

Case Summary

Jeryl Bingham appeals the post-conviction court's denial of his petition for post-conviction relief. We affirm.

Issues

Bingham raises two issues, which we restate as:

- I. whether he was denied the effective assistance of appellate counsel by counsel's failure to argue on appeal that the waiver of Bingham's right to a jury trial was not knowing, intelligent, and voluntary; and
- II. whether Bingham's waiver of his right to a jury trial was knowing, intelligent, and voluntary.

Facts

The facts as stated in Bingham's direct appeal follow:

Sometime in 1999, Bingham became romantically involved with Veronica Davis and moved into her Indianapolis home with her children. Bingham was mildly mentally handicapped with an I.Q. of 55. His cognitive abilities were limited and his reading ability was at a second grade level. At some point during their ten-year relationship, Bingham began having sex with one of Davis's daughters—L.D.—who was four years old at the time.

L.D. eventually reported the sexual abuse to Davis and other relatives. Detective Gustavia Dodson of the Indianapolis Police Department interviewed L.D., at which time she told the detective that she did not report Bingham's abuse earlier because she was afraid of being taken from her mother. Thereafter, the State charged Bingham with four counts of child molesting for abuse that had occurred at three different times. Count I alleged that Bingham had sexual intercourse with L.D. in 2000 while they were all living in the Meadows apartment complex in Indianapolis. Count II alleged that Bingham had sexual intercourse with L.D. when she was twelve years old, and Count III alleged that Bingham

had sexual intercourse with L.D. when she was thirteen years old. Finally, Count IV alleged that Bingham fondled or touched L.D. with the intent to arouse his sexual desires when L.D. was thirteen years old.

On March 17, 2004, Bingham met with Detective Gregory Norris of the Indianapolis Police Department. After being informed of his Miranda rights, Bingham admitted to Detective Norris that he had had sex with L.D. on multiple occasions. . . .

Bingham v. State, No. 49A02-0601-CR-46, slip op. at 2-3 (Ind. Ct. App. Sept. 1, 2006).

At the pre-trial conference, Bingham submitted a waiver of trial by jury signed by himself, his attorney, and the deputy prosecutor. Judge Grant Hawkins then questioned Bingham about the waiver. Bingham indicated that his attorney read the waiver to him and that he understood it, and Bingham's sister indicated that Bingham understood the waiver. The following discussion then occurred:

The Court: By signing this document you're saying you want me or someone like me to do the jury's job, is that right?

Mr. Bingham: Yes, sir.

The Court: You understand you won't be able to change your mind later?

Mr. Bingham: I understand.

The Court: All right. Now, your lawyer didn't twist your arm to get you to sign it, did he?

Mr. Bingham: No, sir.

The Court: After talking with him you think this is the best way for the case to be resolved?

Mr. Bingham: Yes, sir.

The Court: Okay. Did he promise you something good would happen, that some friendly judge would do you a real favor?

Mr. Bingham: No, sir.

The Court: Did he say that if you went to trial by jury that something mean or bad would happen to you?

Mr. Bingham: No, sir.

The Court: You just think this is the best way to resolve it?

Mr. Bingham: Yes, sir.

* * * * *

The Court: Okay, now, Judge Rubick has a lot of involvement in this case. The next time I hear evidence will be the first and I'm not sure Judge Broyles has ever heard about this case. Those are the primary three jurists available for a day-long court trial. Have the parties had any discussion – I know there's some unusual issues and you may or may not want Judge Rubick to hear it. I know that at one point you thought he was going to hear it. Has there been discussion of a preference?

[Deputy Prosecutor]: We haven't but I'm okay with yourself or Judge Rubick. I think that's what [Defense Counsel] would prefer so either one of you two are fine with me.

[Defense Counsel]: That is correct, Judge.

* * * * *

The Court: Let me make one more – clear up one more thing. You indicated subtly a preference for myself or Judge Rubick, I'm taking it there's no problem with Judge Broyles, it's just we're the two you've seen the most on this case?

[Defense Counsel]: Yes.

[Deputy Prosecutor]: Yes.

The Court: All right, then.

PCR Petitioner's Exhibit B pp. 6-10.

The bench trial was presided over by Judge Nancy Broyles, who was serving as the pro tem judge. Bingham objected at the beginning of the trial to Judge Broyles presiding over the trial. Bingham argued that Judge Hawkins or Commissioner Steven Rubick should preside over the trial. Judge Broyles overruled Bingham's request. After the bench trial, Judge Broyles found Bingham guilty as charged.

Bingham filed a direct appeal and argued that: (1) the trial court erred by admitting his confession into evidence; (2) the trial court erred by denying his request for a mistrial; and (3) the trial court abused its discretion by ordering consecutive sentences. We concluded that the trial court did not err by admitting Bingham's confession or denying his mistrial request but that the trial court abused its discretion by ordering consecutive sentences.

Bingham then filed a petition for post-conviction relief, arguing that: (1) he received ineffective assistance of appellate counsel for her failure to argue on appeal that the waiver of his right to a jury trial was not knowing, intelligent, and voluntary; and (2) the waiver of his right to a jury trial was not knowing, intelligent, and voluntary. After an evidentiary hearing, the post-conviction court entered findings of fact and conclusions thereon denying Bingham's petition for post-conviction relief. Bingham now appeals.

Analysis

Bingham appeals the post-conviction court's denial of his petition for post-conviction relief. A court that hears a post-conviction claim must make findings of fact and conclusions of law on all issues presented in the petition. Pruitt v. State, 903 N.E.2d 899, 905 (Ind. 2009) (citing Ind. Post-Conviction Rule 1(6)). "The findings must be supported by facts and the conclusions must be supported by the law." Id. Our review on appeal is limited to these findings and conclusions. Id. Because the petitioner bears the burden of proof in the post-conviction court, an unsuccessful petitioner appeals from a negative judgment. Id. (citing P-C.R. 1(5)). "A petitioner appealing from a negative judgment must show that the evidence as a whole 'leads unerringly and unmistakably to a conclusion opposite to that reached by the trial court.'" Id. (quoting Allen v. State, 749 N.E.2d 1158, 1164 (Ind. 2001), cert. denied). Under this standard of review, "[we] will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion." Id.

I. Ineffective Assistance of Appellate Counsel

Bingham argues that his appellate counsel was ineffective. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his or her counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)), cert. denied). A counsel's performance is deficient if it falls below an objective standard of

reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Bingham argues that his appellate counsel was ineffective because she failed to argue his waiver of jury trial was unknowing, unintelligent, and involuntary. Because the strategic decision regarding which issues to raise on appeal is one of the most important decisions to be made by appellate counsel, appellate counsel’s failure to raise a specific issue on direct appeal rarely constitutes ineffective assistance. See Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999). The Indiana Supreme Court has adopted a two-part test to evaluate the deficiency prong of these claims: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are “clearly stronger” than the raised issues. Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997), cert. denied. If this analysis demonstrates deficient performance by counsel, the court then examines whether the issues that appellate counsel failed to raise “would have been clearly more likely to result in reversal or an order for a new trial.” Id.

According to Bingham, his waiver of jury trial was based on his belief that either Judge Hawkins or Commissioner Rubick would preside over the bench trial. The post-

conviction court rejected Bingham's argument. The post-conviction court concluded that Bingham "failed to show that this was a significant and obvious issue that should have been raised," that Bingham "failed to prove that the decision not to raise it cannot be explained by any reasonable strategy," and that the discussion regarding the judge presiding over the bench trial occurred after Bingham had already waived his right to a jury trial. Appellant's App. pp. 123-24.

In support of his argument, Bingham relies on Kimball v. State, 474 N.E.2d 982, 986 (Ind. 1985). There, the defendant contended his waiver of a jury trial was defective because it was based on a reasonable belief that the regular judge of the court would preside at trial. Our supreme court agreed that "had Appellant waived jury trial on assurances given by the trial court or prosecutor which they later reneged upon, his waiver would not have been given voluntarily, knowingly, and intelligently." Kimball, 474 N.E.2d at 986. However, our supreme court then rejected the defendant's argument that his waiver was involuntary, unknowing, or unintelligent.

Appellant's waiver was made in writing. No conditions were attached to the waiver. We fully agree with the State's contention that no defendant can be given, nor should expect, an absolute right to have the regular judge of the court preside at trial. Consequently, we find no merit to Appellant's argument that he did not knowingly, intelligently, and voluntarily waive his right to a jury trial because he was under the mistaken belief that the regular trial judge would preside over his case.

Id. (internal citation omitted).

Here, Bingham had already waived his right to a jury trial in writing and had discussed his waiver with Judge Hawkins. No conditions were attached to that waiver.

After the waiver, Judge Hawkins, not Bingham, raised the issue of which judge would preside over Bingham's bench trial. Bingham did not waive his right to a jury trial based on assurances that Judge Hawkins or Commissioner Rubick would preside over the bench trial. Moreover, we emphasize our supreme court's holding in Kimball that "no defendant can be given, nor should expect, an absolute right to have the regular judge of the court preside at trial." Id.

Given the facts here and our supreme court's holding in Kimball, Bingham has failed to demonstrate that the unraised jury trial waiver issue was clearly stronger than the issues appellate counsel raised on direct appeal. Bingham has also failed to demonstrate that the jury trial waiver issue would have been clearly more likely to result in reversal or an order for a new trial. Consequently, we conclude that the post-conviction court's findings and conclusion on this issue are not clearly erroneous.

II. Waiver of Right to Jury Trial

Next, Bingham argues that his waiver of his right to a jury trial was not knowing, intelligent, and voluntary. The post-conviction court rejected this argument, finding that it was unavailable on post-conviction relief because it was an issue that was known and available on direct appeal but was not raised. Our supreme court has repeatedly emphasized that 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).

Bingham cites Perkins v. State, 541 N.E.2d 927, 929 (Ind. 1989), for the proposition that the waiver of a right to jury trial is reviewable in post-conviction proceedings. However, Perkins allowed consideration of the waiver issue in the context of fundamental error. More recent opinions from our supreme court have held that fundamental error arguments are unavailable in post-conviction proceedings. See Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) (“It was wrong to review the fundamental error claim in a post-conviction proceeding.”). Additionally, we have specifically held that arguments concerning waiver of a right to a jury trial are unavailable in post-conviction proceedings. See Jackson v. State, 786 N.E.2d 748, 750 (Ind. Ct. App. 2003), trans. denied. The post-conviction court properly found that Bingham’s freestanding claim was unavailable in post-conviction proceedings.

Conclusion

The post-conviction court properly denied Bingham’s petition for post-conviction relief. We affirm.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.