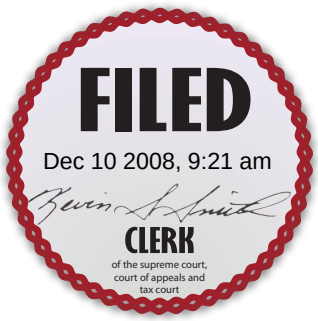

ATTORNEYS FOR APPELLANT:

SUSAN K. CARPENTER
Public Defender of Indiana

TRACY A. NELSON
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

THOMAS D. PERKINS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOHN D. FARRIS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-0805-PC-245
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0301-PC-1

December 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

John Farris appeals the trial court's denial of his petition for post-conviction relief. We affirm.

Issue

Farris raises two issues, which we consolidate and restate as whether he received ineffective assistance of trial counsel.[1]

Facts

On June 22, 1997, Farris committed a robbery with Richard Foreman and Sonny Woods in Fort Wayne. On August 5, 1997, the State charged Farris with Class B felony robbery and alleged that he was an habitual offender. Foreman cooperated with police and agreed to testify against Farris at the robbery trial scheduled for January 1998.

---

[1] In his brief, Farris mentions that appellate counsel was ineffective for failing to raise the stacked habitual offender enhancements issue on direct appeal. See Ritchie v. State, 875 N.E.2d 706, 723-24 (Ind. 2007). One of the ways in which appellate counsel can be ineffective is by not raising issues on appeal.

> Ineffectiveness is very rarely found in these cases because "the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." Accordingly, our review is particularly deferential to counsel's strategic decision to exclude certain issues in favor of others. We first look to see whether the unraised issues were significant and obvious upon the face of the record. If so, then we compare these unraised obvious issues to those raised by appellate counsel, finding deficient performance "only when ignored issues are clearly stronger than those presented." If deficient performance by counsel is found, then we turn to the prejudice prong to determine whether the issues appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial.

Id. at 723-24 (citations omitted). Farris does not develop his ineffective assistance of appellate counsel argument or provide analysis under the Ritchie framework. This issue is waived. See Ind. Appellate Rule 46(A)(8).

On January 16, 1998, Farris instructed Danny Littlepage to kill Foreman. Woods and Littlepage went to the Foreman home and shot four people, one of whom died.[2] Police suspected Farris's involvement in this offense and, on March 19, 1999, he was arrested during a traffic stop in South Bend. On March 25, 1999, Farris was charged with murder and three counts of Class B felony aggravated battery (collectively "the murder charges"). On March 31, 1999, the State alleged Farris to be an habitual offender.

On April 7, 1999, the trial on the robbery charge began. Farris was represented by Attorney P.S. Miller. The next day, Farris was convicted of Class B felony robbery and found to be an habitual offender. Farris was sentenced to fifteen years on the robbery conviction, and this sentence was enhanced by thirty years based on Farris's habitual offender status.

On April 13, 1999, Attorney Mark Olivero entered an apperance on Farris's behalf on the murder charges. On January 25, 2000, a trial began on these charges which ended in a mistrial. On February 2, 2000, Farris was retried, and the next day he was convicted of the murder charges. He was also found to be an habitual offender. Farris was sentenced to sixty-five years on the murder conviction and this sentence was enhanced thirty years by Farris's habitual offender status. Farris was also sentenced to twenty years on each of the aggravated battery convictions. These sentences were ordered to be served consecutive to each other and to the sentence on the murder conviction, for a total sentence of 155 years. This sentence was also ordered to be served consecutive to the sentence on the robbery conviction.

[2] Foreman was not injured.

Farris's robbery conviction was affirmed by this court in Farris v. State, 732 N.E.2d 230 (Ind. Ct. App. 2001). Farris's murder and aggravated battery convictions were affirmed in Farris v. State, 753 N.E.2d 641 (Ind. 2001).

On January 3, 2005 Farris filed an amended petition for post-conviction relief challenging his murder and aggravated battery convictions. On August 10, 2007, an evidentiary hearing on Farris's petition was held. On March 27, 2008, the post-conviction court denied Farris's petition. He now appeals.

Analysis

Farris argues that the post-conviction court improperly denied his petition because he received ineffective assistance of trial counsel on the murder charges. A post-conviction petitioner bears the burden of establishing his or her claims by a preponderance of the evidence. Donnegan v. State, 889 N.E.2d 886, 891 (Ind. Ct. App. 2008), trans. denied; Ind. Post-Conviction Rule 1(5). When reviewing the denial of a petition for post-conviction relief, we neither reweigh the evidence nor judge the credibility of the witness. Donnegan, 889 N.E.2d at 891. To prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. Id. "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." Id.

"To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel performed deficiently and the deficiency resulted in prejudice."

Lee v. State, 892 N.E.2d 1231, 1233 (Ind. 2008) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). The failure to satisfy either prong of the Strickland test will cause the claim to fail. Id. "Therefore, if we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient." Id.

Deficient performance is representation that fell below an objective standard of reasonableness by the commission of errors so serious that the defendant did not have the counsel guaranteed by the Sixth Amendment. State v. McManus, 868 N.E.2d 778, 790 (Ind. 2007), cert. denied, 128 S. Ct. 1739. Consequently, our inquiry focuses on counsel's actions while mindful that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render counsel's representation ineffective. Id. Indeed, there is a strong presumption that counsel rendered adequate assistance. Id. "To satisfy the second prong, the defendant must show prejudice: a reasonable probability (i.e. a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." Henley v. State, 881 N.E.2d 639, 644 (Ind. 2008).

Farris first argues that trial counsel was ineffective for failing to move to dismiss the murder charges because they could have been joined with the robbery charge by the State but were not. Farris's argument is as follows: that the robbery charge and murder charges could have been joined; that it was the State's duty to join the charges; that Farris was not required to move to join the charges; that the State need not have manipulated the timing of filing the charges; and that trial counsel was ineffective for failing to move to

have the murder charges dismissed. Farris claims "that once he was tried on the robbery charge, he was no longer subject to being tried on the crimes that comprised the remaining portion of the series of connected acts." Appellant's Reply Br. p. 11.

Based on the State's concession[3] in its brief in opposition to Farris's petition for post-conviction relief that the robbery and murder were a series of acts connected together and that Farris would have been "entitled to have them joined," we will assume that the two crimes are a series of acts connected together for purposes of the joinder statutes.[4] App. p. 82.

Farris asserts, "When the State takes only some related charges to trial, it is incumbent upon defense counsel to move to dismiss any other related charges brought in a subsequent prosecution." Appellant's Br. p. 11. In support of this assertion, Farris relies on Indiana Code Section 35-34-1-10(b), which provides:

---

[3] Farris did not refer to this concession in his appellate brief and only mentions it for the first time in his reply brief. Raising an issue for the first time in a reply brief can result in its waiver. However, because the concession is not outcome determinative, we will consider it in this case. See Bunch v. State, 778 N.E.2d 1285, 1290 (Ind. 2002) ("However, it was waived in this appeal by Bunch's failure to present it in his appellate brief.").

[4] Indiana Code Section 35-34-1-9(a) provides:

> Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
>
> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Because the State conceded that the robbery and murder are a series of acts connected together, we will not address this issue further.

> When a defendant has been charged with two (2) or more offenses in two (2) or more indictments or informations and the offenses could have been joined in the same indictment or information under section (9)(a)(2) of this chapter, the court, upon motion of the defendant or the prosecuting attorney, or on its own motion, shall join for trial all of such indictments or informations unless the court, in the interests of justice, orders that one (1) or more of such offenses shall be tried separately. Such motion shall be made before commencement of trial on either of the offenses charged.

Because the robbery and murder were a series of acts, Farris claims this statute makes it clear that the State had a duty to prosecute all charges related to the robbery at the same time if it wanted to prosecute them at all.[5]

Farris goes on to assert that this "duty" of the State was given "judicial acknowledgement" in State v. Wiggins, 661 N.E.2d 878 (Ind. Ct. App. 1996). Appellant's Br. p. 12. Farris specifically cites the court's observation that "our legislature has provided that, where two or more charges are based on the same conduct or on a series of acts constituting parts of a single scheme or plan, they should be joined for trial." Wiggins, 661 N.E.2d at 880.

Farris's argument concludes that based on Indiana Code Section 35-34-1-10(c),[6] describing the circumstances in which a defendant may move to dismiss an information,

---

[5] We point out that trial counsel did not enter his appearance until after the robbery trial was concluded. Thus, trial counsel could not have been expected to move for joinder in the highly unlikely event that joinder of the robbery charge and the murder charges was considered to be an effective strategy.

[6] This section provides:

> A defendant who has been tried for one (1) offense may thereafter move to dismiss an indictment or information for an offense which could have been joined for trial with the prior offenses under section 9 of this chapter. The motion to dismiss shall be made prior to the second trial,

and Indiana Code Section 35-41-4-4,[7] describing circumstances in which a prosecution is barred, defense counsel was ineffective for failing to move for the dismissal of the murder charges. Although trial counsel could have moved to dismiss, we cannot conclude that his failure to do so fell below an objection standard of reasonableness.

This nuanced argument set forth by Farris is convoluted at best. Despite our observation in Wiggins that where two or more charges are based on a series of acts they should be joined for trial, we held:

> that in the present case, even if the trial court was not required to dismiss the conspiracy charge under I.C. 35-41-4-4 because it should have been joined in the earlier prosecution, the trial court nevertheless had the discretionary authority under I.C. 35-34-1-10(c) to dismiss the conspiracy charge which could have been joined in the former prosecution.

Wiggins, 661 N.E.2d at 881.

> and shall be granted if the prosecution is barred by reason of the former prosecution.

I.C. § 35-34-1-10(c).

[7] This section provides:

> (a) A prosecution is barred if all of the following exist:
>
> (1) There was a former prosecution of the defendant for a different offense or for the same offense based on different facts.
>
> (2) The former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 of this chapter.
>
> (3) The instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.
>
> (b) A prosecution is not barred under this section if the offense on which it is based was not consummated when the trial under the former prosecution began.

I.C. § 35-41-4-4.

What we can take from Wiggins is the emphasis on the trial court's "authority to protect a defendant from the burden of additional prosecutions which the trial court finds, in its judgment, should have or could have been disposed of in an earlier prosecution. Such authority in the trial court is essential for justice and also serves the interest of judicial economy." Id. In furtherance of this goal, Indiana Code Section 35-34-1-10(b) permits the trial court to join informations on its own motion. The trial court did not do that here.

We do not read Wiggins as clearly requiring the State join all cases that are possible of being joined. In fact, the Wiggins court acknowledged the State's ability to control informations when it stated that this statutory scheme provides "a check upon the otherwise unlimited power of the State to pursue successive prosecutions." Id. This power to pursue successive prosecutions was also acknowledged in Seay v. State, 550 N.E.2d 1284, 1288 (Ind. 1990), superseded by statute on other grounds, in which our supreme court observed:

> Neither 35-34-1-10(c) nor 35-41-4-4(a)(3) has been interpreted to automatically bar successive prosecutions for separate offenses which are committed at the same time or during the same general criminal episode. Neither can it be interpreted to bar successive prosecutions for separate offenses arising from temporally distinct criminal episodes. Here . . . the State was not obligated to pursue all charges against appellant in a unified action, and the trial court did not err in denying his motion to dismiss.

Given the statutory language, the ambiguous language of Wiggins, and the unequivocal language of Seay, Farris has not established that trial counsel's failure to move to dismiss the murder charges fell below an objective standard of reasonableness.

Farris also claims that trial counsel was ineffective for failing to move to dismiss the habitual offender enhancement on the murder charge. Relying on Seay, Farris claims that the habitual offender enhancements on both the robbery and murder convictions were improper. In Seay, our supreme court held, "the State is barred from seeking multiple, pyramiding habitual offender sentence enhancements by bringing successive prosecutions for charges which could have been consolidated for trial." Seay, 550 N.E.2d 1284 at 1289.

Based on this holding, the trial counsel could have moved to dismiss the habitual offender enhancement on the murder charge. However, because the facts in Seay are much different than in the case before us today, we cannot conclude that trial counsel's failure to move to dismiss the enhancement fell below an objective standard of reasonableness.

During the late summer and early fall of 1986, Seay made four separate sales of controlled substances. In February 1987, after the four sales were completed, the State charged Seay with two of the four offenses and alleged that he was an habitual offender. While the jury was deliberating, the State filed charges based on the last two of the four sales and again alleged that Seay was an habitual offender. Based on the four convictions and the two enhancements, Seay was sentenced to a total of 110 years. Our supreme court concluded that the stacked habitual offender enhancements were improper. Id.

Unlike Seay, Farris committed the second offense to avoid a conviction on the pending robbery charge. Specifically, Farris committed the robbery with Foreman in June 1997. The State filed robbery charge and the habitual offender allegation in August

1997. Shortly before the robbery trial was scheduled to begin, Farris tried to arrange for Foreman's murder. It was this shooting that provided the basis for the murder and aggravated battery charges and the second habitual offender enhancement arose. These facts are significantly different from Seay.

As we have discussed above, the State conceded that these separate charges could have been joined. However, it is not clear that the holding in Seay, prohibiting stacked habitual offender enhancements, applies to the facts of this case. Farris has not shown trial counsel's failure to move to dismiss the second habitual offender enhancement fell below an objective standard of reasonableness.

Conclusion

Farris has not established that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. We affirm.

Affirmed.

FRIEDLANDER, J., concurs.

DARDEN, J., concurs in part and dissents in part with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

JOHN D. FARRIS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-0805-PC-245
	)	
STATE OF INDIANA.	)	
	)	
Appellee-Respondent.	)	

DARDEN, Judge, concurring in part and dissenting in part

I concur in part and dissent in part.

I concur with the majority's conclusion that trial counsel was not ineffective for failing to move to dismiss the charges for murder and battery. I agree that neither the statutes, nor State v. Wiggins, 661 N.E.2d 878 (Ind. Ct. App. 1996), nor Seay v. State, 550 N.E.2d 1284 (Ind. 1990), preclude the State's ability to pursue separate prosecutions for those crimes even though the charges *could* have been joined in a single action.[8]

However, I respectfully disagree with the majority's conclusion that trial counsel was not ineffective for failing to move to dismiss the habitual offender allegation filed on

[8] As the majority notes, the State has conceded that the initial robbery offense and the subsequent murder and battery offenses constituted a series of acts that were sufficiently connected together such that Farris was entitled to have them joined in a single prosecution.

March 31, 1999, with respect to the murder charges. When trial counsel appeared for him on April 13, 1999, Farris had already been tried and convicted of the robbery charge, found to be an habitual offender in that proceeding, and had his sentence enhanced by thirty years based on his habitual offender status. I believe that pursuant to the holding of Seay, it was incumbent upon Farris' counsel to move to dismiss the habitual offender allegation filed with the murder and battery charges. Seay held that inasmuch as there is no statutory authorization for the tacking of habitual offender sentences, the State was

> barred from seeking multiple, pyramiding habitual offender sentence enhancements by bringing successive prosecutions for charges which could have been consolidated for trial.

550 N.E.2d at 1289.

I believe that if trial counsel had moved to dismiss the habitual offender allegation filed with the murder and battery charges, Seay would have mandated that the motion be granted. Thus, the result of the proceeding for murder and battery "would have been different" in that Farris would not have been ordered to serve an additional thirty-year habitual offender enhancement in that proceeding. Henley, 881 N.E.2d at 644. Put another way, counsel's failure to file the motion to dismiss caused his client to receive an additional thirty years in prison. Accordingly, I would find that Farris demonstrated ineffective assistance of counsel in that regard and would order vacated the thirty-year enhancement that he received for being an habitual offender after his conviction for murder and several counts of battery.