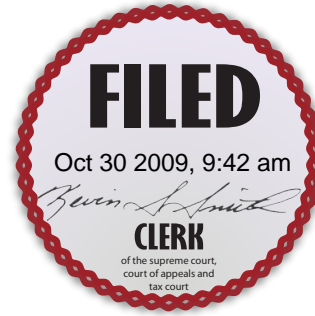


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JERMAINE FOSTER,)
)
Appellant-Defendant,)
)
vs.) No. 02A03-0904-PC-138
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Judge
Cause No. 02D04-0805-PC-47

October 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jermaine Foster, *pro se*, appeals the post-conviction court's denial of his petition for post-conviction relief. Foster raises two issues which we revise and restate as whether Foster was deprived of a procedurally fair post-conviction hearing. We affirm.

The relevant facts as discussed in Foster's direct appeal follow.

On May 3, 2006, Fort Wayne Police Detective Christopher Furge stopped a vehicle driven by Foster when Foster changed lanes without signaling. As Detective Furge approached the vehicle, he smelled the odor of burnt marijuana. Thereafter, Fort Wayne Police Captain Kevin Corey arrived and he also smelled the odor of burnt marijuana. Captain Corey approached the vehicle and observed marijuana on the center console. Captain Corey removed Foster from the vehicle and placed him under arrest. Subsequent to Foster's arrest, Fort Wayne Police Officer Diane Rogers performed an inventory search of the vehicle. During the search, Officer Rogers found a handgun located in the center console. Foster did not have a permit for the handgun.

On May 9, 2006, the State charged Foster with Count I, carrying a handgun without a license, a Class C felony, and Count II, possession of marijuana, a Class D felony. Following a jury trial, Foster was found guilty of carrying a handgun without a license. On December 28, 2006, the trial court sentenced Foster to eight years imprisonment citing Foster's extensive criminal history, which includes prior juvenile adjudications, as an aggravating factor.

Foster v. State, No. 02A05-0702-CR-127, slip op. at 2 (Ind. Ct. App. August 17, 2007), trans. denied. On direct appeal, Foster challenged his sentence, and this court affirmed. See id.

On May 1, 2008, Foster, by post-conviction counsel, filed a verified petition for post-conviction relief.¹ The petition alleged that there was insufficient evidence to

¹ The chronological case summary states, "VERIFIED PETITION FOR POST-CONVICTION RELIEF FILED BY DEFENDANT, PRO SE." Appellant's Appendix at 58. However, the verified

support the conviction and the verdicts were impermissibly inconsistent. The petition also alleged that trial counsel was ineffective because he failed to: (1) move for a directed verdict at the close of the trial because there was a total absence of evidence regarding constructive possession; (2) request a jury instruction under Ind. Code § 35-41-2-1(b), which provides that “If possession of property constitutes any part of the prohibited conduct, it is a defense that the person who possessed the property was not aware of his possession for a time sufficient for him to have terminated his possession;” and (3) introduce “photographic evidence that shows the handgun was in a position and spot that the driver of the vehicle could not see or be within accessible reach.” Appellant’s Appendix at 6.

Foster reviewed the issues with his post-conviction counsel and was satisfied that those were the issues that he wanted to raise. Foster’s post-conviction counsel filed a motion to set the matter for a post-conviction relief hearing. Foster’s post-conviction counsel filed a memorandum brief in support of the petition for post-conviction relief.

At the post-conviction hearing, Foster’s post-conviction counsel appeared and submitted the trial transcript, the sentencing transcript, and the trial exhibits. Foster’s post-conviction counsel also presented testimonial evidence from Foster, Foster’s trial attorney, Foster’s brother, and Foster’s aunt. After the hearing, Foster’s post-conviction counsel submitted proposed findings of fact and conclusions of law.

petition for post-conviction relief that is file stamped May 1, 2008, states, “Comes now the Petitioner, Jermaine Foster, by counsel, Daniel K. Whitehead,” Id. at 1.

The post-conviction court denied Foster's petition for post-conviction relief. Specifically, the post-conviction court concluded that Foster's claims of insufficient evidence and inconsistent verdicts were freestanding and could not be considered in the post-conviction proceeding. The post-conviction court rejected the claim of ineffectiveness of trial counsel based upon the failure to move for a directed verdict because "[f]or a trial court to grant a motion for a directed verdict, there must be a total lack of evidence regarding an essential element of the crime, or the evidence must be without conflict and susceptible only to an inference in favor of the defendant's innocence," and the record revealed that three police officers could see the gun from the driver's side of the car and Foster could easily have reached the gun. *Id.* at 44. The court rejected Foster's ineffectiveness claim regarding the request for a jury instruction because there was no evidence at trial to suggest that Foster "only knew about the gun for too short a time to get rid of it." *Id.* at 47. Lastly, the court rejected Foster's claim of ineffectiveness based upon the failure to introduce photographic evidence because Foster did not present any evidence at the post-conviction hearing regarding what the photographic evidence was and how it would have affected the outcome of the trial.

Before discussing Foster's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-

conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 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. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. “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.” Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

The sole issue is whether Foster was deprived of a procedurally fair post-conviction hearing. Foster argues that his post-conviction counsel was ineffective because he failed to present photographs at the post-conviction hearing.

The Indiana Supreme Court has summarized the method by which we are to review claims of ineffective assistance of post-conviction counsel:

This Court declared its approach to claims about performance by a post-conviction lawyer in Baum v. State, 533 N.E.2d 1200 (Ind. 1989). We observed that neither the Sixth Amendment of the U.S. Constitution nor article 1, section 13 of the Indiana Constitution guarantee the right to counsel in post-conviction proceedings, and explicitly declined to apply the well-known standard for trial and appellate counsel of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Baum, 533 N.E.2d at 1201. The Baum Court noted that post-conviction pleadings are not regarded as criminal actions and need not be conducted under the

standards followed in them. Id. We held unanimously that a claim of defective performance “poses no cognizable grounds for post-conviction relief” and that to recognize such a claim would sanction avoidance of legitimate defenses and constitute an abuse of the post-conviction remedy. Id. at 1200-01.

We therefore adopted a standard based on principles inherent in protecting due course of law – one that inquires “if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court.” Id. at 1201. As Justice DeBruler explained later, speaking for a majority of us, it is “not a ground for post-conviction relief that petitioner’s counsel in a prior post-conviction proceeding did not provide adequate legal assistance,” but such a contention could provide a prisoner with a basis for replying to a state claim of prior adjudication or abuse of process. Hendrix v. State, 557 N.E.2d 1012, 1014 (Ind. 1990) (DeBruler, J., concurring).

Graves v. State, 823 N.E.2d 1193, 1196 (Ind. 2005).

Initially, we note that Foster’s post-conviction counsel filed a nine-page petition for post-conviction relief which raised three issues. Foster reviewed the issues with his post-conviction counsel and was satisfied that those were the issues that he wanted to raise. Foster’s post-conviction counsel filed a memorandum brief in support of the petition for post-conviction relief. At the post-conviction hearing, Foster’s post-conviction counsel appeared and submitted the trial transcript, the sentencing transcript, and the trial exhibits. Foster’s post-conviction counsel also presented testimonial evidence from Foster, Foster’s trial attorney, Foster’s brother, and Foster’s aunt. After the hearing, Foster’s post-conviction counsel submitted proposed findings of fact and conclusions of law.

Regarding the photographic evidence, Foster's post-conviction counsel questioned Foster's trial counsel and Foster's aunt about the existence of such evidence. Specifically, the following exchange occurred during the direct examination of trial counsel:

Q Did you have a chance to look into the car itself at any time, dimensions as to where the gun was hidden, I guess, in the car or stashed in the car versus where our client was sitting?

A I don't recall exactly. I think there were pictures of the interior of the vehicle if I recall correctly, but I can't say with absolute certainty that there was. If there was I would have obviously gone over those things.

Post-Conviction Hearing Transcript at 12. Further, the following exchange occurred during the direct examination of Foster's aunt:

Q Did you still have the car in your possession at the point that trial counsel was hired?

A No.

Q You did not. Did you (unintelligible words) take pictures of the car for trial counsel, yourself?

A No.

Id. at 45-46.

Based upon the record, we cannot say that Foster was deprived of a procedurally fair post-conviction hearing.² See Graves, 823 N.E.2d at 1197 (affirming the post-

² Foster appears to rely upon Waters v. State, 574 N.E.2d 911 (Ind. 1991), Taylor v. State, 882 N.E.2d 777 (Ind. Ct. App. 2008), and Bahm v. State, 789 N.E.2d 50 (Ind. Ct. App. 2003), clarified on reh'g on other grounds, 794 N.E.2d 444 (Ind. Ct. App. 2003), trans. denied. We find those cases distinguishable because, unlike here, they involved post-conviction counsel that effectively abandoned

conviction court's denial of relief when post-conviction counsel appeared at the post-conviction relief hearing, directly examined the petitioner, and tendered affidavits); Daniels v. State, 741 N.E.2d 1177, 1190 (Ind. 2001) (affirming the post-conviction court's denial of relief when post-conviction counsel filed a fifteen-page petition that raised seven separate claims and presented nine witnesses at a three-day hearing), reh'g denied.

Foster also argues that "P.C. COUNSEL WHOM WAS ALSO APPELLATE COUNSEL FOR PETITIONER-DENIED PETITIONER FAIR P.C. HEARING BY FAILURE TO LITIGATE CLAIMS THAT WERE AVAILABLE ON DIRECT APPEAL." Appellant's Brief at 3. As previously mentioned, we note that Foster testified at the post-conviction hearing that he reviewed the issues raised in his petition for post-conviction relief with his post-conviction counsel and was satisfied that those were all the issues that he wanted to raise. Further, Foster does not develop any argument that his post-conviction counsel was ineffective because he failed to raise the issue of whether his appellate counsel was ineffective for failing to argue that the evidence was insufficient or that the verdicts were inconsistent. Rather, Foster appears to focus on his

their clients. See Waters, 574 N.E.2d at 911-912 (holding that post-conviction counsel "in essence, abandoned his client and did not present any evidence in support of his client's claim" where the trial court ordered that the evidence supporting the petition for relief be by affidavit only and all affidavits in support of the petition were submitted by the defendant *pro se* and were technically inadequate); Taylor, 882 N.E.2d at 783 (holding that the petitioner was deprived of a procedurally fair hearing when his post-conviction counsel called no witnesses, presented no affidavits, and did not submit the trial record); Bahm, 789 N.E.2d at 61-62 (holding that post-conviction counsel's failure to present any evidence deprived petitioner of a fair hearing when counsel "did not call any witnesses, submit any affidavits, or even submit the direct appeal record").

trial counsel's failure to move for a directed verdict, which was an issue raised by post-conviction counsel. Foster fails to put forth a cogent argument. Consequently, this issue is waived. See Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority"); Shane v. State, 716 N.E.2d 391, 398 n.3 (Ind. 1999) (holding that the defendant waived argument on appeal by failing to develop a cogent argument).

For the foregoing reasons, we affirm the post-conviction court's denial of Foster's petition for post-conviction relief.

Affirmed.

CRONE, J., and MAY, J., concur.