

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

SUSAN K. CARPENTER
Public Defender of Indiana

LINDA K. HUGHES
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER R. SALYERS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)
)

No. 85A02-0605-PC-370

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen, III, Judge
Cause No. 85C01-9801-CF-9

November 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Christopher R. Salyers appeals from the post-conviction court's denial of his petition for post-conviction relief. Salyers raises a single issue, which we restate as whether the post-conviction court properly denied Salyers' petition claiming he was denied effective assistance of counsel based on his trial counsel's failure to tender an instruction advising the jury that Salyer could not be convicted of criminal recklessness for negligent conduct. We affirm, concluding that the post-conviction court properly denied Salyers' petition.

Facts and Procedural History

During the early morning of January 16, 1998, Salyers, Pete Newcomb, and several others had gathered at Jason Bowman's house to drink and socialize. Salyers brought a handgun, which he displayed and allowed others to pass around and examine. At one point, while Salyers was holding the gun, Newcomb lunged at Salyers and the gun fired. Newcomb was hit in the chest and fell to the ground. Salyers picked Newcomb up off the ground and placed him on a couch. Salyers then called 911 and gave the telephone to Bowman, who reported the incident to the dispatcher. Salyers then left the house and threw the gun into a nearby cornfield. Newcomb eventually died from blood loss due to the gunshot wound.

The State charged Salyers with reckless homicide, criminal recklessness, and carrying a handgun without a license. At trial, Salyers' counsel tendered the following jury instruction:

Evidence Required to Sustain a Conviction of Reckless Homicide

To sustain a conviction of reckless homicide there must be evidence of probative value supporting each of three elements:

1. Causation
2. That the act resulting in the homicide was voluntary; and,
3. That the Defendant's conduct was reckless and not merely negligent.

Record at 258. The trial court rejected most of this tendered instruction, but incorporated the third element of the tendered instruction into a final instruction, and informed the jury, “[t]he Defendant may not be convicted of the offense of Reckless Homicide if you find that his conduct was merely negligent.” Id. at 291.

Salyers' trial counsel did not tender an instruction on criminal recklessness. The trial court's instruction on criminal recklessness informed the jury:

To convict the Defendant of Criminal Recklessness under Count II, the State must have proven each of the following elements:

That the Defendant

1. recklessly, knowingly, or intentionally
2. inflicted serious bodily injury on Peter W. Newcomb;
3. by means of a deadly weapon.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty.

Id. at 292.

The trial court also gave the following instruction on the meaning of “reckless”:

A person engages in conduct “recklessly” if he engages in the conduct in plain, conscious, and unjustifiable disregard of the harm that might result, and the disregard involves a substantial deviation from acceptable standards of conduct.

Id. at 297.

The jury found Salyers guilty of criminal recklessness and carrying a handgun without a license, but not guilty of reckless homicide. Salyers then appealed his convictions, arguing that the trial court had improperly admitted testimony and evidence, and that the jury's

verdicts were inconsistent. We affirmed his convictions in a memorandum opinion. Salyers v. State, No. 85C01-9801-CF-9 (Ind. Ct. App. Sept. 7, 1999). Salyers then filed a pro se petition for post-conviction relief, and later, by counsel, filed an amendment to the petition. The post-conviction court found that Salyers' trial counsel had not rendered ineffective assistance and denied the petition. Salyers now appeals.

Discussion and Decision

I. Standard of Review

Post-conviction proceedings are civil in nature. Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002), cert. denied, 540 U.S. 830 (2003). Therefore, to prevail, petitioners must establish their claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Stevens, 770 N.E.2d at 745. On appeal from a denial of a petition for post-conviction relief, petitioners must convince this court that the evidence, taken as a whole, leads unmistakably to a conclusion opposite that reached by the post-conviction court. Id.

When reviewing ineffective assistance of counsel claims, Indiana courts use the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002). Under the first prong, the petitioner must establish that counsel's performance was deficient; that is, the performance fell below an objective standard of reasonableness, thereby denying the petitioner the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). We presume that counsel provided adequate assistance and defer to counsel's strategic and tactical decisions. Id. at 585. "Isolated mistakes, poor strategy,

inexperience, and instances of bad judgment do not necessarily render representation ineffective.” Douglas v. State, 800 N.E.2d 599, 607 (Ind. Ct. App. 2003), trans. denied. Under the second prong, the petitioner must demonstrate prejudice; that is, petitioner must demonstrate a reasonable probability that the result of the trial would have been different if counsel had not made the errors. Wentz, 766 N.E.2d at 360. If our confidence that the result would have been the same is undermined, we will find that a reasonable probability exists. Id. If we can dismiss an ineffective assistance of counsel claim based on lack of prejudice, we need not address whether counsel provided deficient performance. Id.

II. Assistance of Counsel

Salyers argues that he received ineffective assistance of counsel based on his trial counsel’s failure to tender an instruction that informed the jury that Salyers could not be convicted of criminal recklessness if Salyers’ actions were merely negligent. We disagree.

“[F]ailure to submit an instruction is not deficient performance if the court would have refused the instruction anyway.” Williams v. State, 706 N.E.2d 149, 161 (Ind. 1999), cert. denied, 529 U.S. 1113 (2000). A trial court properly accepts a proposed instruction if: (1) it correctly states the law; (2) it is supported by the evidence; (3) it is not covered by the trial court’s other instructions; and (4) “it does not tend to mislead or confuse the jury.” Nantz v. State, 740 N.E.2d 1276, 1283 (Ind. Ct. App. 2001), trans. denied. In its order finding that Salyers’ counsel was not ineffective, the post-conviction court found that the trial court’s instructions “properly advised the jury of the culpability required to find the defendant guilty of [criminal recklessness].” Appellant’s Appendix at 62. Therefore, the post-conviction

court implicitly found that Salyers' counsel was not ineffective for failing to request an instruction on mere negligence because the trial court would have rejected such an instruction as covered by other instructions. Under these circumstances, "we will reverse the post-conviction court only if the trial court was compelled as a matter of law to give the instruction." Lambert v. State, 743 N.E.2d 719, 738-39 (Ind. 2001), cert. denied, 534 U.S. 1136.

The trial court's Final Instruction Number 10 instructed the jury that in order to find Salyers guilty of criminal recklessness, it must find Salyers acted "recklessly, knowingly, or intentionally." R. at 292. The trial court's Final Instruction Number 15 told the jury the meaning of recklessness. From these two instructions, the jury was reasonably informed that it could not find Salyers guilty if it found that he acted with mere negligence. Therefore, the trial court could have properly rejected a request for an instruction reiterating this requirement as being either covered by other instructions or potentially confusing to the jury. See Cichos v. State, 210 N.E.2d 363, 365 (Ind. 1965), cert. dismissed 385 U.S. 76 (1966) ("The court's own instructions adequately covered this subject, and it was not therefore necessary for the court to read all of the appellant's array of instructions which would have, if given, had the effect of over-emphasizing the subject of 'mere negligence' as an element in the case."). Moreover, Salyers's principal defense at trial was that he acted negligently and not recklessly. As used by Salyers, negligence is not a legal defense, but is an argument that the State failed to prove an element of criminal recklessness. See Springer v. State, 798 N.E.2d 431, 435 (Ind. 2003). The trial court's instructions on the elements of criminal

recklessness and the meaning of recklessness adequately informed the jury of the State's burden and rendered any further elaboration unnecessary. See id.

For similar reasons, we also conclude that Salyers has failed to demonstrate any prejudice he has suffered by his counsel's failure to request an instruction on mere negligence. Salyers argues: "The jury was not told it could not convict Petitioner of either reckless homicide or criminal recklessness if he acted negligently. It found him guilty even though it determined he acted negligently." Appellant's Brief at 14 (emphasis in original). However, as indicated above, the jury was instructed that it must find that Salyers acted at least recklessly in order to convict him of criminal recklessness. Moreover, Salyers main argument at trial was that his actions were merely negligent, and that therefore, his conduct did not satisfy the elements of criminal recklessness. Because the jury knew that it must find that Salyers acted recklessly, an instruction on mere negligence would not have given the jury any additional information and would have had no effect on its decision.

Conclusion

Because the jury was instructed that the State was required to prove that Salyers acted recklessly, the failure of Salyers' counsel to request an instruction that Salyers could not be found guilty for mere negligence did not constitute ineffective assistance of counsel. The post-conviction court properly denied Salyers' petition.

Affirmed.

BARNES, J., concurs.

SULLIVAN, J., concurs with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER R. SALYERS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 85A02-0605-PC-370
)	
STATE OF INDIANA,)	
)	
Appellee.)	

SULLIVAN, Judge, concurring

I concur but write separately to state a slightly different view as to whether the trial court would have properly rejected the proffered instruction to the effect that Salyers could not be convicted of criminal recklessness if his conduct was merely negligent. In so stating, the majority reasons that the giving of Instructions No. 10 and No. 15 adequately covered that matter.

I do not totally agree. Although it might be reasonable to assume that a jury would conclude that recklessness is recklessness no matter the context in which that word is used,¹ I note that the only instruction to the effect that mere negligent conduct will not suffice for conviction of a “recklessness” crime was confined to the crime of Reckless Homicide.

For this reason, it would have been perfectly appropriate and reasonable for the trial

¹ I agree that as to the crime of Criminal Recklessness, the jury was instructed that the defendant’s conduct must be “reckless[], knowing[], or intentional[].” This would certainly imply that mere negligent conduct is not adequate. The same is true of the instruction defining “reckless.”

court to include the offense of Criminal Recklessness along with the crime of Reckless Homicide in its instruction that mere negligent conduct is inadequate to support a conviction. I therefore agree that although the trial court perhaps was not “compelled” to give such an instruction as to Criminal Recklessness, the court would not necessarily “have rejected such an instruction as covered by other instructions.” Slip op. at 6.

Nevertheless, because of the instructions which were given and in light of the likely interpretation placed upon those instructions by the jury, I do not conclude that counsel’s failure to tender an instruction specifically tailored to the Criminal Recklessness charge constituted ineffective assistance of counsel.