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IN THE
COURT OF APPEALS OF INDIANA

PHILLIP R. BENSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0809-PC-809
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
The Honorable Steven Rubick, Magistrate
Cause No. 49G04-0503-FA-036830

June 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Phillip R. Benson appeals from the denial of his petition for post-conviction relief.

We affirm.

ISSUES

1. Whether Benson received ineffective assistance of trial counsel.

2. Whether the trial court properly ordered that Benson register as a sex or violent offender.

FACTS

We adopt the statement of facts set forth in this Court's decision in *Benson v. State*, No. 49A04-0609-CR-526, slip op. at 2-3 (Ind. Ct. App. June 29, 2007), which reads, in pertinent part, as follows:

> According to the factual basis provided by the State at the guilty plea hearing, on the evening of March 4, 2005, J.R. was in the basement of her Indianapolis home watching television with her two-year-old grandson when she heard a knock on the door. Recognizing the individual at the door as Benson, a neighbor who lived down the street, J.R. opened the door slightly to speak with him. Benson asked J.R. if her son or daughter were home, and when J .R. replied that they were not, Benson forced the door open, ripped open J.R.'s robe, lifted her nightgown over her head, threw her to the ground, hit her, and then attempted to penetrate her vagina with his penis. J.R. grabbed a knife with which to defend herself and suffered a cut to one of her fingers. J.R.'s two-year-old grandson witnessed the incident. Upon seeing blood, Benson fled the scene.
>
> On March 8, 2005, the State charged Benson with burglary as a Class A felony, attempted rape as a Class B felony, criminal deviate conduct as a Class B felony, and robbery as a Class C felony. On June 21, 2006, Benson entered into a plea agreement with the State in which he agreed to plead guilty to burglary as a Class A felony, and the State agreed to dismiss the remaining charges. Sentencing was left to the trial court's discretion, but with a cap of forty years with regard to the executed portion of the sentence. On July 5, 2006, the trial court accepted Benson's plea

> agreement and proceeded to sentence him to forty years imprisonment. The court's sentencing statement follows:
>
> "Well the Court has reviewed this and determined that there are aggravating circumstances by the fact just alone from your criminal history and secondly because this act was committed in the presence of her grandson—that's an aggravating circumstance. There are mitigating circumstances because of the fact that you have shown remorse and have at least pled guilty and that you have been participating in programs while you're in the Marion County Jail, however, the Court finds the aggravating circumstances far outweigh the mitigating circumstances and pursuant to the plea agreement would sentence you to a period of 40 years."
>
> The court further recognized that a majority of Benson's arrests and convictions deal with alcohol and drugs and observed that with regard to the present incident, "the alcohol and drugs got the better of [him]." In an exchange with Benson, Benson admitted that he had twice sought treatment for his drug and alcohol problem, but requested that the court give him another chance. With permission from the trial court, Benson filed a belated notice of appeal on September 22, 2006.

(Internal citation and footnote omitted). On appeal, Benson argued that his sentence is inappropriate. This Court affirmed his sentence on June 29, 2007.

Benson filed a petition for post-conviction relief on July 26, 2007. The State Public Defender's Office withdrew its appearance on or about May 12, 2008. The post-conviction court held an evidentiary hearing on July 9, 2008; Benson opted to proceed pro se.

During the hearing, Benson argued that he did not cause bodily injury to J.R. He testified that he went to J.R.'s home "to collect money off her son-in-law." (Tr. 3). He admitted to forcing his way into the home; getting "on top of [J.R.]"; and demanding money. *Id.* He testified that J.R. then got up and retrieved a knife. He further testified that he "grabbed a hold of [J.R.]," cutting himself in the process. *Id.*

According to Benson, his trial counsel had informed him that "there was evidence of blood[.]" *Id.* at 5. He asserted that he had told his trial counsel that he was the source of the blood—not J.R. His trial counsel, however, refused to have DNA tests performed on the blood to confirm that he was the source.

Benson also maintained that he did not understand the plea agreement, believing that he was pleading guilty to burglary as a class B felony. Benson therefore sought to have his conviction reduced from a class A felony to a class B felony. He also requested that he not be required to register as a sex offender. Benson presented no other testimony or evidence. On July 30, 2008, the post-conviction court denied the petition.

DECISION

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*. An appeal from the denial of post-conviction relief constitutes an appeal from a negative judgment. *Id.* Thus, to prevail on appeal from the 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. *Id.* In the post-conviction setting, conclusions of law receive no deference on appeal. *Id.* As to factual matters, the reviewing court examines only the probative evidence and reasonable inferences that support the post-conviction court's determination and does not reweigh the evidence or judge the credibility of the witnesses. *Id.*

"The petitioner bears the burden of presenting a record that is complete with respect to the issues raised on appeal." *Smith v. State*, 822 N.E.2d 193, 206 n.6 (Ind. Ct.

App. 2005), *trans. denied*. It is therefore the petitioner's responsibility to provide this Court with any and all materials which may support his claims. *Id.*

1. Ineffective Assistance of Trial Counsel

Benson contends that his trial counsel was ineffective. Specifically, he argues that his counsel failed to pursue DNA evidence and failed to ensure that he understood the terms of his plea agreement.

> To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish before the post-conviction court the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. To establish prejudice, a defendant must show 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 is one that is sufficient to undermine confidence in the outcome. Further, counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.

Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007) (citations omitted), *cert. denied*, 129 S. Ct. 458 (2008). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

a. *DNA evidence*

Benson asserts that he received ineffective assistance of counsel because his trial counsel "did not adequately investigate the evidence against [him] and communicate the findings of that investigation to [him]." Benson's Br. at 3. We disagree.

Benson argues that "[h]ad the blood found on Benson been demonstrated to be Benson's and not the victim's, the State's claim of bodily injury may have failed and Benson would have faced sentencing on a 'B' felony rather than an 'A' felony." Benson's Br. at 4. We first note that Benson presents no evidence, other than his testimony during the post-conviction hearing, that there was any DNA evidence in this case.[1] Furthermore, Benson's argument ignores his own testimony that the evidence included a "picture of bite marks on [J.R.'s] nipple." (Tr. 5). Such an injury could support a conviction for class A felony burglary. *See Kazmier v. State*, 863 N.E.2d 912, 914 (Ind. Ct. App. 2007) (determining that evidence of bruises and scratches sufficient to sustain conviction for battery resulting in bodily injury). Thus, we do not find that Benson received ineffective assistance of counsel.

b. *Plea agreement*

Benson also asserts that he received ineffective assistance of counsel "in that counsel failed to adequately inform [him] as to the possible penalties he faced under the plea." Benson's Br. at 5. According to Benson, he thought he "was pleading guilty to a B felony burglary" and that his counsel had informed him that he "was going to get 20, suspend 10, 10 do 5." *Id.* at 7.

[1] Moreover, it is quite possible that not investigating the possible presence of DNA evidence or not pursuing DNA evidence, which may have been prejudicial to Benson, was a tactical decision; we would defer to such a decision.

> [F]or claims relating to penal consequences, a petitioner must establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead. Merely alleging that the petitioner would not have pleaded is insufficient. Rather, specific facts, in addition to the petitioner's conclusory allegation, must establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea.

Segura v. State, 749 N.E.2d 496, 507 (Ind. 2001).

Other than Benson's self-serving testimony, he has presented no evidence in support of his contention that he was misinformed regarding the plea agreement or sentence. He also fails to cite to any specific facts that his trial counsel's purported errors in advice as to penal consequences were material to his decision to plead. In fact, he did not even allege during the evidentiary hearing that he would not have pleaded but for the purported errors. He therefore has failed to establish an objective, reasonable probability that competent representation would have caused him not to enter a plea. *See id.*

2. Sex Offender Registry

Benson asserts that he is entitled to post-conviction relief from the trial court's order that he register as a sex or violent offender. We cannot agree.

Indiana Code section 11-8-8-7 provides that sex or violent offenders must register with local law enforcement authority. Indiana Code section 11-8-8-5 defines a "sex or violent offender" as a person convicted of any of the following offenses:

> (1) Rape.
> (2) Criminal deviate conduct.
> (3) Child molesting.
> (4) Child exploitation.
> (5) Vicarious sexual gratification (including performing sexual conduct in the presence of a minor.

> (6) Child solicitation.
> (7) Child seduction.
> (8) Sexual misconduct with a minor as a Class A, Class B, or Class C felony . . . .
> (9) Incest.
> (10) Sexual battery.
> (11) Kidnapping, if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian.
> (12) Criminal confinement, if the victim is less than eighteen (18) years of age, and the person who confined or removed the victim is not the victim's parent or guardian.
> (13) Possession of child pornography.
> (14) Promoting prostitution as a Class B felony.
> (15) Promotion of human trafficking if the victim is less than eighteen (18) years of age.
> (16) Sexual trafficking of a minor.
> (17) Human trafficking if the victim is less than eighteen (18) years of age.
> (18) Murder.
> (19) Voluntary manslaughter.
> (20) An attempt or conspiracy to commit a crime listed in subdivisions (1) through (19).

(Internal citations omitted).

If an issue was known and available, but not raised on direct appeal, it is waived. *Lindsey*, 888 N.E.2d at 322. It is undisputed that Benson's claim regarding the trial court's purported sentencing order was available either during the plea hearing or on direct appeal. He, however, failed to raise it. Thus, it is waived. Waiver notwithstanding, Benson has failed to present an adequate record, showing that the evidence as a whole leads unerringly and unmistakably to a conclusion that the post-conviction court erred in not relieving him from trial court's purported order that he register as a sex or violent offender.

Benson presented no evidence—including evidence at the evidentiary hearing that the trial court did in fact order him to register as a sex offender—regarding the trial

court's sentencing order. He testified only that "they said they want [him] to register as a sex offender," and "[t]hey said they want [him] to register for [sic] a violent offender." (Tr. 6). Accordingly, we find no error in deny Benson's petition for post-conviction relief.

Affirmed.

BAILEY, J., and ROBB, J., concur.