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IN THE COURT OF APPEALS OF INDIANA

BOBBY HENARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0711-PC-936
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
Cause No. 49G04-8904-CF-034639

June 24, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Bobby Henard ("Henard") was convicted in Marion Superior Court of Class A felony dealing in cocaine, Class A felony conspiracy to deal in cocaine, and Class C felony possession of cocaine, and ordered to serve an aggregate sentence of thirty years. After his convictions were affirmed on direct appeal, Henard filed a petition for post-conviction relief, which was denied. Henard appeals and argues that he was denied effective assistance of trial and appellate counsel. We affirm.

Facts and Procedural History

Facts pertinent to this appeal are found in our court's resolution of Henard's direct appeal.

> [O]n April 1, 1989, Indianapolis Police Officer Robert Holt ("Holt"), who was driving his marked vehicle northbound on College Avenue, observed a group of men in an alley just west of College. Holt parked his vehicle two blocks north of where he had seen the men. He then walked one block south so he was within 100 yards of the men, and watched them through binoculars
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> During the twenty minutes which followed, Holt observed Henard, Charles Wilson ("Wilson"), Sherman Ryle ("Ryle") and various other men engage in drug transactions. At one point, Wilson and Ryle were approached by a man who conversed with them. Wilson reached into an empty cigarette box which was lying on the ground, grabbed several plastic bindles, and placed them into a plastic lemon. In exchange for money, Wilson gave the man a bindle from the lemon. Wilson placed the money in his pocket while the man left the area.
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> Thereafter, Henard arrived via bicycle to the scene. He spoke with Wilson and Ryle. Wilson then removed money from his pocket and handed it to Henard. Henard rode the bicycle away from Wilson and Ryle who participated in another similar transaction. As before, Wilson placed the money in his pocket and later gave it to Henard. During a third transaction, Henard received the money directly from a purchaser.
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> Meanwhile, Holt radioed for assistance. Officer Mastin responded and the two officers apprehended Henard, Wilson, and Ryle. Cocaine was found on Wilson, and in the cigarette box on the ground near Wilson. The officers found bags of cocaine in the water bottle attached to the bicycle

> Henard was riding. Further, a search of Henard revealed small plastic bags in his socks and over $400.00 in his jacket.

Henard v. State, No. 49A04-9506-CR-239 (Ind. Ct. App. April 22, 1996).

Henard was convicted of Class A felony dealing in cocaine, Class A felony conspiracy to deal in cocaine, and Class C felony possession of cocaine. On June 14, 1990, Henard was sentenced to an aggregate term of thirty years. Henard belatedly appealed his convictions arguing sufficiency of the evidence, ineffective assistance of trial counsel, and the admission of the bags of cocaine discovered in the water bottle. Our court rejected Henard's arguments and affirmed his convictions.

In 1999, Henard filed a petition for post-conviction relief, which was denied. Henard appealed the denial, but our court terminated the appeal without prejudice and remanded the cause to the post-conviction court for further proceedings. On April 27, 2006, Henard filed a motion for writ in aid of appellate jurisdiction. Shortly thereafter, our court granted Henard's motion and directed the post-conviction court to issue a subsequent order on Henard's petition for post-conviction relief and to appoint appellate counsel.

On August 8, 2007, a supplemental evidentiary hearing was held on Henard's petition at which his trial counsel testified. The next day, the post-conviction court issued an order denying Henard's petition. The court concluded that Henard's claims of ineffective assistance of trial counsel were "not available for further consideration in the instant proceedings" because he raised the issue in his direct appeal. Appellant's App. pp. 38-39. The court also concluded that Henard was not denied effective assistance of appellate counsel because the "evidence before the Court demonstrates that counsel

performed competently and effectively on the petitioner's behalf." Id. at 39. Henard now appeals. Additional facts will be provided as necessary.

Standard of Review

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. McCary v. State, 761 N.E.2d 389, 391 (Ind. 2002). Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Davidson v. State, 763 N.E.2d 441, 443 (Ind. 2002). The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5) (2006); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

The post-conviction court entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6) (2006). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error –'that which leaves us with a definite and firm conviction that a mistake has been made.'" Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (quoting State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997)). Although we accept findings of fact unless they are clearly erroneous, we give conclusions of law no deference. Fisher, 810 N.E.2d at 679.

Discussion and Decision

Henard claims that he was denied both effective assistance of trial and appellate counsel. Because Henard presented a claim of ineffective assistance of trial counsel on direct appeal, that claim is now foreclosed from collateral review.[1] See Woods v. State, 701 N.E.2d 1208, 1220 (Ind. 1998). However, Henard is not precluded from arguing that appellate counsel's litigation of trial counsel's ineffectiveness was itself ineffective. See Seeley v. State, 782 N.E.2d 1052, 1060 (Ind. Ct. App. 2003), trans. denied.

A petitioner arguing ineffective assistance of appellate counsel based upon appellate counsel's failure to properly raise and support a claim of ineffective assistance of trial counsel faces a compound burden. Dawson v. State, 810 N.E.2d 1165, 1177 (Ind. Ct. App. 2004), trans. denied. A petitioner making such a claim must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. Id. The petitioner must establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. Id.

In other words, Henard must prove that: (1) his trial and appellate counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of Henard's Sixth Amendment right to counsel,

[1] Henard argues that because his direct appeal "was filed prior to the Court's clarification in Woods v. State," he "should not be denied review of his ineffective assistance of trial counsel issues due to appellate counsel's error in having incompletely raised ineffective assistance of trial counsel in the direct appeal." Br. of Appellant at 12. We reject Henard's argument. Our courts have long held that a defendant "having once litigated his Sixth Amendment claim concerning ineffective assistance of counsel, is not entitled to litigate it again, by alleging different grounds." Sawyer v. State, 679 N.E.2d 1328, 1329 (Ind. 1997) (citing Morris v. State, 466 N.E.2d 13, 14 (Ind. 1984)). Accordingly, we do not address Henard's claim that his trial counsel was ineffective for failing to communicate a plea offer.

and (2) his trial and appellate counsel's deficient performances prejudiced his defense. See id. To establish prejudice, Henard must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the direct appeal would have been different. See id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Appellate counsel argued trial counsel's failure to call Charles Wilson as a witness. Yet, Henard asserts that his appellate counsel was ineffective because the argument was not properly supported by evidence in the record. On direct appeal, our court did not address the merits of appellate counsel's argument that Wilson should have been called as a witness because Wilson's sworn statement was not properly made part of the record. Our court granted the State's motion to strike the statement, and therefore, there was no evidence in the record to support Henard's claim of ineffective assistance of trial counsel.

Because appellate counsel erred by failing to follow the proper procedures to include Wilson's statement in the record, we must consider whether Henard was prejudiced by the error, i.e. whether the outcome of the direct appeal would have been different. If he had been called to testify, Wilson would have stated that he "did not receive any money or drugs from Bobby Henard," and did not see Henard "associate in any drug activities in any manner." Appellant's App. p. 51. He also would have testified that Henard was not riding a bicycle on the date in question. Id.

The post-conviction court concluded that Henard was not prejudiced by trial counsel's failure to present Wilson's testimony because his testimony was cumulative of

the other witnesses who testified to the same facts. Co-defendant Sherman Ryle testified that no one was selling cocaine in the alley that day, Henard did not have a bicycle, and Henard arrived in the alley in a truck. Trial Tr. pp. 233, 235-37. Three additional witnesses testified that Henard did not sell cocaine in the alley on the date in question, that he arrived in a truck, and was not riding a bicycle. Id. at 290-94, 315-16, 329-31. Finally, we note that trial counsel attempted to call Wilson as a witness, but he was not transported from the Department of Correction. Id. at 244.

The post-conviction court correctly concluded that Wilson's testimony was cumulative of other testimony presented at trial. Therefore, Henard has not established that he was prejudiced by trial counsel's failure to present Wilson's testimony. For this same reason, Henard has not established that the outcome of his direct appeal would have been different had appellate counsel followed the proper procedures to include Wilson's affidavit in the record. Accordingly, we affirm the court's denial of Henard's petition for post-conviction relief.

Affirmed.

MAY, J., and VAIDIK, J., concur.