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**IN THE
COURT OF APPEALS OF INDIANA**

HUGH BEECH,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 49A02-0806-PC-508

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey L. Marchal, Master Commissioner
Cause No. 49G06-0409-PC-168611

April 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Hugh Beech appeals the denial of his petition for post-conviction relief, claiming that he did not knowingly, intelligently, and voluntarily plead guilty to being a habitual offender. Specifically, Beech argues that the guilty plea must be set aside because neither the trial court nor his defense counsel adequately explained to him that the State was required to prove that the predicate felonies that served as the bases for the habitual offender charge were “unrelated.” Appellant’s Br. p. 4-6. Beech further asserts that the State failed to establish a proper factual basis for his guilty plea to the habitual offender count.

Beech also claims that he was entitled to post-conviction relief because his trial counsel was ineffective for failing to investigate whether his prior felony convictions could serve as a proper basis for the habitual offender determination. Finally, Beech contends that his trial counsel was ineffective for failing to object to his sentence because it allegedly violated the terms of the plea agreement. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

On August 6, 2004, Beech was arrested in Marion County and charged with possession of paraphernalia, a class D felony.¹ Thereafter, on September 17, 2004, Beech was charged with burglary, a class B felony, theft, a class D felony, and criminal mischief, a class B misdemeanor, under a separate cause number. Then, on September 23, 2004, Beech was charged with theft, a class D felony, and possession of paraphernalia, a class D felony, in another unrelated incident. On October 14, 2004, the

¹ Beech had a previous conviction for this offense in May 2004.

State alleged that Beech was a habitual offender. In support of the habitual offender count, the State alleged that Beech had been convicted of battery, a class C felony, in 1987, and that he had been convicted of class C felony burglary in 1995.

On November 29, 2004, Beech entered into a plea agreement with regard to all three cases, which provided that he would plead guilty to one count each of burglary, theft, and possession of paraphernalia. Beech also agreed to admit to being a habitual offender.

In exchange for Beech's plea, the State agreed to dismiss the remaining theft, criminal mischief, and possession of paraphernalia charges. The plea agreement also provided that Beech's aggregate sentence would be capped at twenty years of incarceration.

At a hearing that commenced on December 20, 2004, the trial court sentenced Beech to six years on the burglary conviction, which was enhanced by ten years on the habitual offender count. Beech was also sentenced to consecutive terms of one and one-half years each on the two class D felony counts. Thus, Beech received an aggregate sentence of nineteen years.

On May 30, 2006, Beech filed a petition for post-conviction relief, claiming that his guilty plea was not knowingly, voluntarily, or intelligently made, that the State failed to present an adequate factual basis for the plea, and that his trial counsel was ineffective for failing to explain the nature and consequences of the habitual offender enhancement to him and for failing to object to the length of the sentence that was imposed.

At a hearing on Beech's petition for post-conviction relief that commenced on February 7, 2008, Beech's trial counsel testified that

When I visited you at the jail on November 22nd of 2004, I gave you copies of the habitual paperwork and went over it with you. I explained to you, according to my notes, that they had to prove that your first conviction and sentencing occurred before the second conviction and that then occurred before the third conviction. I have in my notes where I wrote it out and sort of did the timeline for you and explained to you what the penalty range was.

Tr. p. 13. Following the hearing, the post-conviction court denied Beech's request for relief. He now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that a petitioner who appeals from the denial of post-conviction relief faces a rigorous standard of review, as we consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. Kien v. State, 866 N.E.2d 370, 380-81 (Ind. Ct. App. 2007), trans. denied. In post-conviction proceedings, the petitioner bears the burden of proof by a preponderance of the evidence. Henley v. State, 881 N.E.2d 639, 643 (Ind. 2008); Ind. Post-Conviction Rule 1(5). If a petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than was reached by the post-conviction court. Ivy v. State, 861 N.E.2d 1242, 1244 (Ind. Ct. App. 2007), trans. denied. We must accept the post-conviction court's findings of fact and may only reverse

if the findings are clearly erroneous. Bahm v. State, 789 N.E.2d 50, 57 (Ind. Ct. App. 2003).

II. Beech's Claims

A. Guilty Plea to Habitual Offender Count and Factual Basis

Beech contends that his petition for post-conviction relief should have been granted because neither the trial court nor his defense counsel adequately explained to him that the State was required to prove the existence of two prior unrelated felony convictions before he could be adjudged a habitual offender. Moreover, Beech argues that the State failed to present an adequate factual basis for the acceptance of his guilty plea on the habitual offender count. Therefore, Beech claims that his guilty plea was not knowingly, intelligently, or voluntarily made.

In discussing the requirements of a guilty plea, our Supreme Court has determined that (1) a defendant has a constitutional right to notice of the true nature of the charge; (2) where the record of the guilty plea hearing contains an explanation of the charge by the trial court or a representation by defense counsel that the nature of the offense has been explained, the defendant's right to notice will have been honored; (3) where intent is a critical element of the offense, notice of that element must be given; and (4) even if notice is required and has not been given and cannot be presumed, a defendant is not entitled to post-conviction relief if the error is harmless beyond a reasonable doubt. Patton v. State, 810 N.E.2d 690, 696 (Ind. 2004).

As noted above, Beech's trial counsel testified at the post-conviction hearing that she gave him copies of the habitual offender charge and explained the State's burden of

proof to him. Tr. p. 13. Moreover, counsel testified that she explained a “timeline” regarding proof of the prior offenses to Beech and told him about the penalty range. Id.

Notwithstanding his trial counsel’s testimony, Beech relies on Roe v. State, 598 N.E.2d 586 (Ind. Ct. App. 1992), in support of his argument that the State failed to demonstrate the required sequence of the unrelated felony convictions pursuant to Indiana Code 35-50-2-8 to prove the habitual offender count.² However, the record in this case demonstrates that Beech admitted at the guilty plea hearing that he had committed the burglary in the instant case after he was sentenced for the battery offense in 1987. Ex. p. 22. Beech also responded affirmatively when the trial court asked whether he had committed the instant burglary after being sentenced for the burglary that he committed in 1995. Id. at 23.

Unlike the circumstances in Roe, where the State failed to present any evidence of the two prior unrelated felonies and the sequence of the offenses that the habitual offender statute requires, the evidence presented at the post-conviction hearing established that Beech’s trial counsel supplied him with a copy of the habitual offender

² Pursuant to Indiana Code section 35-50-2-8:

(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.

...

(c) A person has accumulated two (2) prior unrelated felony convictions for purposes of [the habitual offender finding] only if:

- (1) the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and
- (2) the offense for which the state seeks to have the person sentenced as a habitual offender was committed after sentencing for the second prior unrelated felony conviction.

count, explained the State's burden when proving that allegation, and told him of the penalty range. Tr. p. 13. Moreover, Beech admitted the allegations set forth in the charging information and the proper sequence that was necessary to prove the habitual offender count. As a result, the holding in Roe is not applicable here, and we conclude that the post-conviction court properly concluded that Beech "understood the nature of the habitual offender enhancement to which he was pleading guilty and voluntarily admitted to being an habitual offender." Appellant's App. p. 223. Thus, Beech's claim fails on this basis.

In a related argument, Beech maintains that his petition for post-conviction relief should have been granted because the State failed to establish a sufficient factual basis for the habitual offender guilty plea. A factual basis exists when there is evidence about the elements of the crime from which a trial court could reasonably conclude that the defendant is guilty of the charged offense. DeWitt v. State, 755 N.E.2d 167, 172 (Ind. 2001). The factual basis of a guilty plea need not be established beyond a reasonable doubt. Id. In fact, relatively minimal evidence is enough, and the trial court's determination of an adequate factual basis is presumed correct. Butler v. State, 658 N.E.2d 72, 77 (Ind. 1995).

The factual basis for the acceptance of a guilty plea may be established in one of several ways: (1) the State's presentation of evidence on the elements of the charged offenses; (2) the defendant's sworn testimony regarding the events underlying the charges; (3) the defendant's admission of the truth of the allegations in the information read in court; or (4) the defendant's acknowledgment that he understands the nature of

the charged offense and that his plea is an admission to the charges. Madden v. State, 697 N.E.2d 964, 967 (Ind. Ct. App. 1998). To be entitled to post-conviction relief, the defendant must prove that he was prejudiced by the lack of a factual basis. Id.

In addition to Beech's admission to the prior felonies and the dates on which he was sentenced for those offenses, the following exchange occurred at the guilty plea hearing:

THE COURT: Going back to the first cause, the Burglary case, the State of Indiana did in that case file the Habitual Offender Count, and it reads as follows. It says that Hugh Beech, on or about September 16th 2004, in Marion County, Indiana, had accumulated two prior unrelated felony convictions in violation of Indiana Code 35-50-2-8, that is, on or about August 24th 1987, in Marion County Superior Court, . . . one Hugh Beech was convicted of Battery, a Class C felony. And on or about September 6th, 1995, in Marion County Superior Court . . . one Hugh Beech was convicted of Burglary, a Class C Felony. Do you understand that's the charging Information for the Habitual Offender Count. . .?

BEECH: Yes, ma'am.

THE COURT: Do you understand you're pleading guilty to being an Habitual Offender?

BEECH: Yes, ma'am.

THE COURT: And are you an Habitual Offender?

BEECH: Yeah, I guess so.

Ex. at 22.

In our view, this exchange—coupled with the information that Beech received from his trial counsel—sufficiently established that Beech understood the nature of the habitual offender count and that his plea constituted an admission of the charges.

Therefore, the factual basis that the State presented at the guilty plea hearing was sufficient, and Beech's claim fails.³ Madden, 697 N.E.2d at 967.

B. Ineffective Assistance of Counsel

Beech claims that his petition for post-conviction relief should have been granted because his trial counsel was ineffective. Specifically, Beech argues that his trial counsel failed to investigate whether his prior felonies could properly serve as the basis for a habitual offender determination, that she failed to adequately explain the habitual offender count to him, and she should have objected to the filing of the habitual offender charge because the State did not file a motion to amend the charging information. Finally, Beech argues that his trial counsel should have objected to the sentence that was imposed because it allegedly violated the terms of the plea agreement.

In addressing Beech's claims, we initially observe that there is a strong presumption that counsel rendered adequate legal assistance. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel performed deficiently and the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. McManus, 868 N.E.2d 778, 790 (Ind. 2007). In other words, the petitioner must establish that there is a reasonable probability that, but for counsel's errors, the result of the

³ To the extent that Beech is arguing that there was an "illegal pre-indictment delay of well over five years," appellant's br. p. 10-11, between the date of the commission of the battery in 1987, and the filing of the charging information in that case, we note that Beech litigated that matter in a previous appeal. Beech v. State, No. 49A02-0611-PC-981, slip op. at 8-9 (Ind. Ct. App. April 18, 2007). Thus, his attempt to relitigate that matter is barred by the doctrine of collateral estoppel. See Bonham v. State, 644 N.E.2d 1223, 1226 (Ind. 1994) (observing that the doctrine of collateral estoppel generally operates as a bar to a subsequent relitigation of the same fact or issue presented in a subsequent lawsuit).

proceeding would have been different. Segura v. State, 749 N.E.2d 496, 500-01 (Ind. 2001). In order to establish that a guilty plea “would not have been entered if counsel had performed adequately, the petitioner must show that a defense was overlooked or impaired and that the defense would likely have changed the outcome of the proceeding.” Id. at 499. To satisfy the prejudice prong in the guilty plea context, the petitioner must establish that there is a reasonable probability that he would not have pleaded guilty and would not have been convicted if he had proceeded to trial. Id. Failure to satisfy either prong will cause the claim to fail. Henley, 881 N.E.2d at 645. If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel’s performance was deficient. Id.

In this case, although Beech contends that his trial counsel was ineffective for failing to investigate whether his prior felony convictions could properly serve as the basis for the habitual offender determination, our review of the record reveals that Beech presented no evidence establishing that his prior felonies could not have supported the habitual offender determination. To the contrary, the exhibits that Beech presented show that that he was sentenced for the 1987 conviction on August 24, 1987. Ex. p. 51-54. And, to the extent that Beech contends that he was not sentenced on that offense until he violated his probation in 1992, we note that this court specifically rejected that argument in his prior appeal. Beech, slip op. at 5-7. As a result, Beech’s contention that there was no legitimate basis for the habitual offender count fails. Thus, we reject Beech’s ineffective assistance of counsel claim on this basis.

Next, although Beech claims that his trial counsel did not explain the habitual offender allegation to him, we addressed that issue above and pointed out that his counsel testified otherwise and stated that she provided him with copies of the habitual offender paperwork, explained the necessary proof, and told him about the penalty range. Tr. p. 13. Also, before Beech pleaded guilty, he acknowledged that his trial counsel answered all of his questions. Ex. at 17. As a result, Beech has failed to establish the ineffective assistance of trial counsel in this regard.

Beech also contends that when the State filed the habitual offender allegation, his trial counsel should have objected because the State failed to file a motion to amend the charging information in accordance with Indiana Code section 35-34-1-5. When the habitual offender count was filed, this statute provided that

The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time up to: (1) thirty (30) days if the defendant is charged with a felony; or (2) fifteen (15) days if the defendant is charged only with one (1) or more Misdemeanors; before the omnibus date. When the information or indictment is amended, it shall be signed by the prosecuting attorney.

I.C. § 35-34-1-5.

In this case, the record shows that the omnibus date for Beech's burglary charge was November 19, 2004. Appellant's App. p. 4. Therefore, because the prosecutor amended the information on October 14, 2004, which was more than thirty days prior to the omnibus date, he was not required to file a motion to amend the information. Rather, pursuant to Indiana Code section 35-34-1-5, the prosecutor could amend the information "upon giving written notice to the defendant." As the record demonstrates, the

prosecutor gave notice to Beech on the same day that the habitual offender information was filed. Id. at 86-87. Thus, Beech has failed to show that his trial counsel was ineffective on this basis.

Finally, Beech contends that his trial counsel was ineffective because she should have objected to the sentence that was imposed. Beech maintains that his sentence allegedly violated the terms of the plea agreement.

Contrary to Beech's claim, the specific terms of the agreement capped the sentence at twenty years, and the trial court imposed a sentence of nineteen years. Id. at 100, 119-21. Therefore, Beech received a favorable sentence pursuant to the terms of the plea agreement, inasmuch as he was facing the possibility of fifty years of incarceration on the burglary and habitual offender allegations alone, had he proceeded to trial and been found guilty. I.C. §§ 35-50-2-4, -8. As a result, Beech has failed to show that his trial counsel was ineffective on this basis.

The judgment of the post-conviction court is affirmed.

MAY, J., and BARNES, J., concur.