

The Marion Superior Court denied a petition for post-conviction relief filed by Anthony Crenshaw (“Crenshaw”). Crenshaw appeals and claims:

- I. That the State engaged in prosecutorial misconduct because the State committed a Brady violation by failing to disclose a police helicopter video;
- II. That the post-conviction court erred in determining that he was not denied the effective assistance of trial and appellate counsel;
- III. That failure of the trial court to give an aggravated battery instruction that included a specific intent requirement was fundamental error; and
- IV. That the trial court improperly gave the jury an additional instruction on voluntary intoxication after deliberations began.

We affirm.

Facts and Procedural History

In 2000, the State charged Crenshaw with attempted murder, robbery, confinement, carrying a handgun without a license, and resisting law enforcement. Following a jury trial, Crenshaw was convicted of the lesser-included offense of attempted aggravated battery, robbery, confinement, and resisting law enforcement. The trial court sentenced Crenshaw to an aggregate term of twenty-eight years. On direct appeal, we affirmed Crenshaw’s conviction.¹ On July 3, 2003, Crenshaw filed a petition for post-conviction relief. Following two hearings, the trial court entered written findings of fact and conclusions of law denying relief.

Crenshaw appeals. Additional facts will be provided as necessary.

¹ Crenshaw v. State, 49A02-0111-CR-756 (Ind. Ct. App. July 25, 2002).

Standard of Review

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.

I. Brady Violation

Crenshaw claims that the State engaged in prosecutorial misconduct because the State committed a Brady violation by failing to disclose a police helicopter videotape of the end of the police chase that immediately preceded his arrest. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court determined that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” To prevail on such a claim, Crenshaw must establish: (1) that the evidence at issue is favorable to the accused because it is either exculpatory or impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the evidence was material to an issue at trial. Prewitt v. State, 819 N.E.2d 393, 401 (Ind. Ct. App. 2004), trans. denied. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Id. at 402. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id.

As noted by the post-conviction court, Crenshaw’s claim fails on the materiality prong of the Brady analysis. Appellant’s App. p. 50. The videotape only shows the very end of the police chase, after Crenshaw’s vehicle struck a police officer. It was this act that resulted in the attempted aggravated battery conviction. While the video may have been used to impeach the police officers concerning parts of their testimony, the outcome would not likely have been different because the videotape did not relate to the charges

Crenshaw was facing. The post-conviction court did not err in finding that Crenshaw failed to carry his burden in this regard.

II. Ineffective Assistance of Counsel

Crenshaw 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 inquiries, 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. *Ineffective Assistance of Trial Counsel*

Crenshaw argues that his trial counsel provided ineffective assistance by failing to object to the trial court's instruction that defined the elements of attempted aggravated battery. The trial court's instruction did not contain specific intent as an element of attempted aggravated battery. However, at the post-conviction hearing, Crenshaw did not challenge trial counsel regarding the trial court's instruction. Moreover, Crenshaw did not provide his petition for post-conviction relief to this court and failed to address this issue before the post-conviction court; therefore this issue is waived. See Richardson v. State, 800 N.E.2d 639, 643 n. 4 (Ind. Ct. App. 2003), trans. denied. Issues not raised in the post-conviction court may not be raised for the first time on appeal from the denial of post-conviction relief. See Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006), trans. denied. Waiver notwithstanding, Crenshaw's claim is meritless. Specific intent is not a required element of an attempted aggravated battery jury instruction. Richeson v. State, 704 N.E.2d 1008, 1010 (Ind. 1998).

B. Ineffectiveness of Appellate Counsel

Crenshaw also argues that his appellate counsel provided ineffective assistance by failing to adequately communicate, failing to raise the issue of the police helicopter video, and failing to raise and support other claims of trial counsel ineffectiveness. 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.

Because Crenshaw has failed to include his petition for post-conviction relief in his appendix, we are unable to ascertain the claims that he presented to the post-conviction court in that petition. Therefore, we will restrict our review to issues presented to the post-conviction court that have a basis in the record provided to us by Crenshaw.

First, Crenshaw raised only one issue of appellate counsel's performance at the post-conviction hearing that he attempted to support through his testimony. The following colloquy occurred between Crenshaw and his counsel at the post-conviction hearing:

Q. [] Did you discuss this case with [appellate counsel] before the appeal was filed?

A. I never spoke to him.

Q. Not once?

A. Not once.

Q. Not by the phone or in person?

A. I got one letter from him.

Q. Were you able to send him letters?

A. I sent him a letter.

Q. But you, you only received one letter from him?

A. I received the first introduction letter, and then the denial of appeal letter from him.

Tr. p. 64-65.

Crenshaw states that his appellate counsel failed to provide effective assistance by failing to adequately communicate but fails to allege any facts that would support his claims aside from his statements outlined above. Crenshaw has failed to establish that he was prejudiced by appellate counsel's alleged failure to communicate with him.

Second, the post-conviction court addressed Crenshaw's claim that his appellate counsel did not provide effective assistance by failing to use the police helicopter tape when pursuing Crenshaw's direct appeal. As noted by the post-conviction court, Crenshaw failed to establish when he received the video. Appellant's App. p. 49. While Crenshaw argues that the tape was in existence during the direct appeal, he did not establish how appellate counsel could have known about the tape. Because Crenshaw failed to call appellate counsel at the hearing, Crenshaw could not demonstrate that the video had been disclosed to his appellate counsel. See Culvahouse v. State, 819 N.E.2d 857, 863 (Ind. Ct. App. 2004), trans. denied. Given that Crenshaw has the burden of demonstrating ineffectiveness of counsel, Crenshaw has not met that burden by failing to show that appellate counsel knew of the video and failed to address it in Crenshaw's direct appeal.

Crenshaw waived all other issues related to appellate counsel effectiveness by failing to establish that he had presented these issues to the post-conviction court because his petition is not included in the record, and he failed to raise the issues at the post-conviction hearing.² See Walker, 843 N.E.2d at 57.

² Crenshaw argues that the attempted aggravated battery instruction constituted fundamental error because it lacked a specific intent requirement and claims that the voluntary intoxication instruction was prejudicial. These claims are waived. Freestanding claims of error that were known and available for direct appeal, but not raised, are waived and may not be raised in post-conviction proceedings. Bunch v. State, 778 N.E.2d 1285, 1289 (Ind. 2002).

Conclusion

The post-conviction court did not err in finding that Crenshaw had failed to carry his burden of showing that the State's failure to provide the police helicopter surveillance video violated due process. Crenshaw failed to show that appellate counsel provided ineffective assistance and has waived the remaining issues because his petition is not included in the record and he failed to raise the issues before the post-conviction court. Crenshaw waived the jury instruction issues because the claims were known and available on first appeal but were not raised.

We affirm.

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