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IN THE
COURT OF APPEALS OF INDIANA

KENAN M. POWELL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 45A04-0612-PC-705
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Kathleen A. Sullivan, Judge
Cause No.45G03-0409-PC-14

December 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Kenan Powell appeals the denial of his petition for post-conviction relief. On appeal, Powell raises four issues, which we restate as: 1) whether Powell waived his freestanding claim of trial error by failing to raise it on direct appeal; 2) whether Powell's Blakely claim applies; 3) whether the post-conviction court properly denied Powell relief based on his claims of ineffective assistance of trial counsel; and 4) whether the post-conviction court properly denied Powell relief based on his claim of ineffective assistance of appellate counsel. We affirm, concluding that Powell waived his freestanding claim of trial error, that Powell's Blakely claim does not apply, and that Powell did not receive ineffective assistance of trial or appellate counsel.

Facts and Procedural History

On Powell's direct appeal, this court related the following facts:

> In the early hours of May 28, 2001, James Newell, James Isaac, and Nathaniel Ross were riding in a car driven by Newell. Ross was in the front passenger seat and Isaac was in the back seat. The three were headed to Isaac's house to pick up his brother. As Newell's car approached a stop sign, they noticed a two-tone beige and brown full-size van stopped on the cross street at the stop sign. Newell waited for the van to proceed through the intersection; however, the van flashed its lights, and Newell proceeded through the intersection first. When the three reached Isaac's house, Ross got into the back seat. Just then, the van pulled up next to and within arm's reach of the driver's side of Newell's car and someone in the van began shooting rapidly at the car. Isaac saw a long barrel of a gun protruding from the van window. Newell was hit and the front and rear driver's side windows of Newell's car were shattered. Newell attempted to drive away, but he crashed the car, and the van sped away. Isaac hopped from the car and ran into his house. He began spitting up blood and noticed he had been shot in the neck. Ross was uninjured. Newell fell over in the front seat and died from bullet wounds.
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> Shortly thereafter, Powell, driving a beige van with a dark brown stripe, stopped to talk to Audubree Patterson. Herberto King was riding in the

passenger seat of Powell's van. Patterson had known King and Powell for approximately four years. Powell told Patterson that he and King had been driving around looking for a car to steal, they pulled up next to a car that someone had just exited, King fired a carbine rifle four times before Powell could fire a shot, and they drove away when King's gun jammed.

Later that afternoon, Jimmy Sharma was working as a cashier at a Shell gas station in Gary, Indiana. About 3:50 p.m., Sharma opened the door to get some fresh air when he saw two approaching black men, the taller of whom carried a long gun affixed with a magazine clip. Sharma got inside the station and attempted to close the bulletproof glass to protect himself. However, he did not get the glass shut, and the tall man, who was between six feet and six feet two inches tall and wearing a black hooded jacket, pointed the gun at him. The shorter man was between five feet five inches and five feet seven inches tall, was light-skinned, had a birthmark on his forehead, and was wearing a hooded jacket. He ordered Sharma to hand over the lottery money, and Sharma complied. The shorter man then demanded the rest of the money, and Sharma gave them the other cash drawer containing the gas money. The men took the gas cash drawer and left. Sharma pushed the alarm button. The robbery was captured on the gas station's video surveillance system.

Police who responded to the alarm at the Shell station tried to track the robbers with a police dog. The dog followed a scent to a .30 caliber carbine rifle. The dog then followed the scent to the cash drawer and to an abandoned house at 35th Place and Tennessee, where clothing was found. The dog lost the scent 125 yards later and was not able to locate the robbers.

About 4:00 that afternoon, Patterson saw Powell and King standing next to an abandoned house at 35th Place and Tennessee. Powell was wearing a black sweater with a hood. King, who is light-skinned with a birthmark on his forehead, was wearing a grey sweatshirt with a hood. Twenty minutes later, Patterson again saw Powell and King when they came to his house. Powell told Patterson that he had seen Patterson talking to a police officer earlier and asked what the officer wanted. Patterson replied the officer told him the Shell station had been robbed. King laughed, and Patterson asked if Powell and King had done something. Powell's reply was, "You'll read about it." Powell proceeded to tell Patterson that King and Powell, who held the carbine rifle, had robbed the Shell, and Powell had taken the register with them because King was taking the money out too slowly.

Ballistics tests indicated that the .30 caliber rifle found by the dog after the Shell robbery fired the bullet that killed Newell. Police also found a .32 caliber bullet imbedded in Newell's car. That . . . bullet could not have been fired from the .30 caliber rifle. At some point later, Powell told Rudolph Billups, who had known Powell and King for approximately two years, about the details of the Shell robbery. Billups and Patterson both reported Powell's

incriminating statements to the police.

Powell v. State, No. 45A03-0204-CR-121, slip op. at 2-5 (Ind. Ct. App., Aug. 19, 2003) (citation omitted), trans. denied. The State charged Powell with murder, a felony; attempted murder of Isaac, a Class A felony; attempted murder of Ross, a Class A felony; aggravated battery of Isaac, a Class B felony; and robbery, a Class B felony. The jury returned guilty verdicts on all charges. After merging the aggravated battery verdict into the attempted murder of Isaac verdict, the trial court sentenced Powell to fifty-five years for murder, thirty years for attempted murder of Isaac, twenty years for attempted murder of Ross, and twenty years for robbery. The trial court ordered consecutive sentences for murder, robbery, and attempted murder of Isaac. The trial court also ordered the sentence for attempted murder of Ross to be served concurrently with the consecutive sentences, resulting in a total executed sentence of 105 years. On direct appeal, this court affirmed Powell's convictions and sentence. Id. at 12.

Following this court's decision, Powell filed a pro se petition for post-conviction relief, which was amended twice. The post-conviction court conducted a hearing at which Powell's trial counsel, appellate counsel, and one of the investigating officers testified. The post-conviction court issued findings of facts and conclusions of law denying Powell's petition for relief. Powell now appeals.

Discussion and Decision

I. Standard of Review

To obtain relief, a petitioner in a post-conviction proceeding bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). Moreover, when the petitioner appeals from a denial of relief, the denial is considered a negative judgment and therefore the petitioner must establish "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002), cert. denied, 540 U.S. 830 (2003).

II. Trial Error

Powell argues as freestanding claims of trial error that the trial court "allowed the State to violate the separation of witness order," appellant's brief at 11, and sentenced him in violation of Blakely v. Washington, 542 U.S. 296 (2004). "In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). This rule applies even if the alleged error is fundamental. Id. Because the separation of witnesses claim was available to Powell on direct appeal, his failure to raise the claim at that time constitutes waiver.

Powell's Blakely claim was neither available to him at the time of trial nor on direct appeal because Blakely had not yet been decided. In Smylie v. State, 823 N.E.2d 679, 690-91 (Ind. 2005), cert. denied 546 U.S. 976 (2005), however, our supreme court held that Blakely applies "retroactively to all cases on direct review at the time Blakely was announced." Blakely was decided on June 24, 2004, nearly one year after this court handed down its opinion on Powell's direct appeal. Thus, Blakely does not apply to Powell's case.[1]

III. Ineffective Assistance of Counsel

To establish a violation of the right to effective assistance of counsel as guaranteed by the Sixth Amendment, the petitioner must establish both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). First, the petitioner must show counsel was deficient. Id. "Deficient" means that counsel's errors fell below an objective standard of reasonableness and were so serious that counsel was not functioning as "counsel" within the meaning of the Sixth Amendment. Id. In this regard, counsel is presumed to have "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Stevens, 770 N.E.2d at 746. Second, the petitioner must show that counsel's deficiency resulted in prejudice. Wesley, 788 N.E.2d at 1252. Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. We need not address whether counsel's performance

[1] Powell also mentions briefly that the trial court's sentencing error constitutes ineffective assistance of counsel because counsel failed to object to Powell's sentence on Blakely grounds. However, a defendant

was deficient if we can resolve a claim of ineffective assistance based on lack of prejudice. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002). The same standard of review applies to claims of ineffective assistance of trial counsel and claims of ineffective assistance of appellate counsel. Burnside v. State, 858 N.E.2d 232, 238 (Ind. Ct. App. 2006).

A. Trial Counsel

Powell argues he was denied effective assistance of trial counsel when counsel stipulated to fingerprint evidence recovered from the rifle and when counsel failed to call Powell's mother as an alibi witness. We will consider each argument in turn.

1. Fingerprint Evidence

Powell argues that counsel should have called an expert to testify regarding fingerprint evidence recovered from the rifle and that counsel's decision instead to stipulate to such evidence constitutes ineffective assistance. The State counters that counsel's performance was not deficient because it was "unquestionably a strategic decision." Appellee's Brief at 7. To prove counsel was deficient, Powell must demonstrate counsel's decision fell below an objective standard of reasonableness. Wesley, 788 N.E.2d at 1252.

During the post-conviction hearing, counsel testified that "the only reason I would have stipulated to some fingerprint evidence is if it did not implicate my client," transcript at 35, but that he did not recall what the fingerprint evidence revealed. Consistent with counsel's testimony, the record indicates the fingerprint results did not implicate Powell. See Appellant's Appendix at 47 (lab report concluding that none of the fingerprints recovered

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does not receive ineffective assistance of counsel because counsel did not raise a Blakely claim before it was

from the rifle match Powell's fingerprints). In light of this evidence, Powell has not explained why counsel's decision to stipulate to this evidence rather than elicit it from an expert during direct examination constitutes deficiency. Indeed, as the State argues, pursuing the latter course involved the risk that the expert may have conceded on cross-examination that "the lack of [Powell's] fingerprints on the gun did not mean that [Powell] never held the weapon." Appellee's Br. at 8. Instead, by stipulating to the fingerprint evidence, counsel could argue that the absence of fingerprints meant that Powell did not commit the crimes, while at the same time avoiding any damaging admissions an expert might have made. Putting the reasons why counsel may have stipulated to the fingerprint evidence to the side, the fact remains that Powell still must demonstrate that counsel's decision fell below an objective standard of reasonableness. Wesley, 788 N.E.2d at 1252. Absent any explanation from Powell as to why counsel should have called an expert instead of stipulating to the fingerprint evidence, we are not convinced he has demonstrated deficiency. Thus, because Powell cannot establish counsel was deficient, it follows that he did not receive ineffective assistance based on counsel's decision to stipulate to the fingerprint evidence.

2. Failure to Call Witness

Powell argues counsel was deficient because counsel failed to call Powell's mother as an alibi witness. Although counsel's decision "regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess," Brown v. State, 691 N.E.2d 438, 447 (Ind. 1998), the failure to call an important witness may constitute deficiency, see

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decided. See Smylie, 823 N.E.2d at 690.

Clark v. State, 561 N.E.2d 759, 763-64 (Ind. 1990).

During the post-conviction hearing, the following exchange took place between Powell and counsel regarding counsel's decision not to call Powell's mother as an alibi witness:

> Q. I want to know was it a strategy or a reason you didn't call her?
> A. As I do recall from my notes, your mother was supposed to establish your – that you were at her house on [May 28, 2001,] during the afternoon, and she would not have provided you a complete alibi for the charges for which we were at the trial.
> Q. Even though around the time she would have said I was at her house that's when the crimes happened?
> A. That's not right. You know that's not right.
> Q. Not for the murder, the robbery?
> A. You know that's not right too.
> Q. I was there. I seen them taking the pictures down the street.

Tr. 31. Powell has not presented evidence to refute this testimony, nor has he presented evidence indicating what his mother's testimony would have been. On this latter point, Powell's representation that "she would have said I was at her house . . . when the crimes happened" is not evidence. Id. Absent such evidence, we are not convinced Powell has established that counsel was deficient. Cf. Clark, 561 N.E.2d at 763-64 (concluding that where the defendant was charged with operating a vehicle while intoxicated and there was a conflict between the defendant's testimony and the arresting officer's as to whether the defendant was driving the vehicle, counsel was deficient for failing to call a witness who would have testified that she was driving the vehicle). Thus, it follows that Powell did not receive ineffective assistance based on counsel's failure to call Powell's mother as a witness.

B. Appellate Counsel

Powell argues he was denied effective assistance of appellate counsel because, on direct appeal, appellate counsel failed to raise an ineffective assistance of trial counsel claim regarding counsel's decision to stipulate to the fingerprint evidence. To establish that appellate counsel was deficient, Powell must show 1) that the unraised issue was significant and obvious from the face of the record and 2) that the unraised issue was "clearly stronger" than the raised issues. Bieghler v. State 690 N.E.2d 188, 194 (Ind. 1997) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)), cert. denied, 525 U.S. 1021 (1998). However, because we have determined that Powell's trial counsel was not deficient for stipulating to the fingerprint evidence, see supra, Part III.A.I., we conclude that Powell has also not established that his appellate counsel was deficient. Thus, it follows that Powell did not receive ineffective assistance of appellate counsel with respect to this issue.

Conclusion

Powell waived his freestanding claim of trial error concerning separation of witnesses because he did not raise it on direct appeal and Powell's Blakely claim does not apply. Moreover, Powell did not receive ineffective assistance of trial or appellate counsel.

Affirmed.

KIRSCH, J., and BARNES, J., concur.