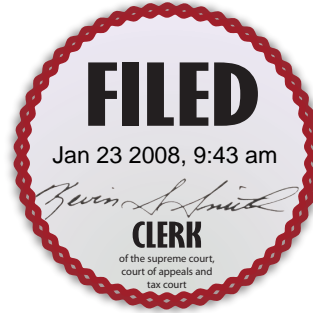


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM J. WOODFORD,
Appellant-Defendant ,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 20A03-0703-PC-146

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry Shewmaker, Judge
Cause No. 20C01-9912-CF-00140

January 23, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

William Woodford (“Woodford”) appeals the denial of his petition for post-conviction relief. On appeal, Woodford raises five issues, which we consolidate and restate as:

- I. Whether the trial court improperly instructed the jury and used an improper verdict form;
- II. Whether the post-conviction court erred by finding and concluding that trial and appellate counsel for Woodford rendered effective assistance; and
- III. Whether the post-conviction court erred in excluding evidence at the post-conviction relief hearing.

We affirm.

Facts and Procedural History

In 2001, Woodford was convicted of Class A felony possession of cocaine in excess of three grams with intent to deliver, Class D felony possession of controlled substance, and being a habitual offender. He was ordered to serve concurrent sentences of forty years for dealing in cocaine and three years for possession of heroin. The trial court also enhanced the sentence by thirty years because Woodford was found to be a habitual offender, to be served consecutive to the dealing in cocaine sentence. Woodford appealed. The Indiana Supreme Court affirmed his convictions. On June 7, 2006, Woodford filed a petition for post-conviction relief. After a hearing, the post-conviction court denied the petition on February 16, 2007. Woodford now appeals. Additional facts will be provided as necessary.

Standard of Review

The purpose of post-conviction proceedings is to afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal.

Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006). These proceedings are not “super appeals” where issues can be raised which the convicted persons failed to raise at trial or on direct appeal. Id. Post-conviction proceedings are civil in nature, and petitioners bear the burden of establishing their grounds for post-conviction relief by a preponderance of the evidence. Smith v. State, 822 N.E.2d 193, 198 (Ind. Ct. App. 2005), trans. denied.

An appeal of the denial of post-conviction relief is an appeal from a negative judgment. Allen v. State, 791 N.E.2d 748, 752 (Ind. Ct. App. 2003), trans. denied. “[T]o the extent his appeal turns on factual issues, the petitioner must convince this court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction relief court.” Smith, 822 N.E.2d at 198 (citation omitted). “It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law.” Godby v. State, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), trans. denied. We will accept the post-conviction court's findings of fact unless they are clearly erroneous, yet we do not give deference to the court's conclusions of law. Allen, 791 N.E.2d at 752.

I. Improper Jury Instruction and Verdict Form

Woodford’s claim that the trial court used an improper jury instruction and improper verdict form is unavailing. Woodford failed to assert these claims upon direct appeal. Accordingly, we deem these claims waived and unavailable for post-conviction review.

II. Ineffective Assistance of Counsel

To prevail upon an ineffective assistance of counsel claim, Woodford must demonstrate that counsel performed deficiently and that prejudice resulted. Strickland v.

Washington, 466 U.S. 668, 698 (1984). To show deficient performance, Woodford must show that counsel's representation fell below an objective standard of reasonableness. Id. at 688. This first prong is viewed within the context of the whole of the lawyer's work on a case. Oliver v. State, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), trans. denied. "A defendant must offer strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense." Id. "The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors and bad tactics do not necessarily mean that representation was ineffective." Grinstead v. State, 845 N.E.2d 1027, 1036 (Ind. 2006). The "prejudice" prong of the Strickland test requires that Woodford show a "reasonable probability" that his trial result would have been different but for counsel's deficient performance. Strickland, 466 U.S. at 698.

A. Trial Counsel

Woodford argues that his trial counsel was ineffective for the following reasons: (1) counsel failed to seek suppression of the illegal drugs as fruit of a search that lacked probable cause; (2) counsel failed to object to the testimony of State's witness regarding truthfulness of another witness; (3) counsel failed to object to the verdict form; and (4) counsel failed to object to the allegedly improper jury instructions.

Woodford argues that his counsel was ineffective for failing to object to the admission of the cocaine found as a result of an inventory search of the vehicle. Woodford challenged the inventory search on direct appeal. See Woodford v. State, 752 N.E.2d 1278 (Ind. 2001). Our supreme court has determined that the inventory search

was valid, Woodford has failed to show that there was a reasonable probability that the outcome of his case would have been different if counsel had pursued the suppression issue.

Woodford also argues that counsel was ineffective because he failed to object to the testimony of a State witness. Yet the record clearly shows that his counsel objected to the original question, “Can you explain for the jury why [Stephen Brooks] was not arrested that night?” Tr. p. 393. Stephen Brooks was the driver of the vehicle in which Woodford was a passenger. Woodford’s counsel failed to object to the answer. Specifically, Officer Sawyer testified, “Mr. Brooks was very honest, very cooperative. Had no idea who the truck belonged to. He was – just had stated that he was just driving it for Mr. Woodford. He was honest about everything.” Tr. p. 393. Within the context of the testimony, Officer Sawyer is referring to the particular conduct of Stephen Brooks on the night in question, not to his testimony at trial. Specifically, Officer Sawyer gave the reason why he chose not to arrest Brooks for possession of marijuana. Woodford has failed to show that trial counsel’s representation fell below an objective standard of reasonableness and further failed to show that the outcome would have differed had counsel objected to the answer.

Next, Woodford argues that trial counsel was ineffective because he failed to object to the verdict form. Woodford believes that the verdict form should have asked that the jury render its verdict as to whether he was guilty or not of “dealing in cocaine” rather than “possession of cocaine in excess of three grams with intent to distribute.” However, the issue is whether trial counsel’s failure to object to the verdict form

constituted ineffective assistance of counsel. We find that it does not. Woodford has failed to show that his argument would have prevailed if an objection had been lodged at the time. As noted by the trial court, the argument regarding the verdict form is “nonsensical” as it requires the court to ignore the language of Indiana Code section 35-48-4-1 (2004).

Additionally, Woodford argues that trial counsel was ineffective because counsel failed to object to the jury instructions. Woodford admits that the instructions at issue “recited the statutory definition” of each offense. Br. of Appellant p. 34. Woodford states that the jury instructions containing the elements for dealing in cocaine and possession of a controlled substance failed to inform the jury that the State must prove the elements of the crime beyond a reasonable doubt. However, Final Jury Instruction 14 explains that the State must prove guilt beyond a reasonable doubt. Tr. p. 112. Therefore, Woodford has not shown that trial counsel’s actions fell below an objective standard of reasonableness and cannot establish that he received ineffective assistance of trial counsel.

B. Appellate Counsel

On direct appeal, Woodford’s appellate counsel argued that (1) the inventory search of the pickup in which the defendant was a passenger was invalid and (2) the evidence was insufficient to establish that Woodford possessed more than three grams of cocaine. Woodford argues that his appellate counsel rendered ineffective assistance when counsel: (1) failed to raise the trial court’s erroneous admission of evidence of prior

bad acts and (2) failed to challenge the reasonableness of Woodford's habitual offender enhancement.¹

Ineffective assistance of appellate counsel claims are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind.1997). Such claims generally fall into three categories: (1) denial of access to the appeal, (2) waiver of issues, and (3) failure to present issues well. Id. at 193-95. One of the most important strategic decisions made by appellate counsel is the decision of what issue or issues to raise on appeal. Id. at 193. Therefore, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id. The defendant must overcome the strongest presumption of adequate assistance to show that counsel was deficient for failing to raise an issue on direct appeal, and judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000).

To evaluate the performance prong of appellate counsel's performance, our supreme court has adopted the following test: (1) whether the unraised issues are significant and obvious from the record; and (2) whether the unraised issues are "clearly stronger" than the issues that were presented. Bieghler, 690 N.E.2d at 194. If this analysis demonstrates deficient performance by counsel, the court will examine the prejudice prong and determine whether "the issues which . . . appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." Id. After all, the ultimate issue is whether, but for counsel's errors, the defendant had a reasonable probability that the outcome of the direct appeal would have differed.

¹ Woodford briefly raises the issue of fundamental error but, generally, such claims must be brought on direct appeal and not on an appeal for post-conviction relief. See Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002).

Id. Further, to determine whether the client received constitutionally adequate assistance, the reviewing court must consider the totality of an attorney's performance and "should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." Id.

Regarding the issue of admission of evidence of prior bad acts, Woodford has failed to show that this issue is "significant and obvious" from the record and that this issue is "clearly stronger" than the issues presented. At the post-conviction hearing, appellate counsel stated that he did consider raising this issue on appeal but after researching the law, he determined that it "wasn't something that was worth raising" because "the case law was against [Woodford] on that point." PCR Tr. p. 90. "Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference." Strickland, 466 U.S. at 690. Appellate counsel specifically addressed this issue when preparing the appeal yet rejected it in favor of other "stronger" issues. Woodford has failed to show that appellate counsel failed to provide effective assistance when choosing which issues to raise for direct appeal.

Next, Woodford argues that appellate counsel's failure to raise the reasonableness of the habitual offender enhancement is ineffective assistance. The post-conviction court did not address this issue because it felt that Woodford's motion to correct erroneous sentence covered it. However, the Court of Appeals did not address the reasonableness of Woodford's sentence when it addressed the motion to correct erroneous sentence so

the post-conviction court should have allowed more questioning of the appellate counsel on that issue.

As noted above, appellate counsel's strategic decisions are given deference. Appellate counsel noted that he could not tell from his notes whether he had considered the issue of reasonableness or not. PCR Tr. p. 95. However, regardless of whether appellate counsel should have raised the issue, Woodford has failed to show that he would have prevailed upon appeal if the issue had been raised. Rather Woodford is arguing that the maximum habitual offender enhancement is too harsh. Woodford has failed to show that the outcome would have differed if the issue had been raised on direct appeal. At the sentencing hearing, the trial judge noted that Woodford had seven felony convictions, five misdemeanor convictions, one past probation violation, one pending probation violation, three court-ordered addictions treatments with unsatisfactory results, use of false name and false identification to elude police on the night of the arrest, and failure to pay child support. Tr. pp. 693-694. With this criminal history, Woodford has not shown that the habitual offender enhancement is manifestly unreasonable.² Woodford has failed to show that the failure to raise the issue of the habitual offender enhancement by his appellate counsel constitutes ineffective assistance.

Exclusion of Evidence

Woodford argues that the post-conviction court abused its discretion when it excluded from evidence a copy of an impound policy. As Woodford acknowledges, he

² Woodford was sentenced prior to the amendment of Appellate Rule 7(B) effective January 1, 2003. Therefore, the sentence here was imposed prior to January 1, 2003, our initial review took place on August 3, 2001, and the "manifestly unreasonable" test is applied rather than the "inappropriate" test. See Kien v. State, 782 N.E.2d 398, 416 n. 12 (Ind. Ct. App. 2003)

made no offer to prove when the post-conviction court excluded this evidence. Woodford has therefore waived review of the post-conviction court's exclusion of the impound policy. Waiver notwithstanding, the post-conviction court did not abuse its discretion to exclude the impound policy.

As with a trial court, post-conviction court has broad discretion in ruling on the admissibility of evidence, and we will reverse a post-conviction court's ruling only for an abuse of that discretion. Truax v. State, 856 N.E.2d 116, 124 (Ind. Ct. App. 2006). An abuse of discretion is established when a decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

The post-conviction court ruled that the impound policy was not relevant because the inventory search had been upheld by our supreme court's decision in Woodford v. State, 752 N.E.2d 1278 (Ind. 2001). In that ruling, the supreme court determined that the inventory search of the pickup truck Woodford was riding in as passenger was valid, specifically that the inventory search and its scope were valid. The post-conviction court was correct in excluding the impound policy because the supreme court had already determined the issue. Therefore, the post-conviction court did not abuse its discretion when it excluded the impound policy. Additionally, Woodford has not shown that this claim would have succeeded if brought on appeal.

Exclusion of Testimony

Woodford argues that the post-conviction court abused its discretion when it excluded from evidence testimony regarding appellate counsel's failure to raise reasonableness of his sentence on direct appeal. Woodford failed to make an offer to

prove when the post-conviction court excluded this evidence. Since the substance of the evidence was not apparent from the context within which the questions were asked and from the claims raised in the post-conviction petition, Woodford has waived review of the post-conviction court's exclusion of evidence.

Conclusion

Woodford has waived the issues of improper jury instruction and improper verdict form. Woodford has failed to show ineffective assistance of trial and appellate counsel and has waived his claims of improper exclusion of evidence by the post-conviction court.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.