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IN THE
COURT OF APPEALS OF INDIANA

RANDALL E. JAMES,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 82A01-0803-PC-122
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT NO. 3
The Honorable Robert J. Pigman, Judge
Cause No. 82D03-0308-PC-9

July 22, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Randall E. James (James), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUES

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

(1) Whether the post-conviction court erred in determining that James' guilty plea to the habitual offender charge was knowing, intelligent, and voluntary; and

(2) Whether the post-conviction court erred in determining that James' appellate counsel was not ineffective for failing to file a petition to transfer with the Indiana supreme court.

FACTS AND PROCEDURAL HISTORY

In our opinion in James' direct appeal, we stated the facts as follows:

> In December 2000, thirteen-year-old D.J.P. came home from school because she was sick. James is the ex-boyfriend of D.J.P.'s mother and was at their home on this particular day. After D.J.P. fell asleep, James entered her room, laid on her bed with her and fondled her breasts. James also attempted to put his hand inside D.J.P.'s pants, but she was able to get up and run from James. James grabbed D.J.P. by the wrists and threw her down on the bed. At some point when James was holding D.J.P. down, he kissed her on the lips. D.J.P. was finally able to get away and run to the neighbor's house.

James v. State, No. 82A04-0211-CR-527, slip op. at 2 (Ind. Ct. App. June 19, 2003).

On December 12, 2000, the State filed an Information charging James with: Count I, attempted child molesting, as a Class C felony, I.C. §§ 35-41-5-1 and 35-42-4-3(b); Count II, confinement, as a Class C felony, I.C. § 35-42-3-3; and Count III, sexual battery, as a Class

D felony, I.C. § 35-42-4-8. On January 8, 2001, the State added a habitual offender allegation based on six prior felony convictions.

A jury trial took place on April 29 and 30, 2002, but it ended in a mistrial. A second jury trial took place on August 26 and 27, 2002. After the State rested its case, the following exchange occurred between the trial court, James, and James' attorney regarding the habitual offender allegation outside the presence of the jury:

> Court: I have the Order here on the complete case prints that I signed to get that procedure taken care of. Then I was advised earlier that maybe that won't be necessary in the event that there is a verdict of guilty on one of the counts. Is that correct?
>
> Counsel: I think that's correct Your Honor. Should that be necessary for the habitual phase on that Mr. James you'll admit that you've had at least two prior felonies unrelated to the felonies in this matter?
>
> James: Yes.
>
> Court: Okay. You do – you don't dispute that the record here that they've set out is your prior record then?
>
> James: No.
>
> Court: You understand that you would be entitled to the same, to have the same jury review the State's evidence and make that determination?
>
> James: Yes Sir.
>
> Court: Okay. But you're not denying that?
>
> James: No Sir.
>
> Court: All right. We'll show that he admits the petition then if it comes to that.

(Trial Transcript pp. 158-59). The transcript before us contains no further mention of James' alleged habitual offender status. The jury found James guilty as charged on Counts I, II, and III.

The topic of the habitual offender allegation turned up again during the sentencing hearing on October 8, 2002, when the trial court sentenced James as follows:

> On Count I [James] will be sentenced for a period of five years and the habitual offender in the amount of twelve years will be added to that and enhanced for a period of total sentence on Count I of seventeen years. On Count II and III, the Court will sentence [James] for a period of four years on each count, will order those sentences served concurrently to one another but consecutively to the sentence in Count I for a total sentence of twenty-one years at the Indiana Department of Correction[].

(Trial Tr. p. 224).

On direct appeal to this court, James argued, in part, that he had never actually been adjudicated a habitual offender because his admission to the prior felonies did not amount to a guilty plea to the habitual offender charge, and that even if his admission did amount to a guilty plea, the habitual offender adjudication could not stand because he had not been advised of his rights under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)—the right to trial by jury, the right of confrontation, and the right against self-incrimination—before entering the plea. We concluded that the colloquy, provided above, amounted to a guilty plea. As such, we refused to review the habitual offender adjudication, noting that "one consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal." *James*, No. 82A04-0211-CR-527, slip op. at 4 (citing *Vanzandt v. State*, 730 N.E.2d 721, 726 (Ind. Ct. App. 2000)). We instructed James that "a petition for

post-conviction relief is the proper vehicle for challenging a guilty plea." *Id*. at 4-5. James' counsel did not file a petition to transfer with the Indiana supreme court.

On August 25, 2003, James filed a *pro se* petition for post-conviction relief. On April 30, 2007, an attorney filed an amended petition on James' behalf. In the amended petition, James made two claims. First, he asserted that his appellate counsel had been ineffective by failing to cite persuasive authority to support his argument that James did not plead guilty to being a habitual offender and by failing to file a petition to transfer with the Indiana supreme court making the same argument. Second, he claimed that even if he did plead guilty to being a habitual offender, the adjudication cannot stand because the trial court failed to advise him of his right against self incrimination and his right to confrontation. On January 18, 2008, the post-conviction court issued an order denying James' petition for post-conviction relief.

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

DISCUSSION AND DECISION

On appeal, James argues that the post-conviction court erred in denying his petition for post-conviction relief. Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Johnson v. State*, 832 N.E.2d 985, 991 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*. To

succeed on appeal from the denial of relief, the post-conviction petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite to the one reached by the post-conviction court. *Johnson*, 832 N.E.2d at 991. We do not defer to the post-conviction court's legal conclusions, but do accept its factual findings unless they are clearly erroneous. *Stevens*, 770 N.E.2d at 745.

Before turning to the merits of James' claims, we note that his first argument is based on the premise that we, in our first opinion, correctly concluded that he pled guilty, while his second argument is based on the premise that our conclusion was incorrect. Should there be any question, we recognize the inconsistency between these two positions. However, given the nature of James' claims, as discussed further herein, such inconsistency is unavoidable.

I. *Validity of Guilty Plea*

James first argues that the post-conviction court erred in determining that the guilty plea was knowing, intelligent, and voluntary. Specifically, he contends that the trial court failed to fully advise him of his *Boykin* rights before accepting the plea. The State responds that James has waived this argument by failing to provide a complete record of the trial proceedings. We agree with the State.

A petitioner for post-conviction relief who claims that his or her conviction was obtained in violation of federal or state constitutional safeguards has the burden of proving the claim by a preponderance of the evidence. *Hall v. State*, 849 N.E.2d 466, 470 (Ind. 2006). The appellant has the responsibility to present a sufficient record that supports his claim to allow intelligent review of the issues. *Miller v. State*, 753 N.E.2d 1284, 1287 (Ind.

2001), *reh'g denied*. "[W]ithout submitting a complete record of the issues for which an appellant claims error, the appellant waives the right to appellate review." *Id*.

Here, the transcript submitted to the post-conviction court and this court moves directly from the attorneys' closing arguments to the sentencing hearing. James has failed to provide us with a transcript of the proceedings that took place after closing arguments or to direct us to evidence, such as testimony from the trial judge or one of the attorneys, showing that no further proceedings took place. Because the habitual offender proceeding typically takes place after the closing arguments, a transcript of those events was vital to James' claim that he did not receive his *Boykin* rights. It may be the case that such a transcript does not exist or has been lost. But our supreme court has instructed that where a petitioner claims a deprivation of his *Boykin* rights and the record is missing, the burden is on the petitioner to either prepare a statement of the evidence in accordance with Indiana Appellate Rule 31[1] or to find a different way of proving that he did not receive his *Boykin* rights. *See Hall*, 849 N.E.2d 466. James has not done so in this case.

Instead, James would have us hold that the lack of a transcript does not prejudice his case because the chronological case summary (CCS) indicates that nothing further regarding

[1] "**A. Party's Statement of Evidence.** If no Transcript of all or part of the evidence is available, a party or the party's attorney may prepare a verified statement of the evidence from the best available sources, which may include the party's or the attorney's recollection."

the habitual offender charge transpired following the closing arguments. He posits, "One may assume that if anything else happened it would have been at least mentioned in the summary." (Appellant's Reply Br. p. 3). In support of his argument, he directs us to our opinion in *Fowler v. State*, 878 N.E.2d 889 (Ind. Ct. App. 2008). In *Fowler*, the State argued that the defendant waived appellate review of an amendment to the charging information by failing to provide a transcript showing that he had objected to the State's motion to amend. *Id*. at 891. We disagreed, noting that the CCS showed that the defendant had made such an objection. *Id*. at 892. We find *Fowler* to be distinguishable. James is asking us to make an assumption based on the lack of an entry in the CCS, whereas the CCS in *Fowler* contained a relevant entry supporting the defendant's argument.

Because James failed to prove by a preponderance of the evidence that he did not receive his *Boykin* rights prior to pleading guilty to the habitual offender charge, the post-conviction court did not err in determining that James' guilty plea was entered knowingly, intelligently, and voluntarily.

II. *Failure to Seek Transfer*

As noted above, James' second argument proceeds from the premise that we wrongly concluded in our first opinion that he pled guilty to the habitual offender charge. James contends that he merely stipulated the facts *underlying* the charge. He maintains that if his appellate counsel would have filed a petition to transfer with the Indiana supreme court, that court would have vacated our opinion and reversed the habitual offender finding. Appellate

counsel's failure to do so, James argues, amounts to ineffective assistance of counsel. We disagree.

As an initial matter, the State maintains that James waived the issue regarding appellate counsel's failure to seek transfer because he did not raise it in his amended petition. The State is wrong. On page 4 of the amended petition, James asserted that if his appellate counsel had filed a petition to transfer with our supreme court, "it is likely James' conviction for being a habitual offender would have been reversed." (Appellant's Post-Conviction App. p. 52). James did not waive this issue.

Turning to James' claim, we note that the standard by which we review claims of ineffective assistance of appellate counsel is the same standard applicable to claims of trial counsel ineffectiveness. *Bieghler v. State*, 690 N.E.2d 188, 192 (Ind. 1997), *reh'g denied*, *cert. denied*, 525 U.S. 1021 (1998). *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), *reh'g denied*, established that 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*, 832 N.E.2d at 996.

Our supreme court has identified three categories of alleged appellate counsel ineffectiveness: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Bieghler*, 690 N.E.2d at 193-95. James contends that the failure to file a petition to transfer falls into the waiver category, but we agree with the State that the issue is

more properly framed as whether appellate counsel failed to present the habitual offender issue well. Claims of inadequate presentation of certain issues admittedly are the most difficult for defendants to advance and reviewing tribunals to support. *Hopkins v. State*, 841 N.E.2d 608, 612 (Ind. Ct. App. 2006). An ineffectiveness challenge resting on counsel's presentation of a claim must overcome the strongest presumption of adequate assistance. *Id*. Judicial scrutiny of counsel's performance, already highly deferential, is at its highest for this type of claim. *Id*. Relief is only appropriate when the appellate court is confident that the result would have been different if the issue had been presented in the way petitioner suggests it should have been. *See id*.

Again, James argues that his appellate counsel was ineffective for failing to seek supreme court review of our conclusion on direct appeal that he had pled guilty to the habitual offender charge. In concluding that James had not just stipulated to the facts underlying the habitual offender count but in fact had pled guilty to the charge, we noted that he did not object when the trial court stated, "We'll show he admits the petition then if it comes to that." (Trial Tr. p. 159); *see also James*, No. 82A04-0211-CR-527, slip op. at 4. In his amended petition for post-conviction relief, James claimed that our conclusion was inconsistent with our earlier holding in *Vanzandt*, where

> counsel informed the court that Vanzandt wished to admit the prior convictions and conclude the jury phase. The trial court then asked Vanzandt, "Your attorney has just advised the Court that you wish to admit to the enhancement?" Vanzandt replied in the affirmative. The court asked, "Are you wishing to admit to both the C felony handgun enhancement as well as to being a habitual offender?" Vanzandt again replied in the affirmative. He then admitted to each of the underlying felony convictions.

730 N.E.2d at 725. Based on this exchange, we concluded that Vanzandt had pled guilty to the habitual offender charge. James argues that his own admissions did not rise to the level of Vanzandt's admissions and amount to a guilty plea.[2]

While we agree with James that his admissions were not quite as explicit as those made by Vanzandt, the colloquy in this case was still sufficient to constitute a guilty plea to the habitual offender charge. When the trial court said that James would "admit[] the petition," not just the facts underlying the petition, neither James nor his attorney objected or otherwise spoke up on the issue. This factual scenario was not so different from that in *Vanzandt* that we can say that James' appellate counsel performed deficiently by failing to cry foul to our supreme court. "When the issues presented by an attorney are analyzed, researched, discussed, and decided by an appellate court, deference is afforded both to the attorney's professional ability and the ability of the appellate judges who first decided the case to recognize a meritorious argument." *Hopkins*, 841 N.E.2d at 612. The post-

[2] James also contends that while he admitted he had at least two prior convictions unrelated to the current charges, he never admitted that his prior convictions were unrelated to each other as required by the habitual offender statute. *See* I.C. § 35-50-2-8. James has failed to develop this as a separate argument, so we will not separately address it. We simply note that James agreed to "admit[] the petition," and the petition alleged that he "has accumulated *at least two (2) prior unrelated Felony convictions unrelated* to the felon[ies] charged in Counts I, II and III[.]" (Appellant's Direct Appeal App. p. 44) (emphasis added).

conviction court did not err in determining that James' appellate counsel was ineffective for failing to file a petition to transfer.[3]

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err in denying James' petition for post-conviction relief.

Affirmed.

BAKER, C.J., and ROBB, J., concur.

[3] In his reply brief, filed on June 2, 2008, James noted that our supreme court was then considering the difference between merely admitting the facts underlying a habitual offender charge and actually pleading guilty to the charge; days ago, our supreme court issued an opinion in that case. *Hopkins v. State*, No. 49S05-0803-PC-00144, slip op. (Ind. July 1, 2008). For now, it is enough to say that the decision in *Hopkins* seems to favor James' argument that his colloquy amounted only to an admission of the facts underlying the habitual offender charge, not a guilty plea. However, James rightfully concedes that "the outcome of *Hopkins* should have no bearing on the instant case[.]" (Appellant's Reply Br. p. 3). This includes the question of whether his appellate counsel rendered ineffective assistance back in 2003.