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IN THE
COURT OF APPEALS OF INDIANA

JOSHUA R. BARNETT,	)	
	)	
Appellant/Petitioner,	)	
	)	
vs.	)	No. 12A02-0812-PC-1060
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Respondent.	)	

APPEAL FROM THE CLINTON SUPERIOR COURT
The Honorable Kathy R. Smith, Judge
Cause No. 12D01-0412-FB-173

June 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner Joshua Barnett appeals from the post-conviction court's denial of his petition for post-conviction relief ("PCR"). Barnett contends that he received ineffective assistance of trial counsel and that his guilty plea should be revoked due to newly discovered evidence. We affirm.

FACTS AND PROCEDURAL HISTORY

On December 2, 2004, Barnett was driving his truck in Clinton County when his intoxication caused an accident that resulted in the death of Olivia Suite. On December 15, 2004, the State charged Barnett with Class B felony operating a vehicle while intoxicated causing death. On February 21, 2006, pursuant to a written plea agreement, Barnett pled guilty as charged. One of the agreement's provisions was that the State would recommend an executed sentence of ten years of incarceration. On March 21, 2006, the trial court sentenced Barnett to ten years of incarceration.

On March 12, 2008, Barnett filed a PCR petition. On November 12, 2008, the post-conviction court denied Barnett's PCR petition. The post-conviction court's order provides as follows:

> ORDER DENYING PCR
>
> 1. On 2/21/2006 Defendant plead guilty to Causing Death When Operating a Motor Vehicle While Intoxicated, a Class B felony. Defendant was represented by counsel; a sufficient factual basis was established to support a conviction; a plea was taken under advisement and presentence conducted.
>
> 2. Defendant was sentenced on 3/21/2006. Court accepted the Plea Agreement and imposed an executed sentence of 10 years for Causing Death When Operating a Motor Vehicle While Intoxicated, a Class B felony. Sentence was ordered consecutive to sentence received in federal cause IP04-111-CR-01 M/F.

3. Defendant pro se filed his unverified Motion for Post Conviction Remedies or in the alternative Petition for Writ of Habeas Corpus on 3/12/2008.

4. Court denied unverified Petition.

5. Affidavit of Defendant "verifying" said Motion was filed on 4/21/2008.

6. Writ of Habeas Corpus cannot be filed to attack a conviction or sentence and said "alternative" relief is denied.

7. Letters and Motions for immediate consideration were filed.

8. Defendant offered no grounds for relief.

a. No claim was made that evidence was not available before plea and/or that Defendant used due diligence to find such evidence. No newly discovered evidence has been claimed, nor does Defendant even claim that newly discovered evidence would likely result in a different result (not guilty) at trial. Defendant's affidavits do not provide examples of newly discovered evidence.

b. Defendant offers no evidence that his counsel was ineffective. Defendant alleges no objective facts to support any conclusion that his decision to plea[d] was "driven by the erroneous advice" (of counsel). Segura v. State v (Ind. 2001) 749N.E.2d 496 at 500.

c. Defendant makes other claim such as Constitutional violation; lack of jurisdiction; erroneous sentence; unlawful detainment; conviction subject to collateral attack or exculpatory advances in technology (such as DNA).

d. Defendant's mere conclusions that counsel was ineffective and submission of affidavits of witnesses is insufficient on its face and warrants summary disposition.

IT IS ORDERED that, for the above reasons, Defendant's Motion for Post Conviction Relief be denied.

Appellant's Br. pp. 64-65. Barnett now appeals.

DISCUSSION

Our standard for reviewing the denial of a PCR petition is well-settled:

> In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court.… Only where the evidence is without conflict and leads to but one

> conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law.

Hall v. State, 849 N.E.2d 466, 468, 469 (Ind. 2006) (internal citations and quotations omitted).

I. Whether Bennett Received Ineffective Assistance of Trial Counsel

We review claims of ineffective assistance of counsel based upon the principles enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> [A] claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). Because an inability to satisfy either prong of this test is fatal to an ineffective assistance claim, this court need not even evaluate counsel's performance if the petitioner suffered no prejudice from that performance. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999). Barnett contends that his trial counsel was ineffective for (1) failing to fully advise him that he was waiving a defense under the Interstate Agreement on Detainers Act ("IAD") by pleading guilty, (2) failing to challenge the qualifications of a State's automobile accident reconstructionist, and (3) failing to present certain mitigating evidence at sentencing.

A. IAD Advisement

Barnett contends that he was entitled to have his charges dismissed under the IAD, that his trial counsel did not advise him that he would waive this defense by pleading guilty,

and that he would not have pled had he been properly advised. The IAD provides, in relevant part, as follows:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Indiana Code § 35-33-10-4, Art. 3(a) (2004).

Barnett, however, has not presented any evidence from his trial counsel to support his allegations in this regard, and the post-conviction court was under no obligation to credit Barnett's affidavit. "Where trial counsel is not presented in support, the post-conviction court may infer that trial counsel would not have corroborated appellant's allegations." *Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989). Second, Barnett himself admits (in the form of his affidavit and that of his mother) that he was well aware of his IAD rights and, yet, pled guilty anyway. (Appellant's App. 28, 31). Third, the record clearly indicates that Barnett was advised that he would waive his right to a speedy trial by pleading guilty. (Appellant's App. 36, 50). Barnett does not explain how he could have waived his right to be tried within a certain period of time, whether based on Criminal Rule 4 or a constitutional provision, without also waiving that right pursuant to the IAD.

Finally, we note that Barnett's argument seems to depend on the notion that one can

plead guilty to a crime and yet retain the right to be tried for that crime within a certain time period. Indiana courts, however, have long recognized that "[t]he right to have a trial expeditiously cannot exist or be enforced apart from the right to trial, and any claim of a denial thereof is waived upon a plea of guilty." *Gosnell v. State*, 439 N.E.2d 1153, 1155 (Ind. 1982). In other words, one cannot plead guilty and waive the right to trial *altogether* without also waiving the right to be tried within a certain time period. The post-conviction court was entitled to conclude that Barnett was properly advised regarding waiver of IAD rights and pled guilty anyway.

B. Failure to Challenge Expert

Barnett also contends that his trial counsel was ineffective for failing to challenge the State's evidence from an accident reconstruction expert. Barnett, however, has provided no evidence to support this claim. Again, Barnett has provided no evidence from his trial counsel that this evidence was not thoroughly investigated, and we may therefore assume that it was. *See id*. Moreover, Barnett has produced no evidence to show what the report contained, much less what the problems were with the report or what challenges his trial counsel should have made.

C. Failure to Present Mitigating Evidence

Finally, Barnett contends that his trial counsel was ineffective for failing to present allegedly mitigating evidence at sentencing, namely that it was foggy the morning of the accident. When scrutinizing counsel's performance, we are highly deferential and avoid using hindsight to distort our evaluation of counsel's performance. *Clark v. State*, 561

N.E.2d 759, 762 (Ind. 1990). A defendant must present strong and convincing evidence to rebut the presumption of competent representation of counsel. *Id*. Isolated instances of poor strategy, or inartfully executed examinations do not necessarily amount to ineffective assistance. *Mott v. State*, 547 N.E.2d 261, 263 (Ind. 1989).

Here, Barnett has failed to establish that the decision not to present evidence of foggy conditions (assuming such a decision was, in fact, made) was not a reasonable strategic decision, as is his burden. *See Clark v. State*, 597 N.E.2d 4, 11 (Ind. Ct. App. 1992), *trans. denied*. We note that presentation of mitigating evidence regarding foggy conditions would have directly contradicted Barnett's guilty plea, in which he admitted that his intoxication, not the weather, caused the fatal collision. It is difficult to see how this might have helped Barnett at sentencing, and he does not enlighten us. On the other hand, the argument that Barnett's trial counsel *did* make, namely that Barnett was remorseful and accepted responsibility for his actions, was consistent with his guilty plea. We cannot say that such an approach was unreasonable under the circumstances. Barnett has not established that he received ineffective assistance of trial counsel.

II. Newly Discovered Evidence

Barnett contends that allegedly newly discovered evidence regarding poor weather conditions the morning of the collision fatally undermines his guilty plea. In other words, Barnett is attempting to undermine his admission that his intoxication caused the collision with evidence that poor weather did. The Indiana Supreme Court, however, has recently held that "a guilty plea may not be challenged in post-conviction proceedings by a claim of newly

discovered evidence regarding the events that constituted the crime." *Norris v. State*, 896 N.E.2d 1149, 1151 (Ind. 2008). Barnett's claim must therefore fail.[1]

The judgment of the post-conviction court is affirmed.

CRONE, J., and BROWN, J., concur.

[1] In any event, we cannot fathom how poor weather conditions the morning of the collision could qualify as newly discovered evidence in this case when it is undisputed that Barnett was at the scene.

Finally, Barnett also seems to attack the post-conviction court's judgment on the basis that it represents an "unreasonable application" of federal law by a state court. Appellant's Br. p. 59. Barnett, however, relies entirely on federal habeas corpus authority to support this claim, law which has no applicability in this state post-conviction proceeding.