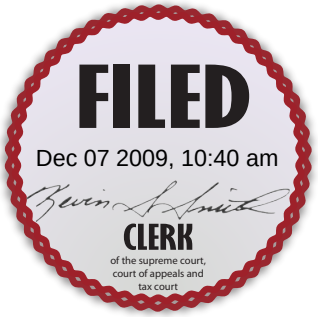

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IN THE
COURT OF APPEALS OF INDIANA

TROY J. HICKMAN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 34A04-0901-PC-55
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Lynn Murray, Judge
Cause No. 34C01-0701-PC-9

December 7, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Troy Hickman appeals the denial of his post-conviction relief petition regarding his convictions and sentence for attempted robbery, a Class A felony, robbery, a Class A felony, and conspiracy to commit burglary, a Class B felony. We affirm.

Issue

Hickman raises one issue, which we restate as two:

I. whether he received ineffective assistance of trial counsel; and

II. whether he received ineffective assistance of appellate counsel.

Facts

A detailed recitation of the facts is set forth in our opinion on direct appeal. See Hickman v. State, 654 N.E.2d 278 (Ind. Ct. App. 1995). We summarize them here as follows:

The victims in this case were seventy-seven-year-old Delores Wagner and her sixty-six-year-old sister, Rosemary Wagner. The evidence adduced at trial, including Hickman's taped confession, revealed that on September 27, 1993, Hickman, his brother, Ronnie Hickman, and a friend, Chris Hamblin, decided to enter into the victims' home to steal money by knocking at the door and asking to use the telephone. When Delores answered the door, Hamblin entered the home followed by Hickman. When the victims became suspicious of the pair, Hamblin and Hickman began cutting them with a knife and pushing, punching, and kicking them until they lost consciousness. Hamblin took an undetermined amount of money from a purse, and the three men fled from the scene.

Upon regaining consciousness, Rosemary managed to call 911. Paramedics and police officers arrived on the scene to find Delores unconscious and bleeding profusely. Delores sustained severe head injuries and lacerations to the neck and forehead, and her right ear was partially severed. Rosemary sustained stab wounds above and below her right eye, face, forearm, and ear. She also suffered severe facial injuries, and her right middle finger was partially severed. Both victims sustained fractured skulls.

Hickman, then seventeen, was charged as an adult with two counts of robbery and one count of conspiracy to commit burglary. On January 27, 1994, a jury found Hickman guilty of Class A felony attempted robbery, Class A felony robbery, and Class B felony conspiracy to commit burglary. At the sentencing hearing, the trial court identified six aggravating circumstances and two mitigating circumstances that it considered in determining Hickman's sentence. The aggravators were that: (1) Hickman had a history of delinquent activity; (2) the offenses threatened the lives of the victims, destroyed their lives as they had known them, and reduced their ability to function normally in their own home and in society; (3) Hickman is in need of correctional or rehabilitative treatment best provided by a penal facility; (4) imposition of a reduced or suspended sentence would greatly depreciate the serious nature of the crimes; (5) the victims were each older than sixty-five years of age and that they suffered permanent injuries as a result of the brutal attack upon them; and (6) there was no excuse for an offense like this in our society. The mitigators were: (1) Hickman's age and (2) that none of Hickman's juvenile offenses would have been felonies if committed by an adult. The court found

that the aggravators far outweighed the mitigators and sentenced Hickman to serve fifty years incarceration.[1]

Hickman appealed his convictions, raising issues regarding his confession, alleging he unknowingly waived his rights, and claiming the State failed to establish the corpus delicti of the crime. Hickman did not raise any issues concerning his sentencing. On July 26, 1995, this court affirmed Hickman's convictions. Hickman, 654 N.E.2d at 283.

In 1998, Hickman filed a petition for post-conviction relief, which was re-filed on January 10, 2007. In his petition Hickman claimed that he received ineffective assistance of both trial and appellate counsel. Specifically, Hickman claimed that his counsel at both stages failed to object to the court's consideration of improper aggravators and failed to argue certain significant mitigators. The State, in its response, asserted that the issues raised by Hickman were waived; that his trial and appellate counsel were not ineffective; and that there was no reasonable possibility that, but for his counsel's errors, the outcome of the proceedings would have been different. On January 5, 2009, the post-conviction court entered its findings of fact and conclusions of law denying post-conviction relief. The court found that three aggravators were improperly considered or insufficiently justified in the trial court's sentencing order. Namely, the post-conviction court found that the trial court: (1) improperly considered that imposition of a reduced sentence would depreciate the seriousness of the crime although the court was not

[1] Hickman did not request that we consider the sentencing order as evidence in this appeal; therefore, the record before us does not contain the details of the trial court's breakdown of the aggregate sentence by individual conviction.

considering a reduction from the presumptive sentence; (2) failed to properly articulate its justification for finding that correctional and rehabilitative treatment would be provided best by a penal facility; and (3) improperly gave consideration to Hickman's long juvenile record despite a lack of detail in the pre-sentence report indicating that the adjudications would have been criminal offenses if committed by an adult. The post-conviction court, nonetheless, found the other aggravators were proper and held that the sentence could have been enhanced based on these proper aggravators alone. Furthermore, the court found that the mitigators were properly considered and weighed. Hickman now appeals.[2]

Analysis

In review of post-conviction proceedings the petitioner stands in the position of one appealing from a negative judgment. Overstreet v. State, 877 N.E.2d 144, 151 (Ind. 2007), cert. denied. When appealing the denial of post-conviction relief, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Id. To prevail 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. Although we do not defer to the post-conviction court's legal conclusions, "[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

[2] Hickman failed to provide the post-conviction court with either the trial record or transcript. The appellant bears the burden of presenting a record that is complete with respect to the issues raised on appeal. Smith v. State, 822 N.E.2d 193, 203 (Ind. Ct. App. 2005), trans. denied. However, because the post-conviction court ruled on the merits of Hickman's petition based solely on the references to the trial transcript without apparent objection by the State, we will review the post-conviction court's decision based on that same evidence.

and firm conviction that a mistake has been made." Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000), cert. denied. We will disturb the post-conviction court's decision only if the evidence is without conflict and leads to but one conclusion and the post-conviction court has reached the opposite conclusion. Ind. Post-Conviction Rule 1(5).

I. Ineffective Assistance of Trial Counsel

Hickman argues that his trial counsel was ineffective for failing to object to certain aggravators and raise certain mitigators. To establish a post-conviction claim alleging a violation of the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution, a defendant must establish both components set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). First, a defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness and that counsel made errors so serious that he or she was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. Id. at 687, 104 S. Ct. at 2065. Second, a defendant must show that the deficient performance prejudiced the defense. Id. To establish prejudice, 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. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Under this standard, counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption. Ben-Yisrayl, 729 N.E.2d at 106. The two prongs of this test are separate and independent inquiries and, thus, if it is easier to dispose of an ineffectiveness claim on the ground of lack of

sufficient prejudice, that course should be followed because the object of an ineffectiveness claim is not to grade counsel's performance. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069. "Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference." Timberlake, 753 N.E.2d at 603 (citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065), cert. denied. Because not all criminal defense attorneys will agree on the most effective way to represent a client, "isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Id. Thus, there is a strong presumption that counsel rendered adequate assistance and used professional judgment. Id.

Hickman claims that he was denied effective assistance of trial counsel because of his counsel's failure to object to certain allegedly improper aggravating factors used to enhance the sentence beyond the presumptive one provided by statute in 1994.[3] At the time of Hickman's conviction, sentencing, and appeal, the trial court was authorized to enhance a presumptive sentence based on a nonexclusive list of aggravators. Ind. Code § 35-38-1-7.1(b) (1994). The trial court was vested with wide discretion to determine whether a presumptive sentence should be enhanced because of aggravating circumstances. Shippen v. State, 477 N.E.2d 903, 905 (Ind. 1985). Moreover, only one valid aggravating factor needed to be shown to sustain the enhancement of a presumptive sentence. Guenther v. State, 501 N.E.2d 1071, 1072 (Ind. 1986). As the post-conviction court noted, even if the trial court did consider one or more inappropriate aggravators, the

[3] In 2005, Indiana's sentencing statutes changed from being "presumptive" to "advisory" in response to the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). See Anglemeyer v. State, 868 N.E.2d 482, 487 (Ind. 2007).

sentence could be upheld based on the use of two key statutory aggravators: the age of the victims and the nature and circumstances of the crime. I.C. § 35-38-1-7.1(b) (1994).

Hickman does not contend that every aggravating factor noted by the sentencing court was inappropriate. He concedes that the age of the victims was an appropriate aggravator. Because both victims were over sixty-five years old, the trial court did not abuse its discretion in relying on that fact to enhance Hickman's sentence.

In addition to this factor, the trial court further found the nature and circumstances of the crimes to be aggravators. Specifically, the trial court found that the victims' lives were threatened, that the crimes totally destroyed the victims' lives as they had known them, and that the crimes had reduced the victims' ability to function in society and their own home. The post-conviction court found that these observations were supported by testimony presented at the sentencing hearing, which described specific permanent consequences of Hickman's crimes that were more vicious than the typical robbery or burglary.

The nature and circumstances of the crime are appropriately considered as potential aggravators. Bailey v. State, 763 N.E.2d 998, 1004 (Ind. 2002). Facts evidencing the particularly brutal nature of an attack may be considered as an aggravator when sentencing a defendant. Id. Although bodily injury is an element of Class A felony burglary, "the viciousness with which the injury was inflicted" can be considered as an aggravator to enhance the sentence. Benton v. State, 691 N.E.2d 459, 464 (Ind. Ct. App. 1998). See also Vasquez v. State**,** 762 N.E.2d 92, 98 (Ind. 2001) (observing that the particularized individual circumstances of criminal acts may constitute separate

aggravating circumstances). Therefore, despite Hickman's claims to the contrary, the trial court did not err in applying the particularly heinous nature of the offenses and the permanent injuries suffered by the victims as aggravators in sentencing him.

Even if some of the aggravators recited by the trial court were improper, these two key aggravators alone were enough to justify the enhanced sentence. Hickman, therefore, has not shown that he was harmed when trial counsel did not immediately object at sentencing that other factors may have been inappropriately considered. Without a showing of prejudice, his attorney cannot be found ineffective.

Hickman also claims that his trial counsel was ineffective for failing to proffer significant mitigating circumstances, which he believes would have affected his sentence—namely, that as a child he had been neglected, that his family life had been unstable, and that he was of low intelligence. Although the trial court did not consider these specific mitigators, the court did consider others, notably Hickman's age and the fact that none of his juvenile offenses would have been felony offenses if committed by an adult.

The use of mitigating circumstances in sentencing is discretionary, not mandatory. Page v. State, 689 N.E.2d 707, 711 (Ind. 1997). The trial court has discretion in weighing mitigators and need only include those that it deems significant. Settles v. State, 791 N.E.2d 812, 815 (Ind. Ct. App. 2003). Further, the trial court is not required to give the same credit or weight to the proffered mitigators that the defendant does. Hammons v. State, 493 N.E.2d 1250, 1255 (Ind. 1986). Consequently, Hickman's trial counsel reasonably could have decided not to propose the factors that are now asserted.

Trial counsel is not required to present all available mitigation evidence, and a reasonable decision to present no evidence of a defendant's unstable childhood "complies with the dictates of Strickland." Burris v. State, 558 N.E.2d 1067, 1075 (Ind. 1990). Thus, counsel is permitted to make strategic judgments not to present certain types of mitigating evidence. Canaan v. State, 683 N.E.2d 227, 234 (Ind. 1997), cert. denied. Regardless, Hickman has not shown that these particular mitigators would have been considered significant by the trial court and, given the court's broad discretion in weighing such factors, he has a substantial burden to do so. Without such a showing, Hickman has not demonstrated that he was prejudiced by his trial counsel's decision not to propose his asserted mitigators. Moreover, the trial court considered two other significant mitigators but did not find that they outweighed the aggravators noted. In the absence of prejudice, Hickman's trial counsel was not ineffective.

II. Ineffective Assistance of Appellate Counsel

The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the petitioner must show appellate counsel was deficient in his or her performance and that the deficiency resulted in prejudice. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997), cert. denied. Our supreme court has recognized three categories of appellate counsel ineffectiveness: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues competently. Timberlake, 753 N.E.2d at 604.

Hickman's claims amount to an allegation that his appellate counsel failed to raise appropriate issues. To show that counsel was ineffective for failing to raise an issue on

appeal, the defendant must overcome the strongest presumption of adequate assistance, and judicial review is highly deferential. Ben-Yisrayl, 738 N.E.2d at 260-61. Moreover, ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on appeal. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997), cert. denied. One reason for this infrequency is that the decision of what issues to raise is one of the most important decisions made by appellate counsel. Id.

Specifically, Hickman claims that he was denied effective assistance of appellate counsel due to counsel's failure to argue that certain aggravating factors identified by the trial court were improper. Hickman's claim fails for the same reasons discussed above regarding his ineffective trial counsel claims. Although the trial court may have cited certain improper aggravators, the two key aggravators (i.e., the nature and circumstances of the crimes and the age of the victims) were sufficient to justify the enhanced sentence. Hickman, therefore, has not shown that he was harmed when appellate counsel did not argue that other factors may have been inappropriately considered. Without a showing of prejudice, his appellate counsel was not ineffective.

Hickman also claims that his appellate counsel was ineffective for failing to proffer the same mitigating circumstances that he argues his trial counsel should have raised. Again, Hickman's claim fails for the same reasons discussed above regarding his trial counsel's failure to raise these issues. Hickman's appellate counsel reasonably could have concluded that these particular mitigators did not make a strong issue for appeal. Where we "have determined that [a petitioner] did not receive ineffective assistance of trial counsel, he can neither show deficient performance nor resulting prejudice as a result

of his appellate counsel's failure to raise this argument on appeal." Davis v. State, 819 N.E.2d 863, 870 (Ind. Ct. App. 2004), trans. denied. Consequently, Hickman has not shown he was prejudiced by appellate counsel's decision not to appeal the failure to raise these alleged mitigators at sentencing.

Lastly, Hickman claims that his appellate counsel was ineffective for not arguing that his sentence was manifestly unreasonable.[4] In 1994, a sentence was manifestly unreasonable if no reasonable person could find such a sentence appropriate to the particular offense and offender for whom such sentence was imposed. Mellott v. State, 496 N.E.2d 396, 398 (Ind. 1986). This standard was difficult to meet. For example, in Schwass v. State, 554 N.E.2d 1127, 1131 (Ind. 1990), a sentence of forty years imposed upon a defendant convicted of attempted robbery resulting in bodily injury was found not excessive, where defendant violently and repeatedly kicked a sixty-five-year-old victim while making repeated demands that the victim give him his money. See also Shoulders v. State, 480 N.E.2d 211, 213 (Ind. 1985) (concluding that thirty-five-year sentence for robbery was not manifestly unreasonable where one victim, a seventy-nine-year-old man, was severely beaten, another victim was seriously injured, and both were subsequently abandoned).

Under the presumptive sentencing scheme in effect in 1994, the court could have imposed an aggregate sentence of 110 years, assuming maximum terms for each count to be served consecutively, in light of the aggravating factors properly found by the court,

[4] In 2003, our standard of review for a sentence authorized by statute was changed from "manifestly unreasonable" to "inappropriate." Ind. Appellate Rule 7(B).

such as the age of the victims and the brutality of the crime. By comparison, Hickman's fifty-year sentence barely exceeds the maximum allowed by statute at the time for just one of the three counts.[5] Consequently, because Hickman's sentence was reasonable in relation to that prescribed by statute and imposed in similar cases, it is unlikely the sentence imposed would have been found manifestly unreasonable on appeal. Hickman has not shown that he was harmed by his appellate counsel's decision not to make such a claim. Therefore, Hickman's appellate counsel was not ineffective.

Conclusion

Hickman has not demonstrated that he received ineffective assistance of counsel at trial or on appeal. We affirm the judgment of the post-conviction court.

Affirmed.

NAJAM, J., and KIRSCH, J., concur.

[5] The presumptive sentence for a Class A felony was twenty-five years, with not more than twenty years added for aggravating circumstances). I.C. 35-50-2-4 (1994). Thus, Hickman faced a possible sentence of forty-five years on a single count.