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IN THE
COURT OF APPEALS OF INDIANA

RAYMOND L. CHILDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0902-PC-151
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
The Honorable Steven J. Rubick, Magistrate
Cause No. 49G04-9901-PC-3504

August 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Raymond L. Childs ("Childs") appeals the denial of his petition for post-conviction relief, following his convictions for Burglary, a Class B felony,[1] Theft, a Class D felony,[2] and Resisting Law Enforcement, a Class A misdemeanor,[3] and his adjudication as an habitual offender.[4] We affirm.

Issue

Childs presents a single issue for review: whether he was denied the effective assistance of appellate counsel because appellate counsel did not challenge his sentence as manifestly unreasonable.

Facts and Procedural History

On December 23, 1998, an Indianapolis postman observed and reported a burglary in progress. The burglars were apprehended after a police chase. As a result of those events, on January 8, 1999, Childs was charged with Burglary, Theft, and Resisting Law Enforcement. A jury found Childs guilty as charged and he admitted to being an habitual offender.

On February 25, 2000, the trial court sentenced Childs to fifteen years for Burglary, enhanced by twenty years because of his habitual offender status. The trial court imposed concurrent sentences of two years and one year for Theft and Resisting Law Enforcement, respectively. Accordingly, Childs received an aggregate sentence of thirty-five years.

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[1] Ind. Code § 35-43-2-1.
[2] Ind. Code § 35-43-4-2.
[3] Ind. Code § 35-44-3-3.
[4] Ind. Code § 35-50-2-8.

Childs appealed his convictions, raising three issues: (1) whether the State erred in failing to file a separate Information with respect to the habitual offender allegation; (2) whether sufficient evidence supported the Burglary conviction; and (3) whether the jury was erroneously instructed on accomplice liability. Childs v. State, No. 49A02-0006-CR-369, slip op. at 2 (Ind. Ct. App. Jan. 8, 2001). Childs' convictions and habitual offender enhancement were affirmed. See id.

On July 23, 2007, Childs filed a petition for post-conviction relief. An evidentiary hearing was held on September 3, 2008. On December 11, 2008, Childs was denied post-conviction relief. He now appeals.

Discussion and Decision

I. Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief appeals from a negative judgment, and to the extent that his appeal turns on factual issues, 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. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.

II. Analysis

A defendant is entitled to the effective assistance of appellate counsel. Stevens, 770 N.E.2d at 760. Appellate ineffectiveness claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must show two things: (1) the lawyer's performance fell below an objective standard of reasonableness; and (2) 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. The two prongs of the Strickland test are separate and independent inquiries. Id. at 697. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Id.

Ineffective assistance claims at the appellate level generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. Gray v. State, 841 N.E.2d 1210, 1214 (Ind. Ct. App. 2006), trans. denied. Here, the second category is implicated. Ineffectiveness is very rarely found in such cases, because the decision regarding which issues to raise is among the most important strategic decisions to be made by appellate counsel, and appellate advocates may be expected to "winnow out weaker arguments" to focus upon one central issue or a few key issues. Bieghler v. State, 690 N.E.2d 188, 193-94 (Ind. 1997). Thus, when analyzing the omission of an appellate issue, we ask whether the decision was "unquestionably unreasonable," that is, whether counsel failed to present a significant and obvious issue for reasons that cannot be explained

by any strategic decision. Gray, 841 N.E.2d at 1214.

Childs' appellate counsel testified at Childs' post-conviction hearing. Counsel testified that she routinely considered raising a sentencing issue "in an abstract sense." (P.C.R. Tr. 5). However, she further explained that, in the context of the particular case and the "old standard" of review, i.e., whether a sentence was manifestly unreasonable, "it would not necessarily be an issue I would have raised." (P.C.R. Tr. 6).

At the time of Childs' sentencing and direct appeal, the reviewing court was permitted to revise a sentence only when it was "manifestly unreasonable in light of the nature of the offense and the character of the offender." See Ind. Appellate Rule 17(B) (2000). Review under this rule was "very deferential" to the trial court, and the reviewing court would revise a sentence only when it was found to be "clearly, plainly, and obviously" unreasonable. Tobar v. State, 740 N.E.2d 109, 113 (Ind. 2000).

Here, the trial court found Childs' lengthy criminal history to be an aggravating circumstance outweighing the hardship to his dependents.[5] The trial court also stated that Childs' admission of his habitual offender status was a mitigating factor. Childs faced a maximum aggregate sentence of fifty-four years (twenty years for the Class B felony,[6] enhanced by thirty years,[7] three years for the Class D felony,[8] and one year for the Class A

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[5] Childs had been convicted of five prior felonies. He also had a substantial number of misdemeanor convictions, arrests, and juvenile adjudications.
[6] Ind. Code § 35-50-2-5.
[7] Ind. Code § 35-50-2-8.
[8] Ind. Code § 35-50-2-7.

misdemeanor).[9] He received an aggregate sentence of thirty-five years (fifteen years for the Class D felony, enhanced by twenty years, with concurrent sentences for the Class D felony and Class A misdemeanor). He does not present a "manifestly unreasonable" sentence subject to revision on appeal. As such, Childs suffered no prejudice from the omission of a sentencing issue on direct appeal.

Conclusion

Childs failed to demonstrate the ineffectiveness of his appellate counsel. Accordingly, the post-conviction court properly denied Childs' petition for post-conviction relief.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.

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[9] Ind. Code § 35-50-3-2.