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FILED
Aug 21 2009, 9:05 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY E. DENNISON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 18A04-0810-PC-597
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0403-PC-2

August 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Timothy E. Dennison appeals the post-conviction court's denial of his petition for relief. We affirm.

Issue

Did the post-conviction court err by denying his petition?

Facts and Procedural History

In our 2003 memorandum decision affirming Dennison's convictions, we restated the facts as follows:

> On March 17, 2002, Dennison started drinking vodka and orange juice early in the morning. At some point later in the day, Bradley Swabb phoned to say he planned on stopping by to visit with Dennison and Patricia Stahl, Dennison's live-in girlfriend, at their mobile home in Muncie, Indiana. By the time Swabb arrived at around 7:00 p.m. that evening, Dennison had consumed approximately one half-gallon of vodka.
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> Dennison, Stahl, and Swabb conversed for a bit in the living room. Denison then retrieved his new handgun to show Swabb and began twirling it around his finger and pointing it. Meanwhile, Stahl went into the kitchen to fix Dennison another drink. Stahl heard the gun go off, looked up, and saw Dennison pointing the gun in Swabb's direction. Swabb had been shot in the head. Dennison then stated, 'Oh, F---, I've shot Brad,' followed by, 'F--- you, Brad.' Stahl rushed into the living room, attempted to check Swabb for a pulse, and then reached for the telephone to call the police. Dennison questioned Stahl about her action, and when she replied that she was calling the police, Dennison grabbed Stahl by the hair, pointed the gun just underneath her jaw, and then threatened to kill Stahl and her son if she told anyone about what had just happened. Because Stahl's clothing became soiled with blood as she was attempting to render assistance to Swabb, Dennison instructed Stahl to remove her clothes, give them to him, and then go to bed. Stahl complied with Dennison's instructions.
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> Later that night, Dennison woke Stahl and told her that he needed her to drive. When Stahl walked into the living room, she noticed that Swabb's body and the recliner Swabb was sitting in when he was shot were gone and that the carpet in the vicinity of where the recliner once had been was removed as well. Dennison and Stahl proceeded out to the mobile home park's maintenance

> truck and drove away. Dennison directed Stahl where to go and made her stop the truck two times. Each time Stahl stopped the truck, Dennison would get out, open the tailgate, remove something, and then close the tailgate. Dennison then ordered Stahl to drive to the car wash where he washed the truck, including the truck bed.
>
> Subsequently, the police recovered Swabb's body in an alley. The police were able to identify the body as being Swabb's based on identification that was found in the back pocket of the pants Swabb was wearing. At a second location, they found the recliner in which Swabb was sitting when he was shot. The investigation conducted by the police led them to suspect Dennison was involved in Swabb's death. Consequently, they went to his home to question him and Stahl. Before the police were able to question Stahl, Dennison reiterated his threat to her not to tell anyone about what transpired the night before with Swabb. Out of fear, Stahl initially did not reveal to the police that Dennison shot Swabb. When questioned by the police regarding whether he had seen Swabb the night before, Dennison told the police that he had not seen Swabb in a couple of months.
>
> Upon further investigation, the police discovered blood on the concrete slab and steps outside of Dennison's home, on the home's floor and ceiling, and on a cooler and ashtray in the living room. Additionally, when the police examined the mobile home park's maintenance truck, they found traces of blood on its tailgate and in the truck's cab on the passenger's side. The police also located bloody clothing and floor tiles in Dennison's shed.
>
> The State charged Dennison with murder, a felony, Reckless Homicide, a Class C felony, and Obstruction of Justice, a Class D felony. At his jury trial, Dennison testified that he had very little recollection of the night he shot Swabb. He did, however, recall hearing the gun go off, seeing the gun in his hand, Stahl yelling from the kitchen, 'Oh, you shot Brad,' and then throwing the gun to the floor. He also testified that he remembered Stahl driving the truck. A firearms expert testified that the gun that Dennison used to shoot Swabb was equipped with multiple safety mechanisms that would prevent the gun from discharging accidentally. Further, the expert testified, "The only way that I could get the firearm to discharge was to disengage the thumb safety, engage the grip safety, and pull the trigger."

Dennison v. State, No. 18A02-0304-CR-328, slip op. at 1-5 (Ind. Ct. App. Nov. 24, 2003) (citations and footnotes omitted). A jury found Dennison guilty as charged. On April 8, 2003, the trial court sentenced Dennison to consecutive terms of fifty-five years for felony murder and eighteen months for class D felony obstruction of justice.

On March 17, 2004, Dennison filed a petition for post-conviction relief. On April 10, 2007, the public defender's office filed a notice of withdrawal of appearance. On April 16, 2007, the post-conviction court issued an order approving the withdrawal. On April 17, 2007, Dennison filed, pro se, a pleading requesting the court to reject the public defender's notice of withdrawal and to appoint counsel for him. At a hearing on May 14, 2007, Dennison told the post-conviction court that he wished to proceed pro se on his petition. On June 1, 2007, the post-conviction court denied Dennison's motion to appoint counsel.

On June 11, 2007, Dennison filed pro se an amended petition, and the State filed its answer on July 2, 2007. On November 21, 2007, Dennison filed a motion for change of judge. The court, noting that Dennison's petition had been pending for years, denied the motion. On November 27, 2007, Dennison again amended his petition, and the State filed another answer on December 12, 2007. On December 12, 2007, Dennison filed another motion for change of judge "for good cause shown[,]" which the post-conviction court denied on December 17, 2007. Appellant's App. at 426.

On February 19, 2008, the post-conviction court held a pre-trial conference. The court noted that Dennison was "having difficulty in framing and presenting his issues for this proceeding" and ordered Dennison to submit his evidence by affidavit. Appellant's App. at 27. On March 28, 2008, Dennison filed his evidence by affidavit after his objection to this order was overruled. The State submitted its evidence in writing on July 2, 2008. Dennison filed a motion to strike the State's evidence, which the post-conviction court denied. On August 15, 2008, the post-conviction court denied Dennison's petition in an order which

included findings of fact and conclusions of law. This appeal ensued.

Discussion and Decision

Dennison appeals from the denial of a post-conviction petition for relief. Our standard of review is well settled.

> The petitioner in a post-conviction proceeding bears the burden of establishing the grounds for relief by a preponderance of the evidence. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing a negative judgment. As such, the petitioner faces a rigorous standard of review. The petitioner must convince the court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. In other words, 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. Further, the post-conviction court in this case entered findings of fact and conclusions of law .... We will reverse a post-conviction court's findings and judgment only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.

Wesley v. State, 788 N.E.2d 1247, 1250 (Ind. 2003) (citations, brackets, and quotation marks omitted). Post-conviction procedures do not afford a petitioner a super-appeal, and not all issues are available. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert denied* (2002). If an issue was known and available, but not raised on direct appeal, it is waived. *Id*. Although claims of ineffective assistance of trial counsel may be brought on direct appeal, the preferred method of presenting such claims is on post-conviction review because they often require the development of new facts not present in the trial record. *McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999). We address each of Dennison's contentions in turn.

A. Ineffective Assistance of Trial Counsel

Dennison alleges that the post-conviction court erred by denying his claim of ineffective assistance of counsel with regard to the admission of certain evidence and sentencing. Before the post-conviction court, Dennison's burden was significant.

> To prevail on a claim of ineffective assistance of trial counsel, a defendant must show not only that trial counsel's performance was deficient, but also that counsel's performance prejudiced him. To establish the first element of this test, a defendant must show counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, or, stated another way, that counsel's actions fell below an objective standard of reasonableness under prevailing professional norms.
>
> In evaluating counsel's performance, judicial scrutiny must be highly deferential. The reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. A defendant must present strong and convincing evidence to prove otherwise.

Wallace v. State, 836 N.E.2d 985, 998-999 (Ind. Ct. App. 2005) (citing throughout *Strickland v. Washington*, 466 U.S. 668 (1984) and *Potter v. State*, 685 N.E.2d 1127 (Ind. 1997), some quotation marks omitted), *trans. denied* (2006).

First, Dennison contends that his trial counsel was ineffective in failing to file a motion to suppress the evidence police recovered during their search of his trailer. When police first arrived at the trailer park to talk with Dennison, he denied their request to enter his trailer. Stahl was interviewed separately and gave her consent for police to conduct a search. Dennison claims that Stahl's consent was not valid and that police therefore entered the trailer illegally, violating his rights under the Fourth Amendment to the United States

Constitution.[1] He further claims that they failed to follow proper procedure when they later obtained a search warrant, making any evidence seized inadmissible.

Although Dennison states that he rented or owned the mobile home and the property within it, Dennison testified that he and Stahl were living together. At the time police searched Dennison's trailer, the most relevant U.S. Supreme Court holding was *U.S. v. Matlock*, 415 U.S. 164 (1974). In *Matlock*, the Court held that valid consent to search may be obtained from a third party who possesses common authority over the premises or effects sought to be inspected. *Id*. at 171. It was not until 2006 that the U.S. Supreme Court clarified this decision to say that "a warrantless search of a shared dwelling for evidence *over the express refusal of consent by a physically present resident* cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *See Georgia v. Randolph*, 547 N.E.2d 103, 120 (2006). While it appears that the search of Dennison's trailer based on Stahl's consent—over the express refusal of Dennison—would be an improper search if it occurred today, it did not clearly violate the law in effect at the time. Counsel's representation does not fall below an objective standard of reasonableness for failure to anticipate a change in the law. *Overstreet v. State*, 877 N.E.2d 144, 161 (Ind.

[1] Although Dennison asserts that the search also violated his rights under Article 1, Section 11 of the Indiana Constitution, he presents no separate argument with respect to the state constitution in his Appellant's Brief. The state constitutional analysis presented in his reply brief comes too late--pursuant to Indiana Appellate Rule 46(D)(5), no new issues shall be raised in a reply brief. *See Bradshaw v. State*, 759 N.E.2d 271, 274 n.2 (Ind. Ct. App. 2001) (granting State's motion to strike appellant's reply brief where appellant raises for the first time in his reply brief a separate state constitutional analysis). Also, Dennison mentions the Fifth Amendment to the U.S. Constitution but neglects to include authority or analysis on that subject as well. Therefore, any separate state constitutional claim and any claim based on the Fifth Amendment of the U.S. Constitution are waived for failure to make a cogent argument. *See Francis v. State*, 764 N.E.2d 641, 646-47 (Ind. Ct. App. 2002).

2007), *cert. denied* (2008).

Moreover, Dennison testified at trial that the victim was in his trailer on the night in question, that Dennison was holding a gun, that he heard the gun go off, that Stahl told him that he had shot Brad, and that he then threw the gun. Therefore, any evidence recovered during the police search of Dennison and Stahl's trailer was merely cumulative of Dennison's own testimony. Dennison's counsel's decision not to file a motion to suppress that evidence was neither unreasonable nor prejudicial.

As for Dennison's claim that his trial counsel was ineffective in failing to "investigate" the circumstances surrounding the police's search of his trailer and his arrest, such claims are generally without merit. *See* Appellant's App. at 10.

> With the benefit of hindsight, a defendant can always point to some rock left unturned to argue counsel should have investigated further. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that it deprived the defendant of a fair trial.

Ritchie v. State, 875 N.E.2d 706, 719 (Ind. 2007). Dennison has failed to show how his counsel's alleged lack of investigation deprived him of a fair trial.

Also, Dennison claims that the post-conviction court erred by denying his claim of ineffective assistance of counsel with regard to his sentencing. We note that Dennison received presumptive sentences of fifty-five years for murder and eighteen months for obstruction of justice. Because the trial court imposed presumptive sentences, it was not required to list aggravating or mitigating factors. *Childress v. State*, 848 N.E.2d 1073, 1080-81 (Ind. 2006). If, however, the trial court finds aggravators and mitigators, concludes that

they balance, and imposes the presumptive sentence, then it must provide a statement of its reasons for imposing the presumptive sentence. *Burgess v. State*, 854 N.E.2d 35, 39 (Ind. Ct. App. 2006). This is precisely the situation in the instant case.

In its sentencing statement, the trial court identified three mitigators: 1) Dennison's apparent remorse, 2) his family's support, and 3) his minor criminal history. As aggravators, the trial court cited the following factors: (1) that Dennison's criminal history involved three misdemeanors which were alcohol-related, like the offenses in this case, 2) that corrective and rehabilitative treatment would be best provided at a penal facility, 3) that imposition of a reduced sentence would depreciate the seriousness of the offenses committed; and (4) that the nature and circumstances of Dennison's obstruction of justice involved "an unusual degree of planning" and a lack of dignity and respect shown by dumping his victim's body in an alley. Tr. at 344. The trial court found that these aggravators and mitigators balanced and thus decided to impose the presumptive sentence for each conviction.

While Dennison claims that all of these considerations were improper, we note that any one of them could support the trial court's decision to impose presumptive sentences. For example, at the time of Dennison's sentencing, Indiana Code Section 35-38-1-7.1 stated several factors that a trial court must consider in determining what sentence to impose, including "the nature and circumstances of the crime committed[.]" Our supreme court has held that this aggravator is generally thought to be associated with "particularly heinous facts or situations." *Smith v. State*, 675 N.E.2d 693, 698 (Ind. 1996). Clearly, the trial court found the facts surrounding Dennison's attempt to cover up the murder—including his extensive

efforts to erase evidence in the trailer and his dumping of the victim's body in an alley—particularly "horrible[.]" Tr. at 341. There was certainly nothing improper about this consideration, and therefore, we find no reversible error as to the trial court's decision to impose presumptive sentences.[2]

While the trial court here sentenced Dennison to presumptive sentences, they were imposed consecutively. In determining whether the sentences should be consecutive or concurrent, the trial court identified two aggravating circumstances—the fact that these were two separate crimes separated by "some significant period of time[,]" and that Dennison "violated the victim's dignity" in the way he disposed of the body. *Id*. at 345. An order of consecutive sentences may be supported by only one aggravating circumstance. *Morgan v. State*, 675 N.E.2d 1067, 1073 (Ind. 1996). The imposition of presumptive, now advisory, sentences on the underlying individual offenses does not preclude those sentences from being imposed as consecutive sentences." *Frentz v. State*, 875 N.E.2d 453, 472 (Ind. Ct. App. 2007), *trans. denied* (2008). There was no error here, and thus Dennison's trial and/or appellate counsel was not ineffective in failing to challenge Dennison's sentence.

B. Plea Agreement

Dennison next argues that the "trial court erred in failing to sentence Defendant in accordance with a signed plea agreement." Appellant's Br. at 14. As noted above, if an issue was known and available but not raised on direct appeal, the issue is procedurally

[2] Having reached this conclusion as to the "nature and circumstances" aggravator, we need not make determinations as to the validity (or lack thereof) of the other three aggravators cited by the trial court.

foreclosed. *Timberlake*, 753 N.E.2d at 597. The trial court's alleged error with regard to the plea agreement was clearly an error available at the time of Dennison's direct appeal. Thus, this issue is waived for our review.

Waiver notwithstanding, Dennison's argument must fail. On October 24, 2002, the parties informed the trial court that they reached an oral plea agreement pursuant to which Dennison had agreed to plead guilty to reckless homicide and obstruction of justice in exchange for the dismissal of the murder charge. The parties told the trial court that they had not reached an agreement as to sentencing. At the court's request, they agreed to submit a written agreement within a few days. The court set the matter for change of plea hearing on October 28, 2002. Dennison signed the written plea agreement, and then the State, after apparently discovering new evidence in its case against Dennison, moved to withdraw the agreement. Dennison argues that the post-conviction court "implicitly accepted" his guilty plea during the pre-trial conference on October 24, 2002, and that it was thus bound by the terms of that agreement. Appellant's Br. at 16.

Indiana Code Section 35-35-1-2 sets forth several determinations that a trial court must make before it may accept a plea agreement. These include the following: that the defendant understands the nature of the charge against him; that the defendant has been informed that his plea waives various rights, including the right to a public and speedy trial by jury; that he has been informed of the maximum possible and the minimum sentence for the crime charged as well as any possible increased sentence by reason of the fact of a prior conviction, and any possibility for the imposition of consecutive sentences; and that if the

court accepts the plea, the court is bound by the agreement. Presumably, the trial court planned to address these issues at the change of plea hearing, which did not occur due to the State's decision to withdraw the plea agreement.

The State cites a similar case in which the defendant claimed that the trial court had accepted a plea agreement, thus binding both parties. In that case, another panel of this Court stated, in pertinent part:

> Here, the parties had completed only the first two stages of the plea bargaining process by filing the plea agreement with the trial court when the prosecutor moved to dismiss the charges. At that point in time, the plea agreement was not a binding contract because it has not yet been accepted by that trial court. Consequently, there was no procedural impediment that would have prevented *either* party from moving to withdraw the plea agreement since neither had the defendant yet entered a plea nor had the trial court formally accepted the agreement.

Mendoza v. State, 869 N.E.2d 546, 552 (Ind. Ct. App. 2007) (emphasis in original, citation and quotation marks omitted), *trans. denied*. Clearly, Dennison's plea agreement had not even reached the point of the one in *Mendoza*, and thus it had not been formally accepted by the trial court.

In sum, the trial court did not err in its decision not to enforce the plea agreement which was offered and then withdrawn by the State. Moreover, any ineffective assistance of counsel claim on this issue, to the extent that Dennison makes one, also fails. We cannot find counsel ineffective for having failed to argue that the trial court should enforce a non-binding agreement.

C. Change of Judge

Finally, Dennison contends that the post-conviction court erred by denying his

motions for change of judge. Indiana Post-Conviction Rule 1, Section 4(b) provides, in pertinent part, as follows:

> Within ten [10] days of filing a petition for post-conviction relief under this rule, the petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner. The petitioner's affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists … A change of judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice. For good cause shown, the petitioner may be permitted to file the affidavit after the ten [10] day period.

Dennison filed his first request for change of judge more than two years after he filed his petition for post-conviction relief. He stated that the presiding judge's family lived next door to his family's home, and that the families had experienced "family disputes." Appellant's App. at 438. Such vague allegations do not satisfy the requirements of Ind. Post-Conviction Rule 1(4)(b) cited above. Moreover, Dennison failed to include within the petition any "good cause" explanation for his delay in filing the motion. The post-conviction court denied Dennison's motion, citing its lateness as well as its failure to recite historical facts which support a rational inference of bias.[3] There was no clear error here.

Two weeks later, Dennison filed a second motion for change of judge "for good cause shown[,]", in which he argued that the public defenders who had represented him during the course of this case had failed to act upon his concerns about the judge's possible bias against him. Again, the judge denied his motion, citing its lateness and its failure to recite historical facts supporting a rational inference of bias. Based on the record before us, we cannot

conclude that the post-conviction court committed clear error by denying these motions.

Affirmed.

BRADFORD, J., and BROWN, J., concur.

[3] In the post-conviction court's order of August 15, 2008, the court stated that "the undersigned knows the family to whom Dennison was referring but did not realize until the post-conviction portion of this case that Dennison was related to that family. Further, the undersigned is not aware of any animosity between the families and always thought the families were always on good terms." Appellant's App. at 711.