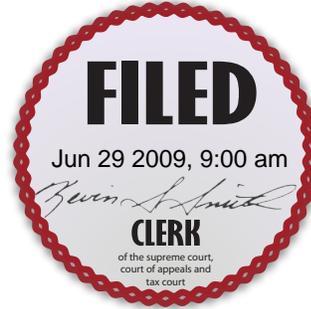


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CURTIS LEE WEIDA,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 34A02-0901-PC-39

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
Cause No. 34C01-0408-PC-303

June 29, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Curtis Lee Weida appeals the denial of his petition for post-conviction relief. Among other things, Weida argues that he received the ineffective assistance of trial and appellate counsel. Finding no error, we affirm.

FACTS

This court set forth the underlying facts in Weida's first direct appeal:

. . . [O]n more than one occasion prior to June 13, 2000, Weida told Kristen Gross ("Gross"), a young woman residing in his home, that he had fantasies that involved kidnapping a young boy and performing sexual acts on him. Weida also informed Gross that he wanted to kill a young boy and have sex with his dead body.

On June 13, 2000, Weida asked Gross to go for a drive with him. During the drive, Weida informed Gross that they were driving around "to look for a kid." Weida and Gross observed several young boys, and Weida made comments about them stating, for example, that a given boy was too old.

Eventually, Weida and Gross arrived in Kokomo, Indiana. While driving through a neighborhood, Weida and Gross observed a young boy, I.P.,[FN] standing on the side of the road. Upon seeing I.P., Weida asked Gross, "[w]hat do you think," to which Gross replied, "[t]oo young." Weida then drove around the block and stopped the car near I.P. Gross asked Weida, "what do you want me to do, what's going on, what are you going to do?" Weida responded, "[w]ell, you're going to get out of the car and ask for directions to the mall or something."

[FN] I.P. was ten years old.

Gross got out of the car and asked I.P. how to get to the mall. As he began to tell her, Gross told him to tell Weida. As I.P. moved closer to the car to give Weida directions, Weida pushed up the front passenger seat and Gross shoved I.P. into the back of the car. Weida then gave Gross, who was in the backseat with I.P., a plastic "band" to tie I.P.'s wrists together, which she did. Before they had spotted I.P., Weida had shown the band to Gross and told her that she could use it to tie up a boy's hands.

As they were driving out of Kokomo, Gross attempted to convince Weida that they should let I.P. go because she did not want Weida to kill I.P. Gross then made a failed attempt to burn the plastic band off of I.P.'s wrists. Weida told her that "if [they] couldn't get him loose there was no option." Gross's understanding of that statement was that if she could not remove the band from I.P.'s wrists, Weida would kill him. Weida eventually stopped at a gas station and borrowed a pair of scissors that were used to cut the band around I.P.'s wrists. Weida then told I.P. to stick out his hands, put a gun in them, and stated "[t]hat's what's going to happen to you if you tell." Weida drove back to Kokomo, and before they dropped I.P. off, Weida stated, "[n]ow you remember what will happen, we know where you live."

Weida v. State, 778 N.E.2d 843, 845-46 (Ind. Ct. App. 2002) (Weida I) (internal citations omitted). On September 18, 2000, the State charged Weida with class A felony conspiracy to commit murder, class A felony child molesting, and class B felony criminal confinement. The State eventually dismissed the child molesting charge. Weida's jury trial commenced on September 17, 2001, and the jury found Weida guilty of conspiracy and confinement. The trial court vacated Weida's confinement conviction on double jeopardy grounds and sentenced him to fifty years imprisonment for conspiracy.

Weida directly appealed, arguing that the evidence was insufficient to support the conspiracy conviction and that the trial court abused its discretion by refusing to give Weida's tendered jury instruction on withdrawal from conspiracy. Weida I, 778 N.E.2d at 845. This court found that the evidence was sufficient but also found that the trial court erred by refusing to give the jury instruction on withdrawal from conspiracy. Therefore, the Weida I court reversed the conspiracy conviction, remanded for a retrial

on that count, and reinstated Weida's class B felony criminal confinement conviction pending the result of the retrial. Id. at 849.

At the close of Weida's April 14, 2003, retrial, the jury found him guilty of conspiracy to commit murder. The trial court again vacated the confinement conviction on double jeopardy grounds and sentenced Weida to fifty years imprisonment for conspiracy. Weida directly appealed, arguing that the evidence was insufficient because he proved that he had abandoned his plan to murder the boy and that he was improperly sentenced. Weida v. State, No. 34A02-0307-CR-557 (Ind. Ct. App. Nov. 21, 2003) (Weida II). This court affirmed, finding that the evidence failed to establish that Weida had abandoned his plan to murder the victim and that he was sentenced properly.

On January 10, 2008, Weida filed an amended petition for post-conviction relief,¹ arguing that (1) trial counsel was ineffective in his first trial; (2) appellate counsel was ineffective in Weida I; (3) trial counsel was ineffective in his second trial; and (4) appellate counsel was ineffective in Weida II. Following a hearing, the post-conviction court denied Weida's petition on December 8, 2008, finding, in pertinent part, as follows:

6. In his Petition, Weida claims that he was denied effective assistance of trial counsel at his first trial. Given that Weida's direct appeal of his conviction for conspiracy to commit murder was successful and he was granted a second trial, all points, issues, and claims for post[-]conviction relief based upon alleged errors during his first trial are now moot.
7. Weida also claims that he was denied effective assistance of appellate counsel during the direct appeal following his first trial.

¹ Weida filed his original petition on August 5, 2004.

Given that Weida's direct appeal of his conviction for conspiracy to commit murder was successful and he was granted a second trial, all points, issues and claims for post[-]conviction relief based upon alleged errors during the appeal are now moot.

8. Weida claims that he was denied effective assistance of trial and appellate counsel because counsel did not raise or pursue alleged errors pertaining to the conviction for criminal confinement. Any alleged errors committed by counsel or the court during the first trial pertaining to the criminal confinement charge are moot, by virtue that said conviction was vacated on double jeopardy grounds.
9. There was no error committed by appellate counsel by the failure to raise alleged trial errors pertaining to the criminal confinement conviction, as prior to the direct appeals the conviction for the confinement offense was vacated.
10. There was no error committed by trial or appellate counsel by the failure to object or to raise the fact that the criminal confinement conviction was reinstated after the first appeal. The trial court reinstated the criminal confinement conviction upon remand and per instruction by the Court of Appeals, pending Weida's retrial on the conspiracy to commit murder charge.
11. There was no error committed by trial or appellate counsel by the failure to object or to raise the trial court's scheduling of the sentencing hearing on the confinement charge beyond thirty (30) days after the conviction was reinstated upon remand. Weida can show no prejudice
12. Weida argues that any errors pertaining to [the] criminal confinement charge are relevant, because the reinstatement of that conviction following the first direct appeal should have precluded[,] on double jeopardy grounds[, him from] being retried and convicted on the conspiracy to commit murder charge. Weida's argument is misplaced, as double jeopardy did not preclude him being convicted on the conspiracy charge, only that he not be convicted and sentenced on the confinement charge if he was convicted and sentenced on the conspiracy charge.

22. At the second trial, [trial counsel] vigorously argued that the evidentiary facts . . . showed that Weida had abandoned any plan to kill [the victim] [Counsel] submitted and the court read to the jury the Indiana pattern instruction on the abandonment defense. . . .

24. Weida has failed to show that any failure by [trial counsel] . . . would have rendered a different result at trial. Trial counsel was not ineffective.
25. Weida argues that [appellate counsel] was ineffective . . . [for] not perfecting a petition for rehearing or transfer of [Weida II] . . . , [and] failing to provide Weida with a copy of the decision timely, so Weida could pursue a petition for rehearing or petition to transfer pro se.

27. Weida has failed to establish how the filing of a petition for rehearing or . . . transfer would have a reasonable probability of securing a reversal of his conviction for conspiracy to commit murder. Weida's appellate counsel was not ineffective.

Appellant's App. p. 184-92. Weida now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the

judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

II. Ineffective Assistance

A. General Principles

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel’s representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. 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. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998). If a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

Claims of ineffective assistance of appellate counsel are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). These claims generally fall into three categories: (1) denying access to the appeal, (2) waiver of issues, and (3) failure to present issues well. Id. at 193-95. The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Id. at 193. Thus, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id.

In evaluating appellate counsel's performance, we consider whether the unraised issues are significant and obvious from the record and whether the unraised issues are "clearly stronger" than the issues that were presented. Bieghler, 690 N.E.2d at 194. If that analysis demonstrates deficient performance by counsel, the court then examines whether "the issues which . . . appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." Id.

B. First Trial and First Direct Appeal

Weida first argues that he received the ineffective assistance of trial and appellate counsel during his first trial and appeal. To the extent that his claims relate to the conspiracy conviction, the post-conviction court properly found those claims to be moot, inasmuch as the Weida I court vacated that conviction and remanded for a retrial.

Weida also argues that his attorneys were ineffective based on alleged failures relating to the confinement conviction. That conviction, however, was vacated on double jeopardy grounds. As to trial counsel, therefore, Weida cannot establish prejudice. And as to appellate counsel, it would have made no sense to have raised issues on appeal that related to a vacated conviction. Therefore, we do not find that Weida received ineffective assistance of trial or appellate counsel in his first trial or first appeal.

B. Second Trial

Weida next complains that his trial counsel was ineffective during his second trial because he failed to: (1) object to the reinstatement of the confinement conviction; (2) move for dismissal of the criminal confinement charges based on an allegedly defective charging information and lack of evidence; (3) sufficiently argue the abandonment defense; and (4) object to the State's alleged misrepresentation of the abandonment defense.

To the extent that Weida argues that his trial counsel should have objected to the reinstatement of the confinement conviction or asked for a retrial on that count, we note that the trial court was following the binding instructions of this court in Weida I.

Therefore, even if trial counsel had made those arguments, they would not have been successful, and Weida cannot establish prejudice on this basis.

For the remainder of Weida's arguments relating to the confinement charge, we again note that the conviction was vacated at the close of both trials. During both trials, the State had to prove that the confinement occurred to prove that Weida committed conspiracy—the confinement was the overt act committed in furtherance of the conspiracy.² To the extent that Weida seems to believe that the State relied on the confinement conviction during the second trial to establish the overt act element, we observe that the State offered evidence—the testimony of I.P. and Gross—in the second trial to prove that the confinement occurred. Thus, given that the confinement charge was vacated and not relied upon by the State to convict Weida of conspiracy a second time, Weida simply cannot establish prejudice as a result of any of his attorney's actions relating to the confinement charge.

Weida also argues that his trial counsel did not present the abandonment defense effectively during the second trial. The record reveals that trial counsel argued that it was Weida who told Gross to burn or cut the binding around the victim's wrists, reminded the jury that the burden was on the State to disprove abandonment, and repeatedly stressed that Weida had abandoned the conspiracy. Counsel argued that Gross's testimony did not establish an agreement and emphasized that Weida had obtained the scissors used to cut

² Indeed, this overlap is the reason that the trial court vacated the confinement charge at the close of both trials.

the victim loose. He submitted a jury instruction regarding the abandonment defense. It is evident that, as the post-conviction court concluded, Weida's counsel mounted a "vigorous[]" argument on the abandonment issue. Appellant's App. p. 17. We agree, and find that trial counsel was not ineffective for this reason.

Weida also directs our attention to statements made by the prosecutor during closing argument in which the State compared the abandonment defense to robbing a bank at gunpoint but returning the money and molesting a child but then apologizing and taking him home. Retrial Tr. p. 277-78. Weida argues that his trial attorney was ineffective for failing to object to these statements because they misrepresented the law of abandonment.³

We acknowledge that these statements are improper analogies, inasmuch as the crimes to which the prosecutor was referring—bank robbery and child molesting—had already been completed in those hypothetical situations and, thus, could not have been abandoned. That said, the prosecutor's further comments make clear that, in the context of this case and on these facts, the State was arguing that the evidence here did not establish that Weida, in fact, abandoned the conspiracy:

The abandonment [defense] doesn't fly here. If that flies you're giving him an excuse to live out his fantasy of killing a young boy and having sex with his corpse because he was talked out of it by [I.P.,] talked out of it by Kristen Gross. Alright, let's play devil's

³ Weida also cursorily states that the statements constituted prosecutorial misconduct but does not elaborate on the argument or attempt to apply the elements of prosecutorial misconduct to these statements. Consequently, we find that he has waived this issue for failure to make a cogent argument or to cite to relevant authority and will not address it.

advocate. Let's say he intended, now he's abandoning it. . . . Why do you, when [I.P.] gets out of the car or near the time he gets out of the car, you make him touch a gun and tell him you know what will happen to you if you tell. . . . Yeah, there's an abandonment for you.

Id. at 278-79. The totality of the prosecutor's statements, therefore, establish that he was arguing that the evidence simply did not support Weida's assertion that he voluntarily abandoned the conspiracy. We find that any inaccuracy in the two analogies is outweighed by the prosecutor's overall discussion of the abandonment defense. Thus, Weida has not demonstrated any prejudice as a result of his attorney's failure to object to the statements.

In any event, as this court found in Weida I, the evidence overwhelmingly supports the jury's conclusion on this issue:

In this case, the record shows that Weida's demeanor changed only when he realized that Gross was "backing out" of the conspiracy. Tr. p. 88-89. Gross attempted to burn the binding from I.P.'s wrists, and she eventually cut them off. Tr. p. 55, 56. It was Gross's idea to release I.P., and the evidence further established that if they were unable to cut the binding from I.P.'s wrists, the crime "was going to happen" as planned. Tr. p. 55, 57, 58-59. This evidence fails to establish that Weida abandoned the crime within the meaning of Indiana Code section 35-41-3-10.

Slip op. p. 3-4; see also Estep v. State, 716 N.E.2d 986, 987 (Ind. Ct. App. 1999) (holding that for the decision to abandon to be considered voluntary, it must originate with the defendant, not "as a result of extrinsic factors that increase the probability of detection"). Under these circumstances, we find that Weida has not established ineffective assistance of trial counsel for this reason.

B. Second Direct Appeal

Finally, Weida argues that appellate counsel was ineffective in Weida II for failing to (1) argue that the charging information for the confinement charge was defective; (2) “properly” challenge the conspiracy conviction based on the abandonment defense, appellant’s br. p. 25;⁴ or (3) timely file a petition for rehearing or transfer or notify Weida so that he could have filed those petitions pro se. As noted above, inasmuch as the confinement conviction was vacated, Weida cannot establish prejudice based on his appellate counsel’s reasonable decision not to challenge the confinement charging information on appeal.

As for the challenge to the sufficiency of the evidence supporting the conspiracy conviction based upon the abandonment defense, we note that counsel raised this precise issue in Weida’s second direct appeal. Counsel set forth and applied the general principles of the defense of abandonment, making a logical and well-written argument on the issue. Counsel directed this court’s attention to the evidence in the record supporting his client’s position, emphasizing that, “[w]hile the evidence strongly and convincingly supports the defense of abandonment, it is not the defendant’s burden to prove the defense, it is the State’s duty to disprove it beyond a reasonable doubt. This it did not do.” PCR Ex. 4 p. 8. Under these circumstances, Weida has failed to demonstrate that

⁴ In his summary of the argument, Weida also briefly argues that appellate counsel did not raise a sufficient argument regarding sentencing. Weida does not refer to this issue again in his brief and has therefore waived it for lack of cogent argument or citation to relevant authority.

his counsel's performance fell beneath an objective standard of reasonableness and has not established ineffective assistance of counsel on this basis.

Finally, Weida argues that appellate counsel was ineffective for filing a petition for rehearing or to transfer or, in the alternative, notifying Weida so that he could file a pro se petition. He does not even attempt to explain, however, why this court would have granted a petition for rehearing or our Supreme Court would have granted a petition to transfer. Therefore, Weida has not established prejudice and we do not find counsel was ineffective for this reason.

The judgment of the post-conviction court is affirmed.

MAY, J., and BARNES, J., concur.