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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES HUSPON,)
)
 Appellant-Petitioner,)
)
 vs.) No. 49A05-0809-PC-517
)
 STATE OF INDIANA,)
)
 Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0310-PC-169775

April 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

James Huspon appeals from the post-conviction court's denial of his petition for post-conviction relief. Huspon raises a single issue for our review, which we restate as whether the post-conviction court erred in denying Huspon's petition.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts underlying Huspon's conviction and sentence were stated by this court on Huspon's direct appeal:

On October 1, 2003, Indianapolis Police Department Officer Khevin Watterson was driving his marked vehicle in Indianapolis when, after he made a turn onto Sharon Avenue, he almost struck a man standing in the middle of the street. That man, later identified as Huspon, fled as Officer Watterson exited his vehicle. Huspon entered a nearby house, and Officer Watterson drove away.

Later that evening, Officer Watterson saw Huspon sitting on the front porch of a house, and Officer Watterson exited his vehicle and approached Huspon. He asked Huspon "whether he had anything on him." Huspon pulled an empty hand out of one of his pockets and said, "[T]his[.]" and then started running away. Officer Watterson chased him and radioed for assistance. At one point, Officer Watterson saw a semi-automatic handgun fall out of Huspon's waistband and onto the ground. Another officer was able to apprehend Huspon, and Officer Watterson arrived to assist in the arrest. While Huspon was lying on the ground, Officer Watterson and other officers saw a baggie containing a substance later determined to be cocaine in Huspon's ear. Then, as officers were helping Huspon into a police vehicle, an officer found three baggies containing marijuana in Huspon's jacket pocket.

After Officer Watterson read Huspon his Miranda rights, Huspon stated that he had borrowed the semi-automatic handgun from his brother-in-law "for protection" and that he was "getting ready to smoke" the cocaine officers found in his ear. But Huspon denied any knowledge about the marijuana in his jacket pocket.

The State charged Huspon with unlawful possession of a firearm by a serious violent felon, possession of cocaine and a firearm, possession of cocaine, carrying a handgun without a license, possession of marijuana, and resisting law enforcement. In addition, the State alleged that Huspon was an habitual offender. During his bench trial, after the State presented its opening statement, Huspon engaged in the following colloquy with the trial court:

Huspon: I want to reject you for sitting in my case.

Court: I'm sorry?

Huspon: I want to reject you hearing my case because I don't think I'll have a fair trial.

Court: Well, sir, I'll overrule that. Call your first witness.

At the conclusion of the trial, the court entered judgment of conviction on the following counts: unlawful possession of a firearm by a serious violent felon, possession of cocaine, possession of marijuana, and resisting law enforcement. The court adjudicated Huspon to be an habitual offender and sentenced him to a total term of twenty-four years.

Huspon v. State, No. 49A05-0405-CR-274 (Ind. Ct. App. Feb. 15, 2005) (citations omitted; alterations original), trans. denied (“Huspon I”).

Following his sentencing, Huspon filed a motion to correct error with the trial court, which the court denied. And on direct appeal, Huspon argued that the evidence was insufficient to support his conviction for possession of marijuana and that the trial court erred when it denied his request for a change of judge. This court affirmed Huspon's convictions and sentence.

On September 7, 2006, Huspon filed his petition for post-conviction relief. On January 2, 2008, the post-conviction court held an evidentiary hearing on Huspon's petition. On January 16, Huspon amended his petition to argue, for the first time, that the trial court erred when it enhanced his sentence under the general habitual offender statute

by proof of the same felony used to establish that he was guilty of the serious violent felony (“SVF”) charge. On May 13, 2008, the post-conviction court denied Huspon’s petition. This appeal ensued.

DISCUSSION AND DECISION

Huspon appeals from the post-conviction court’s denial of his petition for post-conviction relief. 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); Saylor v. State, 765 N.E.2d 535, 547 (Ind. 2002). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Saylor, 765 N.E.2d at 547. 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. Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with 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.

Although Huspon raised numerous issues in his petition for post-conviction relief, on appeal he seeks our review of only one issue. Namely, Huspon argues that the post-conviction court erred in denying his request for relief because he was subjected to an improper double enhancement of his sentence when the trial court used the same prior felony to establish Huspon’s status both as an SVF and as an habitual offender. In

support, Huspon notes that this court, in Conrad v. State, 747 N.E.2d 575, 594-95 (Ind. Ct. App. 2001), trans. denied, held that such double enhancements were impermissible.

Conrad was decided in 2001, well before Huspon's trial. Also decided before Huspon's trial was this court's opinion in Townsend v. State, 793 N.E.2d 1092, 1097 (Ind. Ct. App. 2003), trans. denied. In Townsend, another panel of this court held that the 2001 amendments to the general habitual offender statute superceded Conrad, making double enhancements such as Huspon's permissible. The conflict between Townsend and Conrad was resolved by our Supreme Court in Mills v. State, 868 N.E.2d 446, 447-52 (Ind. 2007), in which the court held that Conrad was the proper application of the law. Our Supreme Court's decision in Mills came two years after this court's decision in Huspon I.

In sum, then, Huspon's argument to this court has two sides. First, he seeks relief under Conrad, which "was law at the time of Huspon's sentencing." Appellant's Brief at 4. Second, he seeks retroactive application of Mills, which, he contends, permits him to raise this issue for the first time in the post-conviction process since "this issue was unknown, it was unclear and ambiguous at best." Reply at 2. Huspon misunderstands the post-conviction process.

Huspon has waived his argument that he is entitled to relief under Conrad. As we have explained:

"The post-conviction relief process is also open to the 'raising [of] issues not known at the time of the original trial and appeal or for some reason not available to the defendant at that time.' Kimble v. State, (1983) Ind., 451 N.E.2d 302, 303-304. It is not, however, open to the raising of issues available to a petitioner upon his original appeal. Brown v. State, (1974) 261 Ind. 619, 308 N.E.2d 699. Errors not assigned at the trial level nor

argued on direct appeal are deemed waived in the context of post-conviction relief. Frith v. State, (1983) Ind., 452 N.E.2d 930; Howland v. State, (1982) Ind., 442 N.E.2d 1081. ‘To unreservedly hold the door open for appellate review under the post conviction remedy rules, regardless of the circumstances which preceded, would perforce characterize post conviction relief as some sort of ‘super-appeal’ contrary to its intended function.’ Langley v. State, (1971) 256 Ind. 199, 210, 267 N.E.2d 538, 544.”

Lindsey v. State, 888 N.E.2d 319, 323 (Ind. Ct. App. 2008) (quoting Bailey v. State, 472 N.E.2d 1260, 1262-63 (Ind. 1985)), trans. denied. That is, a defendant in a post-conviction proceeding may raise an issue for the first time in his or her petition “only when asserting either (1) deprivation of the Sixth Amendment right to effective assistance of counsel, or (2) an issue demonstrably unavailable to the petitioner at the time of his or her trial and direct appeal.” Id. at 325 (quotations, citations, and alterations omitted).

Huspon’s argument that he is entitled to relief under Conrad is a “free standing claim of fundamental error” and is not framed in the context of ineffective assistance of counsel. See id. at 322 (quotation omitted). And Huspon acknowledges that Conrad was available to him on direct appeal, although no issue was raised under Conrad. Accordingly, Huspon’s argument is not available to him under our post-conviction rules. See id. at 325.

Nor is Huspon’s attempt in his reply brief to style his argument as a claim for relief under Mills availing. Mills followed Conrad, and Conrad was available to Huspon on direct appeal. Further, in Brown v. State, 880 N.E.2d 1226, 1230-33 (Ind. Ct. App. 2008), trans. denied, we held that an appellate counsel did not render ineffective assistance for failing to anticipate that our Supreme Court would resolve a conflict of our court. Here, Huspon has made the same type of argument for relief as was made in

Brown, but in freestanding form. That is, without arguing ineffective assistance of appellate counsel, Huspon seeks relief in light of a decision of our Supreme Court resolving a conflict of this court and handed down after his direct appeal had been certified. But if such an argument is unavailing in the context of ineffective assistance of counsel, as we held in Brown, then a fortiori Huspon's freestanding claim for relief on the same grounds cannot stand. Accordingly, we affirm the post-conviction court's denial of Huspon's petition for post-conviction relief.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.