-CF-122368

October 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION
MAY, Judge

Willie Ferrell entered a plea of guilty to possession of cocaine, then sought post-conviction relief. As he was not prejudiced by any of trial counsel's alleged deficiencies, we affirm.

FACTS AND PROCEDURAL HISTORY

In 1994, a confidential informant told an Indianapolis police officer he could purchase cocaine at an address in Indianapolis where Ferrell, then a minor, lived with his mother. Police arranged a controlled buy and the informant purchased cocaine. Police then obtained a warrant and raided the house. When they entered, four teenage males were in the living room, Ferrell's mother was in the kitchen, and Ferrell was in an upstairs bedroom that his mother testified was his room. In that room, police found cocaine, a pager, a cell phone, \$236 in cash, plastic baggies, and bullets.

Ferrell entered into an agreement to plead guilty to possession of cocaine. Juvenile jurisdiction was waived and he was sentenced to eight years. At his post-conviction hearing Ferrell testified he told his counsel he had nothing to do with the cocaine but she advised him to plead guilty even though he maintained his innocence. He testified counsel did not tell him he might have a viable defense because there were other people in the house and did not advise him on the law of constructive possession. Instead, she told him "there's no way that she can beat" the charges, (Tr. at 11), so he agreed to plead guilty because "a couple of years sounded better than 20 years." (*Id.*)

Thirteen years later, Ferrell petitioned for post-conviction relief. The post-conviction

court determined Ferrell “would have proceeded with the plea regardless of his attorney’s putative misadvice,” (App. at 14), and that Ferrell’s claim was barred by laches.¹

DISCUSSION AND DECISION

A petitioner who has been denied post-conviction relief faces a “rigorous standard of review.” *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001). He must convince the court on review that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.* at 170. We will disturb a post-conviction court’s decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Id.* We accept the post-conviction court’s findings of fact unless clearly erroneous. *Id.*

To prevail on a claim of ineffective assistance, the petitioner must establish counsel’s performance did not meet an objective standard of reasonableness under prevailing professional norms at the time of trial, and the deficient performance amounted to a “breakdown in the adversarial process that rendered the result of the proceeding fundamentally unfair or unreliable.” *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999) (quoting *Coleman v. State*, 694 N.E.2d 269, 272 (Ind. 1998)), *reh’g denied*. Failure to establish either prong will cause the claim to fail. *Id.*

¹ Because we affirm the denial of post-conviction relief, we need not review the laches issue.

If we can deny an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009). A petitioner alleging counsel was ineffective for overlooking a defense leading to petitioner's acceptance of a guilty plea must show a reasonable probability that, had the defense been raised, the petitioner would not have pleaded guilty and would have succeeded at trial. *Id.* at 1023. As Ferrell cannot make that showing, we find the prejudice issue dispositive and therefore need not address the alleged deficiency in counsel's performance.

Ferrell argues he "did not have sufficient possessory interest in the premises or objects therein for the State to have convicted him beyond a reasonable doubt based upon constructive possession." (Br. of Appellant at 5.) We disagree. A conviction of possession of contraband may rest on proof of either actual or constructive possession. *Conrad v. State*, 747 N.E.2d 575, 582 (Ind. Ct. App. 2001), *superseded by statute on other grounds by Mills v. State*, 868 N.E.2d 446 (Ind. 2007). To prove constructive possession, the State must show the defendant had both the intent and the capability to maintain dominion and control over the contraband. *Id.*

To prove intent, the State must demonstrate the defendant's knowledge of the presence of the contraband. *Id.* If, as here, control over the premises containing the contraband is non-exclusive, knowledge may be inferred from evidence of circumstances pointing to the defendant's knowledge of the presence of the contraband. *Id.* Among the

recognized additional circumstances that demonstrate knowledge are proximity of the defendant to the contraband and proximity of the contraband to items owned by the defendant. *Jones v. State*, 807 N.E.2d 58, 65 (Ind. Ct. App. 2004).

To establish the second element of constructive possession, the evidence must demonstrate the defendant's capability to exercise control over the item, that is, the ability to reduce the item to his personal possession or to otherwise direct its disposition or use. *Conrad*, 747 N.E.2d at 582. Control in this sense concerns the accused's power, by way of legal authority or in a practical sense. *Id.* at 583. A house or apartment used as a residence is controlled by the person who lives in it, and that person may be found in control of any drugs discovered therein, whether he is the owner, tenant, or merely an invitee. *Jones*, 807 N.E.2d at 66.

The cocaine was discovered in Ferrell's bedroom in the house where he was living. Ferrell was in that room when police entered. The cocaine was packaged in a plastic baggie in which were "many smaller individually packaged portions . . . consistent with packaging of cocaine for street sale." (App. at 144.) Bullets and a significant amount of cash were also found in the room. These circumstances demonstrate Ferrell's intent and capability to maintain dominion and control over the cocaine. Ferrell was not prejudiced by counsel's failure to tell him he might have a viable defense based on the presence of other people in the house or based on the law of constructive possession, because there is no reasonable probability such a defense would have succeeded when police found Ferrell in his bedroom

with the cocaine.

Because Ferrell was not prejudiced by his counsel's failure to tell him about those alleged defenses, Ferrell could not demonstrate his guilty plea was fundamentally unfair or unreliable. As Ferrell could not demonstrate he was entitled to post-conviction relief, Ferrell could not have been prejudiced by any error that may have occurred in the court's decision to deny Ferrell's claim based on laches. Thus, we affirm.

Affirmed.

ROBB, J., and VAIDIK, J., concur.