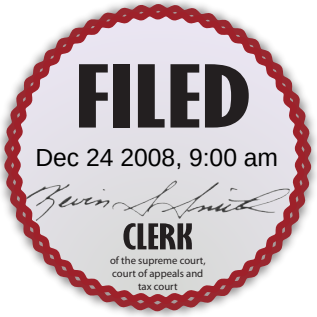

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IN THE
COURT OF APPEALS OF INDIANA

GARLAND WHALEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-PC-362
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-0303-PC-33239

December 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Garland Whaley ("Whaley") appeals the denial of his Verified Petition for Post-Conviction Relief ("Petition"). We affirm.

Issue

Whaley presents a single issue for our review: whether he was denied the effective assistance of trial counsel.

Facts and Procedural History

In 2003, the Marion County Sheriff's Department ("MCSD") and a cooperating individual ("CI") arranged a purchase of cocaine from Whaley. An officer and the CI drove to a restaurant parking lot, where they met Whaley. The CI entered Whaley's car and exchanged $300 in photocopied buy money for the cocaine. The CI returned to the officer's car and showed him a plastic baggie containing crack cocaine.

As the MCSD attempted to detain Whaley, he fled in his car, striking a MCSD vehicle and injuring an officer. In evading other officers, Whaley drove into a ditch. He ran and was ultimately detained. As officers tried to handcuff him, Whaley resisted by placing his arms underneath his body. Two officers sustained injuries in detaining him. The $300 in buy money was recovered from Whaley; testing revealed that the baggie contained five grams of cocaine.

The State filed eight charges and alleged that Whaley was both a habitual offender and a habitual substance offender. After a bench trial, the trial court sentenced Whaley as follows: Dealing in Cocaine, as an A felony (forty-eight years, including the habitual-

substance-offender enhancement); Resisting Law Enforcement ("RLE") as a C felony (fifteen years, including the habitual-offender enhancement); two counts of RLE, as D felonies (two years each); and Criminal Recklessness, an A misdemeanor (one year). All were to run consecutively, except that the misdemeanor and one of the D felonies ran concurrently with other counts, for an aggregate sentence of sixty-five years.

On appeal, this Court reversed the C felony conviction and the habitual-substance-offender adjudication. Whaley v. State, 843 N.E.2d 1 (Ind. Ct. App. 2006), trans. denied. On remand, the trial court made the ordered revisions and reduced the habitual-offender enhancement by four-and-a-half years, for a new aggregate sentence of forty-six-and-a-half years.

Whaley filed his Petition. Testifying at the evidentiary hearing were Whaley, his mother, his aunt, and his trial counsel Christopher Zoeller ("Zoeller"). The trial court denied the Petition.

Whaley now appeals.

Discussion and Decision

Whaley asserts that Zoeller made a litany of tactical errors and that he was therefore deprived of his right to effective trial counsel. Our Supreme Court has described the analysis as follows:

> Ineffective assistance of counsel claims are governed by the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel

> guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.

Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002) (internal citations omitted). "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, which we expect will often be so, that course should be followed." Strickland v. Washington, 466 U.S. 668, 697 (1984). We review a post-conviction court's factual findings for clear error except when they are based entirely upon a paper record. Lee v. State, 892 N.E.2d 1231, 1236-37 (Ind. 2008).

Whaley complains that he was poorly advised in rejecting two plea agreements, which had "fairly if not totally equal terms," but offered at different points during the prosecution. Appellant's Brief at 18. First, he contends that Zoeller told him to reach a deal with the prosecutor as to a plea and then to deny the charged conduct during the plea hearing "in an attempt to get the presiding judge to hear his case." Id. at 16. Second, he claims that he rejected the second offer as Zoeller "had told him that the State could not convict him, because the cocaine had been lost." Id. at 18.

In Lawrence v. State, defense counsel misadvised his client regarding which penal code controlled. Our Supreme Court rejected Lawrence's ineffectiveness claim. "[W]e cannot say that this resulted in defendant receiving ineffective counsel. The test is one of reasonableness; this does not require perfection." Lawrence v. State, 464 N.E.2d 1291, 1295 (Ind. 1984). The Lawrence Court also noted the defendant's "steadfast desire to establish his innocence at a trial." Id. Similarly, this Court rejected a defendant's claim that his counsel was ineffective by inaccurately predicting that he could obtain an acquittal. Means v. State, 807 N.E.2d 776, 786-87 (Ind. Ct. App. 2004), trans. denied.

At the post-conviction hearing, Zoeller testified as follows:

> A: Well, as I remember, [Whaley] was unable to admit to some of the circumstances which were part of the guilty plea that – as I recall.
>
> Q: And was that your advice?
>
> A: To plead guilty?
>
> Q: To plead guilty or to not be able to make a factual basis half way through?
>
> A: I don't think I would have done that. . . . No, I don't think that I would have told him to lie to the judge.

Transcript at 11. He then testified that he advised Whaley that convicting him without the drugs would be "improbable to a great extent," but not "legally impossible." Id. at 14. Whaley does not suggest that he misunderstood the charges against him or the potential penalty of those charges. Meanwhile, he acknowledged on cross-examination that he told Zoeller that he was not guilty.

Whaley admits on appeal that, under the plea agreement, his sentence could have been as much as fifteen to twenty years more than the forty-six-and-a-half years to which he was ultimately sentenced. Appellant's Br. at 20. Furthermore, the evidence supported the post-conviction court's finding that Zoeller effectively denied the suggestion that he told Whaley the State would be unable to convict him of the Class A Dealing charge without the cocaine. Whaley has not established prejudice.

Second, Whaley asserts that Zoeller was ineffective by omitting to request that the presiding judge hear the case. However, Whaley fails to explain how this prejudiced him.

Whaley further argues that Zoeller was ineffective because Zoeller moved for a continuance of the trial on a day when the CI failed to appear. However, Whaley acknowledged that the State had "brought in all of the witnesses which was [sic] eight uniform[ed] officers." Tr. at 50. Zoeller testified that, at that time, he and Whaley "were having some difficulties. . . . I was on the verge of filing a motion to withdraw." Id. at 16. He explained that "the attorney client relationship had gotten on the brink of breaking down. Can't go into a major felony without him having full confidence in me. And I don't think he did at that date." Id. Also, he noted that the State was going to move for a continuance. The post-conviction court found that, even if the trial court had denied a continuance, the State could have dismissed and re-filed the charges. The evidence supported the post-conviction court's conclusion that Whaley did not establish prejudice.

Regarding the cocaine, Whaley criticizes Zoeller's failure to independently test the substance in the baggie and his stipulation to the State's lab report, which identified the

substance as cocaine. Whaley suggests that these decisions were especially bad in a bench trial as "the Judge would follow the law rather than be suspicious of the absence of the actual cocaine." Id. at 21. Following the law, however, is not prejudicial. During the hearing, the State acknowledged that, at some point, the cocaine was lost. Zoeller testified as follows:

> Q: Why did you [stipulate to the chemist's report]?
>
> A: Well, just to save time more than anything. The chemist would have come over and said exactly what was on the report.
>
> Q: Despite the fact that [the] drugs themselves were missing?
>
> A: As I recall the evidence was that it ended up missing after the drug report. So I don't know that the chemist was – was the issue – the issue was the chain of custody.

Id. at 24. The chemist's report was evidence that the substance was cocaine. Whaley fails to assert that it was anything else. Therefore, his contention that an independent test would have aided his defense is simply speculation. The trial court's conclusion that Whaley failed to establish prejudice in this regard was supported by Zoeller's testimony that the State could have called the chemist to testify about the report.

Finally, Whaley argues that his trial counsel was ineffective because he stipulated to the fact that the CI was identifying Whaley as the person who sold him the cocaine. Zoeller acknowledged that the CI testified that he was "having difficulty identifying who in the courtroom was the person who sold him the drugs." Id. at 29. Zoeller explained that "Whaley was the only one wearing orange that day I believe, so it wouldn't have been – you know, he was going there. He was sitting right next to me. It was obvious that he was the

defendant." Id. Furthermore, the record made clear that there were multiple officers to testify as to the identity of the defendant.

"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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Smith, 765 N.E.2d at 585. Whaley criticizes seven of Zoeller's decisions, but Whaley fails to establish that any of them would have made any difference in the trial or Whaley's sentence. Whaley was not deprived of his right to effective trial counsel.

Conclusion

The post-conviction court properly denied the Petition.

Affirmed.

MATHIAS, J., and BARNES, J., concur.