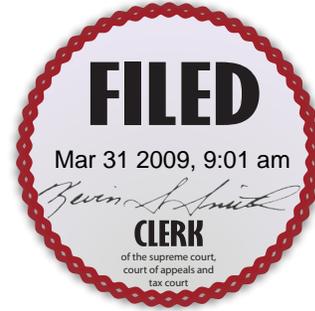


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

SUSAN K. CARPENTER
Public Defender of Indiana

DEIDRE R. ELTZROTH
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TROY A. BOOKER,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 48A02-0809-PC-869

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0708-PC-375

March 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Troy A. Booker (“Booker”) appeals the denial of his petition for post-conviction relief, which challenged his convictions following his plea of guilty to Dealing in Cocaine and Attempted Dealing in Cocaine. We affirm.

Issue

Booker presents the sole issue of whether he was denied the effective assistance of trial counsel because counsel failed to adequately pursue his release under Indiana Criminal Rule 4 during the four-year span of time between the charges and the guilty plea. We restate the issue as whether Booker’s claim of ineffectiveness premised upon an alleged denial of his Criminal Rule 4 right to discharge is foreclosed by his guilty plea.

Facts and Procedural History

In October of 2000, the State charged Booker with Dealing in Cocaine and Attempted Dealing in Cocaine. The State also alleged that Booker is a habitual criminal. During the pendency of the charges, Booker was represented by three successive public defenders. In July of 2003, Booker drafted a pro se Motion for Criminal Rule 4(C) Discharge. With the assistance of counsel, he filed a second motion for discharge on September 6, 2005, which was denied.

Also on September 6, 2005, Booker pled guilty as charged after receiving an advisement of rights, including an advisement that he waived the right to a speedy trial by pleading guilty. He received an aggregate sentence of forty years imprisonment, with ten years suspended to probation. His sentence was affirmed on direct appeal. Booker v. State,

No. 48A02-0602-CR-117 (Ind. Ct. App. 2006), trans. denied.

On August 1, 2007, Booker filed a pro se Petition for Post-Conviction Relief, which was amended on March 5, 2008. On May 30, 2008, the post-conviction court conducted an evidentiary hearing. On August 6, 2008, the post-conviction court denied Booker's petition. Booker now appeals.

Discussion and Decision

Booker contends that the post-conviction court improperly denied his petition for relief, because he was "entitled to discharge under Criminal Rule 4(C)¹ [and] Counsel's failure to so move constitutes deficient performance." Appellant's Brief at 14. A petitioner appealing from the denial of post-conviction relief stands in the position of one appealing from a negative judgment. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). On appeal, we will not reverse unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. Id.

¹ Criminal Rule 4(C) provides:

Defendant Discharged. No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

Ineffectiveness of counsel claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must show both deficient performance and resulting prejudice. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). A deficient performance is a performance which falls below an objective standard of reasonableness. Id. Prejudice exists when a claimant shows “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694.

Here, Booker elected to plead guilty. A plea of guilty constitutes a waiver of the right to trial. Gosnell v. State, 439 N.E.2d 1153, 1155 (Ind. 1982). “The right to have a trial expeditiously cannot exist or be enforced apart from the right to trial, and any claim of a denial thereof is waived upon a plea of guilty.” Id. Accordingly, where a defendant waives his right to have a trial, he thereby waives any right to a speedy trial. Wright v. State, 496 N.E.2d 60, 61 (Ind. 1986). A defendant cannot simultaneously plead guilty and pursue an alleged violation of his Criminal Rule 4 rights on appeal or through a post-conviction relief proceeding. Cornelious v. State, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), trans. denied; Branham v. State, 813 N.E.2d 809, 811 (Ind. Ct. App. 2004).

Accordingly, Booker’s decision to plead guilty foreclosed counsel’s ability to continue to pursue his discharge pursuant to Criminal Rule 4. Booker has not demonstrated deficient performance by counsel. Moreover, Booker makes no claim that his guilty plea was a result of misinformation or otherwise involuntary. Booker was advised that he would be giving up his right to trial, and more specifically his right to a speedy trial, if he pled guilty. He elected

to plead guilty. The post-conviction court properly denied Booker's petition for post-conviction relief.

Affirmed.

MATHIAS, J., and BARNES, J., concur.