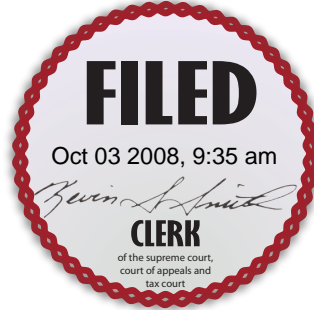


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**IN THE
COURT OF APPEALS OF INDIANA**

ERNEST JOHNSON III,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 85A05-0708-PC-458

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Rosemary Higgins Burke, Special Judge
Cause No. 85C01-0009-DF-51

October 3, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Wabash Circuit court denied a petition for post-conviction relief filed by Ernest Johnson III (“Johnson”). Johnson appeals and claims that the post-conviction court erred in determining that he was not denied the effective assistance of trial and appellate counsel. We affirm.

Facts and Procedural History

Johnson was initially charged with auto theft. However, while under oath in that case, he gave inconsistent answers to various questions. As a result, the State charged Johnson with three counts of Class D felony perjury on September 26, 2000. A jury trial was held on May 17-18, 2001, at the conclusion of which Johnson was found guilty of two counts of Class D felony perjury.

The trial court held a sentencing hearing on June 18, 2001. At this hearing, the trial court found as mitigating that Johnson’s crimes did not result in personal injury or property damage. The trial court found as aggravating that Johnson expressed no remorse for his crimes. In fact, he claimed in the presentence investigation report and at the sentencing hearing that he should not have been prosecuted for perjury and that the charges were “nit picking.” Appellant’s Trial App. p. 40. The trial court also found as aggravating that Johnson had committed his perjuries while incarcerated for another crime. Further, the trial court found as aggravating Johnson’s extensive criminal history, which included juvenile delinquency findings for three counts of misdemeanor criminal mischief, resisting law enforcement, and reckless driving, in addition to adult convictions for Class A misdemeanor domestic battery, Class D felony receiving stolen property,

Class A misdemeanor criminal trespass, Class D felony criminal confinement, Class D felony auto theft, Class A misdemeanor battery, and Class B felony robbery.

The trial court sentenced Johnson to three years on both perjury convictions, to be served concurrently with each other but consecutively with a sentence Johnson was ordered to serve for previous convictions, including the auto theft conviction which led to the current perjury convictions. In sentencing Johnson, the trial court made the following comments:

Perjury as an offense does have consequences and it does have meaning, because it affects how Courts hear things and how (inaudible) decision to make. It's important that the truth be heard. And that the Court have the ability to rely on what somebody's saying, either today through sentencing or at the time of the trial, or any other kind of case that comes before the Court. I need to know when people are telling the truth. And they need to know that if they don't tell the truth, there are some consequences to it. And that's why [perjury] is more than just a petty offense. It's something that is significant and does have some significant consequences. I will order that the terms be served concurrently and I'm going to order that you serve consecutively. That [is] because they were committed while you were incarcerated on another offense[,] they have to be served consecutively.

Trial Tr. p. 107.

Upon direct appeal of his perjury convictions, Johnson claimed that the evidence was insufficient to support his convictions, that the trial court had erred in denying his motion for change of venue, and that the trial court had erred in limiting his counsel's questioning regarding Johnson's state of mind when he made his inconsistent statements. Johnson v. State, No. 85A02-0108-CR-527, slip op. at 2 (Ind. Ct. App. Dec. 27, 2001). This court affirmed the trial court in all respects. Id. at 7.

On June 1, 2006, Johnson filed a *pro se* petition for post-conviction relief. In his petition, Johnson alleged that his trial counsel was ineffective for failing to object to the trial court's statement that his sentences for perjury were required to be served consecutively to his previously imposed sentence. Johnson also alleged that his appellate counsel, who was the same attorney as his trial counsel, was ineffective for failing to raise the issue of the consecutive sentences on direct appeal. A hearing on Johnson's post-conviction petition was held on May 1, 2007, at which Johnson appeared *pro se*. At this hearing, Johnson's trial and appellate counsel testified that he did not remember not objecting to the trial court's statement but stated that he would have objected had he known that the consecutive sentences were not mandatory. However, counsel also testified that even if the consecutive sentences were not mandatory, he believed that the trial court would still have ordered consecutive sentences in light of Johnson's extensive criminal history. Tr. p. 19. Counsel testified that his main strategy was to argue that Johnson's two perjury convictions should be served concurrently with each other.

On July 19, 2007, the post-conviction court issued findings of fact and conclusions of law denying Johnson's post-conviction petition. The post-conviction court concluded that Johnson had failed to prove that he was prejudiced by his trial counsel's failure to object to the trial court's statement that consecutive sentences were mandatory because the trial court could have imposed the sentence it did based upon the aggravating factors found by the trial court. As Johnson's claim of ineffective assistance of appellate counsel was premised upon the same grounds as his claim of ineffective assistance of trial

counsel, the post-conviction court similarly concluded that Johnson had not been denied the effective assistance of appellate counsel. Johnson now appeals.

Discussion and Decision

A petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Henley v. State, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner appeals from a negative judgment. Id. As such, to prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Id. at 643-44. We do not defer to the post-conviction court's legal conclusions, but the post-conviction court's factual findings 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. Id. at 644.

As explained by our supreme court in Overstreet v. State, 877 N.E.2d 144, 152 (Ind. 2007), to establish a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish before the post-conviction court the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, a defendant must show that counsel's performance was deficient, and this requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as counsel guaranteed to the defendant by the Sixth Amendment. Overstreet, 877 N.E.2d at 152. Second, a defendant must show that the deficient performance prejudiced the defense,

and this requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. Id. 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. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id. The failure to satisfy either prong of the Strickland test will cause the claim to fail. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Johnson's claim of ineffective assistance centers on the trial court's statement that it was required to order that Johnson's concurrent sentences for perjury run consecutively to the prior sentence Johnson had been ordered to serve. Johnson admits that, under certain circumstances, trial courts must impose consecutive sentences. Specifically, Indiana Code section 35-50-1-2(d) (2004 & Supp. 2007) provides:

- If, after being arrested for one (1) crime, a person commits another crime:
- (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or
 - (2) while the person is released:
 - (A) upon the person's own recognizance; or
 - (B) on bond;
- the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

It appears that the trial court was referring to this statute when it commented that it was required to order that Johnson's perjury convictions run consecutive to the previously imposed sentence. However, Indiana courts have repeatedly held that Indiana Code section 35-50-1-2(d) applies only if the defendant has already been sentenced on the first

crime when the second crime is committed. See Williams v. State, 787 N.E.2d 461, 463-64 (Ind. Ct. App. 2003). Johnson claims that when he committed his perjury, he had not yet been sentenced for his previous convictions. The State concedes as much, and admits that the imposition of consecutive sentences in the present case was not statutorily mandated.

Johnson argues that because the trial court was incorrect in its statement that consecutive sentences were mandatory, and because his trial counsel failed to object to the trial court's misstatement, he received the ineffective assistance of counsel. We disagree. This is so because even if we assume that Johnson's counsel's performance was deficient, Johnson has not established that, but for this deficiency, the result of the proceeding would have been different.

Pursuant to Indiana Code section 35-50-1-2(c), the trial court, considering the aggravating and mitigating circumstances, still had the discretion to order consecutive sentences. The trial court found three aggravating circumstances, including Johnson's significant criminal history. The trial court also gave a detailed explanation of why perjury was not a petty offense but a serious crime that affects the administration of justice. Given the trial court's statements and the aggravating factors it found, we cannot say that Johnson established that, but for counsel's deficient performance, the result of the proceeding would have been different. In other words, even if the trial court had been made aware that consecutive sentences were not mandatory, the trial court would most likely have imposed the same sentence. Therefore, the post-conviction court did not err

in concluding that Johnson had failed to establish the ineffective assistance of trial counsel.

Johnson claims that his appellate counsel was ineffective for failing to present on direct appeal the issue of the trial court's statement regarding the consecutive sentences. The standard of review for claims of ineffective assistance of appellate counsel is the same as for trial counsel: the defendant must show appellate counsel's performance was deficient and that this deficiency resulted in prejudice. Henley, 881 N.E.2d at 644. When evaluating an ineffective assistance of appellate counsel claim for failure to raise an issue on direct appeal, we will find deficient performance only where the omitted issue was significant, obvious, and clearly stronger than those presented. Wrinkles v. State, 749 N.E.2d 1179, 1203 (Ind. 2001). Appellate counsel is not ineffective for failing to raise an issue that is unlikely to succeed. See Trueblood v. State, 715 N.E.2d 1242, 1259 (Ind. 1999).

Had Johnson's appellate counsel raised the issue of the consecutive sentences on direct appeal, the result would have been the same as we reach today, i.e., the trial court had discretion to enter the sentence it did, and given the facts and circumstances before the trial court at Johnson's sentencing hearing, the trial court would likely have imposed the same sentence. Because Johnson cannot establish that the issue he claims should have been presented on direct appeal would have been successful, his claim of ineffective assistance of appellate counsel fails.

Conclusion

The post-conviction court properly concluded that Johnson had failed to establish his claims of ineffective assistance of trial and appellate counsel.

Affirmed.

BAKER, C.J., and BROWN, J., concur.