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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN KILPATRICK,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee.

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No. 49A02-0601-PC-20

APPEAL FROM THE MARION SUPERIORCOURT
CRIMINAL DIVISION 4
The Honorable Patricia J. Gifford, Judge
The Honorable Cheryl S. Boone, Master Commissioner
Cause No. 49G04-9901-PC-9940

December 4, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

In this pro se appeal, Appellant, Steven Kilpatrick, challenges the post-conviction court's denial of his petition for post-conviction relief. Upon appeal, Kilpatrick makes the following claims: (1) that the evidence introduced to prove his conviction at trial for criminal gang activity, which was later determined upon appeal to be insufficient to establish such a conviction, nevertheless prejudiced the rest of his trial such that he should receive a new trial; (2) that the evidence was insufficient to support his murder conviction in light of "clear contradictory verdict forms" and that the trial court's merger of aggravated battery with murder was not supported by the evidence; (3) that there were "insufficient" jury instructions on attempted robbery and insufficient evidence to support his conviction for said offense; and (4) that he received ineffective assistance of appellate counsel for failing to raise the above claims.

We affirm.

On January 14, 1999, a group of men attacked and beat Edward Crafter, resulting in his death. Kilpatrick v. State, 746 N.E.2d 52, 55 (Ind. 2001). Following a jury trial, Kilpatrick was convicted on September 30, 1999 of murder, attempted robbery as a Class A felony, aggravated battery as a Class B felony, and criminal gang activity as a Class D felony in connection with the incident. Id. He directly appealed his convictions on grounds challenging (1) the admission into evidence of certain exhibits; (2) the propriety of certain jury instructions; (3) his right to confront witnesses; (4) the application of double jeopardy principles to his convictions; (5) the sufficiency of the evidence; and (6) his sentence. Id. On April 11, 2001, our Supreme Court reversed Kilpatrick's conviction

for criminal gang activity on sufficiency-of-the-evidence grounds but affirmed on all other grounds. Id.

On October 16, 2002, Kilpatrick filed a petition for post-conviction relief. On November 3, 2004, the post-conviction court held a hearing on the petition. On November 28, 2005, the court entered findings of fact and conclusions of law and denied Kilpatrick his requested post-conviction relief. Kilpatrick filed his notice of appeal on December 9, 2005.

In turning to Kilpatrick's claims before us, we are mindful that the petitioner bears the burden to establish his grounds for post-conviction relief by a preponderance of the evidence. Godby v. State, 809 N.E.2d 480, 481-82 (Ind. Ct. App. 2004) (citing Ind. Post-Conviction Rule 1(5)), trans. denied. To the extent the post-conviction court denied relief in the case at hand, Kilpatrick is appealing from a negative judgment and faces the rigorous burden of showing that the evidence as a whole "leads unerringly and unmistakably to a conclusion opposite to that reached by the [] court." Id. at 482 (quoting Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999) (internal quotations omitted)). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. Id.

With respect to the first issue raised on appeal, that the evidence of the illegal gang activity prejudiced his trial upon the other charges, the post-conviction court noted that this issue was waived because it was properly an issue for direct appeal rather than post-conviction relief. The court further found that Kilpatrick had failed to meet his burden of

proof on the issue because he did not present any evidence or “cogent” argument at the hearing. Appendix at 59. The court further found the allegation to be without merit because there had been no showing of prejudice.

We agree that Kilpatrick’s first challenge, which is to the possible prejudice caused by certain evidence introduced at trial and the adequacy of other evidence to convict him, was not properly before the post-conviction court. Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001). If an issue was known and available, but not raised on direct appeal, it is waived. Id. If it was raised on appeal, but decided adversely, it is res judicata. Id.

Upon direct appeal, Kilpatrick challenged the sufficiency of the evidence to convict him for murder and attempted robbery on the basis that one witness was not believable. Our Supreme Court rejected this assertion.¹ Kilpatrick, 746 N.E.2d at 60-61. Insofar as Kilpatrick’s instant claim mirrors this claim from his direct appeal, the Supreme Court’s finding of sufficient evidence is res judicata, and we affirm on that ground. To the extent Kilpatrick’s instant challenge to the sufficiency of the evidence is based upon a different claim, we deem it waived because it was available on direct appeal, and we affirm on that ground. We further note, as did the post-conviction court, that there was no evidence introduced at the hearing tending to demonstrate Kilpatrick’s

¹ Upon direct appeal, Kilpatrick did not challenge the sufficiency of the evidence to convict him for aggravated battery. Kilpatrick, 746 N.E.2d at 60.

claim of prejudice due to the gang-related evidence. We therefore will not disturb the post-conviction court's ruling denying relief on this challenge.

Kilpatrick's second challenge, that the evidence was insufficient to support his murder conviction due to "clear contradictory verdict forms," and that the trial court's merger of aggravated battery with murder was not supported by the evidence, was also not properly before the court on post-conviction review.² These claims challenging evidence which Kilpatrick admitted was introduced at trial would have been available on direct appeal, and they have therefore been waived for post-conviction review. Timberlake, 753 N.E.2d at 597. Furthermore, Kilpatrick presented no facts or cognizable argument, either before the post-conviction court or upon appeal, in furtherance of his petition for relief regarding this specific claim. See Ind. Appellate Rule 46(A)(8)(a). We deem it waived and affirm the post-conviction court's denial of relief on this point.

Kilpatrick's third challenge is to the jury instructions and sufficiency of the evidence pertaining to his conviction for attempted robbery. Again, Kilpatrick presented no facts or cognizable reasoning at the hearing or upon appeal tending to support his claim on this point. See App. R. 46(A)(8)(a). Further, as stated earlier, challenges regarding the evidence introduced at trial and jury instructions submitted following trial were available on direct appeal, so they are waived on post-conviction review. See Timberlake, 753 N.E. 2d at 597. Moreover, our Supreme Court already determined in

² In his brief, Kilpatrick cites to, but does not apply, Evolga v. State, 722 N.E.2d 370, 372-73 (Ind. Ct. App. 2000), which refers to the exception to the waiver rule in cases of fundamental error. ("[E]rrors available but not raised on direct appeal are considered waived for purposes of post-conviction relief unless the error is such that it rises to the level of fundamental error.") We do not consider this exception because Kilpatrick presents no cognizable argument of fundamental error in his case. See Ind. Appellate Rule 46(A)(8)(a).

Kilpatrick's direct appeal that the evidence was sufficient to support the attempted robbery conviction. Kilpatrick, 746 N.E.2d at 60-61. Regarding Kilpatrick's third challenge, therefore, we affirm the post-conviction court's denial of his petition for relief.

Kilpatrick's final challenge upon appeal, to the effectiveness of his appellate counsel,³ is based upon several alleged failures by counsel in her representation of Kilpatrick. To prevail upon a claim of ineffective assistance of counsel, Kilpatrick must present strong and convincing evidence to overcome the presumption that counsel's representation was appropriate. Wieland v. State, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), trans. denied. In assessing such claims, we follow the two-pronged test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984). Id. A defendant claiming a violation of the right to effective assistance of counsel must first show that counsel's performance was deficient. Id. A defendant must also show that counsel's deficient performance prejudiced his case. Id. In order to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. This same standard is applicable to claims of ineffective assistance of appellate counsel. Id.

Kilpatrick has made no showing and presented no cognizable argument, either before the post-conviction court or upon appeal, as to how representation by his appellate counsel was deficient or how the result of his proceedings would have been different.

³ As stated in Kilpatrick, 746 N.E.2d at 55, Kilpatrick's appellate counsel was Sarah L. Nagy, Indianapolis. Yet in his challenge to the effectiveness of his appellate counsel, Kilpatrick names Ann Sutton.

We therefore affirm the post-conviction court's denial of his claim for relief on these grounds.

Having reviewed Kilpatrick's claims, we determine they are either waived or without merit, and we find no error in the post-conviction court's denial of his petition for post-conviction relief.

The judgment of the post-conviction court is affirmed.

ROBB, J., and BARNES, J., concur.