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IN THE
COURT OF APPEALS OF INDIANA

TERRY ELDRIDGE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A04-0806-PC-352
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 20
The Honorable William E. Young, Judge
Cause No. 49G20-0602-PC-22219

May 5, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Terry Eldridge (Eldridge), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUES

Eldridge raises four issues on appeal, which we restate as the following two:

(1) Whether the post-conviction court committed reversible error by refusing his attempts to subpoena the arresting officer and affiant of the probable cause affidavit; and

(2) Whether the post-conviction court erred by concluding that he had not proven that his trial counsel provided ineffective assistance of counsel.

FACTS AND PROCEDURAL HISTORY

On three different occasions, an undercover Indianapolis Metropolitan Police Officer telephoned Eldridge and asked him to sell him some cocaine. Eldridge complied each time selling various amounts of cocaine for various amounts of money. On February 7, 2006, the State filed an Information charging Eldridge with nine counts: Count I, dealing in cocaine, as a Class A felony, Ind. Code § 35-48-4-1; Count II, possession of cocaine, as a Class C felony, I.C. § 35-48-4-6; Count III, possession of cocaine and a firearm, a Class C felony, I.C. § 35-48-4-6; Count IV, carrying a handgun without a license, a Class A misdemeanor, I.C. § 35-47-2-1; Count V, resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3; Count VI, dealing in cocaine, as a Class B felony, I.C. § 35-48-4-1; Count VII, possession of cocaine, as a Class D felony, I.C. § 35-48-4-6; Count VIII, dealing in cocaine,

as a Class B felony, I.C. § 35-48-4-1; and Count IX, possession of cocaine, as a Class D felony, I.C. § 35-48-4-6. That same day, the State filed a separate Information adding Part II to Count IV, carrying a handgun without a license, as a Class C felony, I.C. § 35-47-2-1, based on Eldridge's prior conviction for carrying a handgun without a license on August 9, 2000.

On November 8, 2006, Eldridge reached a plea agreement with the State by agreeing to plead guilty to Count I, dealing cocaine as a Class A felony, Count III, possession of cocaine and a firearm, a Class C felony, and Count V, resisting law enforcement, a Class A misdemeanor. In exchange, the State agreed to forego prosecution of all remaining Counts and recommend an executed sentence of twenty years, with all other terms and conditions open to argument. The trial court accepted the plea agreement, and on November 11, 2009, sentenced Eldridge to twenty years for dealing cocaine, as a Class A felony, four years for possession of cocaine and a firearm, as a Class C felony, and one year for resisting law enforcement, as a Class A misdemeanor, all sentences to be served concurrently.

On January 29, 2007, Eldridge filed a petition seeking post-conviction relief. On November 20, 2007, Eldridge filed his final amended petition for post-conviction relief, wherein Eldridge alleged his trial counsel to have been ineffective for several reasons, including: failing to move to suppress evidence, failing to move to dismiss based on an entrapment defense, recommending a plea agreement to Eldridge that violated double jeopardy, and failure to investigate.

On January 23, 2008, the post-conviction court held a hearing. Eldridge called his trial counsel as his sole witness. She testified that she advised Eldridge of his options and the potential sentence that he faced. She also testified, when pressed about her preparation, that she had met with Eldridge, and then "[c]ertain things happened. We didn't get a chance to meet until you were in custody several months later." (Transcript p. 58).

Eldridge submitted proposed findings of fact and conclusions of law at the close of the hearing. On April 15, 2008, the trial court denied Eldridge's petition for post-conviction relief.

Eldridge now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

Post-conviction hearings do not afford defendants the opportunity for a "super appeal." *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. The petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *see also id.* Because Eldridge is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite

conclusion, that its decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

II. *Absence of Witness from Hearing*

Eldridge argues that the post-conviction court "erred when it denied [his] repeated attempts to subpoena" Indianapolis Metropolitan Police Detective Joshua Harpe (Detective Harpe). (Appellant's Br. p. 15). After the post-conviction hearing, Eldridge sent a letter to the post-conviction court wherein he stated:

> I previously submitted a subpoena for [Detective Harpe]. For some unknown reason, Detective Harpe was not present during the hearing. Harpe has knowledge that is crucial to the events alleged in the Petition for Post-Conviction Relief. At this point in time, Eldridge is still unsure of exactly why Harpe was not at the hearing.

(Appellant's App. p. 85). However, Eldridge made no comment at the post-conviction hearing that he intended to call Detective Harpe as a witness. Rather, he called his trial counsel, questioned her, asked the court to take notice of the "whole file," and then rested. (Tr. p. 67). In order to preserve this issue, Eldridge should have brought to the post-conviction court's attention his attempt to subpoena Detective Harpe as soon as Eldridge noticed Detective Harpe was not present at the post-conviction hearing, expressed his desire to call him as a witness, and requested a continuance of the hearing so that the subpoena could have been enforced. By proceeding with the hearing in the absence of Detective Harpe without even mentioning his desire to call Detective Harpe as a witness, Eldridge has waived his claim that the post-conviction court erred by not compelling Detective Harpe to testify on his behalf.

III. *Ineffective Assistance of Counsel*

To establish a violation of the right to effective counsel as guaranteed by the Sixth Amendment, petitioners typically must establish both prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*. *Lee v. State*, 880 N.E.2d 1278, 1280 (Ind. Ct. App. 2008). The defendant must prove (1) his or her counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's failure to meet prevailing professional norms, the result of the proceeding would have been different. *Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *reh'g denied, trans. denied* (citing *Strickland*, 466 U.S. at 690). Essentially, the defendant must show that counsel was deficient in his or her performance and the deficiency resulted in prejudice. *Johnson*, 832 N.E.2d at 1006. Because all criminal defense attorneys will not agree on the most effective way to represent a client, "isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Bieghler v. State*, 690 N.E.2d 188, 199 (Ind. 1997), *reh'g denied*, *cert. denied*, 525 U.S. 1021 (1998). Thus, there is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id*.

A. *Waiver of Double Jeopardy Claim*

Eldridge argues that the post-conviction court erred by concluding that he did not establish ineffective assistance of counsel based on his act of pleading guilty to both dealing

cocaine and possession of cocaine with a firearm for the same criminal act. The post-conviction court's order denying Eldridge's request for post-conviction relief acknowledged that, pursuant to *Hardister v. State*, 849 N.E.2d 563 (Ind. 2006), his convictions for both possession of cocaine with a firearm and dealing cocaine violated the prohibition against double jeopardy. However, the post-conviction court concluded, relying on *Mills v. State*, 868 N.E.2d 446, 453 (Ind. 2007), that because Eldridge pled guilty and received a benefit in exchange for his plea, Eldridge waived his claim of double jeopardy. Furthermore, the post-conviction court concluded that because Eldridge's sentences for these two crimes were to be served concurrently, and because of the benefit that he received, Eldridge had failed to establish any prejudice. We agree.

First, our supreme court has clearly stated that where a defendant pleads guilty to achieve a favorable outcome, that defendant "give[s] up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy." *Mills*, 868 N.E.2d at 453. Here, Eldridge obtained the favorable outcome of the dismissal of several charges, and an executed sentence that was limited to twenty years, the minimum sentence for the most serious crime he pled guilty to, dealing cocaine as a Class A felony. Therefore, although he pled guilty to three crimes, his sentences for each of the lesser crimes he pled guilty to, possession of cocaine and a firearm and resisting law enforcement, would be served concurrently to his sentence for dealing cocaine.

Moreover, although Eldridge discussed the double jeopardy issue with the post-conviction court, he elicited no testimony from his trial counsel that she was unaware of or

failed to advise him of the double jeopardy issue. Therefore, all that Eldridge has presented us with is the necessary conclusion that his counsel did not prevent him from pleading guilty based on the double jeopardy issue. "[B]ecause we presume competence on the part of the lawyer, an action or omission that is within the range of reasonable attorney behavior can only support a claim of ineffective assistance if that presumption is overcome by specific evidence as to the performance of the particular lawyer." *Specht v. State*, 838 N.E.2d 1081, 1087 (Ind. Ct. App. 2005), *trans. denied*. Thus, in the absence of evidence to the contrary, we presume that Eldridge's trial counsel performed effectively, and Eldridge decided, with the aid of counsel, that the benefit of pleading guilty to the plea agreement outweighed the cost of the two convictions for which he was to be sentenced concurrently.

B. *Entrapment*

Eldridge contends that his trial counsel was ineffective by failing to file a motion to dismiss asserting a defense of entrapment. His contention is based on an allegation that the State failed to assert probable cause for the police officers to call him and request that he obtain cocaine for them to purchase.[1] He relies on *Smith v. State*, 258 Ind. 415, 418, 281 N.E.2d 803, 805 (1972), wherein our supreme court expressed "[w]e . . . have clearly adopted or embraced a rule of law that before the State sets into operation a scheme to trap a

[1] Eldridge also seems to raise a claim of entrapment as a freestanding claim. However, by pleading guilty, Eldridge has waived this claim. *See McKrill v. State*, 452 N.E.2d 946, 949 (Ind. 1983) (a guilty plea "is an admission of guilt and a waiver of a variety of constitutional rights . . . including petitioner's right to raise the defense of entrapment at this stage of the proceedings [post-conviction review]."). Moreover, Eldridge attempts to establish this claim by his statement of facts in his Appellant's Brief. However, Eldridge's version of what "actually transpired," as opposed to the version in the probable cause affidavit, was never submitted to the post-conviction court, and, therefore, his version is not properly before us on appeal. (Appellant's Br. p. 3).

particular suspect, there must be probable cause for the suspicions." However, this portion of *Smith* has since been overruled.

In *Hardin v. State*, 265 Ind. 635, 637, 358 N.E.2d 134, 135 (1976), our supreme court acknowledged the requirement that "when entrapment becomes an issue, the prosecution has been required to prove that enforcement officials had probable cause of suspecting that the accused was engaged in illegal conduct and was already predisposed to commit the crime." However, the *Hardin* court concluded that "the probable cause to suspect requirement has proven more difficult in its application than originally believed and no longer should be an additional burden upon law enforcement officials as they combat the trafficking in drugs." *Id*. at 638, 135. As such, Eldridge's claim that his trial counsel should have moved to dismiss is based on legal precedent that has long since been overruled. Eldridge has therefore failed to demonstrate that his trial counsel was ineffective for failing to file a motion to dismiss asserting a claim of entrapment.

C. *Failure to Investigate*

Finally, Eldridge contends that his trial counsel was ineffective for failing to investigate. At the post-conviction hearing his trial counsel testified that she could not remember how much time she spent investigating Eldridge's case. In response to Eldridge's specific question "can you tell me what steps [] you took to prepare my case," his trial counsel responded:

> If I recall, we had at the beginning you were out of custody[.] We had a meeting. Certain things happened. We didn't get a chance to meet until you were in custody several months later. [] At that meeting you indicated what had occurred. And asked me to make an offer to the State which I made at a

> pretrial hearing . . . . And then we were set for a jury trial. And we negotiated a plea. And at that - - - at a pretrial I can't remember the date . . . [i]t may have been a final pretrial that we entered into the plea.

(Tr. p. 58).

Eldridge argues that his trial counsel's failure to investigate is demonstrated by the Chronological Case Summary, which shows that his counsel "made no motions or filings with the [c]ourt []for depositions, suppressions of evidence, or anything else." (Appellant's Br. p. 13). However, Eldridge has failed to demonstrate any grounds for suppression of evidence "or anything else." "To prevail on an ineffective assistance of counsel claim based upon counsel's failure to file motions on a defendant's behalf, the defendant must demonstrate that such motions would have been successful." *Moore v. State*, 872 N.E.2d 617, 621 (Ind. Ct. App. 2007). Further, since Eldridge called no witness aside from his trial counsel, he did not demonstrate how a deposition would have been helpful to his case. In another section of Eldridge's brief, he contends that his counsel was ineffective for failing to file a motion to sever the offenses charged in the information. However, Eldridge has made no contention how severance would have benefitted his defense in any way. Altogether,

Eldridge has failed to demonstrate that his counsel's performance was deficient in any way, or that he was prejudiced in any way.

CONCLUSION

Based on the foregoing, we conclude that Eldridge has failed to prove that the post-conviction court erred when denying his petition for post-conviction relief.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.