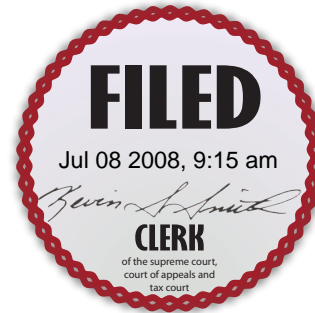


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

FRANK HUNTER,)

Appellant-Petitioner,)

vs.)

STATE OF INDIANA,)

Appellee-Respondent.)

No. 49A02-0803-PC-213

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
The Honorable William Robinette, Master Commissioner
Cause No. 49G03-0112-PC-233058

July 8, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Frank Hunter appeals the denial of his petition for post-conviction relief. Hunter argues that he received the ineffective assistance of trial counsel because his attorney failed to object to the fact that the presentence investigation report (PSI) included a nonexistent conviction. Finding no error, we affirm.

FACTS

On March 6, 1999, Hunter, Gary Jackson, and Anthony Williams agreed to murder Kenzy White, with whom Hunter had a personal relationship. Hunter lured White into a vehicle, picked up Williams, and drove to a secluded alley, where Hunter exited the vehicle and Williams shot White twice in the head, killing him. The State charged Hunter with murder and class A felony conspiracy to commit murder. On June 5, 2002, Hunter pleaded guilty to class A felony conspiracy to commit murder in exchange for the State's agreement to dismiss the murder charge. Sentencing was left to the trial court's discretion.

The PSI was filed on October 9, 2002, the date of Hunter's sentencing hearing, and showed that Hunter had prior Illinois convictions for carrying a firearm and aggravated battery and a federal conviction for conspiracy to possess heroin with the intent to distribute. Evidently, Hunter was not actually convicted of aggravated battery. At the hearing, Hunter told the trial court that he had had time to review the PSI and had no objections; similarly, Hunter's attorney told the trial court that he did not believe that any changes needed to be made to the PSI. The trial court found two mitigators—Hunter's acceptance of responsibility and cooperation in the prosecution of his co-

conspirators—and one aggravator—his criminal history. The trial court sentenced Hunter to thirty-five years of incarceration.

Hunter filed a petition for post-conviction relief on January 22, 2007, and amended the petition on September 7, 2007, alleging, among other things, that his trial attorney should have objected to the inclusion of the aggravated battery conviction in the PSI. Following a hearing, the post-conviction court denied Hunter's petition in relevant part, finding as follows:

. . . [Hunter] admitted that even though he and his counsel had discussed the presentence report prior to the sentencing hearing, Hunter waited until said hearing to voice his disagreement to [his attorney] regarding this prior conviction. [The attorney] does not recall whether or not Hunter advised him that there was no such conviction. The Indiana Supreme Court has held that an isolated omission or error is not itself evidence of deficient performance. . . .

. . . [W]hen Hunter was given the opportunity to address the Court . . . , and he spoke at length, Hunter mentioned nothing of disputing the prior aggravated battery conviction. This further calls into question the credibility of whether [Hunter] said anything about this to counsel at the hearing. Either way, given that effective assistance is determined according to the whole of the lawyer's performance and not just on the performance at issue, [Hunter] has failed to prove deficient performance.

And as to [Hunter's] burden to show prejudice, . . . [t]he sentencing court found Hunter's prior convictions, as a whole, as the single aggravating factor; the Judge did not list the individual convictions In addition, the sentencing Judge made no additional comments about Hunter's criminal history, nor did he specify that any one conviction . . . caused the court particular concern.

Appellant's App. p. 34-35 (internal citations omitted). Hunter now appeals.

DISCUSSION AND DECISION

As we consider Hunter's argument that the post-conviction court erroneously denied his petition for post-conviction relief, we note that 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); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. 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. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

Hunter argues that his trial counsel was ineffective for failing to object to the PSI. When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To

establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Here, Hunter testified that he informed his attorney of the error in the PSI before the trial court imposed the sentence. Tr. p. 16-17. His attorney, however, did not recall Hunter raising that issue. Id. at 7-8. Moreover, when Hunter made a lengthy statement to the sentencing court, he did not complain about the error. PCR Ex. B. Under these circumstances, it was reasonable for the post-conviction court to question the credibility of Hunter's claim that he raised the error with his attorney before the hearing began. Inasmuch as we do not reassess witness credibility on appeal, we defer to the post-conviction court's conclusion that Hunter's testimony was not credible in this regard.

Assuming that Hunter did not, in fact, inform his attorney of the error in the PSI before the hearing began, we note that his attorney gave Hunter the PSI before the hearing, asked him to review it, and highlight any errors contained therein. It was reasonable for Hunter's attorney to rely on his client's personal knowledge of his criminal history, and we do not find his attorney's performance deficient for this reason.

Finally, we note, as did the trial court, that even if we accept for argument's sake that Hunter's attorney's performance was deficient, Hunter cannot establish prejudice. When the erroneous aggravated battery conviction is omitted, Hunter's criminal history includes a juvenile adjudication for use of a weapon and convictions for carrying a firearm and conspiracy to possess heroin with the intent to distribute. The felony drug

conviction was recent—2000—and relevant to the present drug-related conspiracy to commit murder conviction. In finding Hunter’s criminal history to be an aggravator, the trial court described it in general terms: “The Court finds one aggravating factor: The defendant has a prior history of criminal conduct.” PCR Ex. B. The trial court enhanced Hunter’s conviction by only five years, whereas a class A felony conviction may be enhanced by as many as twenty years. Ind. Code § 35-50-2-4. Although there were two mitigators—Hunter’s remorse and cooperation with the prosecution of his co-conspirators—we cannot say that the inclusion of the aggravated battery conviction, on its own, tipped the scale in favor of an enhanced thirty-five-year sentence. Under these circumstances, we cannot conclude that Hunter was prejudiced by the inclusion of the erroneous aggravated battery conviction.

The judgment of the post-conviction court is affirmed.

RILEY, J., and ROBB, J., concur.