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# IN THE
# COURT OF APPEALS OF INDIANA

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| DAREN E. RIDLEY, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 49A05-0806-PC-327 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 4
The Honorable Patricia J. Gifford, Judge
Cause No. 49G04-9504-MR-57140

**July 29, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Petitioner, Daren E. Ridley (Ridley), appeals from the denial of his petition for post-conviction relief.

We affirm.

## ISSUES

Ridley raises six issues, which we restate as the following five:

(1) Whether the trial court's jury instructions were inadequate because they did not contain an instruction on transferred intent;

(2) Whether alleged newly discovered evidence warrants a new trial;

(3) Whether *Blakely v. Washington*, 542 U.S. 296 ( 2004), should be applied retroactively to the sentencing phase of Ridley's trial;

(4) Whether the trial court erred by not inquiring into Ridley's request for new trial counsel; and

(5) Whether the shackling of Ridley and his co-defendants warrants a new trial.

## FACTS AND PROCEDURAL HISTORY

Ridley was charged and later convicted of conspiracy to commit murder, a Class A felony, Ind. Code §§ 35-41-5-2 and 35-42-1-1; murder, a felony, I.C. § 35-42-1-1; and attempted murder, a Class A felony, I.C. §§ 35-41-5-1 and 35-42-1-1. Our supreme court detailed the facts leading to Ridley's charges and convictions in its consideration of one of his co-perpetrator's appeals, *Williams v. State*, 690 N.E.2d 162 (Ind. 1997), by stating as follows:

In October 1993 five men fired at least sixty-five rounds of ammunition from assault rifles at the door and walls of an apartment in a complex in Indianapolis. A sixteen year old girl passing by the apartment was killed by a bullet to the head and inside a seven year old boy was permanently injured. The five shooters-Andre Gaston, Odell Marbley, Joseph Morrow, Darren Ridley, and Derrick Williams-were members of the "Ghetto Boys," a group organized to sell crack cocaine. According to trial testimony by Gaston and two other Ghetto Boy members, Melvin Cornelious and Eugene Childs, the shooting was intended as retaliation against Stacey Reed. The day before the shooting Reed had broken into a Ghetto Boy member's house and stolen from the group's stash of cocaine. This was Reed's second such theft in a matter of days. Gaston testified that he received a call the next day from Williams to invite him to a meeting of the group at Ridley's mother's house. When Gaston arrived-with Ridley, Marbley, and Morrow already present-Williams told him of their intent to "get" Reed later that day. Williams asked Gaston to get his gun, and Gaston and Morrow temporarily left the group.

Earlier that day, Morrow had purchased three MAK-90 assault rifles (AK-47 clones), ten 30-round ammunition clips, and 500 rounds of ammunition. The group reassembled, this time at Ridley's father's house. The five were met there by Cornelious and Childs, who testified that when they arrived at the house, there was an assortment of assault rifles, other guns, and ammunition on the porch. .Both testified that Ridley expressed the group's intention to kill Reed. In the meantime, they were joined by two others, Eddie Dean Gregory and "Old Man" Prewitt, who arrived in a pickup truck and were informed of the plan. Williams asked Gregory to pick up some more ammunition as well as a battery for a sight-a rifle attachment emitting a narrow beam of light to zero in on a target. Gregory and Prewitt left on this errand and soon returned with the goods. The group then sat on the porch with the loaded weapons and waited.

At dark the group, now numbering nine, drove in three vehicles-two rental cars and the pickup truck-to the apartment complex where they believed they would find Reed. The two rental cars and their occupants remained at the perimeter of the complex while the pickup-with Prewitt driving and Gregory in the cab-drove inside. Gregory got out, went to the apartment where Reed was staying, and spoke with him. Gregory and Prewitt then rejoined the others and Gregory reported that Reed was in the apartment as expected. At this point, the two cars drove to another nearby location and met the pickup. The five shooters, with their loaded weapons, boarded the back of the pickup, and rode to the apartment. Cornelious and Childs-the drivers of the two cars-stayed behind. Gregory and Prewitt remained in the cab of the truck as the five shooters

> jumped out, stood shoulder-to-shoulder and opened fire on the apartment from a distance of about sixty yards. The shooting lasted between sixty and ninety seconds. They then reboarded the pickup, drove back to where they left the two cars, and fled the scene.
>
> The trial took place in early 1996. The evidence included the testimony of Cornelious, Childs, and Gaston, all of whom had reached plea agreements with the State. An eyewitness also identified Ridley as one of the shooters.

*Id*. at 165 (footnotes omitted). Ridley appealed, and our supreme court affirmed his convictions for murder and conspiracy to commit murder, but reversed his conviction for attempted murder and remanded for new sentencing. *Ridley v. State*, 690 N.E.2d 177, 179 (Ind. 1997), *overruled in part by Whedon v. State*, 765 N.E.2d 1276 (Ind. 2002). On June 29, 2000, the trial court ordered Ridley to serve fifty years for conspiracy to commit murder, and sixty years for murder, with those sentences to be served consecutive to each other, and consecutive to a sentence he was serving for a federal crime.

On January 21, 2002, Ridley filed a petition for post-conviction relief. The post-conviction court appointed the State Public Defender, who withdrew her representation after review of Ridley's case. The State responded to Ridley's petition by filing its answer on March 17, 2004. On July 9, 2004, the State filed a motion to proceed by affidavit. On July 20, 2004, Ridley filed an amended petition for post-conviction relief, and on July 21, 2004, the State responded with another answer. On December 30, 2004, Ridley filed an affidavit from Robert Bryant (Bryant), who described his interaction with some of Ridley's co-defendants after the shootings at Reed's apartment.

On April 15, 2008, the post-conviction court denied Ridley's petition for post-conviction relief concluding that: (1) Ridley failed to meet his burden of proof in regards to a claim of double jeopardy that he raised; (2) Ridley's claim of actual innocence based upon his self-serving affidavit and the affidavit of Bryant was not newly discovered evidence and did not establish actual innocence in light of the strong evidence that was submitted to convict him; (3) Ridley's claim that the that jury was inadequately instructed on the theory of transferred intent failed because the Indiana Supreme Court "found in his companion case that the doctrine of transferred intent properly applied to the facts herein." (Appellant's Br. p. 8).[1]

Ridley now appeals. Additional facts will be provided as necessary.

## I. *Standard of Review*

The petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). Because Ridley is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its

[1] Ridley did not include a copy of the post-conviction court's order in his Appellant's Appendix, and the only complete copy contained in the materials submitted to this court is located in his "ORIGINAL" Appellant's Brief.

decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

Post-conviction hearings do not afford defendants the opportunity for a "super appeal." *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. Rather, post-conviction proceedings provide a narrow remedy for collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Ross v. State*, 877 N.E.2d 829, 832 (Ind. Ct. App. 2007), *trans. denied*. "In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." *Id*. at 833 (quoting *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002)). Claims of regular or fundamental error are not reviewable in a post-conviction proceeding. *Ross*, 877 N.E.2d at 833.

II. *Transferred Intent*

Ridley contends that the trial court inadequately instructed the jury on the issue of transferred intent. However, Ridley's trial counsel had an opportunity to request an instruction on transferred intent at trial, and Ridley's appellate counsel had an opportunity to raise the inadequacies of the jury instructions on direct appeal. Ridley has not submitted transcripts of the trial, and, therefore, we cannot determine whether his trial counsel requested a jury instruction on transferred intent, and we know from our supreme court's opinion that Ridley did not raise this issue on appeal. *See Ridley*, 690 N.E.2d at 179. Ridley does not contend that his trial or appellate counsels were ineffective for failing to request an

instruction on transferred intent, or for failing to raise the inadequacies of the jury instructions on appeal. Therefore, Ridley's claim of inadequate jury instructions is not reviewable in these post-conviction proceedings. *See Ross*, 877 N.E.2d at 833.

III. *New Evidence*

Next, Ridley contends that his affidavit and the affidavit of Bryant prove that he was actually innocent.[2] Post-Conviction Relief Rule 1 1(a)(4) provides that post-conviction relief is available when the petitioner contends "that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." However, for new evidence to mandate a new trial, Ridley must demonstrate that: "(1) the evidence has been discovered since trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at trial." *Taylor v. State*, 840 N.E.2d 324, 329-30 (Ind. 2006). The basis for newly discovered evidence should be received with great caution and the so-called new evidence carefully scrutinized. *Id*. at 331. "The burden of showing that all nine requirements are met rests with the petitioner for post-conviction relief." *Id*.

In sum, Ridley's personal affidavit alleges the following: (1) that his trial counsel did not discuss the events of the crime sufficiently with him; (2) that he told his trial counsel that

[2] Ridley splits this argument into two separate sections, one analyzing his conviction for murder and another analyzing his conviction for conspiracy to commit murder. Because both arguments rely upon the same so-called "new evidence," we address the arguments together.

he wanted to testify, but his trial counsel "announced to me that he was making a strategic decision to not present any defense"; and (3) that he would have testified that he was visiting his brother's girlfriend at the hospital at the time of the shooting and went to his mother's house thereafter. (Appellant's App. pp. 130-136). Bryant's affidavit explains that Melvin Cornelious, Andre Gaston, Eugene Childs, Edward Carver, and George Anderson III came to his apartment after the shooting and discussed the shooting. Bryant's affidavit makes no mention of Ridley at any point.

We note several reasons why these two affidavits are insufficient to warrant a new trial. First, Ridley's own affidavit does not allege that he learned of certain facts after his trial, but rather alleges facts that, if true, he would have known at his trial. Second, Ridley did not present any evidence from his trial counsel to the post-conviction court. In the context of ineffective assistance of counsel claims, where the petitioner does not submit any testimony or affidavit from trial counsel, the post-conviction court may infer that trial counsel would not have testified in support of allegations of ineffectiveness. *See Downs v. State*, 827 N.E.2d 646, 654 (Ind. Ct. App. 2005), *trans. denied*. Likewise, we may infer that Ridley's trial counsel would have testified that he sufficiently explored Ridley's potential defenses with him and chose for strategy reasons not to have Ridley testify. Third, Ridley did not enter the transcript from the trial as evidence in these post-conviction proceedings, so we are unable to evaluate the defense or lack of defense presented by his trial counsel. Fourth, although Bryant's affidavit makes no mention of Ridley, it does not state that Bryant believed or had any reason to believe that Ridley was not involved in the crime. And finally, we know

from our supreme court's opinion in William's appeal that the testimony of his co-perpetrator and an eyewitness placed Ridley at the scene and identified him as one of the shooters; therefore, Ridley's so-called new evidence would have to compete with strong evidence and have only a remote chance of changing the outcome of his prior trial. *Williams*, 690 N.E.2d at 165. For these reasons, we conclude that Ridley has failed to prove that the evidence was discovered since his trial and that it would likely produce a result different from his prior trial. Therefore, the post-conviction court did not err by denying Ridley's petition for post-conviction relief based upon newly discovered evidence.

IV. *Blakely*

Ridley contends that the trial court's act of finding facts during the sentencing phase of his trial violated his right to trial by jury pursuant to the Sixth Amendment of the United States Constitution as defined by *Blakely v. Washington*, 542 U.S. 296 ( 2004), and applied to Indiana's former presumptive sentencing scheme by *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005). We first note that Ridley has waived this claim because it was not included in his petition or amended petition for post-conviction relief. *See Walker v. State*, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006), *reh'g denied*, *trans. denied* ("Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal."). Waiver notwithstanding, our supreme court plainly stated that *Blakely* will be applied retroactively "to all cases on direct review at the time *Blakely* was announced." *Smylie*, 823 N.E.2d at 690-91. Direct review of Ridley's sentencing terminated when Ridley chose not to

appeal from his sentencing after remand to the trial court in 2000, before *Blakely* was handed down in 2004. Therefore, *Blakely* does not apply to the sentencing phase of Ridley's trial.

V. *Request for New Counsel*

Ridley contends that he is deserving of post-conviction relief because he requested new counsel from the trial court, but the trial court never inquired into his request. However, Ridley did not raise this claim in his petition or amended petition for post-conviction relief, and it is therefore waived. *See Walker*, 843 N.E.2d at 57. Moreover, since Ridley did not enter the trial transcript as evidence, we cannot verify whether and to what extent the trial court addressed his concerns regarding communications with his trial counsel. Furthermore, Ridley's claim is that the trial court erred in not exploring his request for new counsel and, as framed, such a claim is not available in post-conviction review. *See Ross*, 877 N.E.2d at 833.

VI. *Shackles*

Ridley contends that the post-conviction court erred by denying him relief because the trial court ordered him and his co-defendant shackled during the trial over their objections. Again, Ridley has waived this claim by failing to include it in either his petition or amended petition for post-conviction relief. *See Walker*, 843 N.E.2d at 57. Moreover, since Ridley has not entered the trial transcript as evidence on post-conviction review, we cannot determine whether any other reasons justified the trial court's decision to have the

defendant's shackled.[3] Trial courts may present defendants in shackles before a jury where "certain exceptional circumstances" make the restraints "necessary to prevent the escape of the prisoner, to protect those in the courtroom, or to maintain order." *Davis v. State*, 770 N.E.2d 319, 325 (Ind. 2002), *reh'g denied*. Furthermore, Ridley's claim of error by the trial court in ordering the shackles is not a claim that is reviewable upon post-conviction review as presented. *See Ross*, 877 N.E.2d at 833.

## CONCLUSION

Based on the foregoing, we conclude that the trial court did not err by denying Ridley's petition for post-conviction review.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.

[3] Ridley quotes the trial transcript for one comment by the trial court regarding shackles, which, standing alone, would be insufficient to justify shackling the defendants. (Appellant's Br. p. 29). However, we can neither verify the accuracy of this quotation nor determine whether it encompassed the trial court's entire reasoning for the restraints without the trial transcripts.