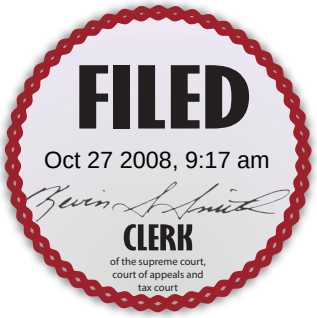


APPELLANT PRO SE:

**DEREK D. FINGERS**
Carlisle, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| DEREK D. FINGERS, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | No. 82A05-0802-PC-65 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee. | ) | |

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl D. Heldt, Judge
The Honorable David D. Kiely, Magistrate
Cause No. 82C01-0604-PC-2

**October 27, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Derek Fingers ("Fingers") was convicted of Class B felony arson and adjudicated a habitual offender in Vanderburgh Circuit Court. Fingers subsequently filed a pro se petition for post-conviction relief alleging ineffective assistance of trial and appellate counsel. His petition was denied and Fingers appeals. Concluding that Fingers has not established that his trial and appellate counsel were ineffective, we affirm.

**Facts and Procedural History**

Facts pertinent to this appeal are found in our court's resolution of Fingers's direct appeal:

> On June 8, 2004, a fire was set on the third floor of the Vanderburgh County Jail, causing extensive damage. Fingers was a prisoner on that floor, and other prisoners implicated him as being involved in the arson. On June 17, 2004, a grand jury indicted Fingers for two counts of Arson, as class A felonies. On June 29, 2004, the State filed an amended information seeking to have Fingers adjudicated as a habitual offender.
>
> On July 21, 2004, following jury selection, Fingers filed a combined, unverified motion for change of judge and change of venue. To his motion, Fingers attached approximately sixty pages of news clippings and articles from local media sources to support his contention that media coverage made a fair trial in Vanderburgh County impossible. The trial court denied Fingers' motion, and a jury ultimately convicted him of two counts of Arson as Class B felonies. Following his conviction, Fingers admitted he is a habitual offender. The trial court entered judgment on one count of arson, and sentenced Fingers to twenty years imprisonment for arson, enhanced by twenty years because of his habitual offender status, for a sentence of forty years.

Fingers v. State, No. 82A01-0409-CR-413 (Ind. Ct. App. July 19, 2005).

Fingers filed a pro se petition for post-conviction relief on April 12, 2006, in which he alleged ineffective assistance of trial and appellate counsel. Fingers later amended his petition. The State denied the allegations in the petition and filed a motion to proceed by affidavit, which the post-conviction court granted on August 14, 2006.

On November 16, 2007, the post-conviction court issued its findings of fact and conclusions of law. The court denied Fingers's petition after concluding that Fingers was not subjected to either ineffective assistance of trial or appellate counsel. Fingers now appeals.

**Standard of Review**

First, we observe that the State failed to file an appellee's brief. Therefore, we apply a less stringent standard of review and Fingers need only establish prima facie error, which is error at first sight, on first appearance, or on the face of it. Parker v. State, 822 N.E.2d 285, 286 (Ind. Ct. App. 2005).

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**

Fingers claims that he was denied both effective assistance of trial and appellate counsel.

> Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, a claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."
>
> Appellate review of the post-conviction court's decision is narrow. We give great deference to the post-conviction court and reverse that court's decision only when "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the postconviction court."
>
> Although the two parts of the Strickland test are separate inquires, a claim may be disposed of on either prong. Strickland declared that the "object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (internal citations omitted). Moreover, we presume that counsel provided adequate assistance, and we give deference to counsel's choice of strategy and tactics. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Id.

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.

First, we note that while it appears that Fingers submitted the trial transcript and exhibits to the post-conviction court with his proposed findings, he did not submit those items to our court. Therefore, we are not able to evaluate Fingers's claims of ineffective assistance of trial and appellate counsel with regard to the issues of Fingers's competency to stand trial and his assertion that he was prejudiced because his witnesses appeared before the jury in restraints. Aside from Fingers's allegations in his brief, there is simply no evidence to support his claims. See Tapia v. State, 753 N.E.2d 581, 588 n.10 (Ind. 2001) ("It is practically impossible to gauge the performance of trial counsel without the trial record[.]")); see also Smith v. State, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005),

trans. denied ("Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.")

However, in his appendix, Fingers did include the depositions of two inmates in support of his claim that trial counsel was ineffective for failing to raise the issue of selective prosecution. Consequently, we will address Fingers's claim that his trial counsel was ineffective for failing to file a motion to dismiss under the theory of selective prosecution.

"The determination of whom to prosecute is within the sole discretion of the prosecutor, and the court may not substitute its discretion for that of the prosecutor." Mueller v. State, 837 N.E.2d 198, 201 (Ind. Ct. App. 2005) (citations omitted). However, "a prosecutor's charging decisions cannot be made in a way that violates the United States Constitution." Id.

> Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

Id. (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)). To prove selective prosecution, the claimant must establish: "(1) that other violators similarly situated are generally not prosecuted; (2) that the selection of the claimant for prosecution was intentional and purposeful; and, (3) that the selection of the claimant was pursuant to an arbitrary classification." Dix v. State, 639 N.E.2d 363, 366 (Ind. Ct. App. 1994), trans. denied.

In Love v. State, 468 N.E.2d 519 (Ind. 1984), our Supreme Court addressed a similar claim of selective prosecution. In Love, the defendant, a black male, was involved in a prison riot and subsequently charged with kidnapping. The defendant moved to dismiss the charges and alleged that although both black and white inmates participated in the riot, only black inmates were charged with kidnapping. The court affirmed the trial court's denial of the motion to dismiss and concluded:

> Contrary to the inferences drawn by the appellant in his recitation of the evidence, we find nothing in an examination of the transcript which would indicate that charges were filed or not filed against inmates based upon their race. All indications are that the report made to the prosecuting attorney, upon which he based the charges, did not even state the race of the participants. The decision to charge was entirely that of the prosecuting attorney who based his decision upon the degree of participation and the conduct and attitude of the various prisoners during the uprising. We find nothing in the record to support the appellant's contention that the charges were filed based on racial prejudice.

Id. at 520-21.

Fingers has included the depositions of two fellow inmates in his appendix. One of those inmates, William Hester testified that he "popped a socket" to cause a spark, which he then used to set a piece of toilet paper on fire. He stated that Fingers and another inmate threatened him and told Hester that he would be tied up "in the back with the fire" if he did not assist them in starting the fire. Appellant's App. p. 215. Hester testified that several inmates were "egging" Fingers on, and Fingers used the flaming piece of paper to start a larger fire in the jail. Id. at 217-221. Hester stated that he did not "know of any other person who was involved in the fire besides" himself and Fingers. Id. at 224. Inmate John Lindsey testified that Hester, Fingers, and Cameron Thompson were

involved in the fire. Specifically, he saw Hester pass flaming toilet paper to Fingers, who took the paper and threw it into a stack of mats, sheets, and towels. Id. at 239. Lindsey believed that Thompson possibly started another fire in a separate, but nearby cell block. Id. at 240. However, he also stated it was possible that Fingers started the fires in both cell blocks.

In his brief, Fingers alleges that the State filed charges against him because he is black, and did not file charges against Hester because he is white. However, there is no evidence in the record establishing Hester's race. Assuming for the sake of argument that Hester is white, Fingers still cannot establish that his counsel was ineffective for failing to file a motion to dismiss based on selective prosecution. From both inmates' testimony, it is reasonable to conclude that Fingers was primarily responsible for the jail fire. Moreover, we note that there is no evidence in the record indicating whether Fingers was the only inmate criminally charged as a result of the jail fire.

Fingers also attempts to support his argument with his recitation of his fellow inmates' trial testimony. However, as we stated above, Fingers failed to include the trial transcript in the record. Therefore, Fingers has waived his argument to the extent that he has relied on trial testimony in his attempt to establish ineffective assistance of trial counsel.

Accordingly, we conclude that Fingers has not established that his trial counsel was ineffective for failing to file a motion to dismiss the charges on a theory of selective prosecution. For this same reason, we need not address Fingers's claim that his appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness on appeal.

Therefore, we affirm the post-conviction court's denial of Fingers's petition for post-conviction relief.

Affirmed.

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