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IN THE
COURT OF APPEALS OF INDIANA

NAJEE S. BLACKMAN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 34A04-0810-PC-626
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
Cause No. 34C01-0603-PC-62

June 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Najee S. Blackman ("Blackman") appeals the denial of his petition for post-conviction relief, which challenged his conviction for Robbery, as a Class B felony.[1] We affirm.

Issue

Blackman presents four issues. We address the single issue that is neither waived, res judicata, nor procedurally defaulted: whether he was denied the effective assistance of appellate counsel.[2]

Facts and Procedural History

On direct appeal, this Court recited the underlying facts as follows:

> The facts most favorable to the jury verdict indicate that on December 29, 2000, Carol Brenner was preparing to close her Kokomo business, Quick Cash of Indiana. She was in the back office when she heard someone enter the store and walk toward her. Then Blackman, dressed as a woman, confronted her with a gun and asked for money. Blackman was wearing a straight-haired wig, a long black leather coat, and pants with a leopard or zebra stripe design. Brenner backed up and crouched against a wall, but Blackman pulled her up by

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[1] Ind. Code § 35-42-5-1.

[2] Blackman's purported issues include his assertions that the trial court denied him due process (in the untimely provision of a post-trial hearing transcript) and that this Court "committed fundamental error" in the course of his direct appeal. Appellant's Brief at 1. Post-conviction procedures do not afford petitioners with a "super-appeal"; rather, the post-conviction rules contemplate a narrow remedy for subsequent collateral challenges to convictions. Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006). The purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. Id. If an issue was known and available but not raised on appeal, it is waived. Id. If an issue was raised on direct appeal, but decided adversely to the petitioner, it is res judicata. Id. Moreover, collateral challenges to convictions must be based upon grounds enumerated in the post-conviction rule. Shanabarger v. State, 846 N.E.2d 702, 707 (Ind. Ct. App. 2006), trans. denied; see also Ind. Post-Conviction Rule 1(1). Accordingly, we do not address Blackman's free-standing claims of deprivation of due process and fundamental error. Nor do we address Blackman's contention that the State failed to prove alleged affirmative defenses, including laches. Blackman's petition for post-conviction relief was not denied on the basis of laches.

the hair, hitting her head against his gun in the process. He dragged her to the front of the store to the cash register. Brenner opened the cash register, and Blackman grabbed the register drawer with the money. Brenner also gave him a deposit envelope from her purse.

When a vehicle pulled into the parking lot outside the store, Blackman ran out the door. The vehicle belonged to Brenner's sister, Sherry Scott, who caught a glimpse of Blackman as he ran out of the store and down the street. Brenner immediately called the police.

On January 10, 2001, Blackman, again dressed as a woman, entered the Lake City Bank in Greentown, Indiana. When the bank's branch manager, Donna Graham, asked if she could assist him, Blackman replied in a deep voice that he wanted to open an account. At that point, Graham realized that what she had first thought was a woman was really a man dressed like a woman. Blackman was wearing a black leather jacket, a black straight-haired wig, black boots, and a leopard print skirt with tights or pants underneath.

Because Graham had a "bad feeling" about Blackman, she called the town marshal and asked him to come to the bank. After waiting approximately five minutes, Blackman got up from his seat and walked out of the bank. At that time, two Greentown police officers arrived and walked toward Blackman, immediately recognizing that he was a man dressed as a woman. The officers asked Blackman to take his hands out of his pockets, but he refused. As a result, the officers drew their weapons. Blackman then fled and got into the passenger side of a Lincoln Continental that immediately sped away.

One of the police officers noted the license plate number of the car, which was licensed to Blackman. Later that day, the two Greentown police officers tracked the car with the help of the Kokomo Police Department. They found the vehicle at the home of Letitia Poke, Blackman's girlfriend. Inside the house, the officers found Blackman dressed as a man. However, one of the officers was certain that Blackman was the man he had seen dressed as a woman in front of the bank.

Brenner later picked Blackman's picture from a photo array and also identified him in a live line-up. In addition to identifying Blackman, she believed that the leather coat seized by police at Poke's house was similar to the one worn by the robber because both coats had big buttons.

The State charged Blackman with the robbery of Carol Brenner at Quick Cash. On March 2, 2001, Blackman filed his Notice of Alibi. On March 20, 2001, Blackman sought an order that Poke's telephone service provider, Ameritech, produced [sic] Poke's telephone records in an attempt to show that he was in Florida or Georgia on the day of the Quick Cash robbery. The trial court entered its order on March 20, 2001. Blackman claims that Ameritech informed his attorney's secretary that the requested records could

> not be produced because Ameritech could retrieve phone records only from the preceding 60 days and the ordered records were more than 60 days old.
>
> On March 27, 2001, a jury found Blackman guilty of robbery. On April 2, 2001, Blackman's counsel received from Ameritech the phone records that had been ordered. Blackman moved to vacate the jury trial and conduct a new trial based on newly discovered evidence in the form of the phone records. The trial court held a hearing on Blackman's motion and denied it. Blackman moved to correct error and the trial court also denied that motion.

Blackman v. State, No. 34A04-0108-CR-369, slip op. 2-5 (Ind. Ct. App. June 20, 2002).

Blackman, by counsel, appealed his conviction, raising the single issue of whether he was entitled to a new trial because of newly discovered evidence. See id., slip op. at 2. Dissatisfied with appellate counsel's representation, Blackman sought to file an additional pro-se appellate brief. Appellate counsel informed this Court that he had met with Blackman for approximately three hours and provided him with a seven page memorandum discussing the lack of viability of Blackman's proposed appellate issues. Appellate counsel further advised this Court that, in light of his specific advice to Blackman to defer the issue of trial counsel's ineffectiveness until post-conviction proceedings, appellate counsel had no formal objection to this Court permitting the submission of a pro-se supplemental appellate brief.

This Court permitted Blackman to file a pro-se appellate brief, supplemental brief, additions to supplemental brief, and supplemental reply brief, alleging various pre-trial and trial errors as well as the ineffectiveness of his three successive trial attorneys. Blackman's conviction was affirmed. See id. On September 5, 2002, the Indiana Supreme Court denied Blackman's pro-se petition for transfer.

On January 11, 2006, Blackman filed a pro-se petition for post-conviction relief,

which was subsequently amended with the assistance of counsel. An evidentiary hearing was held on March 6, 2008. On October 14, 2008, Blackman was denied post-conviction relief. He 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 his appeal turns on factual issues, he 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, Blackman raised the issue of trial counsel's ineffectiveness in his pro-se brief; thus, the issue of trial counsel's effectiveness is now res judicata. Timberlake, 753 N.E.2d 591, 597 (Ind. 2001). Accordingly, Blackman now challenges the performance of his appellate counsel, presenting two arguments in this regard. First, citing United States v. Cronic, 466 U.S. 648 (1984), Blackman contends that prejudice may be presumed because

appellate counsel effectively abandoned him by not precluding his submission of pro-se briefs on direct appeal. Second, Blackman claims that appellate counsel was ineffective for failing to raise viable issues.

Presumption of Prejudice under Cronic. Generally, ineffectiveness claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984).[3] 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. However, "Cronic established, in effect, a narrow exception to the two-pronged Strickland test[.]" Conner v. State, 711 N.E.2d 1238, 1254 (Ind. 1999).

In Cronic, a defendant charged with mail fraud was appointed a real estate attorney with no jury trial experience twenty-five days before trial, although the Government had prepared for over four and one-half years. See Cronic, 466 U.S. 648. Ultimately, the United States Supreme Court rejected a claim of ineffective assistance of counsel but suggested that, in limited circumstances of extreme magnitude, "a presumption of ineffectiveness" may be justified. 466 U.S. at 662. Such extreme circumstances are independently "sufficient [to establish a claim of ineffective assistance] without inquiry into counsel's actual performance at trial." Id. Three such situations were identified by the Cronic Court: (1) when counsel is

[3] Ineffective assistance of appellate counsel claims, like ineffective assistance of trial counsel claims, are reviewed under the standard outlined in Strickland. Bieghler v. State, 690 N.E.2d 188, 192 (Ind. 1997).

completely denied; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when surrounding circumstances are such that, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 659-60.

In evaluating a claim regarding the third situation, alleged systemic defects in a county indigent defense system, our Supreme Court reiterated that the burden under Cronic is "extremely heavy." Games v. State, 684 N.E.2d 466, 481 (Ind. 1997), modified on other grounds, 690 N.E.2d 211 (Ind. 1997). To presume prejudice under Cronic in a post-conviction proceeding, the petitioner must show that "the circumstances completely deprived [him] of any meaningful opportunity to subject the State's evidence to adversarial testing" and also must convince the appellate Court that, to the extent the claim rests upon factual issues, the evidence presented during the post-conviction proceeding is without conflict and, as a whole, leads unerringly and unmistakably to a decision opposite the post-conviction court's rejection of the petitioner's claim. Id. at 479-80. See also Conner, 711 N.E.2d at 1255 (observing that "theoretical imperfections alone will not satisfy the extremely heavy Cronic burden and force us to find a Cronic exception to the Strickland analysis").

Here, Blackman makes no assertion of facts to establish that the State's evidence at trial was not subjected to meaningful adversarial testing. Indeed, this Court has already applied a Strickland analysis and determined that Blackman was not deprived of the effective

assistance of trial counsel. See Blackman, No. 34A04-0108-CR-369, slip op. at 8-9. Because the issue of trial counsel's performance is res judicata, Blackman is seeking the application of the Cronic exception to appellate proceedings.

Blackman does not direct our attention to any Indiana case applying the Cronic exception to counsel's performance in state appellate proceedings. We are aware of some federal cases applying principles similar to the Cronic exception to counsel's performance during appeals. See Bonneau v. United States, 961 F.2d 17, 23 (1st Cir. 1992) (involving counsel's complete failure to file a brief, resulting in the dismissal of the defendant's appeal); United States ex rel. Thomas v. O'Leary, 856 F.2d 1011, 1016-17 (7th Cir. 1988) (homicide defendant's counsel filed no brief during state's appeal of a suppression order and the ensuing decision was thus based only on the record and the government's brief).

Here, in contrast, there was no complete failure to act in a representative capacity. The instant record indicates that appellate counsel did not abandon Blackman, but personally met with him, counseled him, provided him with typewritten memoranda, and ultimately filed an appellate brief and reply brief on his behalf. At this Court's request, appellate counsel submitted written communication regarding his representation of Blackman. As such, the post-conviction court did not err in applying a Strickland analysis (as opposed to presuming prejudice) to Blackman's claim of ineffectiveness of appellate counsel.

Omission of Issues for Appeal. Blackman contends that his appellate counsel failed to raise obvious issues regarding his presentation in a line-up, the admissibility of jailhouse informant testimony, the sufficiency of the evidence, and conflicts of interest relative to each

of his three appointed trial attorneys. The decision regarding what issue or issues to raise on appeal "is one of the most important strategic decisions made by appellate counsel." Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). The petitioner must demonstrate "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." Ben-Yisrayl, 738 N.E.2d at 261. Even if counsel's choice of issues was not reasonable, the petitioner's claim will not prevail unless he can demonstrate a reasonable probability that the outcome of the direct appeal would have been different. Bieghler, 690 N.E.2d at 194.

Blackman argues that his appellate counsel failed to challenge the "validity and suggestiveness" of a lineup in which he appeared in jail clothing. Appellant's Brief at 22. According to Blackman, fundamental error occurred when a photograph of the lineup depicting him in jail clothing was presented to the jury. Although Blackman's appellate counsel did not challenge the propriety of Blackman's appearance in a lineup in jail clothing, Blackman raised the issue in a supplemental brief. This Court addressed his contention as follows:

> Finally, Blackman asserts for the first time in his "Additions to Supplemental Brief Tendered by Blackman" that he was erroneously "compelled to partake in the lineup while handcuffed and in county garb." (Additions to Supplemental Br. Tendered by Blackman at 3.) Blackman is correct that he appeared in the lineup handcuffed and wearing blue clothing apparently issued by the Howard County Jail. We note, however, that the five other men in the lineup also appeared handcuffed and were dressed exactly as Blackman. We decline to hold that a defendant who appears in a lineup is necessarily prejudiced by being compelled to appear dressed exactly like every other individual in the same lineup.

Blackman, No. 34A04-0108-CR-369, slip op. at 10-11. The principles of res judicata bar Blackman from taking a second bite of the apple by claiming that his appellate counsel should have addressed the lineup and photograph in terms of fundamental error.

Blackman also contends that appellate counsel should have alleged error in the admission of testimony from Michael Little, a jailhouse informant. According to Blackman, Little's testimony was "suspicious" and "smacked of fabrication." Appellant's Brief at 22. However, had appellate counsel presented this bald assertion of fabrication, it would have been unavailing, as this Court does not assess the credibility of a trial witness or reweigh the evidence. See Dickenson v. State, 835 N.E.2d 542, 552 (Ind. Ct. App. 2005) (observing that the jury had heard testimony from multiple inmates and had "weighed conflicting testimony and conflicting credibility" and further observing that "we do not reweigh the evidence or assess the credibility of the witnesses"), trans. denied.

Blackman also argues that his appellate counsel improperly "discounted" the value of a challenge to the sufficiency of the evidence. Appellant's Brief at 22. Had appellate counsel raised such an issue, it would have been reviewed according to a well-settled standard:

> When reviewing the sufficiency of the evidence to support a conviction, "appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict." McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005) (emphasis added). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. Wright v. State, 828 N.E.2d 904 (Ind. 2005). To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it "most favorably to the trial court's ruling." Id. Appellate courts affirm the conviction unless "no

> reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt."

Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). In order to convict Blackman of robbery, as a Class B felony, as charged, the State was required to show that he knowingly or intentionally took property from Carol Brenner while armed with a deadly weapon. Ind. Code § 35-42-5-1. At Blackman's trial, Brenner identified Blackman as the man who had entered her business premises and taken money from her at gunpoint. As the State presented sufficient evidence to permit the fact-finder to conclude that Blackman committed robbery, Blackman's conviction would not have been reversed upon an appellate challenge to the sufficiency of the evidence.

Finally, Blackman challenges his appellate counsel's failure to obtain review of "actual conflicts of interest" on the part of each of his trial attorneys. Appellant's Brief at 24. William Menges, Howard County Public Defender, entered an appearance as Blackman's attorney, but was permitted to withdraw his representation after Blackman filed a disciplinary complaint against him. As best we can discern Blackman's argument, he believes that the deputy public defenders reporting to Menges harbored resentment due to Blackman's filing of disciplinary complaints and should not have been allowed to represent Little, the jailhouse informant. Blackman summarily claims that any type of conflict needs to be reviewed by a higher court, but wholly fails to explain how his appellate counsel's presentation of the issue might have secured a reversal of his conviction. To the extent that Blackman is attempting to

demonstrate ineffectiveness of trial counsel, the issue has been decided adversely to him and is res judicata. Timberlake, 753 N.E.2d at 601.

Conclusion

The post-conviction court properly applied a Strickland analysis to Blackman's claim of ineffectiveness of appellate counsel. Pursuant to that standard, Blackman failed to demonstrate either deficient performance or prejudice therefrom. Accordingly, the post-conviction court did not err in rejecting Blackman's claim of ineffectiveness and denying Blackman post-conviction relief.

Affirmed.

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