

Case Summary

Donald Mallard appeals the post-conviction court's denial of his petition for post-conviction relief. We affirm.

Issues

Mallard raises several issues, which we consolidate and restate as:¹

- I. whether he may raise his freestanding claims of error; and
- II. whether he received ineffective assistance of trial counsel.

Facts

The facts, as discussed in Mallard's direct appeal, follow:

Between April 27 and April 30, 200[6], the following venues in South Bend and Mishawaka were robbed: the 7-Eleven on Lincoln Way West, the 7-Eleven on Eddy Street, the Council Oaks Tobacco Discount Store on Portage, the Speedway gas station on S.R. 933, Low Bob's Discount Tobacco store on Lincoln Way East, the Speedway gas station on Ireland Street, and the Days Inn on S.R. 933. In each instance, Willie Anderson entered the venues and conducted the robberies then fled in a minivan driven by Mallard. With regard to the Days Inn robbery, Mallard entered the motel before Anderson and asked for "Mr. Smith." Transcript at 281-82. Mallard left after Helen Simpson, the front desk supervisor, told him that no one staying at the hotel had that name. Anderson then entered and robbed the motel. Anderson used a sawed-off shotgun, provided by Mallard, to commit all of the robberies. He wore a blue hoodie during the April 27 robberies. After each robbery, Anderson and Mallard split the proceeds, with Mallard usually receiving more than half.

¹ Mallard's statement of the issues, statement of facts, summary of the argument, argument, and conclusion each raise different issues. We attempt to address each of his arguments.

In the course of investigating the robberies, the St. Joseph County Police Department and the South Bend Police Department disseminated reports identifying as suspects two black males traveling in a beige Pontiac minivan. The reports contained a photo of a van similar to the one that witnesses had described as being used in the robberies. Galen Pelletier, a South Bend police officer, observed a minivan resembling that description parked on Van Buren Street. While watching that minivan, Pelletier saw another minivan, which also fit the description sent out by the police department. The second minivan paused for several seconds before proceeding through the intersection and passing Pelletier. Pelletier saw two black males in the vehicle. The passenger was wearing a blue hoody and was slouching down in the seat.

At that point, Pelletier made a traffic stop. Mallard stopped and got out of the vehicle. While Officer Pelletier was waiting for backup, Mallard jumped back into the van, fled the scene, and crashed the van into a fence. Mallard then fled on foot. Officer Pelletier found Anderson in the van with a sawed-off shotgun between his legs. Other officers searched the area and found Mallard underneath a car on a nearby street. Mallard again attempted to flee, but officers caught and handcuffed him.

The State charged Mallard with six counts of robbery, as Class B felonies, and one count of robbery, as a Class C felony. After an evidentiary hearing, the trial court denied Mallard's motion to suppress evidence obtained as a result of the traffic stop. At trial Mallard denied driving the van and renewed his motion to suppress evidence, but the trial court denied that motion. A jury found Mallard guilty on all counts, and the trial court sentenced him to twenty years on the Class B felonies and eight years on the class C felony, to be served consecutively, for an aggregate sentence of 128 years.

Mallard v. State, No. 71A03-0802-CR-39, slip op. pp. 2-4 (Ind. Ct. App. Aug. 11, 2008).

Mallard filed a direct appeal, arguing that the trial court abused its discretion by admitting evidence obtained as a result of the traffic stop, the evidence was insufficient to sustain his convictions, the trial court abused its discretion in sentencing him, and the

sentence was inappropriate in light of the nature of the offenses and the character of the offender. We affirmed Mallard's convictions and sentence.

Mallard filed a petition for post-conviction relief in May 2009 and an amended petition in November 2009. After a hearing in May 2010, the post-conviction court denied Mallard's petition for post-conviction relief. Mallard now appeals.

Analysis

I. Freestanding Claims

Mallard argues: (1) there was a material variance between the charging information and the evidence produced at trial; (2) "Brady violations" occurred in the discovery process; (3) prosecutorial misconduct occurred during the trial; and (4) the trial court abused its discretion by allowing the jury to "hear information concerning past sentencing." Appellant's Br. pp. 5, 7. Mallard may not raise these freestanding claims of error in a post-conviction proceeding. Rather, in "post-conviction proceedings, 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." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). Here, Mallard has not demonstrated that his arguments were unavailable at the time of trial or direct appeal. Consequently, we will not address the arguments as freestanding claims. See Conner v. State, 829 N.E.2d 21, 26 (Ind. 2005) (holding that the petitioner's post-conviction claim "of trial court bias was not raised at trial or in [the petitioner's] earlier appeals, and [was] therefore procedurally defaulted").

II. Ineffective Assistance of Trial Counsel

Mallard argues that he received ineffective assistance of trial counsel.² To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)), cert. denied. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Mallard argues that his trial counsel was ineffective because: (1) pre-trial counsel failed to visit with Mallard often enough and failed to conduct adequate discovery; (2) trial counsel failed to impeach Willie Anderson with a DVD and two audio tapes of his statement; (3) trial counsel failed to offer jury instructions regarding a lesser included

² Mallard also argues that he received ineffective assistance of appellate counsel. However, his complete argument is that "Appellate counsel didn't file ineffective assistance of counsel against himself because he was the defense counsel at the original trial for the Appellant." Appellant's Br. p. 4. Mallard has waived this argument by failing to make a cogent argument. Ind. Appellate Rule 46(A)(8)(a). Additionally, in his reply brief, Mallard argues that his appellate counsel was ineffective for failing to raise due process and prosecutorial misconduct arguments and failing to contact him regarding the appeal. A party may not raise a new issue in a reply brief. Felsher v. University of Evansville, 755 N.E.2d 589, 593 n. 6 (Ind. 2001). Consequently, Mallard's new argument is waived.

offense; (4) trial counsel failed to challenge an alleged difference between the charging information and the evidence presented at trial; (5) trial counsel failed to introduce latent examination reports; and (6) trial counsel failed to have DNA testing performed on a baseball cap.

In his appellant's brief, Mallard provides absolutely no citations to the record for any of his arguments and fails to demonstrate he was prejudiced by any of the alleged deficiencies of his trial counsel. "Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record." Smith v. State, 822 N.E.2d 193, 202–03 (Ind. Ct. App. 2005), trans. denied; see also Ind. Appellate Rule 46(A)(8)(a) (stating that argument section of appellant's brief must "contain the contentions of the appellant on the issues presented, supported by cogent reasoning" and that "[e]ach contention must be supported by citations to the authorities, statutes, and the appendix or parts of the Record on Appeal relied on, in accordance with Rule 22."). Mallard has waived his argument that his trial counsel was ineffective.

Conclusion

Mallard has failed to demonstrate that the post-conviction court's denial of his petition for post-conviction relief is clearly erroneous. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.