

Case Summary

Appellant-Petitioner Antoine Hill (“Hill”) appeals the denial of his petition for post-conviction relief. We reverse and remand with instructions.

Issue

Hill presents a single issue for our review, which we restate as whether the post-conviction court erred in denying his petition for post-conviction relief which alleged he was denied the effective assistance of post-conviction counsel when counsel failed to timely appeal the denial of his prior petition to file a belated direct appeal challenging his sentence.

Facts and Procedural History

On June 11, 2004, Hill pled guilty to attempted murder, as a Class A felony, and two counts of attempted battery, both as Class C felonies. He was then sentenced on August 12, 2004, to forty (40) years imprisonment for the Class A felony conviction and six (6) years imprisonment for each Class C felony conviction, with sentences to be served consecutively for an aggregate term of fifty-two (52) years.

On April 29, 2005, Hill filed a pro se petition for post-conviction relief under Indiana Post-Conviction Rule 1 (“P.-C.R. 1 petition”). On January 5, 2006, Hill, through counsel Tasha Reed (“Attorney Reed”) of the State Public Defenders Office, withdrew his petition without prejudice and, on July 3, 2006, filed a petition requesting permission to file a belated direct appeal under Indiana Post-Conviction Rule 2 (“P.-C.R. 2 petition”). The post-conviction court held an evidentiary hearing on this petition on September 26, 2006, and orally denied it the same day.

On November 3, 2006, four days after the notice of appeal of the court's denial of Hill's P.-C.R. 2 petition was due to be filed, Attorney Reed filed another petition for post-conviction relief under Rule 2, attempting to belatedly appeal the denial of the original P.-C.R. 2 petition. The post-conviction court summarily denied the petition, and we affirmed that denial on appeal, but noted that Hill still had a remedy to seek post-conviction relief for ineffective assistance of counsel under Indiana Post-Conviction Rule 1(a)(1). Hill v. State, No. 45A05-0612-CR-748 (Ind. Ct. App. Aug. 7, 2007), trans. denied.

On September 28, 2009, Hill, once again pro se, filed a petition for post-conviction relief under Indiana Post-Conviction Rule 1, alleging ineffective assistance of his counsel at the trial level. The post-conviction court treated this petition as an amendment and reactivation of his original P.-C.R. 1 petition which was filed on April 29, 2005. Hill's current counsel then amended this petition on February 26, 2010, to allege ineffective assistance of post-conviction counsel, premising the claim on Attorney Reed's failure to timely appeal the denial of his P.-C.R. 2 petition. On April 28, 2010, the post-conviction court held a hearing on the matter, and denied Hill's P.-C.R. 1 petition on July 29, 2010. This appeal ensued.

Discussion and Decision

Standard of Review

Hill appeals the denial of his petition for post-conviction relief, and thus stands in the position of one appealing from a negative judgment. Overstreet v. State, 877 N.E.2d 144, 151 (Ind. 2007). The petitioner bears the burden of establishing grounds for relief by a

preponderance of the evidence, and we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to the opposite conclusion. Id. Additionally, when the post-conviction court enters findings of fact and conclusions of law pursuant to 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. (quoting Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000)(citation omitted)). We do not, however, defer to the post-conviction court’s legal conclusions. Id.

Ineffective Assistance of Post-Conviction Counsel

Hill argues that he is entitled to post-conviction relief because he received ineffective assistance of post-conviction appellate counsel. Specifically, he maintains that Attorney Reed’s failure to timely file the notice of appeal from the denial of his P.-C.R. 2 petition constitutes ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), and therefore he is entitled to a review on the merits of his petition for a belated appeal. In the alternative, Hill argues that if we instead apply the standard for ineffective assistance enunciated in Baum v. State, 533 N.E.2d 1200 (Ind. 1989), as the State urges us to do, he is nevertheless entitled to relief because Attorney Reed’s representation denied him a “procedurally fair setting.” Id. at 1201; Appellant’s Reply Br. at 3.

Our supreme court has outlined our approach to reviewing claims of ineffective assistance of post-conviction counsel:

This Court declared its approach to claims about performance by a post-conviction lawyer in Baum v. State, 533 N.E.2d 1200 (Ind. 1989). We

observed that neither the Sixth Amendment of the U.S. Constitution nor article 1, section 13 of the Indiana Constitution guarantee the right to counsel in post-conviction proceedings, and explicitly declined to apply the well-known standard for trial and appellate counsel of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Baum, 533 N.E.2d at 1201. The Baum court noted that post-conviction pleadings are not regarded as criminal actions and need not be conducted under the standards followed in them. Id. We held unanimously that a claim of defective performance “poses no cognizable grounds for post-conviction relief” and that to recognize such a claim would sanction an abuse of the post-conviction remedy. Id. at 1200-01.

We therefore adopted a standard based upon principles inherent in protecting due course of law—one that inquires “if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court.” Id. at 1201. As Justice DeBruler explained later, speaking for a majority of us, it is “not a ground for post-conviction relief that petitioner’s counsel in a prior post-conviction proceeding did not provide adequate legal assistance,” but such a contention could provide a prisoner with a basis for replying to a state claim of prior adjudication or abuse of process. Hendrix v. State, 557 N.E.2d 1012, 1014 (Ind. 1990)(DeBruler, J., concurring).

Graves v. State, 823 N.E.2d 1193, 1196 (Ind. 2005). Because Hill is seeking post-conviction relief premised upon Attorney Reed’s representation, and not his trial counsel’s representation, the Baum standard is applicable in this case, not the Strickland standard employed by the post-conviction court.

Hill maintains that he is nevertheless still entitled to relief under Baum because Attorney Reed’s lack of representation on appeal deprived him of the procedurally fair setting contemplated by the standard.¹ Despite the “highly deferential” nature of the Baum standard, Daniels v. State, 741 N.E.2d 1177, 1190 (Ind. 2001), our supreme court has nevertheless granted a petitioner’s post-conviction relief when his counsel “in essence,

¹ Hill does not challenge Attorney Reed’s representation at his P.-C.R. 2 petition hearing, only her representation of him on appeal. Appellant’s Reply Br. p. 2-3.

abandoned” him, therefore depriving him of a procedurally fair setting. Waters v. State, 574 N.E.2d 911, 912 (Ind. 1991). In Waters, the petitioner filed a pro se petition and counsel entered an appearance one month later. Id. The post-conviction court ordered that evidence be submitted by affidavit. Id. The petitioner submitted the affidavits himself, which were later deemed technically inadequate, and counsel submitted nothing on behalf of the post-conviction petition except for a petition for instructions. Id. Our supreme court stated that “counsel should have known that the affidavits were technically inadequate and should have taken the necessary steps to present them to the trial court in acceptable form. Counsel, in essence, abandoned his client and did not present any evidence in support of his client’s claim.” Id.

We have also found abandonment under Baum when counsel “called no witnesses, presented no affidavits, and did not submit the trial record.” Taylor v. State, 882 N.E.2d 777, 784 (Ind. Ct. App. 2008); also Bahm v. State, 789 N.E. 2d 50 (Ind. Ct. App. 2003) (holding that the Baum standard had been met when counsel “did not call any witnesses, submit any affidavits, or even submit the direct appeal record.”), clarified on reh’g on other grounds, 794 N.E.2d 444 (Ind. Ct. App. 2003), trans. denied. With regard to appellate counsel, we concluded that a petitioner had met the Baum standard when his counsel miscalculated the date the record was due, which resulted in the dismissal of petitioner’s appeal of the denial of his first petition for post-conviction relief. Poling v. State, 740 N.E.2d 872, 878-79 (Ind. Ct.

App. 2000), disapproved on other grounds by Graves, 823 N.E.2d 1193 at n.1.² We wrote, “[w]e assume arguendo that Poling’s counsel’s failure to perfect an appeal was below the standard expected of post-conviction counsel because his counsel neither ‘appeared’ nor represented Poling at a ‘procedurally fair setting.’” Id.

Here, Attorney Reed stated that she inadvertently failed to calendar the appellate deadline, and that the failure to appeal was through no fault of Hill. App. 50. The post-conviction court concluded that had Attorney Reed timely filed the notice of appeal from the P.-C.R. 2 ruling, the case would have been properly appealed. App. 51. Because Attorney Reed failed to timely file her appeal, she did not appear and did not represent Hill. Nor was Hill able to receive an opinion of the appeals court. As a result, Hill was unable to obtain appellate review of the denial of his petition, which “prevented [Hill] from being heard, either through counsel or pro se.” Graves, 823 N.E.2d at 1197 (quoting Harris v. United States, 367 F.3d 74, 77 (2nd Cir. 2004)). Therefore, we hold that Attorney Reed abandoned Hill on appeal, and consequently deprived him of a procedurally fair setting for pursuit of post-conviction relief. Thus, we reverse the post-conviction court’s ruling as to his P.-C.R. 1 petition, and conclude that Hill is entitled to appeal the denial of his P.-C.R 2 petition to file a belated direct appeal.

² In Poling, having found that petitioner satisfied the Baum standard, we then proceeded to analyze Poling’s claim of ineffective assistance of post-conviction appellate counsel by applying the second prong of the Strickland analysis and inquired whether Poling was prejudiced by his attorney’s mistake. Our supreme court stated, “[T]he Court of Appeals announced that when a petitioner met the Baum standard...it would use Strickland v. Washington. Poling is disapproved.” Graves, 823 N.E.2d at n.1 (internal citations omitted). We read Graves’ disapproval of Poling to indicate that we should not apply Strickland after first finding Baum satisfied, not that the Baum standard is completely inapplicable to claims of ineffective assistance of post-conviction appellate counsel.

Conclusion

Because Hill's post-conviction attorney abandoned him on appeal, he was denied the fair setting for post-conviction relief contemplated by Baum. This matter is therefore remanded to the post-conviction court with instructions to enter a final judgment granting Hill's P.-C.R. 1 petition so that Hill may proceed to appeal the denial of his P.-C.R. 2 petition to file a belated direct appeal of his sentence.

Reversed and remanded with instructions.

NAJAM, J., and DARDEN, J., concur.