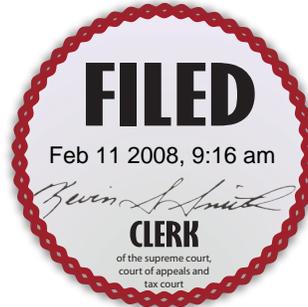


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MARK A. JENKINS,)
)
Appellant-Petitioner,)
)
vs.) No. 82A05-0706-PC-340
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No.82C01-9511-CF-946

February 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Mark Jenkins appeals the denial of his petition for post-conviction relief. On appeal, Jenkins raises three issues, which we consolidate and restate as whether the post-conviction court properly denied Jenkins relief on his claims of ineffective assistance of trial and appellate counsel. We affirm, concluding the post-conviction court properly denied Jenkins relief.

Facts and Procedural History

Our supreme court provided a lengthy recitation of the facts on Jenkins's direct appeal. See Jenkins v. State, 686 N.E.2d 1278, 1279-81 (Ind. 1997). To summarize, around October 1995 Jenkins made several statements to his ex-wife Rhonda that he wanted to kill Stephanie Deffendall, with whom Jenkins and Rhonda had been involved in a three-way sexual relationship several years earlier. Toward the end of October 1995, Jenkins encouraged Rhonda to lure Deffendall to the basement of a home that Jenkins's brother had previously occupied. Once inside the home, Jenkins planned on sexually mutilating and eventually killing Deffendall. Rhonda, however, notified the police of Jenkins's plan, and he was arrested in early November 1995.

On November 8, 1995, the State charged Jenkins with conspiracy to commit murder, a Class A felony, and attempted criminal confinement, a Class B felony. Shortly after Jenkins was charged, the trial court set the omnibus date for January 22, 1996, and trial for April 22, 1996. On April 10, 1996, the State filed an amended charge seeking a sentence enhancement based on Jenkins's alleged status as an habitual offender. During the hearing on the

amendment, Jenkins's counsel obtained leave to file a motion to dismiss the habitual offender charge, but never filed one.

Following a three-day trial, the jury found Jenkins guilty of both charges and also found he was an habitual offender. The trial court sentenced Jenkins to thirty-five years with ten years suspended to probation for conspiracy to commit murder and fifteen years for attempted criminal confinement. The trial court ordered the sentences to run concurrently and also enhanced Jenkins's sentence by thirty years based on the jury's habitual offender finding, resulting in an aggregate sentence of sixty-five years. On direct appeal, our supreme court affirmed Jenkins's convictions. Id. at 1279.

On August 30, 1996, Jenkins filed a pro se petition for post-conviction relief. On August 14, 1998, the State public defender filed an appearance on Jenkins's behalf. Following several substitutions of counsel, on May 27, 2005, Jenkins filed an amended petition alleging ineffective assistance of trial and appellate counsel. On October 25, 2005, the post-conviction court conducted a hearing at which Jenkins, his trial counsel, his trial co-counsel, and the two attorneys who prosecuted his case testified. On April 26, 2007, the trial court issued findings of fact and conclusions of law denying relief. Jenkins now appeals.

Discussion and Decision

I. Standard of Review

To obtain relief, a petitioner in a post-conviction proceeding bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but

we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). Moreover, when the petitioner appeals from a denial of relief, the denial is considered a negative judgment and therefore the petitioner must establish "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002), cert. denied, 540 U.S. 830 (2003).

II. Ineffective Assistance of Counsel

To establish a violation of the right to effective assistance of counsel as guaranteed by the Sixth Amendment, the petitioner must establish both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). First, the petitioner must show counsel was deficient. Id. "Deficient" means that counsel's errors fell below an objective standard of reasonableness and were so serious that counsel was not functioning as "counsel" within the meaning of the Sixth Amendment. Id. In this regard, counsel is presumed to have "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Stevens, 770 N.E.2d at 746. Second, the petitioner must show that counsel's deficiency resulted in prejudice. Wesley, 788 N.E.2d at 1252. Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. We need not address whether counsel's performance was deficient if we can resolve a claim of ineffective assistance based on lack of prejudice. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002). The same standard of review applies to

claims of ineffective assistance of trial counsel and claims of ineffective assistance of appellate counsel. Burnside v. State, 858 N.E.2d 232, 238 (Ind. Ct. App. 2006).

A. Trial Counsel

Jenkins argues counsel was ineffective for failing to move to dismiss the habitual offender charge. To establish that counsel was deficient, Jenkins must show the motion would have been granted. Sauerheber v. State, 698 N.E.2d 796, 807 (Ind. 1998). Jenkins argues the motion would have been granted because the State filed the habitual offender charge more than ten days after the omnibus date and lacked good cause to do so. In this respect, Indiana Code section 35-34-1-5(e) states:

An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8 . . . must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.

Our research reveals that prior to Jenkins’s trial in April 1996, no appellate decision had interpreted subsection (e), specifically what constitutes “a showing of good cause.”¹ Nevertheless, the post-conviction court concluded that “good cause may have existed for the

¹ In 1993, Indiana Code section 35-34-1-5 was amended to include subsection (e), which became effective on July 1st of that year. See Timberlake v. State, 679 N.E.2d 1337, 1339 (Ind. Ct. App. 1997). Prior to the amendment, the State could file an habitual offender charge “at any time before, during or after trial so long as it [did] not prejudice the substantial rights of the defendant.” Id. (quoting Gilmore v. State, 275 Ind. 134, 137, 415 N.E.2d 70, 73 (1981)). Appellate decisions decided after Jenkins’s trial have clarified that subsection (e) does not require the trial court to make a specific finding of good cause to permit a belated filing, see Mitchell v. State, 712 N.E.2d 1050, 1053 n.3 (Ind. Ct. App. 1999) (agreeing with Judge Kirsch’s dissent in Attebury v. State, 703 N.E.2d 175, 180-82 (Ind. Ct. App. 1998)), and that good cause may exist if the filing is delayed because of ongoing plea negotiations, see Land v. State, 802 N.E.2d 45, 53 (Ind. Ct. App. 2004), trans. denied. However, because these cases were decided after Jenkins’s trial, they are not helpful in determining whether counsel’s performance was deficient. See Shaffer v. State, 674 N.E.2d 1, 7 (Ind. Ct. App. 1996) (“[A]n ineffective assistance claim cannot be based on counsel’s failure to argue the legal reasoning of cases not yet decided at the time of trial.”), trans. denied.

delayed filing of the habitual offender count,” appellant’s appendix at 170, because “the delay was attributable to [plea] negotiations and to the delay in receiving certified records [of Jenkins’s prior felony conviction] from another county. Both reasons constitute good cause for delay in filing a habitual offender count,” id. at 169.²

We note initially that we disagree with the post-conviction court to the extent it concluded the State could show good cause based on ongoing plea negotiations. The record indicates that during a hearing on January 3, 1996, Jenkins rejected the State’s plea offer and requested a jury trial. Moreover, there were three hearings following the January 3, 1996, hearing, but none referenced ongoing plea negotiations.³ The lead prosecutor also testified during the post-conviction hearing that it was possible plea negotiations extended beyond the omnibus date, but discounted that possibility because “the docket sheet, it said the defense rejected a plea offer in January.” Transcript at 11. Thus, we agree with Jenkins that the State cannot show good cause based on ongoing plea negotiations because there is no evidence that plea negotiations extended beyond the January 22, 1996, omnibus date.

The post-conviction court also concluded the State could show good cause based on evidence that the belated filing was attributable to a delay in receiving documentation of Jenkins’s prior felony conviction from Posey County. The lead prosecutor testified that one possible reason for the delay was that the State may not have obtained the necessary

² The post-conviction court also concluded the doctrine of laches applied to bar Jenkins’s claim. However, because we conclude below that the post-conviction court’s conclusion on the merits was proper, we do not address whether it properly applied laches to bar Jenkins’s claim.

documentation to prove Jenkins had at least two prior unrelated felony convictions, but conceded he had no independent recollection of the reason for the delay. The co-prosecutor also testified he had no independent recollection, but stated that based on his review of the file, the belated filing was attributable to a delay in obtaining information regarding Jenkins's conviction from Posey County:

I believe what was taking place was that it had just taken a long period of time to get those documents from Posey County. I assume that was because this was an older conviction, and there were certain documents that we would have needed in order to prepare for the habitual offender. It would have been the charging information, probable cause affidavit, if there was one, the docket sheets, the judgment, and other documents that would help us prove that this particular defendant had previously been convicted in that county under that cause number. The day that it was certified is the same date that we ultimately filed the habitual charge. We could not have received that in the mail and filed it in the same day. I think what happened, either I had to ask or [the lead prosecutor] had to ask one of our investigators to physically go to Posey County and get the documents once we were told they were available for us. As soon as those documents came into the office, [the habitual offender charge] was filed that same day.

Id. at 47-48. Jenkins notes that the State already had certified records of two prior unrelated felony convictions from Vanderburgh County. Because the State may seek sentence enhancement by alleging two prior unrelated felony convictions, see Ind. Code § 35-50-2-8(a), Jenkins argues the Posey County conviction was unnecessary to support the habitual offender charge and therefore “the delay in receiving certified records from Posey County did not constitute good cause to justify the late filing.” Appellant’s Brief at 17.

Although we agree with Jenkins that the post-conviction court was free to draw this

³ The record includes the transcript for only the last of these hearings, which occurred on April 10,

conclusion based on the evidence presented, an appeal from the denial of post-conviction relief requires him to show that the evidence unerringly and unmistakably leads to such a conclusion. Based on the testimony reiterated above and the record before us, we are not convinced Jenkins has carried this heavy burden. We recognize that our conclusion is hampered by the absence of appellate decisions discussing what constitutes “a showing of good cause” within the meaning of Indiana Code section 35-34-1-5(e). See supra, note 1 and accompanying text. At the same time, however, had the State offered the delay in receiving documents from Posey County as the reason supporting its belated filing, we are not prepared to say such a reason leads unerringly and unmistakably to a conclusion that the trial court would have granted a motion to dismiss based on a lack of good cause. Because Jenkins cannot establish that a motion to dismiss would have been granted, it follows that counsel was not deficient. Thus, Jenkins did not receive ineffective assistance based on counsel’s failure to move to dismiss the habitual offender charge.

B. Appellate Counsel

Jenkins argues counsel was ineffective for failing to raise the issue of improper sentencing on direct appeal. To establish that appellate counsel’s assistance was deficient, Jenkins must show 1) that the unraised issue was significant and obvious from the face of the record and 2) that the unraised issue was “clearly stronger” than the raised issues. Bieghler v. State 690 N.E.2d 188, 194 (Ind. 1997) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). The post-conviction court found that Jenkins “has neither alleged nor cited any

1996. Ongoing plea negotiations were not referenced during this hearing, however.

authority which would allow this court to engage in the presumption that appellate counsel was ineffective” and therefore concluded that Jenkins “has failed to show he was prejudiced [and] failed to show appellate counsel’s performance was deficient” Appellant’s App. at 172.

Jenkins argues his sentence was erroneous because the trial court used improper aggravating circumstances to enhance his sentence for conspiracy to commit murder. The trial court used three aggravating circumstances to enhance Jenkins’s sentence for conspiracy to commit murder: 1) Jenkins’s criminal history; 2) Jenkins’s lack of cooperation during the presentence investigation; and 3) any lesser sentence would depreciate the seriousness of the crime.

Jenkins argues the first aggravating circumstance is improper because a defendant’s criminal history cannot be used “both as the basis for the habitual offender allegation and to further enhance [Jenkins’s] conspiracy sentence,” and cites to McVey v. State, 531 N.E.2d 458, 461 (Ind. 1988), to support his argument. Appellant’s Br. at 19. In McVey, the aggravating circumstances used to support sentence enhancement for the instant offense, robbery as a Class B felony, were that the defendant used a firearm during the robbery and had two previous felony convictions. The first aggravating circumstance was improper because it was an element of robbery as a Class B felony, see Ind. Code § 35-42-5-1 (stating that robbery “is a Class B felony if it is committed while armed with a deadly weapon”); Ector v. State, 639 N.E.2d 1014, 1015 (Ind. 1994) (“[A] material element of a crime may not also constitute an aggravating circumstance to support an enhanced sentence.”), and the

second aggravating circumstance was improper because it was also used as a basis to support the habitual offender finding. The court concluded that “[i]nasmuch as the use of the gun was what raised the robbery to a Class B felony and the two previous felonies are what supported the habitual offender finding, they cannot standing alone be the aggravating circumstances to justify the enhanced sentence for the robbery.” McVey, 531 N.E.2d at 461.

In contrast to the defendant in McVey, Jenkins’s criminal history consisted of three prior felony convictions, only two of which were used to support his habitual offender status. The trial court was therefore free to use the remaining conviction as an aggravating circumstance.⁴ Because it was well established at the time Jenkins was sentenced in May 1996 that a single valid aggravating circumstance could support an enhanced sentence, see Barany v. State, 658 N.E.2d 60, 67 (Ind. 1995); Sweany v. State, 607 N.E.2d 387, 391 (Ind. 1993), and that a defendant’s criminal history is a valid aggravating circumstance, see Ind. Code § 35-38-1-7.1(b)(2) (1993); Jones v. State, 600 N.E.2d 544, 548 (Ind. 1992), the trial court’s use of Jenkins’s remaining prior conviction as an aggravating circumstance was proper.⁵ Thus, because Jenkins cannot predicate counsel’s deficiency on the failure to raise an issue that the trial court properly resolved, it follows that Jenkins did not receive ineffective assistance based on counsel’s failure to raise the issue of improper sentencing on direct appeal.

⁴ It is not entirely clear from the record that the trial court acted in this manner. At the same time, however, Jenkins has not presented evidence to the contrary.

⁵ Because we conclude the trial court properly found Jenkins’s criminal history to be an aggravating circumstance, we do not address whether the trial court properly found as aggravating circumstances

Conclusion

The post-conviction court properly denied Jenkins relief on his claims of ineffective assistance of trial and appellate counsel.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.

Jenkins's lack of cooperation during the presentence investigation and that any lesser sentence would depreciate the seriousness of the crime.