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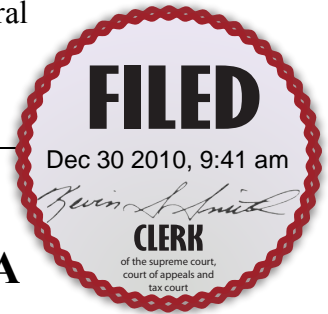
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**IN THE
COURT OF APPEALS OF INDIANA**

BERNARD MARKEY,)
)
Appellant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee.)

No. 49A02-1003-PC-371

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G20-0207-PC-197917

December 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Marion Superior Court denied a petition for post-conviction relief filed by Bernard Markey (“Markey”). Markey appeals and claims that the post-conviction court erred in concluding that he was not denied the effective assistance of trial and appellate counsel. We affirm.

Facts and Procedural History

The facts underlying Markey’s convictions were set forth in his direct appeal as follows:

On July 21, 2002, Indianapolis Police Officer Glenn Grisser responded to a report of “a person stabbed” at 1147 West Roach Street in Indianapolis. Transcript at 40. When Officer Grisser knocked on the door at that residence, a woman answered, but immediately tried to close the door when she saw him. Officer Grisser stopped the door with his foot and entered the residence with his gun drawn. Officer Grisser ordered the people inside, including Markey, to show him their hands, and they complied. But before Markey showed Officer Grisser his hands, he threw something into a nearby closet. Two baggies of cocaine were subsequently found inside the closet. One of the baggies was sitting on top of a pile of clothes.

The State charged Markey with dealing in cocaine, as a Class A felony, and possession of cocaine, as a Class C felony. A jury found him guilty as charged, but the trial court only entered judgment of conviction on the dealing count. The trial court imposed an enhanced sentence of forty years and ordered that that sentence run consecutive to a sentence for Markey’s conviction for committing perjury during the course of the trial. [FN1: Markey was convicted of perjury for testifying that he did not possess any cocaine at the time of his arrest.]

Markey v. State, No. 49A04-0403-CR-153, slip op. pp. 2-3 (Ind. Ct. App. Dec. 16, 2004) (memorandum decision). In his direct appeal, Markey claimed that, under the rule set forth in Blakely v. Washington, 542 U.S. 296 (2004), the trial court erred in imposing an enhanced sentence. Id. at 2. We disagreed and affirmed Markey’s sentence. Id. at 4-5.

On May 11, 2005, Markey filed a pro se petition for post-conviction relief. On February 26, 2008, the post-conviction court denied Markey's petition without a hearing. On March 24, 2008, Markey, by counsel, filed a motion to correct error/motion to re-open and filed an amended petition for post-conviction relief. A hearing on the amended petition was held on December 10, 2008, at which Markey, his trial counsel, and his appellate counsel testified. On February 12, 2010, the post-conviction court denied Markey's amended petition for post-conviction relief. Markey now appeals.

Post-Conviction Standard of Review

A post-conviction petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Henley v. State, 881 N.E.2d 639, 643 (Ind. 2008). On appeal from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. 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 that reached by the post-conviction court. Id. at 643-44. When the post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to the court's legal conclusions, but "the 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." Id. at 644.

I. Ineffective Assistance of Trial Counsel

Markey first claims that he was denied the effective assistance of trial counsel. As explained by our supreme court in Timberlake v. State:

A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (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. The Strickland Court recognized 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. The two prongs of the Strickland test are separate and independent inquiries. Thus, [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.

753 N.E.2d 591, 603 (Ind. 2001) (citations and quotations omitted).

A. Failure to Object

Markey claims that his trial counsel was ineffective for failing to object to the admission of the cocaine found in the house. Markey claims that the police improperly entered and searched the house and that the cocaine found therein should have been inadmissible. He therefore claims that his trial counsel should have objected to the introduction of the cocaine and that the failure to so object constituted ineffective assistance of trial counsel. We are unable to agree.

First, Markey's trial counsel explained at the post-conviction hearing why he did not object to the cocaine at trial:

As to the [cocaine] evidence, there was --- well there were two reasons. One there was a standing issue. At the suppression hearing there was testimony by the officers that they found clothing and other items that would tie Mr. Markey to the --- to the property. That did not come out at trial. We didn't feel that it was relevant, in fact it would hurt Mr. Markey I think in the defense that we were preparing. So I thought there was a standing issue. And then also the whole crux of our defense was that whatever was there was not Mr. Markey's. And I think that rather than draw attention to the cocaine and to --- to make a big thing about it, it was better to focus on the fact that where it was, wasn't near where Mr. Markey was. And in fact . . . it would have been impossible for Mr. Markey to have done what the officer stated that they saw.

P-C. R. Tr. p. 16. When asked if it was a conscious strategy decision not to preserve the evidentiary issue for appeal, Markey's trial counsel explained, "No, it wouldn't have been a conscious effort not to preserve the . . . suppression issue. It would have been a conscious effort not to argue it in front of the jury." *Id.* at 17.

From this, it is clear that Markey's trial counsel made a strategic decision to not object to the introduction of the cocaine evidence. To argue the standing issue would have required Markey's trial counsel to argue that Markey had an interest in the house where he was located because of the clothing he had in the bag found at the house. The trial strategy, however, was to claim that the cocaine did not belong to Markey and not to mention the clothing in the bag. Although this strategy was ultimately unsuccessful, this does not mean that the strategy was so deficient as to fall below an objective standard of reasonableness. See *Fugate v. State*, 608 N.E.2d 1370, 1373 (Ind. 1993) (noting that an unsuccessful defense strategy does not always indicate that the

strategy was a poor one, nor does it indicate trial counsel's ineffectiveness). "[W]e will not speculate about more advantageous strategies which could have been employed by trial counsel." Id.

Because we conclude that the performance of Markey's trial counsel did not fall below an objective standard of reasonableness, we need not decide whether Markey was prejudiced by his counsel's alleged errors. See Timberlake, 753 N.E.2d at 603 (noting that two prongs of the Strickland test are separate and independent inquiries). But even if we were to assume *arguendo* that his trial counsel's failure to object to the cocaine did constitute deficient performance, he must still show that he was prejudiced by this alleged error. See id. This he cannot do.

In the context of a claim of ineffective counsel for failure to object, the defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure. Wrinkles v. State, 749 N.E.2d 1179, 1192 (Ind. 2001). Markey cannot show that his objection would have been sustained or that he was prejudiced by the failure to object. This is so because his objection to the search and seizure of the cocaine would have been meritless even if it had been preserved. Markey claims that he had standing to challenge the search because he "was an invited guest in the residence and thus could challenge the search." Appellant's Br. at 6. In support of this proposition, Markey cites Minnesota v. Carter, 525 U.S. 83, 89-90 (1998). The Court in Carter actually held, however, that "an *overnight* guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." Id. at 90 (emphasis added).

Here, the evidence indicates that Markey was not an overnight guest. Although the owner of the home showed the police a bag of clothing that belonged to Markey, Markey never claimed that he had been an overnight guest at the house. To the contrary, he told the arresting officer that he had simply been at the house “partying.” Suppression Tr. p. 6. Under these facts and circumstances, we cannot say that Markey met his burden of establishing that he had standing to challenge the search which led to the seizure of the cocaine. Thus, even if his counsel had objected at trial to the introduction of the cocaine evidence, this objection, properly, would not have been sustained because Markey lacked standing to challenge the search of a house where he was simply “partying.”

B. Failure to Request Jury Instruction

Markey also claims that his trial counsel was ineffective for failing to request that the trial court instruct the jury regarding circumstantial evidence. Specifically, Markey claims that the jury should have been instructed to the effect that, when the evidence against a defendant is entirely circumstantial, it is not enough that the circumstances be consistent with the hypothesis of guilt; instead, the circumstances must be of such a conclusive character as to exclude every reasonable hypothesis of innocence. This is not an incorrect statement of the law. See Gambill v. State, 675 N.E.2d 668, 675 (Ind. 1996) (noting that a defendant is entitled to an instruction which states that when proof of guilt is attempted by circumstantial evidence alone, the circumstances must exclude all reasonable hypotheses of innocence) (citing Myers v. State, 532 N.E.2d 1158, 1159 (Ind. 1989)).

Markey claims that the trial court should have given a circumstantial evidence instruction because the evidence of his guilt was entirely circumstantial. We disagree. The arresting officer testified at the suppression hearing that he saw Markey throw something to his left. When the officer looked in the area where the object had been thrown, he found two baggies of cocaine. Moreover, when the arresting officer told Markey that he saw him throw cocaine and asked if it was his, Markey responded, “Yeah, I threw it there I threw it in the closet” because he “didn’t want anybody to get into trouble.” Appellant’s App. p. 25; Suppression Tr. p. 20. This is direct, not circumstantial, evidence of Markey’s possession of cocaine. See Nichols v. State, 591 N.E.2d 134, 136 (Ind. 1992) (“Direct evidence immediately establishes the main fact to be proved; circumstantial evidence immediately establishes collateral facts from which the main fact may be inferred.”) (citing Herrick, Underhill’s Criminal Evidence § 15 (Supp. 1970)). Because the evidence against Markey was not wholly circumstantial, we cannot conclude that his trial counsel’s performance was deficient for failing to request such an instruction. See id. (circumstantial evidence instruction is required only if the evidence presented at trial was solely circumstantial).

And again, even if we assume that Markey’s counsel should have requested the circumstantial evidence instruction, the trial court here did instruct the jury with regard to the State’s burden to prove the elements of the crime beyond a reasonable doubt and the presumption that the defendant is innocent. See Appellant’s App. pp. 91, 98, 100, 101. Thus, any potential error in failing to instruct the jury with regard to circumstantial evidence would have been harmless. See Hampton v. State, 936 N.E.2d 1274, 1276-77

(Ind. Ct. App. 2010) (concluding that post-conviction petitioner’s trial counsel was not ineffective for failing to request circumstantial evidence instruction because trial court’s instruction on proof beyond a reasonable doubt “nicely covered the issue and rendered harmless any potential error concerning the necessary proof where the evidence is purely circumstantial.”), reh’g pending.

II. Ineffective Assistance Of Appellate Counsel

Markey also claims that his appellate counsel was ineffective for failing to present certain issues on direct appeal. Ineffective assistance of appellate counsel claims are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). One of the most important strategic decisions made by appellate counsel is the decision of what issue or issues to raise on appeal. Id. at 193. Therefore, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id. The defendant must overcome the strongest presumption of adequate assistance to show that counsel was deficient for failing to raise an issue on direct appeal, and judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000). Even if our analysis demonstrates deficient performance by appellate counsel, we must still determine whether the issues that appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial. Bieghler, 690 N.E.2d at 194. After all, “the ultimate issue under the prejudice prong is whether, but for counsel’s errors, there is a reasonable probability that the outcome of the proceeding [i.e., the direct appeal], would have been different.” Id. (quotations omitted).

A. Failure to Argue Rejection of Tendered Jury Instruction

Markey argues that, in his direct appeal, his counsel should have presented the issue of the trial court's rejection of his tendered jury instruction regarding "mere presence" at the scene of a crime. The State does not argue that Markey's tendered instruction was an incorrect statement of the law. See Peterson v. State, 699 N.E.2d 701, 707 (Ind. Ct. App. 1998) (noting that propriety of giving the "mere presence" instruction on accomplice liability is well-settled). Instead, the State claims that, given the nature of the evidence against Markey, such an instruction would have been "futile," which we take to mean that any error would have been harmless. Under the particular facts and circumstances of the present case, we agree.

Here, the arresting officer witnessed Markey throw something. When he looked to see what had been thrown, he found two baggies of cocaine. And when the officer asked Markey why he had thrown the cocaine, Markey admitted that he had thrown it in the closet so as to not get anyone into trouble. We cannot say that Markey has demonstrated how the outcome of his trial would have been different had the jury been given the "mere presence" instruction because the evidence shows that Markey was not merely present at the scene of a crime. Therefore, we cannot conclude that his appellate counsel rendered ineffective performance by failing to present this non-meritorious claim on direct appeal.

B. Failure to Argue Insufficient Evidence

Lastly, Markey claims the evidence was insufficient to support his convictions and that his appellate counsel was ineffective for failing to present a claim of insufficient evidence in his direct appeal. In arguing that the evidence was insufficient, Markey

essentially asks us to view evidence not favorable to the jury's verdict, reweigh the evidence, and re-assess witness credibility, which we will not do. See McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). Given our standard of review on appeal and the nature of the evidence against Markey, which included the eyewitness testimony of a police officer and Markey's own statements to that officer, we cannot say that his appellate counsel was ineffective for not raising the issue of the sufficiency of the evidence in Markey's direct appeal.

Conclusion

After considering all of these facts and the applicable law, the post-conviction court concluded that Markey was not denied the effective assistance of trial and appellate counsel. The post-conviction court did not clearly err in that determination.

Affirmed.

BAKER, C.J., and CRONE, J., concur.