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IN THE
COURT OF APPEALS OF INDIANA

KEVIN MONCRIEF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1004-PC-245
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Stanley E. Kroh, Commissioner
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0609-PC-183277

SEPTEMBER 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Kevin Moncrief appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUE

Moncrief presents one issue for our review, which we restate as: whether Moncrief was denied his right to effective assistance of counsel on appeal when counsel failed to file a petition to transfer to challenge this Court's determination affirming the trial court's giving of a voluntary manslaughter instruction in the absence of sudden heat at Moncrief's trial for murder.

FACTS AND PROCEDURAL HISTORY

Moncrief was charged with the murder of Allen Humphrey. At trial, the court instructed the jury, over Moncrief's objection, as to the lesser-included offense of voluntary manslaughter. Moncrief was found guilty of voluntary manslaughter and was sentenced to forty years with five years suspended. Moncrief appealed his conviction to this Court arguing that the trial court erred in giving the voluntary manslaughter instruction over his objection. This Court affirmed his conviction. Moncrief petitioned for rehearing, which was denied. Moncrief's appellate counsel did not file a petition to transfer.

Moncrief subsequently filed a *pro se* petition for post-conviction relief alleging that his appellate counsel was ineffective for having failed to seek transfer on the issue of the propriety of the trial court's instruction to the jury. Following an evidentiary hearing, the court denied his petition. It is from this denial that Moncrief now appeals.

DISCUSSION AND DECISION

Moncrief is appealing the denial of his petition for post-conviction relief. The petitioner who appeals the denial of post-conviction relief appeals from a negative judgment and faces the rigorous burden of showing that "the evidence as a whole leads unerringly and unmistakably" to a conclusion opposite that reached by the post-conviction court. *Harris v. State*, 762 N.E.2d 163, 166 (Ind. Ct. App. 2002), *reh'g denied*, *trans. denied*. Thus, we will not set aside the post-conviction court's ruling unless the evidence is without conflict and leads solely to a result different from that reached by the post-conviction court. *Stewart v. State*, 517 N.E.2d 1230, 1231 (Ind. 1988). In making this determination, we consider only the evidence that supports the decision of the post-conviction court together with any reasonable inferences. *McCullough v. State*, 672 N.E.2d 445, 447 (Ind. Ct. App. 1996), *trans. denied*. We neither weigh the evidence nor determine the credibility of the witnesses. *Stewart*, 517 N.E.2d at 1231. Moreover, although we do not defer to the post-conviction court's legal conclusions, we do accept its factual findings unless they are clearly erroneous. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002), *reh'g denied*, *cert. denied*, 540 U.S. 830, 124 S.Ct. 69, 157 L.Ed.2d 56 (2003).

Specifically, Moncrief claims he was denied his right to effective assistance of counsel on appeal. The standard by which we review appellate counsel's performance is the same as that for trial counsel. *Pruitt v. State*, 903 N.E.2d 899, 927-28 (Ind. 2009), *reh'g denied*, 907 N.E.2d 973. In general, claims of ineffective assistance of counsel are reviewed under a two-part test: (1) a demonstration that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) a showing that the deficient performance resulted in prejudice to the defendant. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (*citing Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Prejudice occurs when the defendant demonstrates that there is a reasonable probability that, if not for counsel's unprofessional errors, the result of the proceeding would have been different. *Grinstead*, 845 N.E.2d at 1031. A reasonable probability occurs when there is a probability sufficient to undermine confidence in the outcome. *Id*. Failure to satisfy either prong of the two-part test will cause the defendant's claim to fail. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). If we can easily dispose of an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient. *Id*.

Moncrief argues that his appellate counsel was ineffective because she failed to file a petition to transfer challenging this Court's determination affirming the trial court's giving of a voluntary manslaughter instruction in the absence of sudden heat at his trial for murder. He bases this assertion on *Watts v. State*, 885 N.E.2d 1228, 1233 (Ind. 2008)

in which our Supreme Court held that it is reversible error for a trial court to instruct a jury on voluntary manslaughter in the absence of evidence of sudden heat.

The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter. Ind. Code § 35-42-1-3. "Sudden heat is 'anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary man; it prevents deliberation and premeditation, excludes malice, and renders a person incapable of cool reflection.'" *Wilson v. State*, 697 N.E.2d 466, 474 (Ind. 1998) (*quoting McBroom v. State*, 530 N.E.2d 725, 728 (Ind. 1988)). Words alone cannot generate sudden heat, and evidence that the defendant was angry does not, by itself, show sudden heat; rather, there must be evidence that the victim provoked the defendant. *Morrison v. State*, 588 N.E.2d 527, 531 (Ind. Ct. App. 1992). Moreover, the heat must have been sudden such that there was not a sufficient cooling off period between the provocation and the homicide. *Id*.

In the present case, the evidence disclosed that Humphrey, who was of much larger stature, called Moncrief a "punk bitch" several times. Tr. at 112. Moncrief, appearing scared, returned across the yard to his own home and retrieved a gun. When Moncrief returned to the yard, he called for Humphrey, and Humphrey went over to where Moncrief was standing. Moncrief told Humphrey to stop "walking up on [him]," and Humphrey "chest bumped" Moncrief several times. Tr. at 348 and 353. When Humphrey "made a flinch, like he was going to grab" Moncrief, Moncrief shot him. Tr. at 117.

This evidence establishes provocation by Humphrey, the victim, as well as anger and/or terror on the part of Moncrief so as to render him incapable of cool reflection. Therefore, because there was evidence of sudden heat, the holding in *Watts* does not apply, and the trial court did not err by giving the voluntary manslaughter instruction. Consequently, Moncrief has not shown the prejudicial result necessary to prevail on a claim of ineffective assistance of counsel. Thus, we cannot say that the evidence in the present case leads solely to a result different from that reached by the post-conviction court.

CONCLUSION

Based upon the foregoing, we conclude that the post-conviction court properly denied Moncrief's petition for relief.

Accordingly, we affirm.

BAKER, C.J., and KIRSCH, J., concur.