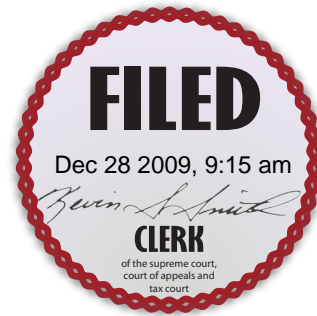


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

CARA SCHAEFER WIENEKE
Wieneke Law Office, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

GUILLERMO SAMANIEGO-HERNANDEZ,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 20A03-0905-PC-217

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0409-FA-124

December 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Guillermo Samaniego-Hernandez (“Samaniego”) appeals the denial of his post-conviction relief petition, which challenged his conviction for Class A felony possession of cocaine with intent to deliver. We affirm.

Issue

The single issue before us is whether Samaniego received ineffective assistance of trial counsel.

Facts

On the evening of September 2, 2004, an informant for the Drug Unit of the Goshen Police Department made a “controlled buy” of cocaine from Samaniego and his wife at their residence. During the buy, after the informant displayed the purchase money, Samaniego pulled a bag of cocaine out of his sock and handed it to his wife, who then handed it to the informant. Samaniego’s wife then collected the money and passed it to Samaniego, who put it in his pocket. The informant left the residence and later surrendered the cocaine to a waiting officer.

Officers of the Goshen Police Department obtained a search warrant for Samaniego’s residence. The warrant indicated that the police intended to search for items associated with narcotics dealing and the manufacture of fraudulent identification cards, and police executed the warrant on September 3, 2004. Officers searched the home and found the following items in the master bedroom, all of which were entered into evidence at trial: two bags of cocaine, an electronic scale, other items associated with drug dealing,

several items listing Samaniego's name and address, and several false identification cards with Samaniego's picture. The total weight of the cocaine discovered was 26.02 grams.

The State charged Samaniego with Class A felony possession of cocaine weighing more than three grams with the intent to deliver. On April 6, 2004, following a trial, the jury found him guilty as charged, and the trial court sentenced Samaniego to thirty-five years incarceration at the Department of Correction.

He appealed, claiming that the sentence was inappropriate, that the evidence was insufficient to sustain the verdict, and that the trial court improperly admitted evidence of Samaniego's involvement in the controlled buy. We disagreed with all three contentions and affirmed Samaniego's conviction and sentence. Samaniego-Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005). Samaniego did not seek transfer.

On December 28, 2006, Samaniego petitioned for post-conviction relief and newly appointed counsel amended that petition on September 15, 2008. In his petition Samaniego alleged that he received ineffective assistance of trial counsel. Specifically, Samaniego claimed that his trial counsel failed to object to the admission of evidence related to manufacturing fraudulent identification cards, including an unredacted version of the search warrant; photos of a false social security card, resident alien card, and birth certificate; and an unredacted version of the audio recording of the controlled buy. Samaniego claimed that these items were improper character evidence and inadmissible under Indiana Evidence Rule 404(b) because they involved evidence of other crimes, wrongs, or acts for which he was not charged. Samaniego further claimed that this

evidence was irrelevant under Indiana Evidence Rule 401 and unfairly prejudicial under Indiana Evidence Rule 403.

On May 1, 2009, the post-conviction court entered its findings of fact and conclusions of law denying post-conviction relief. Samaniego now appeals.

Analysis

When appealing a post-conviction judgment, 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. A post-conviction relief 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 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. Id. at 105.

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., 104 S. Ct. at 2068.

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. “Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference.” Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001), cert. denied. Because not all criminal defense attorneys will agree on the most effective way to represent a client, “[i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.” Id. There is a strong presumption that counsel rendered adequate assistance and used professional judgment. Id.

Samaniego contends that any and all evidence related to the manufacture of false identification cards was inadmissible and should have been objected to by trial counsel. His primary contention is that such evidence was inadmissible pursuant to Indiana Evidence Rule 404(b). That rule provides in part: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” Rule 404(b)’s list of “other purposes” is illustrative only. Dickens v. State, 754 N.E.2d 1, 4 (Ind. 2001). “Extrinsic act” evidence is admissible for any purpose not expressly listed in Rule 404(b), unless precluded by the first sentence of Rule 404(b) or any other Rule. Id. A court faced with a Rule 404(b) objection must determine (1) whether the evidence is relevant to a matter at issue aside from the defendant’s propensity to commit the charged crime; and (2) whether the probative value of the evidence outweighs the improper prejudicial effect. Id.

It does not appear that all of the evidence related to Samaniego’s alleged production of false identification cards was inadmissible. In particular, the falsified birth certificate and social security card, when combined with the falsified resident alien card that bears a photo of Samaniego but the same falsified name from the birth certificate and social security card, tends to identify Samaniego as the occupant of the bedroom where police found the cocaine and drug dealing paraphernalia. This evidence had a tendency to prove a fact at issue in the case other than Samaniego simply being a “bad actor” who commits crimes. Because the trial court would not have been required to sustain an objection to this evidence, trial counsel was not ineffective for not making one. See Stephenson v. State, 864 N.E.2d 1022, 1035 (Ind. 2007) (holding that in order to prevail on claim of ineffective assistance based on failure to object, defendant must establish that trial court would have been required to sustain objection if made), cert. denied.

It is admittedly more difficult to assign any proper evidentiary value to the unredacted search warrant, which stated that officers were permitted to look for evidence of false identification manufacturing, and the unredacted recording of the controlled buy, during which the confidential informant and Samaniego discussed how much he would charge to make false identification cards. An objection to this evidence, or a request to redact the search warrant and recording, might have been sustained. “Isolated mistakes,” however, do not necessarily make counsel’s representation ineffective. Timberlake, 753 N.E.2d at 603.

Counsel for Samaniego did later successfully object to the State’s attempt to introduce additional evidence of his manufacturing of false identification cards, such as a laminating machine, camera, and blank resident alien and social security cards. Thus, counsel prevented the State from making a detailed exploration of that issue. Moreover, the State presented ample evidence of Samaniego’s guilt.¹ Samaniego’s participation in the controlled buy was established by the confidential informant’s testimony and the audio recording of the buy. The cocaine and dealing paraphernalia were discovered in a bedroom containing multiple indicia that Samaniego occupied that room, including documents with both Samaniego’s real and assumed identities on them. We are confident that, even if trial counsel had successfully objected to some of the evidence related to Samaniego’s production of false identification cards, the jury still would have found him

¹ On direct appeal, Samaniego’s only challenge to the sufficiency of the evidence, which we rejected, related to the weight of the cocaine police discovered.

guilty of Class A felony possession of cocaine with intent to deliver. Samaniego has not established that his trial counsel's performance prejudiced him.

Conclusion

Samaniego has not demonstrated that he received ineffective assistance of trial counsel. We affirm the judgment of the post-conviction court.

Affirmed.

MATHIAS, J., and BROWN, J., concur.