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IN THE COURT OF APPEALS OF INDIANA

BRUCE SCOTT HOPPAS,	)	
	)	
Appellant/Petitioner,	)	
	)	
vs.	)	No. 57A04-0909-PC-496
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Respondent.	)	

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Michael J. Kramer, Judge
Cause No. 57D02-0811-PC-5

January 27, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner Bruce Scott Hoppas appeals from the denial of his petition for post-conviction relief ("PCR"). Hoppas contends that his trial counsel was ineffective for failing to move for a discharge pursuant to Indiana Criminal Rule 4(C), or Indiana's speedy trial rule. We affirm.

FACTS AND PROCEDURAL HISTORY

Based on events that occurred on June 14, 2003, Hoppas was charged with felony operating a vehicle while intoxicated ("OWI") on June 16, 2003. In March of 2005, the State dismissed its felony OWI charge against Hoppas and, on March 18, charged him with Class A misdemeanor OWI and with being a habitual substance offender.[1] A jury found Hoppas guilty as charged. On October 4, 2006, the trial court sentenced Hoppas to 365 days of incarceration with all but ninety days suspended and 365 days of probation for OWI and to 1825 days, all suspended, with 1095 days to be served on probation and 545 days to be served on home detention for being a habitual substance offender. The trial court ordered that both sentences were to be served consecutive to one another.

On direct appeal, this court affirmed the trial court in all respects. On September 22, 2008, Hoppas filed a PCR petition, alleging, *inter alia*, that his trial counsel was ineffective for failing to file for discharge pursuant to Criminal Rule 4(C). On March 20, 2009, the post-conviction court denied Hoppas's PCR petition in full, finding, *inter alia*, that it could not take judicial notice of the chronological case summaries ("CCSs") from the original criminal proceedings, on which Hoppas's argument relied.

[1] Nothing in the record clearly indicates that the State originally charged Hoppas with being a habitual substance offender, although we assume that he was.

DISCUSSION AND DECISION

Whether Hoppas Received Ineffective Assistance of Trial Counsel

PCR 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, 469 (Ind. 2006) (internal citations and quotations omitted).

Ineffective Assistance of Counsel Standard of Review

Hoppas contends that his trial counsel was ineffective for failing to file a discharge motion pursuant to Criminal Rule 4(C). 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).

Criminal Rule 4(C) provides, in relevant part, that

> [n]o person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar[.]

Under this rule, a defendant may seek and be granted a discharge if he is not brought to trial within the proper time period. *Morrison v. State*, 555 N.E.2d 458 (Ind. 1990), *overruled on other grounds*, *Cook v. State*, 810 N.E.2d 1064, 1066-67 (Ind. 2004). The purpose of Criminal Rule 4(C), however, is to create early trials and not to discharge defendants. *State v. Hurst*, 688 N.E.2d 402, 408 (Ind. 1997), *overruled on other grounds*, *Cook*, 810 N.E.2d 1064. If a defendant seeks or acquiesces in any delay that results in a later trial date, the time limitations set by Criminal Rule 4 are extended by the length of such delays. *Burdine v. State*, 515 N.E.2d 1085, 1090 (Ind. 1987), *superseded on other grounds*, Ind. Evidence Rule 401 (1994).

Hoppas argues that over the course of his prosecution, which involved two cause numbers and spanned more than three years, 423 days of delay were chargeable to the State, and his trial counsel was therefore ineffective for failing to move for discharge.

This argument, however, relies almost entirely on the CCSs from the original charges filed on June 16, 2003, and the new charges filed on March 18, 2005. Hoppas did not attempt to have these documents admitted as evidence below, and we conclude that the trial court correctly declined his invitation to take judicial notice of them.

"[T]he post-conviction court may not take judicial notice of the original proceedings absent an exceptional situation." *Moser v. State*, 562 N.E.2d 1318, 1321 (Ind. Ct. App. 1990). The record of the original proceedings must be admitted into evidence just like any other exhibit. *Bahm v. State*, 789 N.E.2d 50, 58 (Ind. Ct. App. 2003) (citing *State v. Hicks*, 525 N.E.2d 316, 317 (Ind. 1988)), *clarified on reh'g on other grounds*, 794 N.E.2d 444 (Ind. Ct. App. 2003). Nothing in the facts of this case presents an exceptional situation which precludes application of the general rule that a post-conviction court cannot take notice of the original proceedings. Without the CCSs, which are part of the record of the original proceedings, Hoppas cannot establish that even one day of delay was chargeable to the State in those proceedings, much less an entire year.[2] Because Hoppas has not established that a Rule 4(C) motion to discharge would have been successful at any point, we cannot conclude that his trial counsel was ineffective for failing to file one.

The judgment of the post-conviction court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.

[2] In an order to be issued contemporaneously with this decision, we grant the State's motion to strike the CCSs from Hoppas's appendix.