

Case Summary

Lonnie Weaver appeals from the denial of his petition for postconviction relief that was filed under the Davis/Hatton procedure,¹ challenging his convictions for Burglary, a Class B felony² and Carrying a Handgun without a License, as a Class C felony.³ We affirm.

Issues

Weaver presents a single issue on direct appeal: whether the trial court improperly considered evidence outside the record.

He presents a single issue challenging the denial of postconviction relief: whether he was denied the effective assistance of trial counsel.

Facts and Procedural History

On February 24, 2004, Ruth Armstrong Reily (“Reily”) returned to her Indianapolis home at approximately 5:45 p.m. As she opened the side door, Reily heard a thump. Assuming that her dog was running loose in the house, Reily proceeded inside. When she entered the kitchen, Reily saw a man struggling to get out of her kitchen window, with his body half in and half out, and his face up. Reily screamed and the intruder looked at her for

¹ The procedure “involves a termination or suspension of a direct appeal already initiated, upon appellate counsel’s motion for remand or stay, to allow a postconviction relief petition to be pursued in the trial court.” State v. Lopez, 676 N.E.2d 1063, 1069 (Ind. Ct. App. 1997), trans. denied (citing Davis v. State, 267 Ind. 152, 368 N.E.2d 1149 (1977), and Hatton v. State, 626 N.E.2d 442 (Ind.1993)). Once the petition for postconviction relief is denied after a hearing, and the direct appeal is reinstated, the direct appeal and the appeal of the denial of postconviction relief are consolidated. Edmond v. State, 790 N.E.2d 141, 144 (Ind. Ct. App. 2003), trans. denied (citing Powell v. State, 714 N.E.2d 624, 626 (Ind.1999)).

² Ind. Code § 35-43-2-1.

³ Ind. Code § 35-47-2-1. The offense of Carrying a Handgun Without a License was elevated to a felony because Weaver had been convicted of a felony within the preceding fifteen years, i.e., Residential Entry.

about twenty seconds. He was able to free himself from the window and run across the back yard.

Reily called 9-1-1 on her cellular phone, and gave chase to the intruder. She tried to “keep him in sight until the police could get there.” Tr. 43. After every few steps, the man would look back at her. Eventually, the man got further ahead of Reily, turned a corner, and disappeared.

Reily described the man to investigating officers as “a white male, very skinny . . . a skinny crackhead looking dude [with] facial hair, like dirty blond hair and facial hair, like a goatee.” (Tr. 47.) When presented with a photographic array, Reily identified Weaver as the burglar. Weaver was arrested and charged with Burglary, Carrying a Handgun without a License, and Theft, a Class D felony.⁴

On November 17, 2004, at the conclusion of a bench trial, Weaver was found guilty of Burglary and Carrying a Handgun without a License.⁵ On December 15, 2004, the trial court sentenced Weaver to terms of ten years imprisonment and two years imprisonment, to be served concurrently.

Weaver filed his Notice of Appeal on January 11, 2005. On June 22, 2005, pursuant to a Davis/Hatton proceeding, this Court ordered Weaver’s appeal dismissed without prejudice and remanded to the trial court for further proceedings. On October 18, 2005, Weaver filed his petition for post conviction relief. A hearing was conducted on December 21, 2005. On February 23, 2006, the postconviction court entered Findings of Fact and

⁴ Ind. Code § 35-43-4-2.

Conclusions of Law, denying Weaver relief. On March 20, 2006, the postconviction court granted Weaver's motion to amend the pleadings to conform to the evidence. This appeal ensued.

I. Consideration of Nicole Masterson Affidavit

Weaver contends that the trial court committed fundamental error by making a determination of credibility based in part upon an affidavit executed by his then-girlfriend Nicole Masterson ("Masterson"). Prior to trial, on July 27, 2004, Weaver filed a Notice of Alibi, averring that Masterson accompanied him during the entire day of February 24, 2004. Attached to the Notice of Alibi was Masterson's Affidavit, wherein she swore:

[O]n February 24, 2004, the Defendant, Lonnie Weaver and I were together for the entire day. At the time of the alleged theft Mr. Weaver and myself were together at the U-Haul self storage and moved personal items into the storage unit after executing documents for the contract. We were there from approximately 3:15 p.m. to 5:00 p.m. We arrived at the Texas Roadhouse at approximately 5:15 p.m. We were there approximately one (1) hour. We then went to my sister's house, Melinda Gray, and spent the entire evening there.

(App. 64.) After finding Weaver guilty of Burglary, the trial court expounded upon its deliberative process:

I find it interesting that I asked Mr. Weaver how long they had been at the Texas Roadhouse and he said an hour and forty-five minutes at least. Looking at my file which I can take judicial notice of, I note that Ms. Masterson filed an affidavit with this Court that indicated that they were there for approximately an hour, but that's not – it's those kind of little inconsistencies, as well as relying on the prior convictions of Mr. Weaver and judging his credibility but its – when it comes – you're right, Mr. Dein, it does come down to credibility. And looking at my notes I put at the end at the last time, a note to the Court, that victim, Ruth Reily was an excellent witness, very positive in her identification and I found her to be very, very credible. And that's why I'm finding the Defendant guilty of this.

⁵ The trial court did not enter a judgment of conviction upon the Theft count.

(Tr. 150.) Weaver describes the foregoing as “a breakdown in the adversarial process that denied [him] a fair trial.” Appellant’s Br. at 17. The State responds that a trial court may take judicial notice of the contents of pleadings and filings in the case that is being tried. We agree with the State.

In general, a trial court may take judicial notice of proceedings that have taken place in that court, and in that cause of action. Vance v. State, 640 N.E.2d 51 (Ind. 1994). See Sanders v. State, 782 N.E.2d 1036 (Ind. Ct. App. 2003) (holding that a trial court properly considered the existence of a letter in its file in making a determination of credibility, when the information met the requirements of Indiana Evidence Rule 201(a)). Here, as in Sanders, the trial court judicially noticed the making of a statement and did not purport to conclusively establish by judicial notice the truth of the underlying statement. We observe, moreover, that Weaver submitted the affidavit in question for the precise purpose of the trial court’s consideration. He has failed to demonstrate fundamental error, that is, that he was denied a fair trial. See Goodwin v. State, 783 N.E.2d 686, 687 (Ind. 2003) (describing fundamental error as “a blatant violation of basic principles that denies a defendant fundamental due process”).

II. Alleged Ineffectiveness of Trial Counsel

A. Standard of Review – Post-Conviction Relief

Postconviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000), cert. denied, 534 U.S. 1164 (2002). A petitioner who has been denied post-conviction

relief faces a rigorous standard of review. Benefiel v. State, 716 N.E.2d 906, 911-12 (Ind. 1999), cert. denied, 531 U.S. 830 (2000). To prevail on appeal, the petitioner must demonstrate that the evidence as a whole “leads unerringly and unmistakably to a decision opposite that reached by the trial court.” Prowell v. State, 741 N.E.2d 704, 708 (Ind. 2001). Stated differently, we will disturb a post-conviction court’s decision only where the evidence is uncontradicted and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. Miller v. State, 702 N.E.2d 1053, 1058 (Ind. 1998), cert. denied, 528 U.S. 1083 (2000). Upon reviewing a petition for post-conviction relief, we may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court, i.e., the sole judge of the evidence and the credibility of the witnesses. Blunt-Keene v. State, 708 N.E.2d 17, 19 (Ind. Ct. App. 1999).

B. Standard of Review – Effectiveness of Counsel

Weaver claims he was denied the effective assistance of trial counsel. 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 petitioner 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).

C. Analysis

Weaver complains that his trial counsel's performance was deficient in “four critical areas”: (1) failure to use “an abundance of evidence distinguishing Weaver from the suspect”; (2) failure to present “evidence of impossibility”; (3) failure to corroborate alibi testimony with documentary evidence; and (4) failure to reasonably investigate and prepare. Appellant's Br. at 15. In particular, Weaver claims that his counsel could have established impossibility and misidentification by submitting into evidence a health screening form indicating that his March 2004 weight (at six feet tall) was 187 pounds, together with exact measurements of Reily's kitchen window. Too, he faults counsel for failing to submit into evidence a stamped receipt from the U-Haul self-storage facility in corroboration of

Masterson's alibi testimony.

Trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). Bald assertions of counsel's omissions or mistakes are inadequate to support a post-conviction claim of ineffectiveness of counsel. See Tapia v. State, 753 N.E.2d 581, 587 (Ind. 2001).

At trial, Weaver's counsel pursued the defenses of mistaken identity. To this end, counsel cross-examined Reily at length about her recollection of the intruder's particular features. He garnered Reily's admission that Weaver appeared in the courtroom to be heavier than the intruder as she had initially described him. He also drew attention to Reily's admission that the window and windowsill were very small. Reily nevertheless steadfastly maintained that Weaver was the man in her kitchen. During Weaver's testimony, counsel asked Weaver what he weighed at the time of his arrest, and Weaver responded "a hundred and ninety pounds." (Tr. 118.)⁶

Counsel also presented an alibi defense. He called Masterson as a witness and elicited her account of the events of February 24, 2004. Masterson recalled that she and Weaver were together in the afternoon and evening. According to her recollection, she and Weaver went to a U-Haul Storage building on Pendleton Pike, then to dinner at a Texas Roadhouse on Shadeland Avenue, and finally to the home of Masterson's sister to stay overnight. Counsel elicited consistent testimony from Weaver. Also, Jennifer Smith, a waitress at the

Texas Roadhouse on Shadeland Avenue in Indianapolis, testified that Weaver “looked familiar.” (Tr. 126.)

In closing, counsel emphasized the alibi testimony and the evidence suggesting misidentification. Counsel’s efforts and strategies, although they did not ultimately achieve the result desired by Weaver, were not so unreasonable as to constitute ineffective assistance of counsel. See Badelle v. State, 754 N.E.2d 510, 539 (Ind. Ct. App. 2001), trans. denied (deciding in relevant part that, when trial counsel’s efforts were “more than adequate” to support a defense of mistaken identity, counsel’s decision not to call or seek out additional witnesses was a judgment call within the wide range of reasonable assistance).

Conclusion

Weaver has not established reversible error in the admission of evidence. Nor has he shown his entitlement to postconviction relief.

Affirmed.

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

⁶ Counsel testified at the postconviction hearing that he did not challenge the State’s photographic array, because he believed it actually helped Weaver’s defense of misidentification in that Weaver’s photograph did not show a thin individual as described.