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FILED
Jul 13 2011, 9:04 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

DALLAS WASHINGTON,	)	
	)	
Appellant- Petitioner,	)	
	)	
vs.	)	No. 49A02-1007-PC-801
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
The Honorable Amy J. Barbar, Magistrate
Cause No. 85007546

July 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Dallas Washington, proceeding pro se, appeals the post-conviction court's denial of his petition for habeas corpus, which the post-conviction court treated as a petition for post-conviction relief. Washington raises five issues, which we reorder and restate as two that we find dispositive: 1) whether the post-conviction court erred in treating his petition as one for post-conviction relief, and 2) whether his petition raises any issues that have not been procedurally waived.[1] Concluding that the post-conviction court did not err in treating Washington's petition as one for post-conviction relief, and that Washington has waived each issue in his petition, we affirm.

Facts and Procedural History

In 1985, a jury in Marion County found Washington guilty of rape as a Class A felony, robbery as a Class B felony, and criminal confinement as a Class B felony, and adjudicated him an habitual offender. At the close of a sentencing hearing, the trial court sentenced Washington to the following:

> [O]n Count One, Rape, the defendant is now sentenced . . . to the presumptive sentence of thirty years. On Count Two, Robbery, the defendant is now sentenced to the presumptive sentence of ten years to run consecutive to Count One. Let the record reflect that the Court feels that in view of the defendant's long history of recidivism the Court is aggravating the sentence. . . . For th[at] reason[] the Court shall aggravate Count Two to run consecutive to Count One. On Count Three, Confinement, the defendant shall be comitted [sic] to the Department of Corrections [sic] for ten years to run concurrently with Count One for ten years. For Counts One, Two and Three, the defendant shall serve a combined sentence of forty years. Pursuant to the Habitual Offender conviction, the sentence shall be enhanced by a sentence of thirty years for a maximum sentence of seventy years. . . .

Appellants [sic] Appendix at 20-21.

[1] See section II.B, infra, for Washington's unaltered statement of five issues.

The abstract of judgment indicates Washington was sentenced to thirty years for count one; ten years for count two, to be served consecutive to count one; and ten years for count three, to be served concurrent with count one. In addition, the abstract of judgment states: "Sentence enhanced by 30 yrs due to the habitual criminal," and "Total of 70 yrs executed." Id. at 26.

On direct appeal of his convictions, Washington argued the trial court erred in admitting certain items of evidence and in denying his motion for mistrial, and that insufficient evidence was presented to support his convictions. The Indiana Supreme Court disagreed and affirmed his convictions. Washington v. State, 511 N.E.2d 452 (Ind. 1987). While not addressing his sentence, our supreme court, as part of the procedural history of the case, restated his sentence as follows: "Appellant received thirty (30) years on the rape charge and ten (10) years on the robbery charge, the sentences to run consecutively. On the confinement charge, appellant received ten (10) years, which was enhanced by thirty (30) years by reason of his habitual offender status." Id. at 452.

In 1996, Washington filed a petition for post-conviction relief, to which the State responded and which the post-conviction court ultimately dismissed.[2] In 2006, Washington filed a second petition for post-conviction relief. He was appointed a public defender, but the public defender subsequently withdrew as counsel pursuant to Post-Conviction Rule 1(9)(c), which requires withdrawal "[i]n the event that counsel determines the proceeding is not meritorious or in the interests of justice, [whether]

[2] The appellate record does not include or otherwise indicate Washington's claims in the 1996 Petition for Post-Conviction Relief.

before or after an evidentiary hearing is held." Ind. Post-Conviction Rule 1(9)(c). Washington then withdrew his petition as well.

In April 2009, while incarcerated in Bunker Hill, Miami County, Indiana, Washington filed pro se in Marion County a document entitled: "Petition for Writ of Habeas Corpus." Appellants [sic] App. at 11. This petition, the subject of the current appeal, alleges Washington's unlawful confinement following an improper sentence, that his present sentence is a violation of his right to be free from double jeopardy, and that his habitual offender determination was improper. The post-conviction court held a hearing on this petition and, in June 2010, entered findings of fact and conclusions of law and denied the petition based, in part, on the State's affirmative defense of laches. Washington now appeals the post-conviction court's denial of his April 2009 petition.

Discussion and Decision

I. Treatment as Petition for Post-Conviction Relief

Washington first contends the trial court erred in treating his petition for writ of habeas corpus as a petition for post-conviction relief. Washington does not expand on this blanket alleged error in the argument section of his appellate brief, however, so he has waived this appellate claim by failing to present cogent reasoning – or any at all – in support of his argument. See Ind. Appellate Rule 46(A)(8)(a); Goad v. State, 516 N.E.2d 26, 28 (Ind. 1987). Still, we prefer to address issues on their merits where possible, Armstrong v. State, 932 N.E.2d 1263, 1270 (Ind. Ct. App. 2010), and accordingly address Washington's assertion that the trial court erred in treating his petition as a petition for post-conviction relief, waiver notwithstanding. See Goad, 516 N.E.2d at 28 (addressing an appellant's claim beyond waiver for failure to include a cogent argument).

In Partlow v. Superintendent, Miami Corr. Facility, 756 N.E.2d 978 (Ind. Ct. App. 2001), superceded by statute on other grounds as stated in Paul v. State, 888 N.E.2d 818, 826 (Ind. Ct. App. 2008), trans. denied, we addressed the same issue, where an appellant contended the trial court erred in treating a petition for writ of habeas corpus as a petition for post-conviction relief. We noted that a writ of habeas corpus is a well-established but little-used remedy under Indiana state law, as the vast majority of criminal appeals take the form of either direct appeals or petitions for post-conviction relief. Id. at 980. Further,

> Ind. Code § 34-25.5-1-1 provides that "[e]very person whose liberty is restrained, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered from the restraint if the restraint is illegal." The purpose of the writ of habeas corpus is to bring the person in custody before the court for inquiry into the cause of restraint. One is entitled to habeas corpus only if he is entitled to his immediate release from unlawful custody. A petitioner may not file a writ of habeas corpus to attack his conviction or sentence.

Martin v. State, 901 N.E.2d 645, 647 (Ind. Ct. App. 2009) (some quotations, citations, and alterations omitted).

In other words, when a prisoner attacks the validity of his conviction or sentence, a petition for post-conviction relief is the appropriate path to a judicial remedy. Id. But when one asserts he shall immediately be released from custody, a petition for writ of habeas corpus is proper. Id.; Partlow, 756 N.E.2d at 980.

In Washington's April 2009 petition, he argues he is entitled to immediate discharge from custody, which suggests a writ of habeas corpus is proper. However, the crux of this argument and each basis in his petition questions the propriety of the trial court finding him an habitual offender and his resulting sentence. Washington asserts in

"GROUND ONE" of his petition that he is being "illegally confined . . . under an improper and erroneous sentence in violation of this Petitioner's" constitutional rights granted by the constitutions of Indiana and the United States. Appellants [sic] App. at 12. "GROUND TWO" of his petition contends his current sentence violates his right to be free from double jeopardy. Id. "GROUND THREE" challenges his habitual offender finding as unconstitutional as well. Id. Each of these grounds is a challenge to his sentence, which makes proper the treatment of this petition as one for post-conviction relief.

Treatment of Washington's petition as one for post-conviction relief also makes sense because implicit in his strenuous arguments is a concession that if he was convicted and sentenced properly, then his current imprisonment is also proper. Although Washington contends he is entitled to immediate discharge and such a contention would usually override any collateral arguments and make a petition for writ of habeas corpus proper, the basis of Washington's petition is that his habitual offender status and sentence are invalid, which can only be the subject of a petition for post-conviction relief. Martin, 901 N.E.2d at 647 ("[A] petitioner must file a petition for post-conviction relief in the court of conviction (rather than a petition for a writ of habeas corpus in the court in the county of incarceration) when he attacks the validity of his conviction or sentence and/or does not allege that he is entitled to immediate discharge.") (citation omitted, alteration in original). Consequently, the trial court did not err in treating Washington's April 2009 petition as one for post-conviction relief.[3]

[3] Further, it is a long-standing rule that only the court of the county of incarceration has subject matter jurisdiction over a petition for writ of habeas corpus. Ind. Code § 34-25.5-2-2(a); see Dowd v. Anderson, 220 Ind. 6, 7-8, 40 N.E.2d 658, 658-59 (1942), cert. denied, 317 U.S. 630 (1942). After being convicted and sentenced in

II. Post-Conviction Relief

A. Standard of Review

Post-conviction procedures provide a narrow remedy for collateral challenges to convictions based on grounds enumerated in the post-conviction rules. Wrinkles v. State, 749 N.E.2d 1179, 1187 (Ind. 2001), cert. denied, 535 U.S. 1019 (2002). Generally, one convicted of a crime in an Indiana state court can seek collateral review of that conviction and sentence in a post-conviction proceeding only once. See Baird v. State, 831 N.E.2d 109, 114 (Ind. 2005), cert. denied, 546 U.S. 924 (2005); P-C.R. 1. To proceed with each "successive" post-conviction claim, petitioners need court permission, P-C.R. 1(12)(a), which will be granted if he or she establishes a "reasonable possibility" of entitlement to post-conviction relief. P-C.R. 1(12)(b). In determining whether petitioners have made the required showing, we "may consider applicable law, the petition, and materials from the petitioner's prior appellate and post-conviction proceedings including the record, briefs and court decisions, and any other material the court deems relevant." Id.

Two other limitations restrict review of successive petitions for post-conviction relief. To the extent an argument within the petition is the same claim made and rejected in prior proceedings, that argument is barred by the doctrine of res judicata. Wallace v. State, 820 N.E.2d 1261, 1264 (Ind. 2005). To the extent an argument is raised for the first time but could have been raised earlier either on direct appeal or in an earlier petition

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Marion County, Washington was incarcerated in Miami County by the time he filed his April 2009 petition. As a result, if Washington's petition were treated as one for writ of habeas corpus, then it should have been denied at the time of filing because it was filed in a court without jurisdiction. Ind. Code § 34-25.5-2-2(a); see Dowd, 220 Ind. at 8, 40 N.E.2d at 659 ("It is not within our province to decide whether a state of facts which [the petitioner] brings before us from a court that was without jurisdiction to pass upon them would be sufficient to entitle [the petitioner] to relief if made the basis of a proceeding in a court that has jurisdiction to consider them."). In other words, if we agreed with Washington that his petition should have been treated as a petition for writ of habeas corpus, we would next conclude that the trial court should have dismissed it outright because he filed it in Marion County and not Miami County, the county of his incarceration.

for post-conviction relief, the claim is procedurally defaulted for not having been presented timely. Id.; P-C.R. 1(8) (requiring that all grounds for relief be raised in the original petition for post-conviction relief, and cannot be the basis for a subsequent petition). Successive post-conviction relief "exists for those cases in which an issue was unascertainable or unavailable at the time of the original post-conviction petition." Arthur v. State, 663 N.E.2d 529, 531-32 (Ind. 1996) (citing P-C.R. 1(8)).

Petitioners must establish their grounds for relief by a preponderance of the evidence. P-C.R. 1(5). Here, Washington appeals from the denial of post-conviction relief, which is a negative judgment. See Wrinkles, 749 N.E.2d at 1187. As a result, 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." Id. at 1187-88. "This Court will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion." Id. at 1188 (quotation and citation omitted).

B. Limited Review of a Successive Petition for Post-Conviction Relief

As noted above, Washington's first petition for post-conviction relief was denied, he withdrew his second petition, and he now appeals the post-conviction court's denial of his third filed petition. Before we can proceed to the substance of his petition, we must determine the threshold issue of whether, given the law regarding our limited ability to review a successive petition for post-conviction relief, there are indeed any issues to address. Were any of the issues that Washington raised in his April 2009 petition "unascertainable or unavailable at the time of the original post-conviction petition"? Arthur, 663 N.E.2d at 532 (citing P-C.R. 1(8)).

Washington raises the following issues on appeal:

> 1) Whether or not the Habitual Criminal Enhancement was attached to a specific charge?
> 2) Whether or not the Court errored [sic] in not hearing this cause as a Writ of Habeas Corpus rather than a Petition for Post Conviction relief?
> 3) Whether or not the concurrent charge of criminal confinement was habitually enhanced, and if so is the appellants [sic] term of incarceration completed?
> 4) Whether or not the abstract of judgment correctly summed up terms of confinement as ; [sic] count I- thirty (30) years, count II- ten (10) years consecutive to count I, and count III – ten (10) years enhanced by thirty (30) years concurrent to count I, as a total of seventy years of incarceration?
> 5) Did the Post-Conviction Court error [sic] by applying laches to the issues/argument raised when all evidence is supported by the record?

Brief of Appellant at 1.

As discussed, regarding the second of these issues, the post-conviction court did not err in its treatment of Washington's petition as one for post-conviction relief. Next, the first, third, and fourth of these issues are substantive challenges to Washington's habitual offender finding and sentence. Because the appellate record does not contain or indicate the grounds of Washington's first petition for post-conviction relief, we cannot state with certainty that he already raised these arguments, they were rejected, and are thereby barred by res judicata. Cf. Wallace, 820 N.E.2d at 1264. We can state with certainty though, that to the extent these challenges are not barred by res judicata, they were both ascertainable and available at the time of Washington's first petition for post-conviction relief. Accordingly, at best, Washington has procedurally defaulted on these issues for not having presented them timely. See P-C.R. 1(8); Arthur, 663 N.E.2d at 531-32 (citing P-C.R. 1(8)); see also Dull v. State, 267 Ind. 549, 554, 372 N.E.2d 171, 174 ("Since appellant did not raise this issue either at trial level, on appeal, nor on any of

his subsequent post-conviction petitions before the present one, he waived the issue and was not entitled to relief in the hearing . . . .”).

Washington’s fifth stated issue concerns the post-conviction court’s reliance on the doctrine of laches in denying his April 2009 petition. Given the above discussion and the resulting conclusion that no claim remains in Washington’s April 2009 petition, we find it unnecessary to opine whether the post-conviction court’s analysis and reliance on laches was correct. Even if the post-conviction court’s analysis of Washington’s April 2009 petition were wrong, Washington has waived all of his claims and we would still have nothing to decide. Based on our limited ability to review successive petitions for post-conviction relief and the contents of Washington’s petition, we could not grant Washington the remedy of immediate release that he requests.

In the interest of completeness, we also look to the grounds raised in Washington’s April 2009 petition, which predictably mirror the issues he raises on appeal. As discussed above specifically concerning Washington’s April 2009 petition, each of the grounds therein question the propriety of the trial court finding him an habitual offender and his resulting sentence. These challenges were both available and ascertainable at the time of his first petition for post-conviction relief, and are therefore waived.

Conclusion

The post-conviction court did not err in treating Washington’s April 2009 petition as one for post-conviction relief. The substantive challenges in his 2009 petition were ascertainable and available at the time of his first petition for post-conviction relief, and

are therefore waived. No issues remain on which we may grant Washington post-conviction relief, and therefore, we affirm the post-conviction court's denial of the same.

Affirmed.

NAJAM, J., and CRONE, J., concur.