

Appellant-petitioner Santos Irizarry, Jr. appeals the denial of his petition for post-conviction relief, claiming ineffective assistance of appellate counsel. Specifically, Irizarry contends that his appellate counsel was ineffective for failing to challenge his habitual offender enhancement as an improper double enhancement in his direct appeal. Concluding that Irizarry has failed to show that his appellate counsel was ineffective on this basis, we affirm the judgment of the post-conviction court.

FACTS

The facts as reported in Irizarry's direct appeal are as follows:

Irizarry lived with his girlfriend, Dawn Oakes. The two also allowed Russell Eaton to live with them. On February 9, 2003, at approximately 5:00 a.m., Irizarry and Oakes were arguing. Irizarry also began arguing with Eaton. Irizarry threatened Eaton with a gun. Eaton left the house and called the police from a pay phone.

Police Officers Shannon McComas and Rodney Bradburn were informed that a domestic disturbance involving a gun had been reported and were dispatched to the house. When the officers arrived, Irizarry, Oakes, and Eaton were outside. Because it was extremely cold outside, Officer Bradburn asked if they could go inside the residence to sort everything out. Irizarry agreed and led the officers inside.

After entering the home, the officers asked if there was a gun inside and where it was. Irizarry denied that there was a gun in the house, but Eaton insisted that there was. Irizarry told the officers they could look for a gun. The officers did so and found a gun behind a television. Irizarry was then arrested and Mirandized.

On February 10, 2003, the State charged Irizarry with Class B felony unlawful possession of a firearm by a serious violent felon, Class D felony intimidation, and Class D felony pointing a firearm. The State later charged Irizarry with being a habitual offender. Irizarry filed a motion to suppress the discovery of the gun, which the trial court denied. The State dismissed the two Class D felony charges. A jury convicted Irizarry of unlawful possession of a firearm, and he pled guilty to the habitual offender enhancement.

Irizarry v. State, No. 49A02-0311-CR-958, slip op. at 2 (Ind. Ct. App. June 30, 2004). Irizarry's serious violent felon status was based upon a 1985 conviction for class C felony battery. That same battery conviction was also one of the two prior felony convictions used to establish his habitual offender status.¹ The trial court sentenced Irizarry to eleven years on the unlawful possession of a firearm conviction and enhanced the sentence by fifteen years based on the habitual offender count. Thus, the trial court sentenced Irizarry to an aggregate term of twenty-six years in the Indiana Department of Correction.

Irizarry directly appealed to this court, arguing that the trial court erred by denying his motion to suppress. In an unpublished memorandum decision of June 30, 2004, this court affirmed Irizarry's conviction. Id., slip op. at 8.

Irizarry then filed a pro se petition for post-conviction relief on March 2, 2005. Thereafter, on July 20, 2005, Irizarry filed an amended petition for post-conviction relief, claiming that he was improperly sentenced and that his appellate counsel was ineffective. Specifically, Irizarry alleged that he received a double enhancement of his sentence under Indiana Code section 35-50-2-8 because the same prior conviction was used to establish both his serious violent felon status and his habitual offender status and that his appellate counsel was ineffective for failing to raise such a double enhancement argument on direct appeal.

Following a hearing on Irizarry's post-conviction petition, the post-conviction court denied Irizarry's request for relief on July 12, 2006. In relevant part, the post-conviction court ruled as follows:

¹ The other felony used to establish Irizarry's habitual offender status was a 1983 conviction for class C felony child molesting.

2. The Court finds that Petitioner is entitled to no relief on his claim he received ineffective assistance of appellate counsel by failing to challenge Petitioner's sentence after the trial court used the same prior felony to establish both an essential element of the possession of a firearm charge and to support a habitual offender enhancement in the same proceeding

3. The case on point in the Petitioner's situation is Townsend v. State, 793 N.E.2d 1092 (Ind. Ct. App. 2003). Prior to Townsend, there were some Indiana cases, which did not support the use of certain enhanced convictions for both an underlying crime and as one of the elements of the habitual offender enhancement. See Ross v. State, 729 N.E.2d 113 (Ind. Ct. App. 2000). The legislature amended the habitual offender statute effective July 1, 2001 to enumerate specific types of convictions precluded from the habitual offender enhancement. In Townsend, the Court of Appeals interpreted the revised statute of I.C. [§] 35-50-2-8, which reads in relevant part:

35-50-2-8 Habitual offenders

Sec. 8. (a) Except as otherwise provided in this section, the state may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions.

(emphasis added)[.]

The Court in Townsend focused on the phrase "except as otherwise provided in this section", which clearly states the State may file the habitual offender unless certain conditions apply. The statute then lists specific situations that preclude the State from filing a habitual offender enhancement. The use of the same prior felony to create the underlying felony of unlawful possession of a firearm by a serious violent felon and also as one of the prior convictions of a habitual offender enhancement is not included in the statute as a prohibited enhancement. Supra at 1098. The case at hand is indistinguishable from Townsend, so the Petitioner's battery conviction may be used as both an element of the unlawful possession of a serious violent felon charge and in support of the habitual offender enhancement.

4. . . . It is reasonable that appellate counsel did not raise this issue as the Court of Appeals had made a recent ruling on the same set of circumstances. The Petitioner has shown neither deficient performance nor resulting prejudice from the appellate counsel's representation.

Appellant's App. p. 80-82. Irizarry now appeals.

DISCUSSION AND DECISION

Before addressing Irizarry's claims of error, we note the general standard under which we review the denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

We also note that the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

Irizarry argues that his appellate counsel was ineffective for failing to challenge his sentence after the trial court used the same prior felony to establish an essential element of his possession of a firearm by a serious violent felon charge and to support his habitual

offender enhancement. As a result, Irizarry argues that his habitual offender enhancement should be set aside.

In addressing this claim, we apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. Williams v. State, 724 N.E.2d 1070, 1078 (Ind. 2000). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his 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 (1984)). 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 satisfy 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. Failure to satisfy either prong will cause the claim to fail. Id.

Ineffective assistance claims at the appellate level of proceedings generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. Bieghler v. State, 690 N.E.2d 188, 193-195 (Ind. 1997). Inasmuch as Irizarry's claim of appellate counsel's ineffectiveness is based on the second category, we note that our Supreme Court has observed that the reviewing court must be deferential to appellate counsel:

[T]he reviewing court should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find

deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

Timberlake v. State, 753 N.E.2d 591, 605 (Ind. 2001) (quoting Bieghler, 690 N.E.2d at 194).

Next, we note that this court employs the following two-part test to evaluate "waiver of issue" 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. Id. at 605-06. Stated somewhat differently, "[a] defendant may establish that his appellate counsel's performance was deficient where counsel failed to present a significant and obvious issue for reasons that cannot be explained by any strategic decision." Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000).

Here, Irizarry was charged with Class B felony unlawful possession of a firearm by a serious violent felon and alleged to be a habitual offender. Irizarry's serious violent felon status was based upon a 1985 conviction for class C felony battery and that same battery conviction was also one of the two prior felony convictions used to allege that he was a habitual offender. See Petitioner's Ex. A at 30, 46. A jury found Irizarry guilty of Class B felony unlawful possession of a firearm by a serious violent felon, and Irizarry pleaded guilty to being a habitual offender. Irizarry pleaded guilty to the habitual offender allegation in exchange for the State's recommendation that the enhancement imposed for his habitual offender status be in the range of ten to fifteen years. Id. at 135-136. The trial court sentenced Irizarry to eleven years on his unlawful possession of a firearm by a serious violent felon conviction and enhanced the sentence by fifteen years for his habitual offender

adjudication. Appellant's App. p. 18-19. On direct appeal, the sole issue raised by Irizarry's counsel was that the trial court erred by denying Irizarry's motion to suppress the gun found in the search of his house. Petitioner's Ex. C at 2.

The State argues that Irizarry's counsel did not perform deficiently by not challenging the validity of Irizarry's habitual offender enhancement on direct appeal because: (1) Irizarry waived any challenge to his habitual offender enhancement by pleading guilty to being a habitual offender; and (2) Irizarry's argument regarding his habitual offender enhancement constituting a double enhancement had already been decided adversely to Irizarry prior to the time his counsel filed a direct appeal brief.

Our Supreme Court has explained, "[D]efendants who plead guilty to achieve favorable outcomes give up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy." Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004) (citation omitted). Also included in the rights given up is the right to challenge the validity of a sentence that was imposed, even if it is one that the court might otherwise not have the ability to impose. See id. (citing Davis v. State, 771 N.E.2d 647, 649 n. 4 (Ind. 2002)). Because Irizarry pleaded guilty to being a habitual offender, he gave up any challenge to the propriety of his habitual offender enhancement. See id.; Games v. State, 743 N.E.2d 1132, 1135 (Ind. 2001) (holding that the defendant who pleaded guilty had waived his claim of double jeopardy). Accordingly, Irizarry's appellate counsel's failure to challenge Irizarry's habitual offender enhancement did not constitute deficient performance.

Furthermore, as the post-conviction court noted, Irizarry’s argument regarding his habitual offender enhancement had already been decided adversely to him by Townsend at the time of his direct appeal. In Townsend, we affirmed a defendant’s habitual offender enhancement of a serious violent felon sentence even though the enhancement and conviction relied upon the same underlying prior felony. Townsend, 793 N.E.2d at 1096-1097. In Townsend, we reviewed the 2001 amendment to the habitual offender statute—the same version of the statute that was in effect at the time Irizarry was sentenced—and found that the statute expressly provides that a sentence for “any felony” may be enhanced, subject to certain restrictions that appear “in this section” of the habitual offender statute, and we held that because “[t]he use of the same prior felony to create the underlying felony of unlawful possession of a firearm by a serious violent felon and support the habitual offender enhancement does not appear ‘in this section[,]’” the use of the same prior felony to support both was not erroneous. Id.

Irizarry was sentenced in October 2003, and he filed his appellant’s brief in his direct appeal in March 2004. Because Townsend, which was issued in August 2003, had already established that a serious violent felon sentence could be enhanced by a habitual offender adjudication when both were based on the same prior felony conviction, Irizarry has failed to show that his appellate counsel’s performance fell below an objective standard of

reasonableness when counsel failed to raise this issue on direct appeal.² As a result, Irizarry's petition for post-conviction relief was properly denied.

The judgment of the post-conviction court is affirmed.

DARDEN, J., and ROBB, J., concur.

² Irizarry suggests that Townsend was “flawed and devoid of precedential value[,]” see appellant’s br. p. 9; however, we recently rejected such an argument and held that “Townsend was decided correctly.” See Mills v. State, 855 N.E.2d 296, 302 (Ind. Ct. App. 2006), trans. pending.