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**IN THE
COURT OF APPEALS OF INDIANA**

CLARENCE LENGACHER,
Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 02A03-0511-CR-550

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-9911-CF-546

December 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Clarence Lengacher appeals from the post-conviction court's denial of his motion for post-conviction relief. Specifically, Lengacher argues that the post-conviction court wrongly concluded that his trial attorney, Nikos Nakos, rendered effective assistance of counsel. Lengacher does not meet the burden of proof for his allegations, and thus, we affirm the denial of his petition for post-conviction relief.

Facts and Procedural History

In Lengacher's direct appeal, we found the following facts:

At approximately 10:00 p.m. on November 1, 1999, Lengacher, Joseph Perkins, Richard Morgan, Matthew Reed, and Jonle Daugherty were congregated outside Daugherty's house on Huestis Street in Fort Wayne. A car, containing John Wright, Isaac Landis, Justin Ehinger, Amin Rogers, and Kareem Shuttleworth, drove by the house at least two times. The final time the car came down the street, it stopped in front of Daugherty's house, and one or more of the passengers exited the car. The two groups exchanged words. When the passengers from the car saw that Lengacher's group had guns, the passengers returned to the car. As the car was driven away, Perkins and Lengacher began firing shots at the car with a rifle and a handgun, respectively. Witnesses heard between ten and one hundred shots fired. One of the shells fired hit John Wright, who died of a gunshot wound to the head. Forensic tests could not determine conclusively whether the shell matched Perkins's gun or Lengacher's gun.

On November 12, 1999, the State charged Lengacher with murder. On January 23 and 24, 2001, a jury trial was conducted. . . . The jury found Lengacher guilty of murder. The trial court sentenced Lengacher to sixty-five years of imprisonment.

Lengacher v. State, 02A03-0106-CR-215, slip op. 2-3 (Ind. Ct. App. Jan. 10, 2002).

Lengacher's conviction was affirmed. Lengacher subsequently filed a *pro se* petition for post-conviction relief, in which he alleged ineffective assistance of trial and appellate counsel, prosecutorial misconduct, and abuse of discretion by the trial court. Specific to his

claims of ineffective assistance at the trial level, Lengacher claimed that Nakos

failed to investigate the facts and circumstances of the case, and thereby failed to learn exculpatory evidence; . . . failed to conduct a professional interview of his client and other defense witnesses in order to learn exculpatory evidence; . . . failed to investigate the alleged crime scene; . . . failed to advocate the interests of his client, and the actual innocence claim of his client; . . . failed to subpoena defense witnesses; and . . . failed to file a suppression motion on evidence illegally obtained.

Appellant's Appendix at 144. Lengacher also filed a Motion for Hearing on Petition for Post-Conviction Relief, which included an additional claim that Nakos rendered ineffective assistance by calling Lengacher to testify at trial. Lengacher, Nakos, and Lengacher's mother testified at an evidentiary hearing prior to the post-conviction court's denial of Lengacher's petition. With regard to Lengacher's allegations of ineffective assistance of trial counsel, the post-conviction court held that Lengacher failed to make the requisite showing of prejudice. Lengacher now appeals.

Discussion and Decision

Lengacher makes three arguments on appeal, each of which center on allegations of ineffective assistance of trial counsel. These arguments include: (1) that Nakos failed to sufficiently investigate and prepare for trial; (2) that Nakos rendered ineffective assistance by allowing Lengacher to testify; and (3) that Nakos rendered ineffective assistance by failing to withdraw as counsel. We note that Lengacher failed to raise the argument regarding Nakos' withdrawal in the petition for post-conviction relief or motion for hearing. Claims not raised in the petition for post-conviction relief and presented to the post-conviction court may not be raised for the first time on post-conviction appeal. Walker v. State, 843 N.E.2d 50, 57

(Ind. Ct. App. 2006), trans. denied; Ind. Post-Conviction Rule 1(8) (“All grounds for relief available to a petitioner under this rule must be raised in his original petition.”). Thus, Lengacher’s claim that Nakos rendered ineffective assistance of counsel by failing to withdraw prior to trial is waived on appeal. We therefore turn to Lengacher’s two remaining contentions.

I. Standard of Review

In a petition for post-conviction relief, the petitioner has the burden of establishing grounds for relief by a preponderance of the evidence. P-C.R. 1(5). A petitioner for post-conviction relief appealing the denial of his petition stands in the position of one appealing from a negative judgment. Willoughby v. State, 792 N.E.2d 560, 562 (Ind. Ct. App. 2003), trans. denied. On appeal, we will not reweigh the evidence or judge the credibility of the witnesses. Id. “In order to prevail, the petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.” Id. “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 the decision will be disturbed as being contrary to law.” Moody v. State, 749 N.E.2d 65, 67 (Ind. Ct. App. 2001), trans. denied. 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 legal conclusions. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004).

II. Ineffective Assistance of Counsel

To succeed on a claim of ineffective assistance of counsel, Lengacher must meet both prongs of the test set out in Strickland v. Washington, 446 U.S. 668 (1984): (1) deficient performance by counsel (2) resulting in prejudice to the defense. Wieland v. State, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), trans. denied. Thus, Lengacher must establish that Nakos' performance fell below an objective standard of reasonableness, tantamount to denial of the right to counsel under the Sixth Amendment of the United States Constitution. Id. Moreover, Lengacher must also establish prejudice resulting from the deficient performance by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. Lastly, because the two prongs of the Strickland test are independent inquiries, if Lengacher makes an insufficient showing on one, there is no reason to address the other component of the analysis. Id.

A. Investigation and Trial Preparation

Lengacher first contends Nakos provided ineffective assistance of counsel by failing to investigate and prepare for trial. Specifically, he alleges that Nakos failed to speak with witnesses prior to their testimony at trial in order to "formulate a coherent theory of defense." Appellant's Brief at 15, 17. Lengacher also claims that Nakos did not investigate the prosecutor's decision to pursue Lengacher for the shooting, and only met with Lengacher for one thirty-minute meeting prior to trial. However, besides Lengacher's testimony, the post-conviction court heard testimony from Nakos establishing that he met with Lengacher approximately eleven times before trial, read through discovery material several times, and telephoned witnesses in preparation for trial. Furthermore, Nakos developed and argued a

theory of self-defense at trial.

From this, the post-conviction court found the following:

13. The Petitioner has made no showing of any additional evidence that attorney Nakos could have presented at trial had he conducted more extensive investigation or discovery, interviewed or subpoenaed witnesses, or performed any other actions related to evidence before or during trial.

...

15. Petitioner has not shown that a credible claim of actual innocence could have been presented or that his interests could have been advanced in any way, had attorney Nakos done more for him.

Appellant's App. at 16-17. The post-conviction court refrained from considering whether Nakos' performance was deficient, however, because Lengacher "entirely failed to make the required showing of prejudice to the defense" on these allegations. *Id.* at 17. To the extent that Nakos' testimony differed from that of Lengacher, it was for the post-conviction court to resolve those discrepancies, as well as assign weight to the testimony given by each witness. Lengacher essentially asks us to reweigh the evidence and reassess the credibility of the witnesses, which we will not do. As such, we cannot say the evidence that Nakos failed to investigate and prepare for trial is without conflict and leads unerringly and unmistakably to a conclusion that Nakos rendered ineffective assistance of counsel.

B. Testimony

Lengacher also claims "[t]he decision by trial counsel Nakos to call Lengacher to testify was clearly outside the objective standard of reasonableness." Appellant's Br. at 19. At the same time, as conceded by Lengacher, the determination of whether a defendant should testify is recognized as a matter of trial strategy. *Clancy v. State*, 829 N.E.2d 203,

212 (Ind. Ct. App. 2005), trans. denied.

Lengacher's and Nakos' testimony conflicted with regard to who decided Lengacher would testify at trial. Lengacher claimed Nakos met with him the weekend prior to trial and told him, "This is what you're going to say on the stand." Transcript at 60. In contrast, Nakos explained that the final decision to testify resided with Lengacher, who chose to do so. Id. at 35. The post-conviction court found that Lengacher did not present "credible evidence tending to show that attorney Nakos failed to let him make the decision whether to testify at trial. Attorney Nakos credibly testified that [Lengacher] made the decision to testify at trial." Appellant's App. at 17. Again, we will not reweigh the evidence or reassess the credibility of the witnesses.

Moreover, we agree with the trial court's conclusion that Lengacher's defense did not suffer prejudice from his being called to testify. Other evidence at trial established Lengacher's presence at the scene and participation in the shooting. Thus, even without Lengacher's testimony, these facts would have been presented to the jury. In addition, Lengacher's testimony served only to bolster Nakos' theory of self-defense. Lengacher explained that he shot at the car after beginning to run away, firing only a few shots because he was afraid. He also explained that he did not aim at anyone, did not mean to shoot or kill anyone, and that the bullets probably hit the ground. As such, Lengacher's testimony did not prejudice his case with regard to the intent to commit murder. Without it having been established that Lengacher was prejudiced by his own testimony, we cannot say that Nakos rendered ineffective assistance of counsel.

Conclusion

Lengacher failed to establish that the evidence of Nakos' ineffective assistance is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. We therefore affirm the post-conviction court's denial of Lengacher's petition for post-conviction relief.

Affirmed.

SULLIVAN, J., and BARNES, J., concur.