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IN THE COURT OF APPEALS OF INDIANA

CHRISTOPHER L. ZELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0701-PC-53
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0304-FC-157

November 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Christopher Zell appeals the denial of his petition for post-conviction relief ("PCR petition"), which challenged his convictions for Class D felony theft, two counts of Class C felony forgery, and an habitual offender enhancement. We affirm.

Issue

Zell raises multiple issues, which we consolidate and restate as whether the post-conviction court properly concluded that Zell received effective assistance of trial counsel.

Facts

On September 12, 2002, Zell used a friend's credit card to make two purchases totaling approximately $300 at a Wal-Mart store in Anderson. The friend did not give Zell permission to use the card. The State charged Zell with Class D felony theft and two counts of Class C felony forgery on April 1, 2003. On July 2, 2003, the State amended the charges to include an habitual offender charge under Indiana Code Section 35-50-2-8.

Zell did not attend the trial held on April 22, 2004. A jury found Zell guilty of all counts and found that he was an habitual offender. On June 1, 2004, the trial court sentenced Zell to three years for the Class D felony theft and eight years for each count of Class C felony forgery, to run concurrently. The trial court enhanced one of the felony sentences by an additional eight years based on Zell's habitual offender status, for an aggregate sentence of sixteen years.

Zell appealed to this court contending that his sentence was inappropriate, the trial court erred in allowing the habitual offender charge, and the trial court erred by allowing evidence of uncharged misconduct. We affirmed Zell's conviction. We did not reach the habitual offender charging issue, instead determining the issue was waived because Zell did not object to the habitual offender charge prior to or during the trial. Zell v. State, No. 48A02-0406-CR-538 (Ind. Ct. App. March 17, 2005). Zell filed a PCR petition on July 26, 2006. The trial court denied his petition on December 14, 2006, and this appeal followed.

Analysis

A petitioner appeals a negative judgment when appealing the denial of post-conviction relief. Cornelious v. State, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), trans. denied. We will not reverse such a judgment "unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court." Id. Where, as here, the post-conviction court enters findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule (1)(6), we will reverse only upon a showing of clear error, which only occurs if we are left with a definite and firm conviction that a mistake has been made. Hall v. State, 849 N.E.2d 466, 469 (Ind. 2006).

Zell contends his trial counsel was ineffective in multiple instances. Claims of ineffective assistance of counsel are reviewed under the two-part test set out by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). A defendant must

demonstrate not only that counsel performed below an objective standard of reasonableness, but also that the deficient performance resulted in prejudice. Id.

We will presume that counsel provided adequate assistance and will defer to his or her strategic decisions. Terry v. State, 857 N.E.2d 396, 403 (Ind. Ct. App. 2006), trans. denied. Given this presumption, a defendant must present "strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense." Oliver v. State, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), trans. denied. Regarding the prejudice element of the test, the defendant must show "a reasonable probability (i.e. a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." Reed v. State, 866 N.E.2d 767, 769 (Ind. 2007).

Zell contends that his trial counsel was biased and the bias was demonstrated by various comments made during the trial. To support this proposition, Zell cites a page of the trial transcript that includes an exchange between his attorney, the prosecutor, and the trial court. Zell does not provide the entire transcript of the trial court proceeding. Despite Zell's contentions that his attorney is discussing trial exhibit 8, the excerpt included in the appendix does not reveal what exhibit the attorneys are discussing. Only one and two-page excerpts of the trial transcript are included, and we cannot ascertain what transpired immediately prior to and immediately after the statement. From the excerpt available, it seems counsel for Zell pointed out that date was missing from one of the charging documents. The trial court noted that more specificity was needed and moved on. Nothing else in the record indicates what happened. This comment was not a

deficient performance that resulted in prejudice to Zell. We cannot ascertain what result, if any, this comment had on the proceeding. Moreover, if the piece of evidence was indeed missing a pivotal date entry, then drawing such omission to the court's attention can in no way be construed as a demonstration of bias. Zell has not shown that but for this comment, the result of the proceeding would have been different.

Zell points to another comment made by his counsel that he contends indicates bias and amounts to a prejudicial remark. During a discussion of Zell's whereabouts, trial counsel for Zell stated, "Knowing Chris, he could be in any one of the 51 county jails in the state of Indiana." App. p. 58. The trial court responded, "Well, and I'm not sure, even if that were true, it's his obligation to let [trial counsel] know where he is and that he has a trial coming up." Id. Taking this comment in context, it is obvious no prejudice resulted to Zell and the trial court acknowledged that the scenario proposed by Zell's trial counsel was likely not true and would not affect the proceeding.[1] Zell has not demonstrated that this remark altered the outcome of the proceeding and resulted in prejudice.

Zell next contends that his trial counsel repeatedly failed to object regarding the habitual offender charge. First, Zell claims that trial counsel failed to object to the

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[1] Regarding this specific exchange, the State contends that Zell's history of incarceration and admission of forgetting about the trial due to drug abuse corroborated the comments made by his trial counsel. This evidence, however, is not in the post-conviction record before this court and we will not consider testimony that is not part of this record. The entire transcript of the criminal trial was not admitted before the post-conviction court and is not part of the record before this court in this appeal. We consider only those matters contained in the record below. Hoosier Outdoor Advertising Corp. v. RBL Mgmt., Inc., 844 N.E.2d 157, 161 (Ind. Ct. App. 2006), trans. denied. The supplemental appendix from the direct appeal cited by the State is also not part of the record before this court in this appeal.

admission of an exhibit. To support this contention, Zell maintains that the exhibit was improperly certified and did not provide adequate evidence of sequential dates that prove he was an habitual offender. Zell also argues that his trial counsel failed to object to the State's late filing of the habitual offender enhancement.

In order to support a claim of ineffective assistance of counsel based on the failure to object, a defendant must demonstrate that a proper objection would have to have been sustained by the trial court. Lambert v. State, 743 N.E.2d 719, 734 (Ind. 2001), cert. denied, 534 U.S. 1136, 122 S. Ct. 1082 (2002). A defendant also needs to prove that trial counsel's failure to object was unreasonable and he or she was prejudiced by the failure. Id.

Zell has not demonstrated that a proper objection should have been made or would have been sustained if made. Zell has not shown that the allegedly objectionable exhibit was indeed improperly certified or prejudicial. He contends that because the State did not file the habitual offender charge within ten days of the omnibus date as required by Indiana Code Section 35-34-1-5(e) that the charge must fail. Zell's position ignores the remaining language in that statutory section that allows trial courts to permit late filings upon a showing of good cause. The facts as recited by this court on direct appeal indicate that the habitual offender charge was added after plea negotiations failed. The current record is not clear in disclosing the details regarding this delay, but Zell failed to demonstrate that the State did not have good cause or that an objection necessarily would have been sustained. The failures to object cited by Zell do not amount to ineffective assistance of counsel.

Finally, Zell contends that his trial counsel's performance included so many errors during the habitual offender phase of his trial that the representation amounted to a cumulative ineffective assistance of counsel. We may look to whether counsel's performance, as a whole, fell below an objective standard of reasonableness. Slusher v. State, 823 N.E.2d 1219, 1221 (Ind. Ct. App. 2005). Zell has only pinpointed various alleged instances of ineffective assistance and has not demonstrated how these instances, as a whole, resulted in prejudice to him or fell below an objective standard of reasonableness. He has not overcome the presumption that he received adequate assistance of counsel.

Conclusion

Zell did not meet his burden of establishing that he received ineffective assistance of trial counsel. The post-conviction court properly denied his PCR petition. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.