

Case Summary

George W. Wilson (“Wilson”) appeals from the denial of his petition for post-conviction relief.

We affirm.

Issues

Wilson raises two issues for our review. We restate these as:

- I. Whether Wilson is precluded from seeking post-conviction relief from his allegedly illegal arrest after a nonconsensual search and the imposition of consecutive sentences; and
- II. Whether the post-conviction court properly denied Wilson’s petition for relief as to ineffective assistance of counsel when the trial record was unavailable to the post-conviction court?

Facts and Procedural History

We take the facts of the case from our decision on Wilson’s prior, direct appeal to this court:

On the evening of August 28, 1990, Wilson appeared at the Evansville home of Sherry Berry and asked Berry’s 9 year old son if he was interested in karate lessons. The child instructed Wilson to remain outside while he asked his mother about the lessons; however, Wilson opened a side door and came inside the house. Berry declined the offer of karate lessons and returned to her bedroom to watch a television program.

Shortly thereafter, Wilson entered Berry’s bedroom with Berry’s two children in his arms. Wilson was holding a gun against the head of Berry’s 3 year old daughter. Wilson commanded Berry and a guest (L.W.) to remove their clothing and lie down on the floor; he demanded money and jewelry. Wilson compelled Berry to telephone a neighbor (M.E.). When M.E. arrived at the Berry home, Wilson blindfolded her at gunpoint and raped her. Wilson also raped L.W. and forced L.W. to perform oral sex upon him. Wilson admitted an accomplice to the Berry home to assist in the search for valuables. Finally, Wilson ordered the women and children to remain on a bed without

moving for 20 minutes after he left the house. These events took place over a period of approximately 6 hours.

Wilson v. State, Cause No. 82A04-9112-CR-00402, slip op. at 2-3 (Ind. Ct. App. Nov. 16, 1992).

Wilson was convicted of burglary, two counts of rape, one count of criminal deviate conduct, and five counts of confinement. The trial court imposed an aggregate sentence of 120 years imprisonment, running consecutively the sentences for Wilson's convictions for burglary (ten years), two counts of rape (thirty years each), and criminal deviate conduct (thirty years); and running consecutively to these but concurrently among themselves three of his convictions for confinement (ten years); and finally running consecutively to these but concurrently among themselves the remaining two convictions for confinement.

In 1997, Wilson filed a petition for post-conviction relief which was eventually dismissed without prejudice. On May 11, 2009, Wilson filed the petition for post-conviction relief which is the subject of this appeal, contending that he had received ineffective assistance of trial counsel and that the trial court inappropriately sentenced him to consecutive terms. In the period between his initial petition and the petition filed in 2009, Wilson sought copies of various portions of the trial record. In his May 11, 2009, petition, Wilson sought to withdraw from this court's records the record of his direct appeal before this court; his request was denied, but we indicated that we would consider a motion for such from the post-conviction court itself, from the State, or from counsel assisting Wilson. There is no record that any of these events occurred, nor that Wilson moved the post-conviction

court to obtain the trial record from this court.

On June 21, 2009, after reviewing Wilson’s petition and supporting affidavit and exhibits and the State’s response, the post-conviction court denied Wilson’s petition for relief.

This appeal followed.

Discussion and Decision

Standard of Review

Our standard of review in post-conviction proceedings is well-established.

In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. Conner v. State, 711 N.E.2d 1238, 1245 (Ind. 1999). The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. Graves v. State, 823 N.E.2d 1193, 1197 (Ind. 2005). Where, as here, the post-conviction court enters findings and conclusions in accordance with Indiana Post-Conviction Rule (1)(6), we will reverse “upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (quotation omitted), cert. denied, 534 U.S. 830, 122 S. Ct. 73, 151 L. Ed. 2d 38 (2001). Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law. Miller v. State, 702 N.E.2d 1053, 1058 (Ind. 1998).

Hall v. State, 849 N.E.2d 466, 468-69 (Ind. 2006).

Legality of Arrest and Sentencing

Wilson appeals from the trial court’s denial of his petition for post-conviction relief, raising issues as to the legality of his arrest after a nonconsensual search and the trial court’s

imposition of consecutive sentences.

A petition for post-conviction relief is not a substitute for a direct appeal from a conviction or sentence. Ind. Post-Conviction Rule 1(1)(b). Post-conviction petitions afford defendants with the opportunity to raise issues not known at trial or unavailable upon direct appeal; claims that were available to a petitioner on direct appeal are not available in a proceeding for post-conviction relief. Bunch v. State, 778 N.E.2d 1285, 1290 (Ind. 2002). “These are applications of the basic principle that post-conviction proceedings do not afford the opportunity for a super-appeal.” Id. (citing Wrinkles v. State, 749 N.E.2d 1179, 1187 (Ind. 2001)). Thus, a petitioner waives any freestanding claim of error in his petition where that issue was “known or available at the time of direct appeal but [was] not raised.” Reed v. State, 856 N.E.2d 1189, 1193-94 (Ind. 2006).

Wilson’s petition first challenges the trial court’s denial of his attempt to suppress evidence of his arrest in a motel room. Specifically, Wilson contends that there is no evidence that Cindy Groves (“Groves”) consented to a search of the motel room in which he was arrested, and that the post-conviction court “is doing nothing more than shifting the burden away from the State having to produce evidence that Ms. Groves consented to a search of the motel room that the appellant was arrested in.” (Appellant’s Br. 5.) Yet Wilson does not explain how this argument was not available to him upon direct appeal. His freestanding claim on the question of consent to search was unavailable to him in his petition for relief. We thus affirm the trial court on the question of Ms. Groves’s consent to search the motel room and the legality of Wilson’s arrest.

Wilson also challenged his sentence before the post-conviction court, but does not raise his sentencing issue before this court. Having thus failed to articulate an argument beyond a blanket assertion that the post-conviction court erred when it failed to overturn his conviction, any challenge to the post-conviction court's determination on his sentence is waived. See Ind. Appellate R. 46(A)(8)(a) (requiring that "[t]he argument must contain the contentions of the appellant ... supported by cogent reasoning" and "citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal").

Notwithstanding his failure to articulate such an argument, Wilson's petition sought relief from the trial court's imposition of consecutive sentences for certain of the convictions. Yet Wilson's sentence was a known and appealable issue at the time of his direct appeal. Having had and having foregone his opportunity to challenge the consecutive sentences in his direct appeal, Wilson was foreclosed from seeking post-conviction relief from the trial court's imposition of consecutive sentences. We therefore affirm the post-conviction court's determination that Wilson was precluded from pursuing relief on that basis in his petition.

Ineffective Assistance of Counsel

Wilson also claims that he did not enjoy effective assistance of trial counsel because his attorney did not seek to depose Groves or subpoena her to provide testimony at a suppression hearing or at trial. The general standard for a claim of ineffective assistance of trial counsel is well established.

To prevail on a claim of ineffective assistance of counsel, a petitioner must show two things: (1) the lawyer's performance fell below an "objective standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); and (2) "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. 2052.

Segura v. State, 749 N.E.2d 496, 500-01 (Ind. 2001). As the post-conviction court recognized, however, Wilson's petition for post-conviction relief on the basis of ineffective assistance of counsel is made problematic by the lack of any trial record from which the post-conviction court could review the effectiveness of his attorney at trial.

Though not directly on-point, Hall v. State provides appropriate guidance to this court in ruling on Wilson's ineffectiveness claim. Hall appealed from a denial of post-conviction relief where "Hall was required to prove that he was not informed of his rights to silence, to trial by jury, and to confront witnesses, thus rendering his guilty plea unknowingly and involuntarily made." Hall, 849 N.E.2d at 470. The record for Hall's guilty plea hearing was missing without any indication of misconduct by the State that would have led to this absence. Id. at 472. The Hall court emphasized that, absent a showing of wrongdoing or other irregularity leading to the loss of evidence required for obtaining relief, "the petitioner for post-conviction relief has the burden of establishing his grounds for relief by a preponderance of the evidence," id., because of "the presumption of regularity that attaches to final judgment." Id. (quoting Parke v. Raley, 506 U.S. 20, 30 (1992)).

Here, Wilson filed his petition and, upon learning that the trial transcript was unavailable to the post-conviction court, sought from this court the record of his direct appeal. This court denied his request, but indicated that a request of the record would be reconsidered if Wilson obtained counsel who moved to check out the record or upon similar

motion by the State or the post-conviction court. Wilson did not obtain counsel; the State did not move this court to obtain the record; and contrary to Wilson's assertion in his reply brief, Wilson did not move the post-conviction court to obtain the trial transcript from this court.

Thus, Wilson's post-conviction proceeding occurred without the record of his trial, but without Wilson having adequately pursued a copy of the transcript. As in Hall, then, to the extent Wilson's petition for relief failed to demonstrate by a preponderance of the evidence that his trial counsel was inadequate because no such evidence was submitted, Wilson failed to carry his burden of proof. Cf. State v. Damron, 915 N.E.2d 189, 192-93 (Ind. Ct. App. 2009) (reversing a trial court's grant of post-conviction relief where no presumption of wrongdoing or other irregularity arose), trans. denied. We thus affirm the trial court as to the matter of his claim of ineffective assistance of trial counsel.

Conclusion

Wilson's freestanding challenges to his sentence and the legality of his arrest were not available to him in a post-conviction relief proceeding. His claim of ineffective assistance of counsel was unsupported by any evidence because the trial record was unavailable and Wilson did not adequately pursue means to obtain a copy of the record.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.