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IN THE
COURT OF APPEALS OF INDIANA

STEPHEN J. TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 06A04-1009-PC-557
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Matthew C. Kincaid, Judge
Cause No. 06D01-0908-PC-246

July 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Stephen J. Taylor appeals the denial of his petition for post-conviction relief. Taylor was convicted of Class A felony child molesting. His conviction was affirmed on direct appeal. He now alleges ineffective assistance of trial and appellate counsel and raises several freestanding claims of trial and appellate court error as well. We find an insufficient showing of ineffective assistance, and we find his freestanding claims non-cognizable in this proceeding. We affirm the judgment of the post-conviction court denying relief.

Facts and Procedural History

The underlying facts as reported in this Court's decision on direct appeal are as follows:

> During the summer of 2006, eight-year-old A.D. was enrolled in a day camp. On June 27, 2006, A.D. and the other campers were swimming in a creek in Lions Park. A.D. told Melissa Rabb, a counselor, that he needed to go to the bathroom. Because the bathrooms were far away, Rabb directed him to a designated spot in the woods. The spot was about fifteen to twenty yards away and allowed her to see the child's shoulders and head.
>
> Taylor approached A.D. and gave him a piggy back ride to the other side of the woods. Taylor said he would "trade" A.D. for a $100 bill. When A.D. took the money, Taylor put his mouth on A.D.'s penis.
>
> About a minute after A.D. left the area where the campers were swimming, Rabb realized she could not see A.D. None of the other counselors had seen A.D., so Rabb began calling his name and looked for him in the woods. Rabb found him about thirty yards from the designated restroom spot.
>
> Taylor ran away when he heard Rabb calling for A.D., but he left behind a hat. A.D. told Rabb what had happened, and the hat and the $100 bill were turned over to the police.
>
> On August 30, 2006, Officer Brian Stewart received a report of a suspicious person in Hummell Park. Officer Stewart found Taylor in a secluded area. Officer Stewart approached him and asked what his name was. Taylor said his name was Jason Riley. Officer Stewart then asked his date of birth. After a long pause, Taylor gave him a date. Officer Stewart

checked whether there was a driver's license, identification card, or warrant matching that information and found nothing. Officer Stewart again asked him for his name and date of birth, and also for his social security number. Taylor said he could not remember his social security number "because he had too many numbers to remember by trying to remember his mom and dad's telephone number in Iowa."

Officer Stewart believed Taylor was lying because he paused before giving his date of birth, claimed not to remember his social security number, and would not look at him when he was answering. In Officer Stewart's experience, if a person is not forthcoming with identification, it is often because the person has an outstanding warrant. Concerned for his safety, Officer Stewart asked Taylor if he had any weapons. Taylor said he had a knife. Officer Stewart conducted a pat down and removed a knife, disposable razors, and scissors.

Meanwhile, Officer Christopher Duffer arrived. He asked Taylor if he had lived in Indiana his whole life. Taylor said he had recently come to Indiana from Iowa. Officer Duffer asked if he had an Iowa driver's license, and Taylor said he did not. Officer Duffer then asked how he had gotten to Indiana, and Taylor said he had ridden his bike. Unable to confirm Taylor's identity, the officers decided to leave. Officer Stewart told Taylor he could pick up his personal items once the officers were inside their cars. It was getting close to dark, and Officer Stewart told Taylor he should "move on due to the park closing at dark."

The officers conferred briefly, and each felt Taylor was lying and may have an outstanding warrant. They decided to ask what his parents' phone number was, and began walking back toward Taylor. Taylor had gathered his belongings and was pushing his bicycle toward the officers. Officer Stewart asked him what his parents' number was, and Taylor provided a number with a 317 area code. The officers then felt certain Taylor was lying because the number was from the Indianapolis area, rather than Iowa. Officer Stewart told Taylor he knew that was not an Iowa number and "he needed to start being truthful."

Taylor paused, then took off on his bicycle. The officers subdued him and placed him under arrest for false informing. They removed the contents of his pockets, which included a large sum of cash and a note that read, "I'll give you $100 if you let me suck your dick. Please!" The officers asked dispatch to call the number Taylor provided. A woman answered and stated she did not have a son named Jason Riley, but did have a son named Stephen Taylor. It was then discovered Taylor had two outstanding warrants.

A DNA sample was obtained from Taylor pursuant to a warrant. The sample matched DNA from the sweat band of the hat Taylor left when he molested A.D.

Taylor v. State, 891 N.E.2d 155, 157-58 (Ind. Ct. App. 2008) (record citations omitted), *trans. denied*.

Defense counsel filed a motion to suppress the evidence seized from Taylor following his arrest. Counsel alleged that Taylor's detention and arrest were without probable cause, warrant, or consent, so the subsequent search was unconstitutional and evidence obtained inadmissible. The motion was denied following a suppression hearing.

Counsel filed an additional motion in limine seeking to exclude the money and note found in Taylor's possession. Counsel argued that the money and note constituted inadmissible prior bad acts evidence under Evidence Rule 404(b) and that their admission would be unfairly prejudicial under Rule 403. The motion was denied following a pretrial hearing. Counsel renewed his objection when the evidence was offered at trial.

Taylor was convicted of Class A felony child molesting and sentenced to fifty years imprisonment. He appealed, arguing that (1) the State's evidence was improperly admitted as the product of an unconstitutional search and seizure, (2) the trial court abused its discretion at sentencing by finding various unsupported aggravating circumstances, and (3) his sentence was inappropriate in light of the nature of the offense and his character. This Court affirmed Taylor's conviction and sentence. *Id.* at 157. On the search-and-seizure issue, we concluded that the initial encounter between Taylor and law enforcement was consensual, the officers ultimately had probable cause to arrest Taylor for false informing, and the subsequent search was therefore incident to a lawful arrest. *Id.* at 159-60.

Taylor next sought post-conviction relief alleging that (a) his conviction was "obtained by use of evidence gained pursuant to an unlawful search and seizure," (b) his conviction was "obtained by violation of rule 404b," (c) he was denied "meaningful appellate review," and (d) he was denied effective assistance of counsel. With regard to his claim of ineffective assistance, Taylor averred that trial counsel failed to adequately (1) litigate the motion to suppress evidence, (2) inform Taylor of the possibility of a conditional plea, (3) seek exclusion of evidence pursuant to Evidence Rule 404(b), and (4) investigate and present mitigators at sentencing. Taylor claimed that appellate counsel was defective for failing to (1) raise a Rule 404(b) issue on direct appeal and (2) competently present the search-and-seizure/suppression issue.

The post-conviction court denied relief following a hearing. Taylor appeals.

Discussion and Decision

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); *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). 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.* The post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been

made. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.* We accept findings of fact unless clearly erroneous, though we accord no deference to conclusions of law. *Id.*

I. Non-Cognizable Claims

We first address Taylor's post-conviction claims which do not involve allegations of ineffective assistance. Taylor claims that (a) his conviction was "obtained by use of evidence gained pursuant to an unlawful search and seizure," (b) his conviction was "obtained by violation of rule 404b," and (c) he was denied "meaningful appellate review."

A. Freestanding Search-and-Seizure Issue

Taylor claims he was convicted on the basis of unlawfully seized evidence.

"If an issue was raised on direct appeal, but decided adversely to the petitioner, it is *res judicata*." *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006).

Taylor's search-and-seizure claim was raised and disposed of on direct appeal. Accordingly, it is *res judicata* and no longer available for review.

B. Freestanding 404(b) Claim

Taylor argues that he was convicted on the basis of inadmissible uncharged misconduct evidence.

"If an issue was known and available, but not raised on direct appeal, it is waived." *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001).

Taylor's 404(b) issue was known, available, and even properly preserved for appellate review. However, it was not raised on direct appeal. It is therefore waived.

C. "Denial of Meaningful Appellate Review"

Taylor next argues that he was "denied a meaningful appellate review of his direct appeal." He maintains that in our direct appeal opinion, this Court invoked an improper standard of review, failed to consider uncontested evidence, misconstrued the offense of false informing, and failed to properly review his sentence.

Taylor's arguments here are mere attempts to relitigate the issues raised and decided on direct appeal. These claims are therefore *res judicata* and non-cognizable in this post-conviction proceeding.

II. Ineffective Assistance of Counsel

Taylor raises several allegations that his trial and appellate counsel rendered ineffective assistance.

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)), *reh'g denied*. Failure to satisfy either prong will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *reh'g denied*. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* To meet

the appropriate test for prejudice, the petitioner 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.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009).

The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). There are three ways in which appellate counsel may be considered ineffective: (1) when counsel's actions deny the defendant his right of appeal; (2) when counsel fails to raise issues that should have been raised on appeal; and (3) when counsel fails to present claims adequately and effectively such that the defendant is in essentially the same position after appeal as he would be had counsel waived the issue. *Grinstead v. State*, 845 N.E.2d 1027, 1037 (Ind. 2006). The decision of what 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). Thus, we give considerable deference to appellate counsel's strategic decisions and will not find deficient performance in appellate counsel's choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. *Taylor v. State*, 717 N.E.2d 90, 94 (Ind. 1999). To establish deficient

performance for failing to raise an issue, the petitioner must show that the unraised issue was "clearly stronger" than the issues that were raised. *Bieghler*, 690 N.E.2d at 194.

A. Trial Counsel

1. Investigation/Argument of Motion to Suppress

Taylor first argues that trial counsel was ineffective for failing to adequately litigate the suppression motion. Taylor claims that counsel failed to (a) present Taylor's side of the story—specifically that he did not hesitate when giving his birthdate and never said that his family lived in Iowa, (b) elicit that Officer Stewart told Taylor to "come here," indicating that the encounter evolved from a consensual interaction to bona fide detention, (c) elicit Taylor's belief that he was not free to leave, (d) raise specific arguments as to the lack of probable cause, and (e) present specific case law to the trial court, namely *Sanchez v. State*, 803 N.E.2d 215 (Ind. Ct. App. 2004), *trans. denied*.

Assuming any deficient performance by trial counsel as alleged here, we find an insufficient showing of prejudice to sustain a finding of ineffective assistance. Even if counsel had solicited Taylor's perspective and version of events at the suppression hearing, Taylor fails to demonstrate a reasonable probability that the trial court would have (a) credited Taylor's testimony over that of the arresting officers and (b) rendered a different suppression ruling as a result thereof. Taylor also fails to explain coherently how his version of the story would have altered the overall probable cause/suppression analysis. Moreover, while trial counsel did not bring *Sanchez* to the attention of the trial court or raise other desired arguments, appellate counsel litigated the search-and-seizure

issue in depth on direct appeal and cited *Sanchez* at great length. For these reasons we cannot say that trial counsel's alleged deficiencies resulted in prejudice to Taylor.

2. Advisement of Conditional Plea

Taylor claims that trial counsel rendered ineffective assistance by failing to advise him that he could enter a conditional guilty plea, reserving his right to appeal the denial of his motion to suppress.

It is well-settled that one who pleads guilty cannot challenge the propriety of his resulting conviction on direct appeal; he is limited on direct appeal to contesting the merits of a trial court's sentencing decision, and then only where the sentence is not fixed in the plea agreement. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004). Accordingly, this Court has long held that a defendant cannot question pretrial orders such as suppression rulings following the entry of a guilty plea. *See, e.g.*, *Branham v. State*, 813 N.E.2d 809, 812 (Ind. Ct. App. 2004); *Lineberry v. State*, 747 N.E.2d 1151, 1155 (Ind. Ct. App. 2001); *Ford v. State*, 618 N.E.2d 36, 38-39 (Ind. Ct. App. 1993), *reh'g denied*, *trans. denied*. Our Supreme Court also recently confirmed that conditional pleas are impermissible in Indiana. *Alvey v. State*, 911 N.E.2d 1248, 1250 (Ind. 2009).

As Indiana prohibits conditional plea agreements, and as our case law so indicated at the time of Taylor's pretrial proceedings, one could not say defense counsel rendered deficient performance by failing to advise Taylor of the possibility of a conditional plea. We therefore find no ineffective assistance.

3. Attempt to Exclude Evidence Pursuant to Rule 404(b)

Taylor claims that trial counsel was defective for inadequately seeking exclusion pursuant to Evidence Rule 404(b) of the note and cash discovered on his person.

Here we conclude that Taylor fails to sustain a finding of deficient performance. Counsel moved in limine to exclude the note and money pursuant to Rules 404(b) and 403. He argued his motions to the court, and he timely renewed his objections at trial. Accordingly, we find no ineffective assistance.

4. Investigation and Presentation of Mitigators

Taylor claims that trial counsel failed to investigate and present mitigating circumstances at sentencing. Taylor claims the following mitigators were available but not proffered: (a) his offense neither caused nor threatened serious harm to persons or property, or Taylor did not contemplate that it would do so, (b) the offense was the result of circumstances unlikely to recur, (c) Taylor is likely to respond affirmatively to probation or short term imprisonment, and (d) Taylor has a supportive family.

We find no ineffective assistance in counsel's decision not to present Taylor's proposed mitigators. The first three are unsupported—and in fact refuted—by the record. And even if the trial court had heard evidence that Taylor received support from family, we find no reasonable probability that the court would have calculated a different sentence than that imposed. Accordingly, we find no prejudice.

B. Appellate Counsel

1. Failure to Raise 404(b) Issue

Taylor claims that appellate counsel rendered ineffective assistance by failing to raise the above-mentioned 404(b) issue on appeal.

Evidence Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." The rule is designed to prevent assessment of a defendant's present guilt on the basis of his propensities—the so-called "forbidden inference." *See Hicks v. State*, 690 N.E.2d 215, 218-19 (Ind. 1997). But prior misconduct may be admissible to prove motive, intent, or other material facts at issue in a case. *Id.*

Here we find no showing of ineffective assistance by appellate counsel. The perpetrator in this case offered the victim $100 for the opportunity to perform fellatio on him. Taylor was found with a large sum of money and a note specifically reading, "I'll give you $100 if you let me suck your dick. Please!" The note and money were admissible for the independent, non-propensity purpose of proving Taylor's identity as the perpetrator. The trial court thus acted within its discretion by admitting the evidence, and this Court would have found no error in its admission on appeal. Accordingly, we cannot say appellate counsel rendered deficient performance by foregoing Taylor's 404(b) issue, nor can we say that Taylor was prejudiced by appellate counsel's decision not to raise it.

2. Search-and-Seizure Issue

Taylor claims that appellate counsel was defective in his presentation of the search-and-seizure issue on direct appeal. Taylor claims that appellate counsel

wrongfully conceded that the initial encounter between him and Officer Stewart was consensual.

Assuming without deciding that appellate counsel's concession constituted deficient performance, we nonetheless find no prejudice. The facts most favorable to the trial court's suppression ruling demonstrate that the initial encounter between Taylor and Officer Stewart was consensual. We therefore find no reasonable probability that, but for appellate counsel's concession, this Court would have found the initial encounter nonconsensual, altered its remaining analysis of the suppression issue, and reached a different disposition on appeal.

For the reasons stated, the post-conviction court's judgment is affirmed.

Affirmed.

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