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IN THE
COURT OF APPEALS OF INDIANA

DEBRA WILLSEY,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 83A01-0808-PC-377
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VERMILLION CIRCUIT COURT
The Honorable Sam Swaim, Special Judge
Cause No. 83C01-0709-PC-4

June 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Debra Willsey ("Willsey") appeals the denial of her petition for post-conviction relief, which challenged her conviction for Murder.[1] We affirm.

Issue

Willsey presents a single issue for review: whether she was denied the effective assistance of appellate counsel.

Facts and Procedural History

On October 2, 1995, Willsey was charged with the murder of sixty-eight-year-old Robert E. Biddle ("Biddle"), an elderly and infirm man who had been living with Willsey and her romantic partner April York ("York"). See Willsey v. State, 698 N.E.2d 784, 786-87 (Ind. 1998). At Willsey's trial, York testified for the State. See id. at 788. A jury found Willsey guilty of murder and she was sentenced to sixty years in prison. See id. at 789.

Willsey appealed her conviction to the Indiana Supreme Court. She raised five issues, including: (1) admissibility of her post-arrest statements; (2) violation of Miranda rights; (3) admissibility of bank records; (4) assistance of trial counsel; and (5) sentencing. See id. at 786. On September 1, 1998, Willsey's conviction and sentence were affirmed. See id.

On January 25, 2000, Willsey filed a pro-se petition for post-conviction relief, which was subsequently amended. An evidentiary hearing was held on May 9, 2008. On July 15,

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[1] Ind. Code § 35-42-1-1.

2008, Willsey was denied post-conviction relief. She now appeals.

Discussion and Decision

I. Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief appeals from a negative judgment, and to the extent that her appeal turns on factual issues, she 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. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.

II. Analysis

On direct appeal, Willsey raised the issue of trial counsel's ineffectiveness. In her post-conviction petition, Willsey claimed that appellate counsel failed to support her assertion of trial counsel's ineffectiveness by developing an adequate record.

A defendant is entitled to the effective assistance of appellate counsel. Stevens, 770 N.E.2d at 760. Appellate ineffectiveness claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). 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; 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The two prongs of the Strickland test are separate and independent inquiries. Id. at 697. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Id.

A defendant who chooses to raise on direct appeal a claim of ineffective assistance of trial counsel is foreclosed from relitigating that claim. Timberlake v. State, 753 N.E.2d 591, 601 (Ind. 2001). However, the petitioner may allege that appellate counsel was ineffective for failure to properly raise and support deficient performance of trial counsel. Id. at 606. In this instance, the petitioner must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. Id.

The petitioner faces a compound burden, because he must establish the two elements of ineffective assistance of counsel as to both trial and appellate counsel. Seeley v. State, 782 N.E.2d 1052, 1059 (Ind. Ct. App. 2003), trans. denied. An assertion of appellate ineffectiveness challenging the quality of counsel's treatment of an issue actually presented must "overcome the strongest presumption of adequate assistance." Bieghler v. State, 690 N.E.2d 188, 196 (Ind. 1997).

Here, Willsey's direct appeal challenged trial counsel's effectiveness and in particular alleged that trial counsel was deficient for failing to object to prosecutorial misconduct during closing argument. The prosecutor's remarks included a reference to York as having "every one of the single characteristics that you find in a battered spouse." (Tr. R. 2253.) Our Supreme Court described this as a statement to "bolster York's credibility" after "Willsey invited the jury to disbelieve York's explanation that she was afraid of Willsey." Willsey, 698 N.E.2d at 794-95. In the course of determining that ineffectiveness had not been established, the Court observed, "Even if we assume [impropriety], counsel's failure to object may well have been grounded in a decision that an objection would call undue attention to the State's remark or would be seen by the jury as aggressive and unsympathetic." Id. at 795.

In hindsight, with the benefit of our Supreme Court's decision, Willsey argues that appellate counsel should have filed a Davis/Hatton petition[2] so that the direct appeal could be suspended, and appellate counsel could initiate post-conviction proceedings and develop a record including trial counsel's explanation of his subjective motivation.

Our Indiana Supreme Court has expressed reluctance to entertain such a claim:

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[2] A Davis/Hatton petition involves "a termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court." Slusher v. State, 823 N.E.2d 1219, 1222 (Ind. Ct. App. 2005). See also Indiana Appellate Rule 37.

> We are very reluctant to consider a claim of appellate ineffectiveness based on the failure to request a Davis proceeding. Appellate counsel's use or non-use of such a proceeding does not have substantive significance, but serves only to raise at an earlier time an issue that otherwise would be available for later presentation in post-conviction proceedings. It is difficult to imagine how the failure to seek a Davis proceeding could result in substantive prejudice.

Thomas v. State, 797 N.E.2d 752, 755 (Ind. 2003).

In this case, the issue of trial counsel's effectiveness has been decided adversely to Willsey and is now res judicata. Timberlake, 753 N.E.2d at 601. Thus, reviewing the omission of a Davis/Hatton petition is of limited practical value. Nonetheless, the post-conviction record discloses that Willsey's trial counsel, when asked under oath to divulge his reasons, if any, for failing to challenge portions of closing argument, did not recall the circumstances surrounding his failure to object. As such, the development of a post-conviction record did not result in any supplementation of the direct appeal record that could have conceivably altered our Supreme Court's assessment of trial counsel's performance.

Willsey has not established that she was prejudiced by appellate counsel's omission of a Davis/Hatton petition; accordingly, the post-conviction court did not err in denying her petition for post-conviction relief.

Affirmed.

DARDEN, J., and ROBB, J., concur.