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IN THE
COURT OF APPEALS OF INDIANA

LEONARD TOWNSEND, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-1004-PC-251
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0802-PC-2

July 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Leonard Townsend, Jr. appeals from the trial court's denial of his petition for post-conviction relief raising the following restated issues for our review:

1. Did the post-conviction court abuse its discretion by denying Townsend's oral motion to withdraw his petition for post-conviction relief without prejudice made on the day of his evidentiary hearing?

2. Did the post-conviction court abuse its discretion by concluding that Townsend failed to meet his burden of establishing his claim of ineffective assistance of trial counsel?

We affirm.

Townsend was convicted of murder, attempted murder, and battery and was sentenced to an aggregate sentence of eighty-five years executed. Townsend then pursued a direct appeal of his conviction and sentence. A panel of this court affirmed his sentence and remanded the matter to the trial court to vacate the battery conviction due to double jeopardy concerns. *Townsend v. State*, 860 N.E.2d 1268 (Ind. Ct. App. 2007). Townsend filed his petition for post-conviction relief on February 4, 2008, arguing that he had received the ineffective assistance of trial counsel.

Counsel from the State Public Defender's Office was appointed to represent Townsend, but withdrew on September 11, 2008, citing Indiana Post-Conviction Rule 1(9)(c), after reviewing Townsend's petition. Townsend then chose to proceed *pro se* and was mailed a pamphlet explaining the procedure for obtaining a continuance or withdrawing a petition without prejudice. Townsend did not seek a continuance but moved to withdraw his petition without prejudice when he appeared at his evidentiary hearing on January 30, 2009.

The post-conviction court asked Townsend if he had any evidence to present. Townsend replied that he wished to withdraw his petition without prejudice. After the State objected to Townsend's motion, the trial court inquired if Townsend had received the pamphlet containing the explanation that a motion to withdraw a petition without prejudice had to be made ten days prior to the evidentiary hearing. Townsend acknowledged receiving the pamphlet, claimed he did not understand it, but then stated that he had waited until the last minute to read it and realized that he failed to file his motion ten days prior to the hearing. The post-conviction court then gave Townsend the choice of proceeding or having his petition withdrawn with prejudice. Townsend elected to proceed making various arguments, but failing to present any evidence directly bearing on his claim of ineffective assistance of trial counsel or any prejudice that may have resulted from that performance.

After considering the parties' submitted proposed findings of fact and conclusions of law, the court denied Townsend's petition concluding that Townsend had failed to present any evidence in support of his contentions of ineffective assistance of trial counsel. Townsend now appeals.

1.

Townsend argues that the post-conviction court abused its discretion by denying his oral request to withdraw his petition without prejudice. P- C.R. 1 (4)(c) allows a post-conviction court to grant leave to withdraw a petition at any time prior to the entry of judgment. This rule has been interpreted to mean that while a petitioner has a conditional right to withdraw a previously filed petition, that right is not absolute and may be granted in the absence of any overriding prejudice that may result to the State by such withdrawal.

Neeley v. State, 382 N.E.2d 714 (Ind. 1978), *overruled on other grounds by German v. State*, 428 N.E.2d 234 (Ind. 1981). Prejudice to the State is one factor to consider in the abuse of discretion analysis. *Tapia v. State*, 753 N.E.2d 581 (Ind. 2001). An abuse of discretion occurs if the court's decision is clearly against the logic and effect of the facts and circumstances before it. *Abernathy v. State*, 852 N.E.2d 1016 (Ind. Ct. App. 2006).

Townsend claims that there was no evidence before the post-conviction court that his motion for withdrawal was made for an improper purpose and contends that the State did not demonstrate substantial prejudice if the court had permitted the petition to be withdrawn. Townsend argues that this supports his claim that the post-conviction court abused its discretion by denying his motion to withdraw his petition without prejudice.

Our examination of the facts and circumstances before the post-conviction court leads us to the conclusion that there was no abuse of discretion. Townsend's claim of ineffective assistance of trial counsel had been examined by a public defender assigned to assist him with his petition and that public defender withdrew after determining that there was no merit to his claim. Townsend informed the court at the evidentiary hearing that he was in the process of hiring an attorney to assist him. He then stated that there was no explanation for his failure to seek a continuance of the evidentiary hearing. He claimed that he was "in the process of trying to do my own case law, and . . . waited until the last minute to--I read the letter. It was a pamphlet that you sent me." *Transcript* at 6. Although Townsend focuses on the lack of evidence of improper purpose for the motion and prejudice to the State, the record reveals that there also was a lack of evidence establishing how Townsend would have benefitted from the withdrawal.

Townsend's situation is factually different from that in *Tucker v. State*, 786 N.E.2d 710 (Ind. 2003), a case upon which Townsend relies. In *Tucker*, the defendant was represented by the public defender's office through the appeals process and counsel filed a written motion to withdraw the petition a week prior to the hearing, renewing that motion at the evidentiary hearing. Here, Townsend had months after counsel withdrew during which he could have sought a continuance of the hearing or the withdrawal of his petition, but failed to do so. Townsend's actions here do not mirror the active prosecution of a petition for post-conviction relief exhibited in *Tucker*.

2.

Townsend contends that the post-conviction court erred by finding and concluding that he failed to meet his burden of establishing his claim of ineffective assistance of trial counsel. Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000), *cert. denied* (2002); *Wieland v. State*, 848 N.E.2d 679 (Ind. Ct App. 2006), *trans. denied*, *cert. denied*. The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl v. State*, 738 N.E.2d 253. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. P-C.R. 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals a negative judgment. *Fisher v. State*, 878 N.E.2d 457 (Ind. Ct. App. 2007), *trans. denied*. The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a

conclusion contrary to that of the post-conviction court. *Id*. We 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. *Wright v. State*, 881 N.E.2d 1018 (Ind. Ct. App. 2008), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Lindsey v. State*, 888 N.E.2d 319 (Ind. Ct. App. 2008), *trans. denied*. We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Fisher v. State*, 878 N.E.2d 457.

We review ineffective assistance of trial counsel claims under the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Fisher v. State*, 878 N.E.2d 457. First, the petitioner must demonstrate that counsel's performance was deficient, which requires a showing that counsel's representation fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001), *cert. denied*. Second, the petitioner must demonstrate that he was prejudiced by counsel's deficient performance. *Id*. To show prejudice, a petitioner must show that there is a reasonable probability that the outcome of the trial would have been different if counsel had not made the errors. *Id*. A probability is reasonable if it undermines confidence in the outcome. *Id*.

We presume that counsel rendered adequate assistance and give considerable discretion to counsel's choice of strategy and tactics. *Smith v. State*, 765 N.E.2d 578 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id*. at 585. "If we can resolve a claim of

ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel's performance." *Fisher v. State*, 878 N.E.2d at 463-64.

Here, Townsend claimed that his trial counsel failed to hire expert witnesses, file motions, advise Townsend to testify, and locate an eyewitness. Townsend did not present the testimony of trial counsel in support of his claim. Absent evidence in support of a petitioner's claim of ineffective assistance of counsel, a court can infer that counsel would not corroborate the allegations. *Dickson v. State*, 533 N.E.2d 586 (Ind. 1989). Townsend failed to provide the evidence that he needed to establish his claim by developing a record of the strategic decisions made by his trial counsel and the reasons for those decisions. The trial court did not abuse its discretion by concluding that Townsend failed to meet his burden of establishing his claim.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.