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FILED
May 20 2011, 9:22 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

MAURICE A. DAVIS,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 49A02-1008-PC-1005
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G20-0106-PC-142462

May 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Following a bench trial, Maurice A. Davis, Jr., was convicted of possession of cocaine with intent to deliver, a Class A felony, and was sentenced to forty years in prison. His conviction was affirmed on direct appeal in Davis v. State, 791 N.E.2d 266 (Ind. Ct. App. 2003), trans. denied. Davis filed a petition for post-conviction relief, which the post-conviction court denied following evidentiary hearings. Davis appeals the denial of post-conviction relief, raising the sole issue of whether he received ineffective assistance of trial counsel for his attorney's failure to prepare for trial or subpoena or call witnesses in Davis's defense. Concluding that Davis has failed to demonstrate prejudice, we affirm.

Facts and Procedural History[1]

On direct appeal, we recited the following facts related to Davis's arrest:

> On June 28, 2001, Indianapolis Narcotics Detective Steven Gorgiveski [sic][2] (Detective Gorgiveski) and Indianapolis Police Department Officers Ball, Brannon, and Campbell worked a special detail in the area of Broadway and College Avenue in Indianapolis, Indiana due to a high number of complaints for gambling and narcotic sales. . . .
>
> When Detective Gorgiveski and Officers Ball, Brannon, and Campbell arrived at a house located at 3048 Broadway [pursuant to a report of narcotic sales], they observed a group of six or seven people drinking. After watching the subjects bend or crouch down for a while, the officers also believed that they were gambling. Detective Gorgiveski and Officer Ball approached the group of people, while Officers Campbell and Brannon positioned themselves behind the car. At this time, Davis stood up and the officers heard the dice hit the ground. Davis also dropped two clear plastic baggies, containing a substance suspected to be cocaine, and a bottled water. Additionally, there was an assortment of U.S. currency on the ground near the two plastic baggies of cocaine, bottled water, and dice.

[1] We heard oral argument on April 19, 2011, at Rochester High School in Rochester, Indiana. We thank Rochester High School for its hospitality and counsel for their advocacy.

[2] The correct spelling of this officer's last name is "Gorgieviski." Trial Transcript at 5.

> As a result, Detective Gorgiveski arrested Davis. Davis advised Detective Gorgiveski that the contraband did not belong to him and that he was on probation. . . . Eventually, the suspected cocaine was transported to the narcotics vault. After stipulation from both parties, the substance was identified as cocaine, with a total weight of 5.6225 grams.

Davis, 791 N.E.2d at 267-68. Davis was charged with possession of cocaine with intent to deliver, a Class A felony, and possession of cocaine, a Class C felony.

Detective Gorgieviski testified that he "observed [Davis] throw down two clear plastic baggies suspected to be crack cocaine." Trial Transcript at 9. Officer Ball testified that he observed Davis "toss[] two bags of cocaine[;] I watched them leave his right hand to his side behind him next to the door and the car and the curb, I watched them leave his hand and I watched them hit the ground." Id. at 24. He added that he is "[o]ne hundred percent" certain that he saw Davis throw down the cocaine. Id. at 26.

At trial, Davis testified that he and George Stokes were crouched down among a group of people when an unmarked police car pulled up and several officers emerged and told everyone to put their hands up. Davis testified that he raised his hands and when an officer told him to open them he did so and dropped some dice. The officers then handcuffed Davis and others nearby. Davis heard officers accuse another person of dropping a packet of cocaine and heard that person insist he was innocent. Davis also testified the officers asked each person if they had "any priors." Id. at 46. Everyone else denied having any prior convictions, but Davis told them he was on probation for a drug dealing offense. Davis testified the officers then "huddle[d]" and released everyone but Davis, and told him they saw him drop the packets of cocaine. Id. at 47. In addition to recounting these facts and professing his innocence, Davis testified that he knew that Shanita Hurley dropped the cocaine. Davis was the only witness to testify in his defense.

The trial court found Davis guilty of both possession of cocaine with intent to deliver and possession of cocaine, merged the two counts in entering judgment, and sentenced Davis to forty years in prison. In 2003, we affirmed Davis's conviction on direct appeal, addressing the proper admission of evidence and sufficiency of the evidence; Davis did not argue he received ineffective assistance of counsel. See generally Davis, 791 N.E.2d at 266.

On July 22, 2009, Davis filed an amended petition for post-conviction relief on a number of grounds including, as relevant here, that he received ineffective assistance of trial counsel from John Freeman, IV. The post-conviction court held evidentiary hearings, at which it heard testimony from Freeman and three people who were present at the time of Davis's arrest, Anthony Taylor, Tony Lewis, and Joseph Hale.

Freeman testified at the post-conviction hearing that upon admission to the practice of law in 1993, he served as a deputy prosecutor for two years and then opened his own law office in which about sixty to seventy percent of his cases were criminal defense. After over six years of this type of practice, Freeman began to represent Davis in this case.

Freeman's theory of the case, consistent with Davis's current argument, was that the cocaine was not Davis's. He explained that he did not go to the scene of Davis's arrest because the residents were not involved in the dice game and because Davis was out of prison on bond, so Freeman asked Davis to bring him potential witnesses. However, according to prison records introduced into evidence at the post-conviction hearing, Davis was incarcerated during the pendency of his case. Freeman stated he did not call or subpoena any witnesses for trial because the witnesses he listed on his

potential witness list – Hurley, Lewis, Taylor, and Lucious Pickens – were not willing to testify by the time of trial. Freeman did not recall speaking with Taylor or Lewis, but noted that it was his practice to speak with individuals before including them on a witness list. Freeman noted that Hurley was the "crux" of his defense strategy because she admitted to him prior to trial that the contraband was hers, but she was no longer willing to testify after a judge referred her to a public defender at a pre-trial hearing. Post-Conviction Transcript at 9. Freeman added that his plan for Davis's defense was to present Hurley's admission "to the prosecutor prior to trial and the prosecutor would give Mr. Davis an outright dismissal." Id. at 14. Freeman agreed that Hurley "was the only witness that [he] felt was credible that was available to [him] to support [his] then theory of defense." Id. at 31.

Freeman was suspended from the practice of law in December 2005 for a variety of reasons. The disciplinary order addressing each of the twelve allegations against Freeman – none of which refer specifically to Davis's case – states that Freeman's "overall conduct" in each of the eleven instances where the Indiana Supreme Court found misconduct "demonstrated a lack of competence and diligence that is contrary to the requirements of" the professional conduct rules, including "serial neglect of his client's cases." In re Freeman, 835 N.E.2d 494, 498-99 (Ind. 2005).

At the post-conviction hearing, Taylor testified that he watched the events leading to Davis's arrest from across a two-lane street. After the officers pulled up, Taylor heard them ask each person if they had "priors." Post-Conviction Tr. at 60. Taylor continued that the officers – although he did not say which ones – accused Lewis of owning drugs they found on the ground, which Lewis denied. Taylor testified that once Davis told the

officers that he was on probation for a drug case, the officers arrested Davis. Taylor also testified that Davis did not possess any drugs at that time, that Hurley "ha[d]" the drugs, and that both Lewis and Hurley told the officers that the drugs were not Davis's. Id. at 62. Taylor further testified that Hurley told the officers the drugs were hers, but Davis was the only one arrested anyway. Taylor was available to testify at Davis's trial, but Freeman did not speak with him prior to trial.

Lewis testified that when the officers pulled up and got out of the car, one of the officers – although he did not say which one – accused him of throwing drugs on the ground, and while he was professing his innocence the other officers questioned other individuals who were standing around him. Lewis then testified that the officers asked Davis who among them was presently on probation and Davis admitted he was. Lewis testified further that he was in a position to see Davis drop the drugs if he had, but did not see Davis do so. Lewis saw "somebody handin' some drugs off to a female and the same female said that she threw" drugs to the ground. Id. at 73. Lewis acknowledged having told Freeman what he saw and that he attended a pre-trial hearing, but did not testify at Davis's trial.

Hale testified that Edwin Hubbard drove him, Hurley, and one other woman to the sidewalk where others were gambling, and Hubbard handed drugs to Hurley and told her to hold them while he went to the liquor store. Hale, Hurley, and the other woman got out of the car, and the police pulled up in an unmarked car soon after Hubbard left. According to Hale, the officers rounded people up and while searching the area found drugs on the ground. Hale testified he is not sure how the officers came to accuse Davis, but that Davis had an "altercation" with the officers. Id. at 86. The officers handcuffed

all of the men briefly, and after speaking with each of them released all but Davis. Hale also testified that Hurley and others told the officers the drugs were Hurley's and not Davis's, and Hurley told the officers to call her mother, a detective. Hale further testified that Freeman did not speak to him at all and that he was available to testify at trial.

The post-conviction court entered findings of fact and conclusions of law, and denied Davis's petition for post-conviction relief. In pertinent part, the post-conviction court's findings of fact and conclusions of law include:

> INEFFECTIVE ASSISTANCE OF COUNSELFOR [sic] FAILURE TO CONTACT, INTERVIEW, CALL WITNESSES
> ***
> Failure to contact, interview, call witnesses
> ***
> At the May 26, 2010 portion of the hearing, Petitioner entered into evidence jail record, indicating that Petitioner had been in custody during the pendency of his case. Petitioner did not recall Freeman to the stand to use the jail record for the purpose of impeachment. In the absence of any evidence that Freeman's mistake was other than a lapse of memory after the passage of eight years, the Court will consider the jail record in that light.
> ***
> *As to "contact"*
> In light of the testimony given, the Court finds that . . . Freeman did have contact with two potential defense witnesses; Lewis and a woman who was probably Hurley. . . .
> *As to "interview"*
> The Court finds that Freeman did interview Lewis and Hurley.
> *As to "call"*
> The Court finds that Freeman did attempt to call Hurley to testify as a witness at trial, but was prevented by her decision at the last minute not to cooperate.
> ***
> [T]he Court does find that Freeman's performance as trial counsel satisfies the Sotelo [v. State, 273 Ind. 694, 408 N.E.2d 1215 (1980)] court's view of effective assistance. Freeman did have contact with two possible witnesses, he did interview two possible witnesses, and he made a good faith effort to call one of the witnesses to the stand during trial. Freeman cannot be faulted for the fact that the single witness in whom he apparently had confidence did not ultimately take the stand after seeking legal advice.
> ***
> Prejudice

> ***
> Taylor was the only one of the three who said he saw Hurley throw drugs to the ground. But Taylor was across the street when the police arrived, and Lewis testified there was "a lot of stuff going on at once." The finder of fact would have been asked to accept that although Taylor was across the street, he would not only have recognized the objects as two clear plastic baggies, but he would have seen that the baggies contained numerous other, smaller, clear plastic baggies, each of which contained a rocky substance resembling cocaine . . . . The finder of fact would also have had to accept that Taylor kept the two larger baggies in constant sight while four law enforcement officers, and up to a dozen gambler [sic] and onlookers, were sorting themselves out for an on-street investigation.
> . . . The finder of fact would have then been in the position of having to decide whether it was likely that while "a lot of stuff was going on", neither [Lewis nor Hale] took their eyes off Petitioner even for a moment.
> This leaves Petitioner with only one of the three men who could have testified that he saw a person other than Petitioner throw objects to the ground . . . .
> ***
> [T]he Court finds that of these three witnesses that Petitioner presented at hearing – Taylor, Lewis and Hale – only Taylor's testimony would have had persuasive weight, because he was the only one who said he saw someone other than Petitioner throw something to the ground. . . .
> Therefore, the Court finds that Petitioner has failed to prove prejudice, and this claim also fails upon the prejudice prong of a Strickland-type review.
> ***

Appendix to Brief of Petitioner-Appellant at 86-93 (footnote omitted).

Davis now appeals. Additional facts will be supplied as appropriate.

Discussion and Decision

I. Standard of Review

Davis challenges the denial of his post-conviction petition. The petitioner in a post-conviction proceeding has the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1, § 5. When appealing the denial of a petition for post-conviction relief, the petitioner appeals a negative judgment. Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied. Therefore, we will not reverse the judgment based on a question of fact unless the evidence as a whole

unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. See id.; Fisher v. State, 878 N.E.2d 457, 463 (Ind. Ct. App. 2007), trans. denied. We review a post-conviction court's conclusions of law de novo. Fisher, 878 N.E.2d at 463.

II. Ineffective Assistance of Trial Counsel

A. Legal Framework

To prevail on a claim of ineffective assistance of counsel, the petitioner must establish the two components first set out in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must first demonstrate that counsel's performance was deficient. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). This requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel's errors were so serious that they resulted in a denial of the right to counsel guaranteed under the Sixth Amendment of the United States Constitution. McCorker v. State, 797 N.E.2d 257, 267 (Ind. 2003). There is a strong presumption that counsel's representation was adequate. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). This presumption can be rebutted only with strong and convincing evidence. Elisea v. State, 777 N.E.2d 46, 50 (Ind. Ct. App. 2002). "Isolated poor strategy, bad tactics, a mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel unless, taken as a whole, the defense was inadequate." Woods v. State, 701 N.E.2d 1208, 1211 (Ind. 1998) (citation omitted); see Miller v. State, 702 N.E.2d 1053, 1059 (Ind. 1998) ("[S]ince there are countless ways to provide effective assistance in any given case, unless consideration is given to counsel's overall performance, before and at trial, it will be all too easy for a court, examining counsel's defense after it has proved unsuccessful, to

conclude that a particular act or omission of counsel was unreasonable.") (citation omitted), cert. denied, 528 U.S. 1083 (2000).

To establish the second component, the petitioner must demonstrate that counsel's deficient performance resulted in prejudice to the defendant. Smith, 765 N.E.2d at 585. The petitioner must show that but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. McCorker, 797 N.E.2d at 267. A reasonable probability for the prejudice requirement is a probability sufficient to undermine confidence in the outcome. Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003).

Our supreme court has also noted that the two parts of the Strickland test are separate inquiries and that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001) (citations omitted).

B. Prejudice

Davis has failed to demonstrate prejudice due to Freeman's action or inaction. The issue as to prejudice is whether the post-conviction hearing testimonies by Freeman, Lewis, Taylor, and Hale undermine confidence in the outcome such that Davis's acquittal – rather than conviction – would have been reasonably probable had Freeman represented him differently at trial. See Wesley, 788 N.E.2d at 1252. At the post-conviction hearing, Lewis, Taylor, and Hale explained their recollection of Davis's arrest similar to Davis's explanation at trial. In a bench trial where a judge is assessing the credibility of Davis and comparing it to that of two uniformed officers, other testimony consistent with Davis's certainly could have increased the likelihood of Davis's acquittal. However, we

cannot assess the credibility of Davis, the officers, Lewis, Taylor, or Hale. Further, the inference that three more witnesses would have made Davis's acquittal reasonably probable depends upon the specifics of these witnesses' testimony, not just for which side they would have testified.

Lewis and Taylor testified consistent with Davis that at least one officer first accused Lewis of throwing down drugs. This could support Davis's contention that officers did not see him throw drugs to the ground, but Lewis's and Taylor's testimonies would show such a discrepancy only if the same officers accused Lewis as those who testified to having seen Davis throw down drugs. Notably, the record from the post-conviction hearing does not include this crucial link. At the post-conviction hearing, no one testified as to which officers accused Lewis of throwing down the drugs. At trial, Detective Gorgieviski testified that he did not accuse anyone else of throwing down the packets of cocaine, tr. at 19; Officer Ball was not questioned on this subject. As a result, we cannot conclude that Lewis's or Taylor's testimony in this regard would have had a persuasive effect at trial, and neither undermines confidence in Davis's conviction.

Further, Hale's testimony that Hurley possessed drugs does not eliminate the possibility that Davis also possessed and threw down drugs. For this reason, Hale's testimony as to Hurley does not exonerate Davis, particularly when two officers testified at Davis's trial to having seen the packets of cocaine leave Davis's hand.

Davis did not present to the post-conviction court Hurley or any evidence supporting the suggestion that Hurley received favorable treatment although possessing cocaine because her mother was linked to the police department. And although Davis had no burden to prove his innocence at trial, he bore the burden to demonstrate prejudice

(and deficient performance by trial counsel) at his post-conviction hearing. Evidence of this nature could not have been required for Davis to prevail, but its absence is notable, especially considering his heavy burden in this appeal from denial of post-conviction relief. Further, no other specific portion of any testimony at the post-conviction hearing serves to undermine confidence in Davis's conviction.

Therefore, we cannot conclude that the post-conviction testimony of Hale, Taylor, and Lewis undermines confidence in Davis's conviction such that his acquittal would have been reasonably probable if Freeman had called them as witnesses at Davis's bench trial.

Conclusion

Davis did not meet his burden at his post-conviction hearing to show that but for trial counsel's alleged errors, his acquittal would have been reasonably probable. Therefore, because Davis did not demonstrate prejudice, we affirm the post-conviction court's denial of his petition.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.