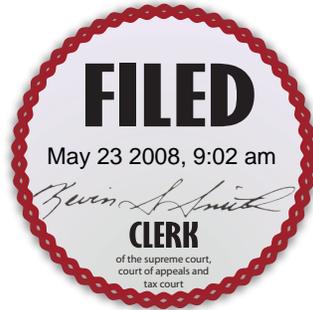


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

SEAN HADLEY,)
)
Appellant-Petitioner,)
)
vs.) No. 02A05-0707-PC-380
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-9904-CF-181
Cause No. 02D04-9905-CF-234

May 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Sean Hadley (“Hadley”) appeals the denial of his petition for post-conviction relief subsequent to his plea of guilty to two counts of Sexual Misconduct with a Minor, as Class B felonies,¹ and one count of Child Molesting, as a Class C felony,² for which he received an aggregate sentence of twenty years. We affirm.

Issues

Hadley presents three issues for review:³

- I. Whether the post-conviction court erroneously denied Hadley’s motion to amend his post-conviction petition;
- II. Whether Hadley’s guilty plea was involuntary because he lacked accurate information of the possible penal consequences of standing trial; and
- III. Whether he was deprived of the effective assistance of counsel.

Facts and Procedural History

On April 13, 1999, the State charged Hadley with four counts of Sexual Misconduct with a Minor, for acts involving C.C. and J.R. On a separate page accompanying each charging instrument, the State alleged Hadley was a habitual offender. On May 10, 1999, the State charged Hadley with two counts of Child Molesting, for acts involving K.N.

On January 18, 2000, the State and Hadley entered into a plea agreement whereby

¹ Ind. Code § 35-42-4-9.

² Ind. Code § 35-42-4-3.

³ Upon review of the denial of post-conviction relief, we do not address Hadley’s argument that Indiana law should be changed to prevent the habitual offender statute, Indiana Code Section 35-50-2-8, from operating as a double enhancement. See Reed v. State, 856 N.E.2d 1189, 1193 (Ind. 2006) (observing that post-conviction proceedings do not afford a petitioner a “super-appeal” and that the post-conviction rules contemplate a narrow remedy for subsequent collateral challenges to convictions).

Hadley agreed to plead guilty to two counts of Sexual Misconduct with a Minor and one count of Child Molesting, and the State agreed to dismiss the remaining charges and the habitual offender allegation. The plea agreement provided that Hadley would be sentenced to twenty years imprisonment on each Class B felony, and eight years imprisonment on the Class C felony, to be served concurrently, for an aggregate sentence of twenty years. On February 18, 2000, the trial court accepted the plea agreement and sentenced Hadley accordingly.

On December 19, 2001, Hadley filed a petition for post-conviction relief. On January 10, 2002, the post-conviction court ordered Hadley to submit his case by affidavit and to do so by April 10, 2002. Hadley moved for an extension of time. On March 28, 2002, the post-conviction court granted Hadley an indefinite extension of time to submit required affidavits. Five years later, on April 9, 2007, Hadley filed his affidavit. The State responded on May 2, 2007.

On May 30, 2007, the post-conviction court issued its findings of fact, conclusions of law, and judgment denying Hadley post-conviction relief. On that same day, Hadley filed a motion to amend his post-conviction petition. The post-conviction court denied the motion to amend as untimely. Hadley appeals.

Discussion and Decision

Standard of Review

Our post-conviction rules contemplate a narrow remedy for subsequent collateral challenges to convictions, based upon grounds enumerated in the post-conviction rules.

Williams v. State, 706 N.E.2d 149, 153 (Ind. 1999). Hadley had the burden of establishing his grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). He now appeals from a negative judgment, and to the extent his appeal turns on factual issues, Hadley must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Harrison v. State, 707 N.E.2d 767, 773 (Ind. 1999). The decision will be disturbed only if the evidence is without conflict and leads to a conclusion contrary to the result of the post-conviction court. Id. at 774.

I. Motion to Amend

Hadley first challenges the denial of his motion to amend his post-conviction petition. He argues that he was entitled to an amendment as of right pursuant to Indiana Post-Conviction Rule 1(4)(C), which provides:

At any time prior to entry of judgment the court may grant leave to withdraw the petition. The petitioner shall be given leave to amend the petition as a matter of right no later than sixty [60] days prior to the date the petition has been set for trial. Any later amendment of the petition shall be by leave of the court.

Hadley argues that, because he was ordered to submit the case by affidavit and no hearing date was ever set, his right to amend continued indefinitely, including after the entry of judgment. We disagree. To interpret the rule in this manner would mean that no post-conviction judgment entered upon examination of affidavits would be final. The post-conviction petitioner denied relief would essentially be given a second bite of the apple via amendment after judgment. This is contrary to the purposes of the post-conviction rules,

which is to afford a narrow remedy for relief and not an avenue for unlimited challenges. Williams, 706 N.E.2d at 153. We will not interpret a post-conviction rule to achieve an illogical or absurd result. See Bolin v. Wingert, 764 N.E.2d 201, 206 (Ind. 2002) (observing that the foremost precept of statutory construction is the avoidance of illogical and absurd results). The post-conviction court did not erroneously deny Hadley an amendment as of right.

II. Voluntariness of Guilty Plea

Hadley contends that he should be permitted to withdraw his guilty plea because he was induced to plead guilty by his fear of greater punishment than that which was legally possible. According to Hadley, he believed that he could have received five consecutive habitual offender enhancements, for a potential aggregate sentence of 239 years, as opposed to the correct potential aggregate sentence of 134 years.⁴ He further claims that he was unaware of the possibility of jury nullification, and the jury might have rejected the State's habitual offender allegation because one of the predicate felonies was trivial.

A post-conviction petitioner must be allowed to withdraw his previous guilty plea when the withdrawal is necessary to correct manifest injustice that occurred because the plea was not knowing and voluntary. Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003), trans. denied. Pursuant to Indiana Code Section 35-35-1-2(a)(3), the trial court is required to advise a defendant of the maximum possible sentence and minimum possible sentence for the crimes charged, and to advise the defendant of the possibility for the

imposition of a greater sentence because of a prior conviction or the possibility of consecutive sentences.

However, the trial court is not required to give an advisement of penalties for charges dismissed pursuant to a plea agreement. Dillehay v. State, 672 N.E.2d 956, 959 (Ind. Ct. App. 1996). The defendant is entitled to be informed of the actual penal consequences of his plea of guilty, not the hypothetical result of a trial on a charge which the State has agreed not to prosecute in return for a plea. Id. Absent coercion or deception regarding the dismissed charges, a reviewing court must consider the facts and circumstances, including any misadvice, to determine whether the defendant voluntarily and intelligently pled guilty. Id.

Hadley has not alleged that the trial court misstated the penalties for the charges and habitual offender allegation he faced after the dismissal of the other charges. He has not submitted the guilty plea hearing transcript as part of the appellate record for review. He did not submit an affidavit from his trial counsel regarding what advice of penal consequences may or may not have been given. We are left with Hadley's bald assertion of his own misapprehension of penal consequences.

Even so, either a 134-year or a 239-year sentence would have, as a practical matter, been a life sentence to thirty-five-year-old Hadley. Hadley accepted a plea bargain providing for an aggregate sentence of 20 years. We are not persuaded that the difference between 239 years and 134 years would have swayed Hadley's decision when the State offered only 20 years as opposed to a life sentence.

⁴ The 134-year maximum potential sentence consists of a fifty-year sentence for one Class B felony with the habitual offender enhancement, plus twenty years each for three non-enhanced Class B felonies, plus eight

Hadley offered no evidence to the post-conviction court regarding counsel's advisement, if any, pertaining to jury nullification. On appeal, he offers no authority for his proposition that a guilty plea may be withdrawn if a defendant is not advised regarding jury nullification.

Based upon our review, Hadley has not established that his guilty plea was involuntary due to his perception of exaggerated penal consequences or the remote possibility of jury nullification with respect to the habitual offender allegation. Accordingly, he is not entitled to the post-conviction remedy of withdrawal of his plea.

III. Effectiveness of Counsel

Hadley alleges that he received ineffective assistance of counsel. He claims he should have been allowed to appear, in person and by counsel, to present witnesses at the "critical stage" of the determination of probable cause. Appellant's Brief at 15. He also claims that, after the appointment of counsel, counsel refused to prepare a defense. Specifically, he argues that counsel should have pursued defenses of his mental illness and the alleged promiscuity of one of the child victims. Finally, he complains that his counsel failed to oppose the State's evidence and instructions.⁵

To prevail on a claim of ineffective assistance of counsel, Hadley must show that his counsel's performance fell below an objective standard of reasonableness as determined by prevailing professional norms. Dobbins v. State, 721 N.E.2d 867, 873 (Ind. 1999). If this is established, he must also show prejudice resulting therefrom. Id. The two prongs are

years each for three Class C felonies (50 + 60 + 24).

separate and independent inquiries under Strickland v. Washington, 466 U.S. 668, 697 (1984).

Competency of counsel is presumed and the post-conviction petitioner bears the burden of rebutting that presumption by admissible evidence. Tapia v. State, 753 N.E.2d 581, 587 (Ind. 2001). Bald assertions of counsel's omissions or mistakes are inadequate to support a post-conviction claim of ineffectiveness of counsel. See id.

Moreover, if a petitioner is convicted pursuant to a guilty plea, and subsequently claims that his counsel rendered ineffective assistance because counsel overlooked or impaired a defense, the petitioner must show that a defense was indeed overlooked or impaired and that the defense would have likely changed the outcome of the proceedings. Richardson, 800 N.E.2d at 646 (citing Segura v. State, 749 N.E.2d 496, 499 (Ind. 2001)).

We observe that Indiana's statutes of criminal procedure contemplate an indictment or a judicial determination of probable cause but do not contemplate an adversarial process at the determination of probable cause. See Ind. Code §§ 35-33-2-1, 35-33-7-2. Although Hadley may, in retrospect, desire to have begun the presentation of a defense at the determination of probable cause, he was not entitled to do so at that time. The absence of counsel at that juncture does not entitle Hadley to post-conviction relief.

With regard to counsel's performance after appointment, we first observe that Hadley has failed to do more than make bald assertions of counsel's alleged omissions. He presented no affidavit from counsel. He offered no evidence, by affidavit or exhibit, to the post-

⁵ Hadley's argument in this regard is not entirely clear. This case was resolved by guilty plea rather than a trial.

conviction court tending to show that either of his claimed defenses would have been viable. His argument, unaccompanied by admissible evidence, falls far short of demonstrating that his counsel overlooked a defense that would have likely changed the outcome of the proceedings.

Conclusion

Hadley has failed to demonstrate that his guilty plea was involuntary, or that he received ineffective assistance of counsel. Accordingly, the post-conviction court did not err in denying Hadley's petition for post-conviction relief.

Affirmed.

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