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IN THE
COURT OF APPEALS OF INDIANA

JEORGE CELAYOS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A03-0511-CR-545
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Steven E. King, Judge
Cause No. 46D02-0208-MR-30

December 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Jeorge Celayos ("Celayos") appeals his conviction for Murder, a felony,[1] and his sixty-year sentence. We affirm.

Issues

Celayos presents three issues for review:

I. Whether the trial court abused its discretion by denying Celayos' request for funds to employ a psychiatrist or psychologist to conduct an independent evaluation subsequent to the appointment of two court-appointed psychologists and one court-appointed psychiatrist;

II. Whether Celayos was denied the effective assistance of trial counsel; and

III. Whether the sixty-year sentence was imposed upon Celayos in contravention of Blakely v. Washington, 542 U.S. 296 (2004), reh'g denied.

Facts and Procedural History

During 2001, Celayos was incarcerated in the Westville Correctional Facility. In late summer, Celayos was involved in a physical altercation with another inmate, Raul Benevides ("Benevides"). The incident ended with Celayos threatening to kill Benevides.

On August 10, 2001, Benevides was transferred to Celayos' dormitory. Celayos was in the day room when Benevides approached the dormitory, carrying his property box. Celayos stated to another inmate, "I hope he's coming up here," and began to "holler at" Benevides in Spanish. (Tr. 465.) When correctional officer Pammy Gilmore opened the door to the day room and Benevides stepped inside, he and Celayos immediately began a fistfight.

Celayos pulled out a knife and stabbed Benevides repeatedly. When Benevides fell to the floor, Celayos kicked him and stomped on his face. Leaving Benevides bleeding on the floor, Celayos returned briefly to his dormitory room, and then went back to the day room and sat in front of the television. Medical personnel arrived to assist Benevides, but were unable to resuscitate him. Benevides died as a result of a stab wound to his heart. A knife with Benevides' blood on it was later recovered from Celayos' dormitory room.

On August 1, 2002, the State charged Celayos with Murder and Possession of a Deadly Weapon by an Inmate.[2] At the conclusion of a jury trial conducted on October 17 through October 20, 2005, Celayos was found guilty as charged. Because of double jeopardy concerns, the trial court entered a judgment of conviction only upon the murder count. On November 7, 2005, the trial court sentenced Celayos to sixty years imprisonment. He now appeals.

Discussion and Decision

I. Denial of Motion for Funds for Additional Psychiatrist

Celayos contends that the trial court abused its discretion by denying him funds to employ an independent psychiatrist or psychologist. Prior to trial, Celayos filed a notice of intention to interpose an insanity defense and also filed a "Motion for Psychiatric Examination to Determine Competence to Stand Trial." (Amended App. 398.) Pursuant to Indiana Code Section 35-36-2-1(b), the trial court then appointed two psychologists and one

[1] Ind. Code § 35-42-1-1.
[2] Ind. Code § 35-44-3-9.5.

psychiatrist to examine Celayos.[3] They opined that Celayos was competent to stand trial and was sane at the time of the offense.

Celayos subsequently filed a "Motion for Funds to Employ Independent Psychiatrist or Psychologist." (App. 12.) Therein, Celayos argued that the court's appointees had "a financial incentive to find Defendant sane at the time of the incident [so] that they may be appointed by the Court in these matters in the future." (App. 12.) At the hearing on his motion, Celayos' counsel also argued that the appointees "did not pursue certain things in their reports" and that an independent mental health professional would "help clarify the information" and assist in trial preparation. (Tr. 18.) The trial court denied Celayos funding for an additional psychiatrist or psychologist. Ultimately, Celayos' counsel elected not to pursue an insanity defense.

In Watson v. State, 658 N.E.2d 579 (Ind. 1995), the Indiana Supreme Court acknowledged the breadth of a trial court's discretion in considering additional appointments after statutory compliance has been achieved. The trial court had appointed two mental health professionals to examine an arguably insane defendant, but refused to provide further access to psychological testing. See id. On appeal, the Court determined that the denial of supplemental testing at state expense was not an abuse of discretion, reasoning:

> The defendant argues that the trial court's denial of his motion for further testing violated the rule that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the [United States] Constitution requires that a State provide

[3] Indiana Code Section 35-36-2-2(b) provides in relevant part: "When notice of an insanity defense is filed, the court shall appoint two (2) or three (3) competent disinterested psychiatrists, psychologists endorsed by the state psychology board as health service providers in psychology, or physicians, at least one (1) of whom must be a psychiatrist, to examine the defendant and to testify at the trial."

> access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." Ake v. Oklahoma, (1985), 470 U.S. 68, 74, 105 S.Ct. 1087, 1091-92, 84 L.Ed.2d 53, 60. While it may be considered an open question whether Ake applies to non-capital cases, we nonetheless conclude that the Ake requirement was satisfied here. Upon the filing of the defendant's Notice of Intent to Interpose Insanity Defense, the trial court, as required by statute, Ind. Code § 35-36-2-2, appointed two psychiatrists, both of whom were available to assist the defense on this issue. Ake does not address the extent to which trial courts must provide supplemental testing, and we decline to extend it to the circumstances of the present case.
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> Acknowledging that the appointment of an expert at state expense is a matter within the discretion of the trial court, see Schultz v. State (1986), 497 N.E.2d 531, 533, the defendant argues that the trial court's denial of the requested additional assistance constituted an abuse of discretion. Considering the substance of the psychiatrists' reports and testimony and the absence of demonstrated medical necessity for the requested testing, we decline to conclude that the trial court abused its discretion.

658 N.E.2d at 581-82. Here, as in Watson, the trial court complied with the statutory requirements invoked by a defendant's notice of intention to present an insanity defense. See Indiana Code Section 35-36-2-1(b). Moreover, there is no demonstrated medical necessity for additional testing. Rather, Celayos has postulated, without evidentiary support, that court-appointed professionals have a financial incentive to find a defendant to be sane. Such speculation does not establish that the trial court abused its discretion by refusing to fund additional testing.

II. Ineffectiveness of Counsel

Two court-appointed attorneys represented Celayos at his trial. Celayos alleges that they were ineffective because: (1) they failed to adequately consult with him, (2) they failed

to challenge an untruthful witness, and (3) they failed to lodge a Blakely objection when the sixty-year sentence was imposed.

Effectiveness of counsel is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in Strickland. Id. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. Dobbins v. State, 721 N.E.2d 867, 873 (Ind. 1999) (citing Strickland, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687; see also Douglas v. State, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant 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 is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see also Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the Strickland test are separate and independent inquiries. Strickland, 466 U.S. at 697. 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." Id.

Moreover, under the Strickland test, counsel's performance is presumed effective. Douglas, 663 N.E.2d at 1154. A claimant must present convincing evidence to overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690; Broome v. State, 694 N.E.2d 280, 281 (Ind. 1998).

The thrust of Celayos' primary argument is as follows. His attorneys would have ferreted out the truth of how Benevides died had they engaged in sufficient consultation with Celayos. Armed with this truth, they could have adequately challenged the eyewitnesses who testified falsely against Celayos. Even assuming that Celayos' attorneys did not engage in lengthy consultation with him, he has not demonstrated resultant prejudice. Celayos testified, and apprised the jury of his version of the events at issue, that is, an unknown assailant stabbed Benevides in his side. Although the jury ultimately rejected Celayos' testimony, this does not render his attorneys ineffective under the Strickland standard.

Furthermore, Celayos has failed to demonstrate prejudice resulting from his attorneys' failure to lodge a Blakely objection at the sentencing hearing. In Kincaid v. State, 837 N.E.2d 1008 (Ind. 2005), the Indiana Supreme Court expressly rejected the State's contention that a defendant must object at the sentencing hearing to preserve a Blakely claim on appeal. Because the failure to object did not cause the forfeiture of Celayos' Blakely claim, he suffered no prejudice, and we next address his allegation of Blakely error.

III. Alleged Blakely Violation

At the time of Celayos' offense, Indiana Code Section 35-50-2-3 provided that a person convicted of murder could be imprisoned for a fixed term of fifty-five years, with not more than ten years added for aggravating circumstances or not more than ten years subtracted for mitigating circumstances.[4] In imposing a sentence of sixty years, the trial court found no mitigators and two aggravators: Celayos' criminal history and his

"apparent" violent propensities. (App. 919.) From the trial court's comments at the sentencing hearing, we can discern that he based the finding of violent propensities upon Celayos' possession of a weapon during his incarceration.

Celayos contends that his sentence was imposed in violation of his Sixth Amendment right to have a jury determine whether or not there existed aggravating circumstances to support his sentence enhancement, according to Blakely. The Blakely court applied the rule set forth in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The Blakely court defined the relevant statutory maximum for Apprendi purposes as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

In Smylie v. State, 823 N.E.2d 679, 685 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005), our Supreme Court applied Blakely to invalidate portions of Indiana's sentencing scheme that allowed a trial court, without the aid of a jury or a waiver by the defendant, to enhance a sentence where certain factors were present. The Court has subsequently clarified that a sentence may be enhanced upon facts that "are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived Apprendi rights and stipulated to certain facts or consented to judicial factfinding." Trusley v. State,

[4] Indiana Code Section 35-50-2-3 now provides that one convicted of a murder committed on or after April 25, 2005 shall be imprisoned for a fixed term of between forty-five and sixty-five years, with the advisory

829 N.E.2d 923, 925 (Ind. 2005).

Here, Celayos had a prior conviction for battery. Too, the instant jury determined beyond a reasonable doubt that Celayos possessed a weapon while he was incarcerated. This was the predicate fact upon which the second aggravator – violent propensities – rested. Because a jury found the facts that the trial court used to enhance Celayos' sentence, there is no direct Blakely violation.

Nevertheless, a material element of the offense of which one is convicted may not be relied upon as an aggravating circumstance. See Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988) (holding that, while a sentencing court may appropriately consider the particularized circumstances of the criminal act as aggravating circumstances, it may not rely on a fact that comprises a material element of the offense as an aggravator). Here, the State charged that Celayos killed Benevides by stabbing him. Thus, to prove that Celayos committed murder, as charged, the State was required to present evidence that Celayos possessed a weapon with which to stab Benevides. This same possession was not a separate valid aggravator.

When one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed. Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). Where the Court finds an irregularity in a trial court's sentencing decision, we have the option to remand to the trial court for a clarification or new sentencing determination, to

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sentence being fifty-five years.

affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Id.

Here, the valid remaining aggravator is Celayos' prior conviction for battery. In Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005), the Indiana Supreme Court confronted the issue of whether a defendant's criminal record, standing alone, is a sufficient aggravator to support any enhancement above the presumptive term. In addressing this issue, the Court recognized that "the question of whether the sentence should be enhanced and to what extent turns on the weight of an individual's criminal history." Id. Such "weight is measured by the number of prior convictions and their seriousness, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." Id. While acknowledging that, in many instances, "a single aggravator is sufficient to support an enhanced sentence," the Morgan Court cautioned sentencing and appellate judges to think about the appropriate weight to give a history of prior convictions. Id.

Here, Celayos' prior conviction was similar to the instant conviction, in that it involved violence. Too, it was in close proximity to the instant offense. Celayos was serving his prison sentence for the prior offense when he committed the instant offense. The trial court properly exercised its sentencing discretion when it imposed upon Celayos a five-year enhancement beyond the presumptive sentence.

Conclusion

In light of the foregoing, Celayos has demonstrated no abuse of discretion in the trial

court's refusal to appoint an additional mental health professional, or in the trial court's sentencing order. Nor has Celayos established that he was denied the effective assistance of trial counsel.

Affirmed.

VAIDIK, J., and BARNES, J., concur.