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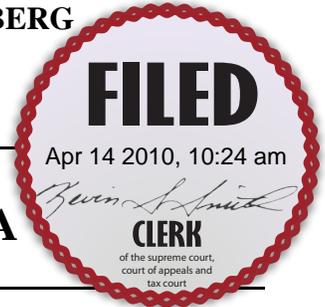
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COURT OF APPEALS OF INDIANA

KENDRICK BATES,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 02A03-0907-PC-334

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0602-FA7

April 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Kendrick Bates appeals the denial of his petition for post-conviction relief. Bates argues that he was entitled to relief for the following reasons: (1) he was denied the effective assistance of trial counsel when his attorney did not file a motion to suppress evidence acquired as the result of an allegedly illegal traffic stop; (2) he was denied the right of representation when the trial court denied his request to continue the trial and hire a new attorney the night before his trial was scheduled to begin; and (3) there was insufficient evidence to sustain the trial court's finding that he had violated probation in a separate cause by pleading guilty herein. Finding no error, we affirm.

FACTS

On February 17, 2006, Bates was charged with class A felony dealing in cocaine. Although a public defender was initially appointed to represent Bates, on January 30, 2007, Bates retained private counsel. Bates's trial was scheduled to begin on April 26, 2007. On April 25, 2007, Bates requested a continuance so that he could fire his attorney and hire another one. The trial court denied his request. Later that same day, Bates pleaded guilty as charged pursuant to a plea agreement that provided that his sentence would be capped at thirty years. The plea agreement also provided that Bates "admit[ted] to the probation revocation violation in [another causes]. [Bates] shall be unsatisfactorily released from probation in that cause[.]" Guilty Plea Tr. p. 19. On May 16, 2007, the trial court sentenced Bates to an executed term of thirty years.

On April 4, 2008, Bates filed a petition for post-conviction relief.¹ On February 6, 2009, the post-conviction court held a hearing on Bates’s petition, at which Bates presented his own testimony and essentially no other evidence in support of his arguments. On May 5, 2009, the post-conviction court denied Bates’s petition. Bates now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Perry, 904 N.E.2d at 307. 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. Post-conviction procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Perry, 904 N.E.2d at 307; see also P-C.R. 1(1).

¹ The petition is not included in the record on appeal.

II. Ineffective Assistance

Bates's first argument is that his trial counsel was ineffective for failing to move to suppress evidence that was obtained following an allegedly illegal traffic stop. When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Second, the defendant must show that the deficient performance resulted in prejudice. Id. We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998).

Bates argues that his attorney should have sought to suppress the cocaine that was obtained after police officers initiated a traffic stop. At the post-conviction hearing, however, the only evidence that Bates presented in this regard was his own self-serving testimony. Inasmuch as Bates pleaded guilty below, we do not have the police officers' version of events. Moreover, Bates's attorney did not testify at the hearing, though the post-conviction court noted that Bates presented his attorney's affidavit, which stated that counsel "has little recollection of the case other than being able to recall meeting with the

petitioner and that he believed that he competently represented the petitioner.”² PCR Order para. 8.³

Thus, the only evidence on this issue before the post-conviction court was Bates’s own testimony, which the court was free to disregard. Bates testified that he discussed the possibility of seeking to suppress the evidence with his attorney, who “said that there’s no way that I have a chance at this [suppression] and he’s not going to [file a motion to suppress].” PCR Tr. p. 11. Bates has failed to offer any evidence establishing that this strategic decision was erroneous. Thus, Bates has failed to establish that the evidence unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court, and we decline to disturb its ruling in this regard.

III. Motion to Continue

Bates next argues that the trial court erred by denying his request to continue the trial and find another attorney on the day before his trial was scheduled to begin. Initially, we observe that this freestanding claim of error is not available for review in post-conviction proceedings. Randolph v. State, 802 N.E.2d 1008, 1012 (Ind. Ct. App. 2004) (holding that “[i]ssues available, but not raised, at trial or on direct appeal are waived for post-conviction proceedings”).

Waiver notwithstanding, we note briefly that the denial of a continuance is reviewed for an abuse of discretion. Lewis v. State, 730 N.E.2d 686, 690 (Ind. 2000).

² The affidavit itself is not included in the record on appeal.

³ The order entered by the post-conviction court is not included in Bates’s appendix; instead, it is merely attached to his appellant’s brief.

Moreover, although a defendant has the right to the counsel of choice, the right is not absolute and must be exercised at the appropriate stage of the proceeding. Id. at 689. Continuances sought shortly before trial to hire a new attorney are disfavored because they cause substantial loss of time for jurors, lawyers, and the court. Id. Here, at the time Bates made this request, he told the trial court that he and his attorney had not communicated for some time and that he wished to hire a new attorney. Given that this request was made the day before the trial was set to begin, we cannot say that the trial court abused its discretion by denying a continuance. Thus, in any event, Bates was not entitled to post-conviction relief on this basis.

IV. Probation Violation

Finally, Bates directs our attention to his admission, as part of the plea agreement herein, that he had violated the terms of his probation in another, unrelated cause. Bates argues that the trial court should have inquired into the factual basis for the probation violation and, essentially, that its failure to do so means that there is insufficient evidence supporting the implicit finding of a probation violation. We note, again, that this is a freestanding claim of error that is not available in post-conviction proceedings. Randolph, 802 N.E.2d at 1012.

Waiver notwithstanding, we observe that although Bates has failed to provide us with the terms of his probation in that other cause, it is reasonable to assume that among those terms was a requirement that he comport himself with good behavior and comply with the rule of law. By pleading guilty herein to a class A felony, he was necessarily

admitting that he had broken the law, thereby violating that term of probation. Under these circumstances, we do not find that the post-conviction court erred by denying relief on this basis.⁴

The judgment of the post-conviction court is affirmed.

DARDEN, J., and CRONE, J., concur.

⁴ To the extent that Bates seems to argue that the trial court's order that any time served as a result of the probation violation be served consecutively to the thirty-year term herein was a violation of the thirty-year cap in his plea agreement, we note that the trial court was required to order consecutive sentences pursuant to Indiana Code section 35-50-1-2(d).