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IN THE
COURT OF APPEALS OF INDIANA

ANDRE R. CUNNINGHAM,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 32A01-0608-PC-338
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Karen M. Love, Judge
Cause No. 32D03-0408-PC-3

December 14, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Andre R. Cunningham appeals the denial of his petition for post-conviction relief, by which he challenged the sentence he received after pleading guilty to robbery causing serious bodily injury, a class A felony. Cunningham presents two issues for review, both involving *Blakely* challenges. They are:

1. Is Cunningham's *Blakely* challenge available on post-conviction relief?

2. Did Cunningham receive ineffective assistance of appellate counsel when counsel failed to present a *Blakely* challenge upon direct appeal?

We affirm.

In an unpublished memorandum decision, this court affirmed Cunningham's conviction upon direct appeal. The facts underlying the conviction were set out therein as follows:

> On the evening of April 3, 2003, Jesse Lindsey drove Cunningham and Adrian Johnson to Nicholas Lee's house in Brownsburg, Indiana, to steal marijuana and scare Lee in order to seek revenge for a prior incident between Lee and Lindsey. Upon arrival, Lindsey remained in the vehicle while Cunningham and Johnson went inside Lee's house. Once inside, Johnson asked for a "QP," or quarter-pound, of marijuana from Lee. When Lee produced the marijuana, Johnson pulled out a handgun and demanded the marijuana. An argument ensued, and Johnson ordered Lee into another room where Austin Musser, Gabriel Hulse, and seventeen-year-old Anthony "Justin" Reuzenaar were present.
>
> Cunningham followed Johnson into the room with the others. Johnson ordered Lee, Musser, Reuzenaar, and Hulse to sit down and empty their pockets. When Lee refused, Johnson approached Lee to reach inside Lee's pockets, and they began to struggle. Musser, Reuzenaar, Hulse, and Cunningham joined in the fight, and at some point during the struggle, Johnson fired four shots. One bullet struck a bookshelf; another bullet struck Lee in his back, and two bullets struck Musser. Johnson and

> Cunningham fled. On his way out, Cunningham grabbed the marijuana. Musser subsequently died as a result of his injuries.
>
> The next day, Cunningham turned himself in to the police. The State charged Cunningham with felony murder and robbery causing serious bodily injury.[1] Cunningham entered into a plea agreement with the State whereby he agreed to testify truthfully in the criminal proceeding against Lindsey in exchange for the State dismissing the felony murder charge and placing a cap of forty years on his sentence. The trial court accepted the plea agreement and, following the presentation of evidence and argument from both parties, sentenced Cunningham to forty years executed in the Indiana Department of Correction.

Cunningham v. State, No. 32A01-0310-CR-388, *slip op*. at 2-3 (Ind. Ct. App. June 1, 2004).

Cunningham contends the post-conviction court erred in concluding his *Blakely* challenge is not available on post-conviction relief. When reviewing the judgment of a post-conviction court, we consider only the evidence and reasonable inferences supporting that judgment. *Hall v. State*, 849 N.E.2d 466 (Ind. 2006). We do not revisit determinations of the post-conviction court with respect to the weight of the evidence and the credibility of witnesses. *Id*. To succeed in appealing the denial of a petition for post-conviction relief, the petitioner must show the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to the one reached by the post-conviction court. *Id*. Where the post-conviction court enters findings and conclusions as it did here in accordance with Post-Conviction Rule (1)(6), we will reverse upon a showing of clear

[1] The State initially charged Cunningham with conspiracy to commit murder. At the State's request, however, the trial court dismissed the charge.

error, which is error that leaves us with a definite and firm conviction that a mistake has been made. *Id.*

1.

Cunningham brings his *Blakely* claims in a petition for post-conviction relief, after having not raised such a claim on direct appeal. The State contends he may not do so.

In *Blakely v. Washington*, 542 U.S. 296 (2004), the United States Supreme Court determined the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase the sentence for a crime above the presumptive sentence assigned by the legislature. That decision was handed down June 24, 2004. After it was handed down, questions arose as to its applicability. In *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), our Supreme Court concluded that *Blakely* applies retroactively to all cases pending on direct review at the time *Blakely* was announced, or June 24, 2004. The Court further held that a defendant need not have objected by then to his or her sentence on *Blakely* grounds in order to raise a *Blakely* claim on appeal. Rather, any defendant who raised a claim of sentencing error could add a *Blakely* claim. Only those defendants who did not appeal their sentence at all were foreclosed from asserting a *Blakely* claim. Cunningham contends he meets the criteria set out in *Smylie* in that his direct appeal was pending at the time *Blakely* was decided[2] and he raised therein

[2] In the instant case, because Cunningham did not seek rehearing or transfer, the June 1, 2004 opinion became final on July 12, 2004. *See Jacobs v. State*, 799 N.E.2d 1161 (Ind. Ct. App. 2003), *aff'd in part, rev'd on other grounds*, 835 N.E.2d 485 (Ind. 2005). Thus, his appeal was pending at the time *Blakely* was decided.

a challenge to his sentence. We recently decided this issue contrary to Cunningham's position in *Henry v. State*, 848 N.E.2d 1124 (Ind. Ct. App. 2006).

In *Henry*, the relevant facts were substantially similar to those in the instant case. The defendant pled guilty to an offense and a conviction was entered thereon before *Blakely* was decided. Approximately one month before *Blakely* was decided, on May 14, 2004, Henry submitted an appellate brief challenging the appropriateness of his sentence and the aggravating circumstances upon which it rested. *Blakely* was decided on June 24, 2004. On July 14, 2004, Henry's appeal was fully briefed and transmitted to this court. In a decision handed down on September 21, 2004, this court affirmed Henry's conviction and sentence in an unpublished decision. *See Henry v. State*, No. 64A-03-0404-CR183, 816 N.E.2d 97 (Ind. Ct. App. Sept. 21, 2004). Henry did not seek rehearing or transfer with respect to that decision and the time for submitting such petitions lapsed. Henry later filed a PCR petition asserting a *Blakely* challenge to his sentence. In that case, as here, the State argued that the defendant had not preserved his *Blakely* challenge. We concluded that Henry had indeed waived his *Blakely* challenge, citing the following excerpt from *Smylie* as setting forth the applicable criteria for preserving a *Blakely* challenge for cases pending on direct appeal at the time *Blakely* was decided:

> Thus, we regard defendants such as Smylie who sought sentence relief from the Court of Appeals based on arbitrariness or unreasonableness, and who added a *Blakely* claim by amendment or on petition to transfer as having adequately presented the issue of the constitutionality of their sentence under *Blakely*.

Smylie v. State, 823 N.E.2d at 690 (internal citation omitted). In *Henry*, we interpreted the foregoing passage to mean that "for *Blakely* to retroactively apply to a defendant whose sentence was pending on direct appeal at the time *Blakely* was announced, the defendant must have added a *Blakely* claim by amendment or on petition to transfer." *Henry v. State*, 848 N.E.2d at 1126. Cunningham did not do so.

After our decision affirming Cunningham's convictions and sentence was certified on July 12, 2004, Cunningham did not file a petition for rehearing and argue for the application of *Blakely*. *See* Ind. Appellate Rule 54 (petitions for rehearing may be filed for 30 days after decision). Moreover, Cunningham did not seek to present a *Blakely* claim in a petition for transfer, an option that was available for him until August 12, 2004, *see* App. R. 57, a date almost two months after *Blakely* was issued. Therefore, Cunningham has forfeited a challenge to his sentence based on *Blakely*. *See Henry v. State*, 848 N.E.2d 1124. Finally, we note that our Supreme Court held in *Smylie* that a *Blakely* claim not preserved as described above on direct appeal will not be available via retroactive application through post-conviction relief.

2.

Cunningham contends he received ineffective assistance of appellate counsel when counsel failed to present a *Blakely* challenge upon direct appeal. We recently set forth the standard of appellate review of claims of ineffective assistance of appellate counsel as follows:

> We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Failure to satisfy either prong will cause the claim to fail.

Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*) (internal citations omitted), *trans. denied*.

As indicated previously, after *Blakely* was decided, issues quickly arose regarding who could assert a *Blakely* claim. The general rule was at the time, and still is, that an issue cannot be raised for the first time in a petition for rehearing or transfer. *Cf. Bunch v. State*, 778 N.E.2d 1285 (Ind. 2002) (issue deemed waived if presented for the first time in reply appellate brief); *Paramo v. Edwards*, 563 N.E.2d 595 (Ind. 1990) (claim waived because it was presented for the first time on petition to transfer). In fact, the first two published decisions of this court on that issue held that a *Blakely* claim was waived if it was raised for the first time on rehearing. *See Bledsoe v. State*, 815 N.E.2d 507 (Ind. Ct. App. 2004), *trans. denied; Carson v. State*, 813 N.E.2d 1187 (Ind. Ct. App. 2004). It was not until the Supreme Court handed down *Smylie* in March 2005 that the right to present a *Blakely* claim for the first time on appeal was established. "[O]nly the precedent available to appellate counsel at the time of the direct appeal is relevant to our determination of whether counsel was ineffective." *McCurry v. State*, 718 N.E.2d 1201,

1206 (Ind. Ct. App. 1999), *trans. denied*. *Smylie* was handed down months after the time for filing Cunningham's petitions for rehearing and transfer had lapsed. "[T]he failure to anticipate or effectuate a change in existing law cannot support an ineffective assistance of appellate counsel claim." *Concepcion v. State,* 796 N.E.2d 1256, 1263 (Ind. Ct. App. 2003), *trans. denied*.

Judgment affirmed.

DARDEN, J., and NAJAM, J., concur.