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**IN THE
COURT OF APPEALS OF INDIANA**

MILES REDMOND,)
)
Appellant-Petitioner,)
)
vs.) No. 45A03-0602-PC-78
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
The Honorable Kathleen Sullivan, Magistrate
Cause No. 45G04-0401-PC-1

December 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Miles Redmond (“Redmond”) appeals the denial of his Petition for Post-Conviction Relief challenging his convictions of attempted murder, a Class A felony,¹ aggravated battery, a Class B felony,² and battery, a Class C felony.³ We affirm the denial of post-conviction relief as to the attempted murder conviction, but remand to the post-conviction court with instructions to order that the judgments of conviction for aggravated battery and battery be vacated.

Issues

Redmond presents the following issues:

- 1) Whether Redmond’s trial counsel was ineffective by admitting Redmond’s guilt as to aggravated battery and battery in an effort to more effectively contest the charge of attempted murder,
- 2) Whether Redmond’s trial counsel was ineffective by failing to offer a jury instruction that two of the charges were lesser included offenses of the attempted murder, and
- 3) Whether counsel for Redmond’s direct appeal was ineffective by failing to raise the above arguments.

Facts and Procedural History

In considering the direct appeal of this case, this Court described the facts as follows.

On November 10, 2001, Leandre Drake was driving in his car with Redmond down Monroe Street in Gary when Redmond, who wanted the keys to Drake’s car, ordered Drake to “get out of [the] car.” [Trial t]ranscript at 131. Drake, afraid that Redmond was carrying a gun, removed the keys from

¹ Ind. Code § 35-41-5-1 and Ind. Code § 35-42-1-1.

² I.C. § 35-42-2-1.5.

³ I.C. § 35-42-2-1.

the ignition and exited the vehicle. Redmond followed Drake and at some point during the pursuit warned him, “Don’t make me kill you.” [Trial t]ranscript at 132. Drake jumped in front of oncoming motorist Wayne Odom in an attempt to get Odom to stop, but Odom proceeded to drive slowly down the street with Drake in front of his truck and Redmond on the side. Redmond then grabbed Drake by the shirt to pull him away from Odom’s truck, but Drake managed to wiggle out of his shirt. At that point, Drake noticed that Redmond did have a gun and ran down the street. As he ran, he saw his friend Shakeya Johnson walking up to her house with her boyfriend. He followed the couple and, sensing that Redmond was about to shoot, pushed Johnson and her boyfriend into the house.

Redmond then fired several shots, two of which hit Drake. The first bullet hit Drake in the spinal cord, paralyzing him from the waist down. The other bullet hit Drake in his upper arm, next to his chest. After firing the shots, Redmond immediately fled the scene. When Gary Police Detective Daniel Callahan arrived, he found Drake lying face down in a pool of blood in Johnson’s doorway. Drake then told Detective Callahan that Redmond had shot him. Two days later, police arrested Redmond. At the police station, Redmond told Gary Police Sergeant Delmar Stout, that he “knew who the witnesses were and even if [he] don’t [sic] get out, [he’ll] tell [his] boys and they will take care of them.” [Trial t]ranscript at 78.

Redmond v. State, No. 45A03-0209-CR-291, slip op. at 2, 3 (Ind. Ct. App. Apr. 25, 2003).

The State charged Redmond with aggravated battery and battery, later amending its information to include a charge of attempted murder.

During the trial, Redmond waived his opening statement. In closing argument, Redmond’s attorney acknowledged that his client shot Drake and that both battery charges had been proved beyond a reasonable doubt. “There is no sense in trying to insult your intelligence here. . . . [A]ll thirteen of you know Miles Redmond shot Leandre Drake.” Trial transcript at 151. Redmond’s attorney argued that Redmond had not intended to kill Drake, emphasizing that Redmond was just inches away from Drake when firing, yet Redmond did not shoot Drake in the head or heart.

The preliminary and final jury instructions accurately reflected the elements of the respective crimes, without noting that the two battery charges were lesser included offenses of the attempted murder charge. Further, the trial court instructed the jury to “consider all the instructions as a whole and . . . to regard each with the others given to you.” Appendix at 48. The jury found Redmond guilty and the trial court entered judgments of conviction on all three counts, “merg[ing] into” the attempted murder conviction the other two counts.⁴ The trial court sentenced him to thirty-two years imprisonment. On direct appeal, Redmond challenged only the sufficiency of the evidence. This Court affirmed Redmond’s convictions in an unpublished opinion. Redmond v. State, No. 45A03-0209-CR-291, slip op.

Redmond filed a Petition for Post-Conviction Relief in January, 2004, alleging ineffective assistance of trial and appellate counsel. He later moved for leave to withdraw the same in August, 2004. Redmond re-filed a Petition for Post-Conviction Relief in February, 2005, arguing that his trial counsel was ineffective by admitting Redmond’s guilt as to the two battery charges and by not offering jury instructions that noted that the battery charges were lesser included offenses of the attempted murder charge. Redmond further argued that his counsel for the direct appeal was ineffective by not raising either of the above trial issues. The post-conviction court denied Redmond’s petition. Redmond now appeals.

⁴ Neither Redmond nor the State contests the appropriateness of the merger. However, the trial court’s act of merging, without also vacating, the judgments of conviction for aggravated battery and battery is not sufficient. Prior to “merger,” the trial court had entered judgments of conviction upon each of the jury’s verdicts. A double jeopardy violation occurs “when a court enters judgment twice for the same offense.” Green v. State, No. 15S01-0611-CR-468, slip op. at 2 (Ind. Nov. 15, 2006). Therefore, we remand this cause to the trial court with instructions to vacate Redmond’s judgments of conviction for aggravated battery and battery.

Discussion and Decision

I. Standard of Review

Our review of petitions for post-conviction relief is well settled.

In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. Where, as here, the post-conviction court enters findings and conclusions in accordance with Indiana Post-Conviction Rule (1)(6), we will reverse upon a showing of clear error--that which leaves us with a definite and firm conviction that a mistake has been made. Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law.

Hall v. State, 849 N.E.2d 466, 468, 469 (Ind. 2006) (internal citations and quotations omitted). Meanwhile, we review claims of ineffective assistance of counsel based upon the principles enunciated in Strickland v. Washington, 466 U.S. 668 (1984).

[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."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting Strickland, 466 U.S. at 694).

II. Defense Counsel's Admission of Aggravated Battery and Battery

On appeal, Redmond argues that his trial counsel was ineffective by admitting, without his consent, that Redmond shot Drake and that the State had proved beyond a

reasonable doubt that Redmond was guilty of aggravated battery and battery. Counsel has considerable discretion in choosing strategy and tactics, and we accord those decisions deference. Wentz v. State, 766 N.E.2d 351, 361 (Ind. 2002) (citing Strickland, 466 U.S. at 689). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Wentz, 766 N.E.2d at 361 (citing Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001), cert. denied). “[T]actical choices by trial counsel do not establish ineffective assistance of counsel even though such choices may be subject to criticism or the choice ultimately prove[s] detrimental to the defendant.” Merrill v. State, 716 N.E.2d 902, 905 (Ind. 1999) (quoting Garrett v. State, 602 N.E.2d 139, 142 (Ind. 1992)). See also Florida v. Nixon, 543 U.S. 175 (2004) (Justice Ginsburg wrote for a unanimous Supreme Court that trial counsel’s performance was not deficient where counsel admitted to the killing in an attempt to avoid the death penalty, even though defendant failed to provide express consent).

At the post-conviction hearing, Redmond testified that “I wanted him to defend me on all three of these charges.” PCR Transcript at 25. Meanwhile, Redmond’s trial counsel, Noah Holcomb (“Holcomb”), acknowledged that he had not reviewed Redmond’s file in preparation for the hearing.⁵ “I don’t recall offhand what the strategy would have been in your case, but some of this is coming back to me now.” PCR Transcript at 37. Nonetheless, Holcomb testified that he would not have admitted Redmond’s guilt as to the aggravated battery and battery charges without at least Redmond’s implied consent.

⁵ Redmond requested subpoenas the day before the post-conviction hearing. Holcomb had one day to prepare.

I don't recall if you said it specifically, but if I actually argued that you were only guilty of battery or aggravated battery and not attempted murder, it would have been at least with your implied consent.

Had you told me I want it all or none, I don't want you to tell the jury that I'm guilty of one of these, a lesser offense than of the greater and not guilty of the greater offense, had you told me that specifically, I would not have done that. . . .

. . . And in light of the evidence that was held in your case with regards to the identity of the person who did the offense, . . . it would have been foolish to say you weren't the one who did it.

. . . .

I don't recall from this right now whether or not we had that conversation, but certainly I would have at least had your implied consent.

PCR Transcript at 37-38. In its findings of fact, the post-conviction court noted that Holcomb had so testified, without actually making any findings as to Redmond's communications on trial strategy.

We note that the evidence against Redmond was significant and included eyewitness testimony of the victim, a friend of the victim, and a bystander. Redmond was clearly identified as the shooter. Redmond was in the victim's car, ordered him out of the car, followed him down a street, and shot him. The State charged Redmond with three felonies, with maximum sentences of fifty, twenty, and eight years imprisonment, respectively.⁶ In light of the evidence and the significant potential penalty for a conviction of attempted murder, the decision to admit to aggravated battery and battery was a reasonable trial strategy. Redmond's trial counsel concluded that contesting the battery charges would amount to insulting the jury's intelligence. As the Nixon Court held with respect to a capital

case, “counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in ‘a useless charade.’” Nixon, 543 U.S. at 192. We conclude that the same is true in this non-capital case, as Redmond faced a maximum sentence of fifty years for attempted murder.

Meanwhile, contrary to Redmond’s argument, this tactic was not “the functional equivalent to entering a guilty plea.” Appellant’s Brief at 8. Redmond retained the rights accorded a defendant in a criminal trial, such as the right to cross-examine witnesses and the right to appeal. See Nixon, 543 U.S. at 188. We conclude that Redmond’s trial counsel was not ineffective by admitting Redmond’s guilt as to aggravated battery and battery.

III. Jury Instruction regarding Lesser Included Offenses

Redmond also argues, without citation to authority, that his trial counsel was ineffective by failing to offer jury instructions regarding the fact that the aggravated battery and battery charges were lesser included offenses of the attempted murder charge. Essentially, Redmond claims that “these instructions are fundamentally vague because the jury was not instructed on what to do if it did not find each of the particular elements which elevated the level of felony.” Appellant’s Brief at 10.

Here, the State charged Redmond with three counts, attempted murder, aggravated battery, and battery. The State has statutory authority for joining multiple offenses in the same information, if stated in separate counts, when the offenses are based upon the same conduct. Ind. Code § 35-34-1-9(a)(2). Further, the trial court was not required to instruct the jury that certain counts constituted lesser included offenses of another count. See Cummings

⁶ I.C. § 35-50-2-4 to -6.

v. State, 434 N.E.2d 90, 92 (Ind. 1982) (“We hold where the lesser included offense is charged as a separate count of the indictment and the jury is adequately instructed as to the elements of that offense, the defendant is not entitled to a lesser included offense instruction.”).

In its preliminary and final instructions to the jury, the trial court advised that, “[t]o each count of the Information in this case, the Defendant has entered a plea of not guilty, which makes it incumbent upon the State of Indiana to prove to your satisfaction, beyond a reasonable doubt, each and every material allegation of any or all counts of said Information.” Appendix at 24 and 36. Redmond makes no argument that this instruction or the instructions on the substantive crimes were flawed. We conclude that Redmond’s trial counsel was not ineffective by failing to offer a jury instruction that two of the counts were lesser included offenses of attempted murder.

IV. Appellate Counsel

Finally, Redmond claims that counsel for his direct appeal was ineffective by failing to argue that his trial counsel was ineffective, based entirely on the two arguments addressed above. To succeed on such a claim, our Supreme Court has held that a defendant must establish that trial counsel was ineffective.

When the claim of ineffective assistance is directed at appellate counsel for failing fully and properly to raise and support a claim of ineffective assistance of trial counsel, a defendant faces a compound burden on postconviction. The postconviction court must conclude 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.

Timberlake, 753 N.E.2d at 604. Having held above that Redmond’s trial counsel was not

ineffective, we therefore conclude that counsel for Redmond's direct appeal was also not ineffective.

Conclusion

We conclude that neither Redmond's trial counsel nor counsel for his direct appeal was ineffective. Accordingly, we affirm the denial of Redmond's Petition for Post-Conviction Relief as to the attempted murder conviction, but remand to the post-conviction court with instructions to order that the judgments of conviction for aggravated battery and battery be vacated.

Affirmed in part, reversed in part, and remanded with instructions.

RILEY, J., and MAY, J., concur.