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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER COUSINS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0910-PC-973
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 1
The Honorable Kurt M. Eisgruber, Judge
The Honorable John Jay Boyce, Master Commissioner
Cause No. 49G01-0508-FC-143687

April 13, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Christopher Cousins (Cousins), appeals the denial of his petition for post-conviction relief.

We affirm.

ISSUES

Cousins presents two issues for our review, which we restate as follows:

(1) Whether the trial court erred by ordering him to serve a sentence enhancement for being an habitual offender consecutive to other time which he would have to serve due to a separate finding that he was an habitual offender; and

(2) Whether his trial counsel provided ineffective assistance of counsel.

FACTS AND PROCEDURAL HISTORY

On October 19, 2005, Cousins agreed to plead guilty to burglary, a Class C felony, Ind. Code § 35-43-2-1, and to an enhancement of his sentence for being an habitual offender in Cause No. 49G01-0508-FC-143687. In exchange, the State agreed to dismiss two additional Counts in that Cause and the charges filed in Cause No. 49F15-0507-FD-115497, and agreed not to file additional burglary charges supported by a confession which Cousins made on August 21, 2005. The plea agreement recommended a six year executed sentence to the trial court, with four of those six years to be served in the Department of Correction, and two of those years to be served as determined by the trial court. That same day, the trial court heard Cousins' plea of guilty, took it under advisement, and scheduled his sentencing hearing for November 4, 2005. At the sentencing hearing, the trial court accepted Cousins' plea.

The trial court noted Cousins' extensive criminal history and commented that he had "been stealing like a fool." (Transcript p. 46). The trial court informed Cousins that his habitual offender enhancement would have to be served consecutive to his sentence for the burglary, and that his entire sentence would have to be served consecutive to backup time that he may receive for violating his parole. The trial court initially ordered Cousins to six years for his burglary conviction alone, but after being reminded that he had pled guilty to both the burglary charge and to being an habitual offender, the trial court adjusted his sentence by ordering two years for the burglary with an enhancement of four years for being an habitual offender.

On November 29, 2007, Cousins filed a petition for post-conviction relief contending that his recent habitual offender enhancement was being served consecutive to an habitual offender enhancement that he had been previously sentenced to. On August 19, 2008, the post-conviction court held a hearing on Cousins' petition. Cousins called his trial counsel as his sole witness and asked him, in pertinent part: "Well, at the time that we was havin'[sic] the guilty plea hearing, did you object or address the court[] pertaining to [] consecutive habitual offender sentences?" (Supplemental Tr. pp. 7-8). His trial counsel answered negatively, and Cousins rested. Per the State's request, the post-conviction court took judicial notice of its file.

On August 31, 2009, the post-conviction court denied Cousins' petition for post-conviction relief. In doing so, the post-conviction court noted the legal precedent which holds that separate enhancements for being an habitual offender cannot be ordered to be

served consecutively. However, the post-conviction court stated that Cousins presented no evidence that any portion of his prior sentence was due to his status as an habitual offender.

> The transcript establishes the parties considered the fact that petitioner was on parole at the time he committed the burglary offense. The [c]ourt advised him his sentence in this case would be consecutive to any parole violation sentence. There is no evidence, however, that [Cousins] had previously been sentenced to an enhanced sentence. He argues he had a prior enhanced sentence in his post-hearing findings and conclusions but he put no evidence of a prior enhanced sentence into evidence. Nor does the [c]ourt's file support a finding [Cousins] was serving a prior habitual sentence. The [c]ourt's file is, of course, only of this case. The sentence in any other case would have to have been introduced as evidence. As noted previously, [Cousins] bears the burden of establishing his case. He has not done so here and his claim on this issue must be denied.

(Appellant's App. p. 168).

Cousins now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

The petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). Because Cousins is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). 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*.

Post-conviction hearings do not afford defendants the opportunity for a "super appeal." *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. Rather, post-conviction proceedings provide a narrow remedy for collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Ross v. State*, 877 N.E.2d 829, 832 (Ind. Ct. App. 2007), *trans. denied*. Cousins has done so by alleging that his trial counsel provided ineffective assistance of counsel, which would violate Article 1, Section 13 of the Indiana Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. *See* Post-Conviction Rule 1 (1)(a).

In order to demonstrate ineffective assistance of counsel, Cousins must establish both prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*. *Lee v. State*, 880 N.E.2d 1278, 1280 (Ind. Ct. App. 2008). The defendant must prove (1) his or her counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's failure to meet prevailing professional norms, the result of the proceeding would have been different. *Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *reh'g denied, trans. denied* (citing *Strickland*, 466 U.S. at 690). Essentially, the defendant must show that counsel was deficient in his or her performance and the deficiency resulted in prejudice. *Johnson*, 832 N.E.2d at 1006. There is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment. *Timberlake v. State*, 753 N.E.2d 591,

603 (Ind. 2001). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id*.

Cousins argues that the trial court erred by ordering him to serve a sentence enhancement for being an habitual offender consecutive to time which he would have to serve due to his violation of parole, considering that a portion of the paroled time was attributable to a prior finding that he was an habitual offender. We first note that Cousins' claim has problems from the outset. Cousins pled guilty pursuant to a plea agreement which recommended to the trial court a specific number of years for his sentence, and the aggregate number of years was less than the maximum sentence for his underlying offense: burglary, as a Class C felony. *See* I.C. § 35-50-2-6. Thus, although the trial court allocated some of his sentence to an habitual offender enhancement, it could have completely allocated the sentence solely to his sentence for burglary.

Our supreme court has stated that "a post-conviction petitioner will have a difficult time overturning his guilty plea on collateral attack." *State v. Cozart*, 897 N.E.2d 478, 483 (Ind. 2008). Typically, in such situations, only defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor, or defense counsel will present colorable claims for relief. *Cornelious v. State*, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), *trans. denied*. It is difficult to say that Cousins was coerced into pleading guilty where he received the sentence that he agreed to, and if the trial court had simply ordered the entire sentence attributable to his crime of burglary as it initially stated it was going to, Cousins would have no claim regarding the impropriety of his sentence.

Nevertheless, we will address Cousins' claim head on. In *Breaston v. State*, 907 N.E.2d 992, 993 (Ind. 2009), our supreme court was presented with a challenge to the imposition of habitual offender enhancements, to be served consecutively, where the defendant had committed his second offense after having been arrested for, but before being discharged from, the first offense. The *Breaston* court acknowledged that Indiana Code section 35-50-1-2(d) provides that, in such a situation, the "terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences imposed." *Id*. at 995. However, the *Breaston* court held that because of the "special and distinct dimensions" of the habitual offender enhancement, a trial court is precluded from ordering habitual offender sentences to run consecutively. *Id*.

Likewise, where a defendant is on parole at the time he commits a subsequent offense, the trial court cannot order his enhancement for being an habitual offender to be served consecutive to any remaining time which he would have to serve by way of a prior enhancement for being an habitual offender. The post-conviction court correctly acknowledged this current state of the law. However, our supreme court's decision in *Breaston* came after Cousins' conviction and time for direct appeal had been exhausted, and the trial court did not address the more difficult question, that being whether Cousins' counsel should have predicted the outcome of *Breaston* and objected either at Counsins' guilty plea or sentencing hearings.

Instead, the post-conviction court found that Cousins had failed to prove that he would serve consecutive time attributable to two separate habitual offender findings. We must

agree. The post-conviction court was presented with some information that makes it seem possible that Cousins could be put in a position where he would serve time for two separate habitual offender enhancements consecutively.[1] At the State's request, the trial court took note of its file for Cause No. 49G01-0508-FC-143687. In addition, the post-conviction court stated in its Order denying Cousins' petition for post-conviction relief that it admitted the "transcripts" as evidence, which we assume includes the transcriptions of the guilty plea hearing and sentencing hearing. (Appellant's App. p. 164). During the sentencing hearing, the trial court noted that Cousins had been convicted of "burglary and a habitual offender in '96." (Tr. p. 46). Furthermore, the trial court was informed that Cousins was on parole and noted that he would have to serve "backup," meaning time remaining on the offense he was on parole for. (Tr. p. 46).

However, Cousins has not presented any evidence that he would have to serve any time due to a parole violation attributable to a prior sentence enhancement for being an habitual offender. For that matter, Cousins has yet to produce evidence that his parole was in fact violated, or that he was on parole for his conviction for burglary in 1996. As we stated above, petitioners appealing negative decisions in post-conviction proceedings must show us that the evidence "unerringly and unmistakably" supports their claim that the post-conviction court erred. *Stevens*, 770 N.E.2d at 745. This Cousins has failed to do. Thus, because

[1] We note that Cousins has placed in his Appellant's Appendix a copy of the Abstract of Judgment for Cause No. 49G04-9511-FC-172318, which demonstrates that on February 20, 1996, Cousins was sentenced to 18 years for a burglary conviction, a Class C felony. That would be the maximum 8 years for the Class C felony, and an enhancement of 10 years, presumably for being an habitual offender. However, we cannot find in the Transcript of the post-conviction hearing where this Abstract of Judgment was admitted into evidence.

Cousins has failed to present evidence that would prove he will serve time for separate habitual offender enhancements consecutively, he has not demonstrated that his trial counsel should have objected. Therefore, his claim of ineffective assistance of counsel fails as well.

CONCLUSION

Based on the foregoing, we conclude that Cousins has not demonstrated that the post-conviction court erred when it denied his petition for post-conviction relief.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.