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IN THE
COURT OF APPEALS OF INDIANA

DANTE A. WEBB,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-1007-PC-459
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane R. Boswell, Judge
Cause No. 45G03-0910-PC-9

May 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Dante Webb appeals the denial of his petition for post-conviction relief, alleging ineffective assistance of counsel and challenging DNA evidence, credibility of witnesses, and sufficiency of evidence to prove his guilt. We affirm.

FACTS AND PROCEDURAL HISTORY

Webb and two accomplices robbed a store in Lake County and its employees. Webb entered the store wearing a mask and took cigarettes, the store's surveillance video, and money from the owner and employees. About twenty minutes after the robbery, a Hammond police officer took the store owner to the location in Chicago where Webb had been arrested. The officer told the owner that police might have apprehended one of the suspects. The owner identified Webb as one of the robbers.

The trial court denied Webb's motion to suppress evidence of that identification. Webb was convicted of confinement and robbery. He appealed on the ground the trial court should not have admitted the victim's identification of him as one of the robbers. We affirmed. *Webb v. State*, 45A05-0911-CR-655 (Ind. Ct. App. June 3, 2009), *trans. denied*. Webb then sought post-conviction relief, which was denied.

DISCUSSION AND DECISION

Post-conviction proceedings provide defendants with the opportunity to raise issues that were not available on direct appeal or were not known at the time of the trial. *State v. Hernandez*, 910 N.E.2d 213, 216 (Ind. 2009). Claims available on direct appeal but not presented are not available for post-conviction review. *Id*. Thus, not all issues are available in a post-conviction proceeding; challenges to convictions must be based on grounds

enumerated in the post-conviction rules. *Id*.; P-C.R. 1(1). A petitioner for post-conviction relief cannot avoid application of the waiver doctrine by asserting fundamental error. *Id*. Rather, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal. *Id*.

1. Assistance of Counsel

A successful claim of ineffective assistance of counsel must satisfy two components. First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness involving errors so serious that the defendant did not have the counsel guaranteed by the Sixth Amendment. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002), *reh'g denied*. Second, the defendant must show prejudice: a reasonable probability (*i.e.*, a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different. *Id*.

When considering the first prong, the question is not whether the attorney could -- or even should -- have done something more. Rather, the question is whether the attorney's performance amounted to a reasonably competent defense. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). The inquiry must focus on what the attorney actually did. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id*. As counsel is afforded considerable discretion in choosing strategy and tactics, there is a strong presumption that counsel rendered adequate assistance. *Id*.

A. Identification Testimony

Webb argues his trial counsel was ineffective because he did not object to the victim's trial testimony identifying Webb as one of the people who robbed him. Webb moved to suppress that evidence before trial, and the motion was denied. His counsel did not object when the testimony was elicited at trial.[1]

We decline Webb's invitation to second-guess his counsel. At Webb's post-conviction hearing, his trial counsel testified he made a strategic decision not to object. Instead, he decided to "bring it forward to the jury, let them see that there was a mistake, that this guy could not, even months after the alleged crime, identify you. . . . So we could object and get that removed or we could use it to our advantage." (Tr. at 15.) Counsel's decision fell "within the range of acceptable trial strategy, and we will not second-guess what appears to be the sort of reasonable choice litigators make." *Grinstead v. State*, 845 N.E.2d 1027, 1035 (Ind. 2006).

B. Prosecutorial Misconduct

Webb asserts a State's witness, Major Hull, said in a deposition "various things that exonerated" Webb. (Br. of the Appellant at 3.) At trial, Hull "gave a whole different story" and "took a plea deal to testify against" Webb. (*Id.*) Webb argues the prosecutor "used perjured testimony to get a conviction," and his trial counsel allowed the "perjured testimony

[1] In Webb's direct appeal we found Webb had waived his argument the identification procedure was impermissibly suggestive because Webb did not make a contemporaneous objection at trial. We further noted "the admission of allegedly tainted identification evidence does not constitute fundamental error." *Webb*, 45A05-0911-CR-655, slip op. at 4.

to go unpunished," apparently because he did not object to it. (*Id*. at 7.)

To establish ineffective assistance for failure to object, a petitioner must show that the trial court would have sustained the objection had it been made and that the petitioner was prejudiced by the failure to object. *Taylor v. State*, 929 N.E.2d 912, 918 (Ind. Ct. App. 2010), *trans. denied*. Stated another way, the petitioner must demonstrate that had the objection been made, the trial court would have had no choice but to sustain it. *Id*.

As Webb does not indicate a ground on which trial counsel could have objected to Hull's testimony, we cannot find counsel ineffective.[2]

2. DNA Evidence

Webb alleges certain irregularities in the use and admission of DNA evidence.[3] It does not appear Webb objected to the evidence at trial. Nor did he raise the DNA issue on direct appeal. In his post-conviction proceedings, he did not present this issue as one involving ineffective assistance of counsel. When no objection is raised at trial and the issue is not presented on direct appeal, the challenge is foreclosed in a post-conviction proceeding as a freestanding claim of error, fundamental or otherwise. *Stephenson v. State*, 864 N.E.2d 1022, 1029 (Ind. 2007), *cert. denied* 552 U.S. 1314 (2008). We accordingly decline to address the DNA-related issues.

[2] The post-conviction court also noted Webb's counsel impeached Hull on cross-examination, so the jury learned of the inconsistency between Hull's deposition testimony and his statements at trial.

3. Credibility of Witnesses

Webb argues the testimony of two accomplices should "be discarded from the trial court[']s records with prejudice" because both witnesses "took deals to testify." (Br. of the Appellant at 10.) Promises and offers of immunity, leniency, money or other benefit made to a State's witness by the prosecution to induce cooperation are within the scope of prosecutorial authority. However, their use places a burden on the prosecution to disclose efforts in this direction because they tend to impair the credibility of a witness or show his interest, bias or motives as a witness. *Schmanski v. State*, 466 N.E.2d 14, 15 (Ind. 1984). A prosecutor must therefore disclose to the jury any agreement made with the State's witness, such as promises, grants of immunity, or rewards offered in return for testimony. *Lott v. State*, 690 N.E.2d 204, 211 (Ind. 1997). Webb acknowledges that requirement, but does not argue there was no such disclosure to the jury.[4] We accordingly cannot find error.

4. Sufficiency of Evidence

Finally, Webb argues "[a]ll the evidence presented leads to the fact [Webb] may actually be innocent." (Br. of Appellant at 12.) It does not. When we review the sufficiency of evidence to support a conviction, we consider only the evidence and inferences therefrom most favorable to the judgment. *Hurst v. State*, 890 N.E.2d 88, 96 (Ind. Ct. App. 2008). When we view the record in that light, we find evidence Webb was identified as one of the

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[3] Webb does not indicate what, if anything, the DNA evidence revealed or how it might have contributed to his conviction. Instead, he asserts, without explanation, the DNA test he was given was "non factual, and tainted." (Br. of the Appellant at 12.)

[4] The post-conviction court noted Webb offered no evidence witness Delaney was ever offered leniency in exchange for his testimony. It did not address Hull.

robbers, the mask he wore during the robbery was found in an accomplice's truck, and an accomplice testified Webb tried to open the store's safe and took the surveillance video. We decline Webb's invitation to reweigh the evidence, and affirm the post-conviction court.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.