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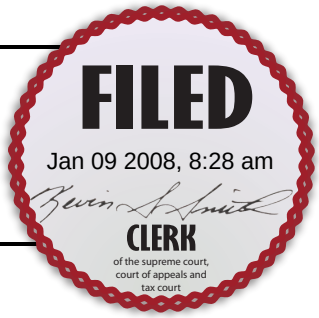

IN THE
COURT OF APPEALS OF INDIANA

KEVIN TURNER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 79A05-0706-PC-336
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0601-PC-1

January 9, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Kevin Turner appeals from the denial of his petition for post-conviction relief ("PCR"). Turner claims that the trial court erred in allowing the State to file an allegedly late habitual offender charge, that he received ineffective assistance of trial and appellate counsel, and that his trial counsel labored under a conflict of interest such that he is entitled to relief. We affirm.

FACTS

The underlying facts of this case were found by this Court in its disposition of Turner's direct appeal:

> On the morning of May 13, 2003, Turner, Reginald Turner (Reginald), and Cynthia Lacey (Lacey) drove to a Fifth Third Bank in Lafayette, Indiana. While Lacey stayed in the car as the getaway driver, Turner and Reginald robbed the bank. During the robbery, Reginald brandished a handgun, and Turner took money from a teller. After fleeing the bank, Lacy drove them away in a Chevrolet Malibu. Shortly thereafter, all three were arrested.
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> On May 15, 2003, the State filed an information, charging Turner with Count I, robbery while armed with a deadly weapon, a Class B felony, I.C. § 35-42-5-1; and Count II, conspiracy to commit robbery, a Class B felony, I.C. §§ 35-41-5-2, 35-42-5-1. On the same day, the State also filed its Notice of Intention to file Information of Habitual Offender. On June 3, 2003, the State filed an additional information, charging Turner with Count III, theft, a Class D felony, I.C. § 35-43-4-2; five counts of confinement while armed with a deadly weapon, all Class B felonies, I.C. § 35-42-3-3(a)(1)(B)(2); and Count IX, resisting law enforcement, a Class D felony, I.C. § 35-44-3-3. Thereafter, on October 18, 2004, the State filed an information, charging Turner with Count X, habitual offender, I.C. § 35-50-2-8.
>
> On October 19, 2004, in accordance with a plea agreement, Turner agreed to plead guilty to Count I, robbery while armed with a deadly weapon, as a Class B felony, and admit to Count X, habitual offender, in exchange for the dismissal of the remaining counts. On the same day, the trial court held a guilty plea hearing, following which, the trial court took Turner's Plea Agreement and guilty plea under advisement. On December 13, 2004, Turner filed a motion to withdraw his guilty plea. On December 29, 2004, counsel for Turner filed an additional motion to withdraw

> Turner's guilty plea. On January 6, 2005, the trial court held a hearing on Turner's Motion. During the hearing, the trial court denied Turner's Motion. On the same day, the trial court held a guilty plea and sentencing hearing. Following the hearing, the trial court accepted Turner's plea agreement, and sentenced him to ten years for robbery while armed with a deadly weapon and enhanced his sentence by twenty years for adjudication as an habitual offender.

Appellant's App. p. 136-37. On direct appeal, this court rejected Turner's argument that his guilty plea was involuntary and affirmed the trial court in all respects. On January 9, 2006, Turner filed a PCR petition, which the post-conviction court ruled would be submitted by affidavit. On April 4, 2007, the post-conviction court denied Turner's PCR petition in full.

DISCUSSION AND DECISION

Standard of Review

Our standard for reviewing the denial of a PCR petition is well-settled:

> In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court.… Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law.

Hall v. State, 849 N.E.2d 466, 468-69 (Ind. 2006) (internal citations and quotations omitted).

I. Habitual Offender Filing

Tuner contends that the trial court erred in allowing the State to file an allegedly late habitual offender count. Turner, however, waived any claim he might have had on this basis when he pled guilty. "A defendant cannot question pre-trial orders after a guilty plea is entered." *Branham v. State*, 813 N.E.2d 809, 811 (Ind. Ct. App. 2004) (citing *Ford v. State*, 618 N.E.2d 36, 38 (Ind. Ct. App. 1993)). By pleading guilty, Turner waived any freestanding claim that the trial court erroneously allowed the State to file its habitual offender count.

II. Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel based upon the principles enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> [A] claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). Because an inability to satisfy either prong of this test is fatal to an ineffective assistance claim, this court need not even evaluate counsel's performance if the petitioner suffered no prejudice from that performance. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999).

Moreover, counsel is given wide discretion in determining strategy and tactics, and therefore courts will accord these decisions deference. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). "A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*.

A. Trial Counsel

Turner contends that his trial counsel, Michael Troemel, was ineffective for scheduling a guilty plea hearing without his knowledge, failing to object to the untimely filing of the habitual offender count, and failing to sufficiently investigate his case. For various reasons, all of these claims are without merit.

As for Turner's claim that Troemel scheduled a guilty plea hearing without his knowledge, there is no evidence, save his affidavit, that this, in fact, happened. Indeed, Troemel averred that he had multiple conversations with Turner, apprised him of his legal situation and options, and that he ultimately entered into a knowing, intelligent, and voluntary guilty plea. (Appellee's App. 36). Because the post-conviction court was free to believe Troemel, Turner's claim in this regard must fail.

Turner's claim that Troemel was ineffective for not objecting to the allegedly late habitual offender count must fail because Turner has not overcome the strong presumption that this was a perfectly reasonable strategy, as was his burden. Even assuming, *arguendo*, that such an objection would have been successful, Troemel likely would have allowed the habitual offender charge to stand in order to preserve what he considered to be an advantageous plea agreement for his client, one apparently capping

Turner's sentence at thirty years of incarceration. Turner admitted to Troemel that he had been caught "red handed[,]" and Troemel believed, due to the overwhelming nature of the evidence and Turner's record, that he would receive "the upper end of the potential fifty year sentence" if he went to trial. Appellee's App. p. 35. Moreover, Turner cannot explain how a dismissal of the habitual offender charge would have benefited him, as the State had eight other charges with which to bargain, and, even assuming, *arguendo*, that the habitual offender charge would have properly been dismissed, Turner could have received a maximum sentence of fifty years of incarceration had he gone to trial.[1] Turner's claim in this regard must fail.

Turner also contends that Troemel failed to sufficiently investigate his case. Specifically, he contends that Troemel did not interview Reginald, who allegedly had "information that could have exonerated Turner." Appellant's Br. p. 11. Even if Troemel failed to interview Reginald, Turner's second contention is not supported by the record, which indicates that Reginald, far from being able to exonerate Turner, stood ready to testify against him. Troemel averred that the State's case was a "formidable one in that [Turner] was caught in a car close to the scene of the crime accompanied by

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[1] Turner could have received sentences of twenty years each for robbery, conspiracy to commit robbery, and five counts of criminal confinement, all Class B felonies. Additionally, Turner could have received sentences of three years each for theft and resisting law enforcement. Because Class B felony robbery is a crime of violence pursuant to Indiana Code section 35-50-1-2(a)(12), its sentence could have been imposed consecutive to any others without restriction. *See* Ind. Code § 35-50-1-2(c). As for any other sentences Turner might have received, the total number of additional years could not have exceeded thirty years, which could have been imposed consecutive to his robbery sentence. *See id.*

We additionally note that there is some indication in the record that the delay in filing the habitual offender charge was for good cause, which would have justified its late filing. *See* Ind. Code § 35-34-1-5(e). If this were the case, Turner could have received an additional thirty-year sentence enhancement, for a total sentence of eighty years. *See* Ind. Code § 35-50-2-8(e).

[Reginald and Lacey] *who were to testify against him* as well as with a bag of money taken from the bank." Appellee's App. p. 35 (emphasis added). In the end, the post-conviction court was free to disregard Turner's claims to the contrary. Because Turner points to no other evidence that Reginald would have helped him, his claim must fail.

B. Appellate Counsel

Our standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel–the petitioner must show that appellate counsel was deficient in his performance and that this deficiency resulted in prejudice. *Wrinkles v. State*, 749 N.E.2d 1179, 1203 (Ind. 2001). The Indiana Supreme Court has recognized three types of ineffective assistance of appellate counsel claims, namely: (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). The second category is the only category applicable here, and will lead to a finding of deficient performance only when the reviewing court determines that the omitted issues were significant, obvious, and "clearly stronger than those presented." *Id*. at 194 (quotation omitted). "[T]he decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Id*. at 193 (quotation omitted).

Turner contends that his appellate counsel was ineffective for failing to claim that his trial counsel was ineffective for failing to object to the State's allegedly untimely filing of its habitual offender charge. As we concluded in issue II(A), however, this particular claim is without merit, as Turner has failed to establish that Troemel's failure

to object was an unreasonable strategy. Turner's appellate counsel cannot have been ineffective for failing to a raise a meritless claim.

III. Conflict of Interest

Finally, Turner claims that Troemel labored under a "conflict of interest" in representing him. Although claims of a conflict of interest generally arise when one attorney representing co-defendants favors one at the expense of the other, *see, e.g.*, *Williams v. State*, 529 N.E.2d 1313, 1315 (Ind. Ct. App. 1988), we see no reason a similar claim could not arise when an attorney representing a single defendant, as here, stands to gain significantly at his client's expense. Turner, however, has failed to establish that any such conflict of interest existed. Quite simply, there is no evidence that Troemel stood to gain anything at Turner's expense. Turner's argument on this point consists almost entirely of restatements of the ineffective assistance of trial counsel arguments raised in his brief and details regarding disagreements about strategy, none of which tends to show that Troemel stood to gain anything at Turner's expense. Turner has failed to show that Troemel labored under a conflict of interest.

The judgment of the post-conviction court is affirmed.

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