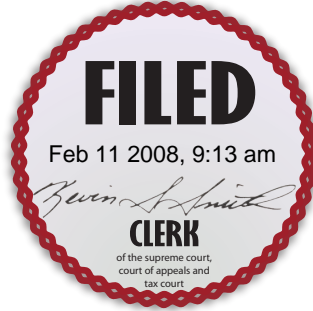


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES BRUCE WEATHERS,)

Appellant-Defendant ,)

vs.)

No. 63A01-0703-PC-133

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE PIKE CIRCUIT COURT
The Honorable Jeffrey L. Biesterveld, Judge
Cause Nos. 63C01-0608-PC-00403 and 63C01-0305-FB-00313

February 11, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Pike Circuit Court denied a petition for post-conviction relief filed by James Bruce Weathers (“Weathers”). Weathers appeals and presents several issues, which we renumber and restate as the following two: (1) whether the post-conviction court erred in concluding that Weathers received the effective assistance of trial counsel; and (2) whether the post-conviction court erred in concluding that Weather received the effective assistance of appellate counsel.

We affirm.

Facts and Procedural History

From 2001 through 2003, Weathers and his wife lived on property owned by his parents in Pike County. Both Weathers and his wife used methamphetamine. To fuel their methamphetamine habit, Weathers would bring the drug home several times a month. He also gave methamphetamine to others in exchange for helping him work on his house.

Weathers and his wife apparently became estranged at some point in 2003, and she eventually gave Indiana State Police Corporal Stewart Sanders permission to search the couple’s home. During the search, Corporal Sanders discovered items which made him suspect that Weathers was involved in methamphetamine. Specifically, he discovered a notebook with an entry that mentioned that another individual had “picked [Weathers] up to make dope.” Tr. p. 282. He also discovered what appeared to be a shopping list which included baggies, a wire stripper, gloves, salt, peroxide, cotton balls, and D batteries, some of which could be used in the manufacture of methamphetamine.

On April 24, 2003, Corporal Sanders and the local prosecutor interviewed Weathers, who was apparently already in custody on other charges. Weathers was informed of his Miranda rights and signed a waiver thereof at the start of the questioning. Shortly thereafter, the following exchange occurred:

[Weathers]: I mean, you know, I'm not going to self incriminate myself [sic] right now, by no means. I see no, no deal in front of me for anything yet there, so we'll see how we go here, and from there and you know, that's all I know. I can cooperate the best I can, but I'm not going to dig myself in the dirt, stab myself in the back.

[Prosecutor]: You're going to tell us the truth . . . ?

[Weathers]: To the best of what I can.

[Prosecutor]: Okay. That's what I'm, I'm curious about . . .

[Weathers]: You know, I'm just, you know I'm not going to incriminate myself at this time and point.

Tr. pp. 167-68. Despite his statements to the contrary, Weathers then proceeded to admit that he had used methamphetamine, that he brought methamphetamine he had purchased home for his wife to use, and that others had "mooched" methamphetamine from him in exchange for helping him work on his house. Weathers also claimed that his wife had ordered ephedrine pills in order to make methamphetamine.

On May 5, 2003, the State charged Weathers with two counts of Class B felony dealing in methamphetamine, eleven counts of Class C felony possession of more than three grams of methamphetamine, and one count of Class D felony maintaining a common nuisance. On October 28, 2004, eleven days before the start of the jury trial, Weathers's trial counsel moved to tender a witness list. The trial court denied this request, because it was apparently untimely under local court rules. The court informed

Weathers's trial counsel that he would be allowed to call anyone on the State's witness list, but not any other witnesses.

From November 8 through November 10, 2004, a jury trial was held. The State's main evidence consisted of Weathers's taped statement and the testimony of his wife. At the close of the State's case-in-chief, Weathers's trial counsel moved for judgment on the evidence. The trial court granted the motion as to the count of maintaining a common nuisance, but denied it as to the remaining counts. At the conclusion of trial, the jury found Weathers guilty of the remaining charges, but the trial court entered judgment of conviction only upon the two counts of dealing in methamphetamine. At a hearing held on December 17, 2004, the trial court sentenced Weathers to the presumptive sentence of ten years on each conviction, to be served concurrently.

On direct appeal, Weathers unsuccessfully challenged the trial court's denial of his motions for change of judge under Indiana Criminal Rule 12(C) and for discharge under Indiana Criminal Rule 4(C). See Weathers v. State, No. 63A01-0501-CR-23 (Ind. Ct. App. Sept. 6, 2005). On August 10, 2006, Weathers filed a petition for post-conviction relief, alleging that both his trial and appellate counsel were ineffective. The post-conviction court held a hearing on Weathers's petition on December 6, 2006. The post-conviction court issued an order denying Weathers's petition on February 16, 2007. Weathers now appeals.

Standard of Review

A. *Post-Conviction Standard*

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentence by filing a post-conviction petition. Ind. Post-Conviction Rule 1(1); Craig v. State, 804 N.E.2d 170, 172 (Ind. Ct. App. 2004). Post-conviction proceedings do not afford a petitioner with a “super-appeal,” but instead provide defendants the opportunity to present issues which were not known at the time of the original trial or that were not available upon direct appeal. Id. (citing Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001); Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000)). Thus, if an issue was known and available upon direct appeal, but not presented, it is waived. Id. (citing Timberlake, 753 N.E.2d at 597). And if it was presented upon direct appeal, but decided adversely, it is res judicata. Id. (citing Timberlake, 753 N.E.2d at 597).

A defendant who petitions for post-conviction relief has the burden of establishing his grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Timberlake, 753 N.E.2d at 597. Therefore, a petitioner who does not prevail below appeals from a negative judgment, and, to the extent the appeal turns on factual issues, the petitioner must convince this court that the evidence as a whole unmistakably and unerringly points to a conclusion contrary to the post-conviction court’s decision. Timberlake, 753 N.E.2d at 597.

B. *Ineffective Assistance of Counsel Standard*

Weathers bases all of his post-conviction claims on grounds of ineffective assistance of trial and appellate counsel. As explained by our supreme court in Timberlake:

A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness, id. at 688, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment, id. at 687. Second, the defendant must show that the deficient performance prejudiced the defense. Id. 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. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. Id. at 689. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690. The Strickland Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Id. at 689. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Bieghler v. State, 690 N.E.2d 188, 199 (Ind. 1997); Davis v. State, 598 N.E.2d 1041, 1051 (Ind. 1992); Ingram v. State, 508 N.E.2d 805, 808 (Ind. 1987). The two prongs of the Strickland test are separate and independent inquiries. 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." Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999) (quoting Strickland, 466 U.S. at 697).

Timberlake, 753 N.E.2d at 603.

I. Effective Assistance of Trial Counsel

Weathers claims that the post-conviction court erred in concluding that he received the effective assistance of trial counsel. Weathers specifically complains of the following three perceived deficiencies in his trial counsel's performance: (a) the failure to timely file a witness and exhibit list; (b) the failure to object to the testimony of Weathers's wife based upon the marital privilege; and (c) the failure to file a motion to suppress Weathers's taped statement to the police. We address each of these claimed deficiencies in turn.

A. *Witness List*

Weathers complains that his trial counsel's failure to timely file a witness and exhibit list, which resulted in Weathers being unable to call any witnesses not on the State's witness list, amounted to the deprivation of his right to the effective assistance of trial counsel. Weathers's claim regarding the witness list is that, had he been allowed to present his own witnesses, he would have called his father and son to testify on his behalf. At the post-conviction hearing, Weathers's father testified that, had he been called as witnesses at trial, he would have testified that he had purchased a table and given it to his son to be refinished. Weathers's father would also have testified that he told his son that he should put his wife to work refinishing the table. Weathers claims that this testimony "would have got a long way toward explaining the . . . list of items" found by Corporal Sanders during the search of Weathers's home. Br. of Appellant at 14.

With regard to Weathers's son, he testified at the post-conviction hearing that, had he been called as a witness at his father's trial, he would have testified that the items on

the “shopping list” were to be used in refinishing the table given to Weathers by his father. Weathers now claims that without this explanatory testimony, the jury was left with the impression that he wanted items that could be used in the manufacture of methamphetamine.

Even if we assume that trial counsel’s failure to timely file a witness list amounted to a showing that counsel’s representation fell below an objective standard of reasonableness, it was Weathers’s burden to prove to the post-conviction court that but for this failure, the result of the proceeding would have been different. In this respect, he has not convinced us that the post-conviction court erred.

Although trial counsel was not allowed to call witnesses, he was permitted to cross-examine the State’s witnesses. Corporal Sanders admitted under cross-examination that most of the items on the list could have been purchased for non-criminal purposes and that some of them were not involved in the manufacture of methamphetamine at all. As noted by the State, Weathers was not convicted for the manufacture of methamphetamine; he was convicted for dealing in methamphetamine. Therefore, Weathers’s possession of such items was not essential to his convictions. Further, Weather’s admitted to the police that he bought methamphetamine, gave it to his wife, and gave it to others in exchange for helping him with household jobs. His wife also testified that he gave methamphetamine to her and to his friends. Given this evidence, we are unable to conclude that, even if Weathers’s witnesses had been called to testify, the result of the proceeding would have been different.

B. *Testimony of Weathers's Wife*

Weathers claims that his trial counsel was ineffective for failing to object to the testimony of his wife. Where a claim of ineffective assistance of trial counsel is based on the failure to object at trial, the defendant must show that if a proper objection had been made, it would have been sustained. Taylor v. State, 689 N.E.2d 699, 705 (Ind. 1997). According to Weathers, his wife's testimony was inadmissible due to the "marital privilege." Weathers argues that his trial counsel should have objected to the testimony of his wife because she was a "joint participant" in a crime and that this joint participation renders her entire testimony inadmissible.

In Indiana, the marital privilege is codified at Indiana Code section 34-46-3-1 (1999), which provides in relevant part, "Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications: . . . Husband and wife, as to communications made to each other." This marital communications privilege is restricted to confidential communications and information gained by reason of the marital relationship, and not every communication between spouses is protected by virtue of the marital relationship. Dixson v. State, 865 N.E.2d 704, 713 (Ind. Ct. App. 2007), trans. denied. Indeed, only those communications passing from one spouse to the other because of the confidence resulting from their intimate marriage relationship receive such protection. Id.

Thus, the marital communications privilege is subject to certain well-established exceptions and is not an absolute bar to all communications. Id. Among the exceptions to the marital privilege are: (1) where a spouse's testimony concerns disclosures by the

other spouse not made in reliance upon the marital relationship but because the disclosing spouse was in need of his mate's assistance and attempted to coerce his spouse by force and fear, (2) where the communication between spouses was intended to be transmitted to a third person, (3) where one spouse discloses a threat made by the other; and (4) where acts and communications to the spouse were made in the presence of third parties. Id.

Weathers seems to argue that his wife's testimony in its entirety should have been excluded. This is incorrect. The testimonial privilege, which allows one spouse to completely prevent the other from testifying against him, is not recognized in Indiana. See id. at 712 (citing Glover v. State, 836 N.E.2d 414, 421 (Ind. 2005)). With regard to the more limited marital privilege, Weathers does not explain which specific portions of his wife's testimony should be considered privileged marital communications. Weathers does cite Shepherd v. State, 257 Ind. 229, 277 N.E.2d 165 (1971), for the proposition that joint participation in a crime by spouses renders the other spouse's testimony inadmissible.

In Shepherd, the husband of the defendant testified that he had committed a burglary and that his wife aided and abetted him by driving an automobile. The Shepherd court ultimately concluded that the witness's participation in the crime was a matter of confidence between the defendant and the witness and that the operation of the vehicle was "information imparted in confidence." 257 Ind. at 234, 277 N.E.2d at 168. This rather broad view of the marital privilege was reined in by subsequent decisions of our supreme court. In Kindred v. State, 524 N.E.2d 279, 295-96 (Ind. 1988), the court wrote, "not all acts done privately in the presence of the other spouse are protected by the

privilege. Insofar as Sheperd [sic] has been construed as standing for such a proposition, it must yield to a more reasonable application.” As explained in Kindred, we must determine whether the communicating spouse intended to convey a message to the other. Id. at 296 “There must be some indication the communicating spouse invite[d] the other’s presence or attention, and that any disclosure was an express manifestation of the intent to communicate the knowledge imparted by the act.” Id.

Here, Weathers does not explain what message his delivery of methamphetamine to her and others was intended to convey. Additionally, to the extent that his wife testified about Weathers exchanging drugs to others, such acts were committed in the presence of third parties and cannot be protected by the marital privilege. See Dixon, 865 N.E.2d at 713. Moreover, the marital privilege prevents a court from *requiring* a spouse to testify as to confidential marital communications; it does not bar a spouse from testifying if the spouse chooses to do so. Glover, 836 N.E.2d at 421. Weathers does not argue that his wife was forced to testify against him;¹ indeed the two were estranged at the time of the trial. In short, Weathers has failed to show that an objection to his wife’s testimony, had it been made, would have been successful. As such, we cannot fault his trial counsel for failing to object to this testimony at trial.

C. Taped Statement

Weathers’s final argument with regard to his claim of ineffective assistance of trial counsel involves his trial counsel’s failure to file a motion to suppress Weathers’s taped

¹ Weathers’s wife was granted use immunity, but he does not argue that, without such, his wife was unwilling to testify.

statement to the police. According to Weathers, his statement was inadmissible because he invoked his right to remain silent at the beginning of the interview. We do not agree.

After signing a waiver of his Miranda rights, Weathers told the police and prosecutor that he was not going to “incriminate [him]self.” Tr. pp. 167-68. This does not amount to an assertion of the right to remain silent. In fact, Weathers stated that he intended to “cooperate.” He simply indicated, incorrectly, that he did not plan to incriminate himself while talking. Because Weathers did not assert his right to remain silent, any objection to the admission of his taped statement would not have been successful, and his trial counsel cannot be said to have been ineffective for failing to object to the admission of the statement. See Taylor, 689 N.E.2d at 705 (holding that trial counsel was not ineffective for failing to object to admission of defendant’s statement where defendant never explicitly asserted his right to remain silent but instead stated “I don’t wanna get myself into trouble” and “I don’t wanna tell you the story because I don’t wanna slip up and say the wrong thing that’ll get me into trouble.”).

II. Effective Assistance of Appellate Counsel

Weathers claims that his appellate counsel was constitutionally ineffective because of his failure to present the following arguments upon direct appeal: (a) that trial counsel was ineffective for the reasons argued above; (b) that the State failed to establish the corpus delicti of the crime before the admission of Weathers’s taped statement; (c) that the notebook and “shopping list” were inadmissible due to lack of proper authentication; and (d) that the trial court erred in denying Weathers’s motion for a directed verdict as to

Counts I and II at the close of the State's case-in-chief. We address each of these arguments in turn.

A. Failure to Argue Effectiveness of Trial Counsel

Weathers argues that his appellate counsel was ineffective for failing to argue in Weathers's direct appeal that his trial counsel was ineffective for the reasons argued above. In addressing this claim, we first observe that we have already determined Weathers's claims of ineffective assistance of trial counsel to be without merit. Therefore his appellate counsel could not have been ineffective for failing to present these issues upon direct appeal.²

B. Corpus Delicti

Weathers argues that his appellate counsel was ineffective for failing to argue on direct appeal that the State failed to establish the *corpus delicti* of the crime before the admission of Weathers's taped statement. The *corpus delicti* rule was addressed in Sweeney v. State, 704 N.E.2d 86, 111 (Ind. 1998), wherein the court explained that a crime may not be proved solely on the basis of a confession. Instead, there must be some other proof of the crime in order to prevent convictions upon confessions to crimes which never occurred. Id. The independent evidence need not be shown beyond a reasonable

² We note that our supreme court has repeatedly stated that although claims of ineffective assistance of trial counsel may be brought on direct appeal, the preferred method of presenting such claims is on post-conviction review. See McIntire v. State, 717 N.E.2d 96, 101 (Ind. 1999); Woods v. State, 701 N.E.2d 1208, 1219 (Ind. 1998), cert. denied 528 U.S. 861 (1999). Post-conviction proceedings are preferred because presenting such claims often requires the development of new facts not present in the trial record. McIntire, 717 N.E.2d at 101. However, if a defendant does choose to present the issue of ineffective assistance of trial counsel on direct appeal, the issue will be foreclosed from later collateral review. Id. at 102; Woods, 701 N.E.2d at 1220. Thus, even if Weathers had meritorious claims of ineffective assistance of trial counsel, which he does not, we would not find appellate counsel ineffective for declining to present such via the non-preferred method of direct review.

doubt, but instead the evidence need only provide an inference that a crime was committed. Id. Such inference may be established through circumstantial evidence. Id. at 112.

This question of whether the *corpus delicti* must be established *before* the admission of a confession was addressed in Beal v. State, 453 N.E.2d 190, 195 (Ind. 1983), wherein the court explained that although it has been held that the *corpus delicti* must *first* be proved before any statements or any involvement of the defendant can be introduced, “[t]he stringent rules of order of proof . . . have been abrogated by this Court . . . [and] the order of evidence is a matter to be determined in the sound discretion of the trial judge.” Id. Thus, to the extent that Weathers’s argument is that the *corpus delicti* was not proved *before* the admission of his taped statement, he has not established any error. See Williams v. State, 837 N.E.2d 615, 617-18 (Ind. Ct. App. 2005) (no error in order of proof establishing *corpus delicti* of crime charged), trans. denied; Pawloski v. State, 269 Ind. 350, 360, 380 N.E.2d 1230, 1235 (1978) (no error for trial court to allow State to reopen its case-in-chief in order to establish *corpus delicti* of arson).

To the extent that Weathers argues that the State failed to establish the *corpus delicti* of the crimes charged at all, we again are unable to agree. In addition to his taped statement, his wife testified that Weathers gave her methamphetamine and gave it to others in exchange for helping Weathers do household jobs.³ Further, another witness testified that Weathers delivered what he believed to be methamphetamine to him while

³ Although Weathers claims that his wife’s testimony cannot be used to establish the *corpus delicti* because of his claim that her testimony was inadmissible, we have rejected this claim above.

he helped Weathers put a roof on his garage. This evidence was sufficient to establish the *corpus delicti* of the crime of dealing in methamphetamine, and there was no violation of the *corpus delicti* rule in the admission of Weathers's taped statement. Because of this, Weathers's appellate counsel was not ineffective for failing to present this argument on direct appeal.

C. Authentication of Exhibits

Weathers contends that his appellate counsel was ineffective because he failed to argue on direct appeal that the notebook and "shopping list" found at his home were inadmissible due to lack of proper authentication. Once again, Weathers is incorrect.

With regard to the notebook, Weathers acknowledges that his wife testified that she was present in the room when Weathers instructed his son to write something for him in the notebook. Thus, his wife's testimony sufficiently establishes that the notebook is what the State claimed it to be. See Ind. Evidence Rule 901. Weathers again contends that his wife's testimony was inadmissible pursuant to the marital privilege, and thus could not authenticate the notebook. But we have already rejected this claim above,⁴ and his argument with regard to the authentication of the notebook must fail.

With regard to the authentication of the "shopping list," containing the items that could be used in the manufacture of methamphetamine, we have already determined above that the admission of the list was not key to Weathers's convictions. We again note that Weathers was not convicted of dealing, not manufacturing, methamphetamine.

⁴ Indeed, his wife testified that she heard Weathers tell his son what to write in the notebook. This communication to a third person was not a privileged communication between Weathers and his wife.

More importantly, given Weathers's taped statement and the testimony of his wife, we cannot say that the result of Weathers's trial would have been any different even if this list had been excluded at trial.⁵

D. Judgment on the Evidence

Weathers lastly claims that his appellate counsel was ineffective for failing to raise the issue of the propriety of the trial court's denial of his motion for judgment on the evidence. We disagree. Weathers essentially claims that his convictions for dealing in methamphetamine cannot be supported by the testimony of his wife because of his view that her testimony should have been excluded. Because we have concluded that his wife's testimony was not improperly admitted, this claim fails. Moreover, in addition to the testimony of his wife, Weathers admitted on his taped statement to delivering methamphetamine to his wife and others. In short, Weathers has not shown that his motion for judgment on the evidence was properly denied, and his appellate counsel was therefore not ineffective for failing to present this issue upon direct appeal.

Conclusion

The post-conviction court did not err in determining that Weathers was not denied the effective assistance of trial counsel. Similarly, the post-conviction court did not err in concluding that Weathers was not denied the effective assistance of appellate counsel.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.

⁵ This also holds true for the notebook. Even if this exhibit was not properly authenticated and should not have been admitted at trial, given the other evidence against him, we cannot say the result of his trial would have been any different had the notebook been excluded.