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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY WHEELER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1101-PC-22
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49G04-8807-PC-78324

September 2, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Anthony Wheeler appeals from the denial of his petition for post-conviction relief. Wheeler presents three issues for our review, which we consolidate and restate as the following two:

1. Was Wheeler's appellate counsel ineffective for failing to argue on direct appeal that the trial court had enhanced his sentence based upon an impermissible factor?

2. Did Wheeler's appellate counsel render ineffective assistance by failing to seek rehearing or transfer?

We affirm.

The facts as set forth by this court in Wheeler's direct appeal follow.

> [O]n June 22, 1988, the victim, S.M.A., was approached by Wheeler when she stopped to use the phone on her way home from work. Wheeler asked her for a cigarette. She gave him one and lit it for him and then went home.
>
> S.M.A. had intended to lay out in the sun in her back yard when she got home. Upon arriving at home, she placed some pillows in her back yard. She went back inside to change into her bathing suit but did not lock the back door. As she came out of the bathroom, she encountered Wheeler in the hallway. Wheeler had rope wrapped around both hands and was holding a knife. He grabbed S.M.A. by the neck and threw her back into the bathroom into the bathtub causing her to strike her head on the bathtub. Wheeler then forced her to commit an act of fellatio upon him. Next, he turned her around, pulled her bathing suit off, leaned her over the bathtub and raped her from behind. He ordered her to remain there for a few minutes as he was going to leave.
>
> S.M.A. did not report the above incident to the police. She stayed away from her home for approximately three weeks. Upon S.M.A.'s request, her landlord secured her windows by placing nails into the sills.
>
> On July 21, 1988, Wheeler broke into S.M.A.'s house late at night through a window and attacked S.M.A. as she lay sleeping on the couch in the living room with her son. Wheeler threatened her with a knife and told her he would cut her throat if she made any noise that might wake up her boyfriend who was sleeping in the bedroom. He also threatened to kill her boyfriend if she should wake him up. Wheeler grabbed S.M.A. by the hair and forced her to commit an act of fellatio upon him. He then forced her to the floor and made her get down on all fours and raped her from behind. Wheeler then led

> S.M.A. by the arm into the kitchen and later had her walk him to the front door. S.M.A. did not resist because she feared further violence.
>
> Before leaving, Wheeler asked S.M.A. if he could return. She agreed to allow Wheeler to return the following Monday night after 8:00 p.m. She called the police the morning after the second attack. The police were present and arrested Wheeler when he arrived at S.M.A.'s home the following Monday night.

Wheeler v. State, Cause No. 49A02-8907-CR-332, slip op. at 2-3, (Ind. Ct. App. March 14, 1991), *reh'g denied, trans. denied*.

On August 1, 1988, the State charged Wheeler with two counts of burglary as class B felonies (Counts I and V); two counts of criminal deviate conduct as class A felonies (Counts II and VI); two counts of rape as class A felonies (Counts III and VII); and two counts of confinement as class B felonies. (Counts IV and VIII). Counts I through IV stemmed from the incident that occurred on June 22, 1988, and Counts V through VIII stemmed from the second incident on July 21, 1988. Wheeler was eventually released on bond. On October 4, 1988, the State moved to revoke Wheeler's bond, alleging as the basis therefrom that Wheeler had been arrested for an attempted rape on September 11, 1988. Following an evidentiary hearing, the trial court denied the State's request to revoke Wheeler's bond.

Following a two-day jury trial that commenced on April 17, 1989, Wheeler was found guilty as charged. At a May 12, 1989 sentencing hearing, defense counsel asked the court to consider the fact that the charges against Wheeler stemming from the September 11 incident had been dismissed. In response, the State informed the court through the testimony of a deputy prosecutor that those charges were dismissed because of Wheeler's convictions in the instant case and because of the victim's reluctance to testify. The State pointed out that although the charges were dismissed the evidence against Wheeler was strong; noting

specifically that the victim in the September 11 incident had identified Wheeler as her attacker. In setting forth the sentence imposed, the trial court stated:

> In don't think I can ignore the fact that again, while the defendant was out on this particular matter, the 9/11/88 offense was committed.[1] And as the Pre-Sentence Investigation Report indicate [sic] the aggravating circumstances certainly outweigh the mitigating in this particular matter. The aggravating especially being as outlined in the Pre-Sentence Investigation Report, namely, that the defendant is in need of correctional rehabilitative treatment that can best be provided by his commitment to a penal facility; imposition of a reduced sentence would depreciate the seriousness of the offense, and by reason of those matters of aggravation, the Court at this time, Mr. Wheeler, will sentence you to the Indiana Department of Corrections [sic].

Appellant's Appendix at 171 (footnote supplied). The trial court sentenced Wheeler to an aggregate term of ninety years—thirty-five years for each class A felony conviction and ten years for each class B felony conviction, with the sentences for the felony convictions resulting from each attack to run consecutively to each other and the two sets of four convictions (each set representing one attack) to run concurrently.

On direct appeal, Wheeler's appellate counsel presented the following issues for this court's review: (1) Whether the trial court's sentencing statement was sufficient to support the imposition of enhanced and consecutive sentences; (2) whether Wheeler's ninety-year sentence was unconstitutional; (3) whether Wheeler received ineffective assistance of trial counsel; and (4) whether the evidence of penetration was sufficient to support Wheeler's rape convictions. This court affirmed Wheeler's convictions in a memorandum decision. *Wheeler v. State*, Cause No. 49A02-8907-CR-332. As part of its analysis of Wheeler's first sentencing claim, this court noted that "the trial court did state a specific fact which

supported the imposition of enhanced and consecutive sentences – that Wheeler was arrested and charged with the '9/11/88 offense' . . . ." Slip op. at 7.

Our court docket and the trial court's chronological case summary indicate that Wheeler, pro se, filed a petition for rehearing that was denied by this court and a petition for transfer, which our Supreme Court denied. On July 5, 2005, Wheeler filed a pro se petition for post-conviction relief. On January 2, 2007, the State responded to Wheeler's PCR petition, raising res judicata and laches as affirmative defenses. On April 6, 2009, Wheeler, by counsel, requested permission to amend Wheeler's pro se petition for post-conviction relief. In his amended PCR petition, Wheeler claimed his appellate counsel was ineffective for failing to challenge the trial court's finding that the September 11 offenses were "committed" while Wheeler was out on bond in the present case. *Appellant's Appendix* at 171. Wheeler maintains that this is an erroneous historical fact that could not have been used to support imposition of enhanced and consecutive sentences. The post-conviction court held evidentiary hearings on June 9, 2009 and January 19, 2010. Wheeler stipulated that he never requested assistance from the trial court or from his appellate counsel in filing his petitions for rehearing and transfer. Copies of Wheeler's petitions for rehearing and transfer were not made part of the record in Wheeler's PCR proceeding. The parties also stipulated to the admission of an affidavit from Wheeler's appellate counsel in which counsel stated that he had no specific recollection of his handling of Wheeler's appeal. On January 5,

[1] In its written sentencing order, the trial court noted "Deft. committed offense while out on bond on similar case." *Transcript* at 195.

2011, the post-conviction court entered its order denying Wheeler his requested relief. Wheeler now appeals.

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* 534 U.S. 1164 (2002); *Wieland v. State*, 848 N.E.2d 679 (Ind. Ct. App. 2006), *trans. 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. Ind. Post–Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals from 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 PCR court. *Id.* We will disturb a PCR court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the PCR court has reached the opposite conclusion. *Wright v. State*, 881 N.E.2d 1018 (Ind. Ct. App. 2008), *trans. denied*. The PCR 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 PCR 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.

Here, Wheeler argues that his appellate counsel was ineffective in two different

respects: (1) failing to challenge on appeal the trial court's reliance upon the fact that the September 11 offenses were "committed" while he was on bond for the instant case and (2) failing to seek rehearing and/or transfer in light of subsequent case law and also based upon what Wheeler claims was a misstatement of fact by this court[2] in the memorandum decision that Wheeler claims affected the outcome of the appeal as it related to the propriety of the sentence imposed.

In reviewing claims of ineffective assistance of appellate counsel, we use the same standard applied to claims of ineffective assistance of trial counsel. *Harris v. State*, 861 N.E.2d 1182 (Ind. 2007). That is, the party seeking post-conviction relief must show that appellate counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the deficient performance of counsel the result of the proceeding would have been different. *Id.* Claims of ineffective assistance of appellate counsel generally fall into one of three categories: (1) denying access to appeal; (2) failing to raise issues; and (3) failing to present issues competently. *Bieghler v. State*, 690 N.E.2d 188 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998).

[2] On direct appeal, this court stated that the trial court had relied upon the fact that Wheeler was "*arrested and charged* with the 9/11/88 offense." *See Wheeler v. State*, Cause No. 49A02-8907-CR-332, slip op. at 7 (emphasis supplied). Wheeler maintains that this is a material misstatement of the record because the trial court specifically stated that the September 11 offense was "committed" while Wheeler was on bond in this case. *Appellant's Appendix* at 171.

1.

Wheeler argues that his appellate counsel rendered ineffective assistance by failing to argue on direct appeal that the trial court had enhanced his sentence based upon an impermissible factor. Specifically, Wheeler maintains that his appellate counsel should have challenged the trial court's reliance upon "an erroneous finding of historical fact", *Appellant's Brief* at 15, that "while [Wheeler] was out [on bond] on this particular matter, the 9/11/88 offense was committed." *Appellant's Appendix* at 171. Wheeler points out that the charges in that matter were dismissed. The essence of Wheeler's claim is that his appellate counsel failed to present an argument to this court on direct appeal that was clearly stronger than the arguments counsel chose to present. We disagree.

The decision of what issue or 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. When assessing these types of ineffectiveness claims, reviewing courts should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable. *Id*. In evaluating counsel's performance, we apply the following test: (1) Whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). To succeed on a claim that counsel was ineffective for failing to raise a claim on appeal, the petitioner must overcome the strongest presumption of adequate assistance. *Ben-Yisrayl v. State*, 738 N.E.2d 253.

As noted above, Wheeler's appellate counsel challenged the sentence imposed on direct appeal, arguing that the trial court's sentencing statement was inadequate and that his

ninety-year sentence was unconstitutional. Wheeler's counsel did not challenge Wheeler's sentence on the grounds Wheeler now claims would have secured him relief from his ninety-year sentence.

We begin by noting that although appellate counsel's argument on appeal was not centered on the trial court's finding that the September 11 offenses were "committed" while Wheeler was on bond in this case, counsel did argue in the appellant's brief on direct appeal that the trial court had erroneously considered matters "which were not in evidence." *Direct Appeal Brief* at 22. Given that the trial court had made only one particularized finding—relating to the September 11 offenses—this argument could only have been based upon the court's finding in this regard. Thus, it is not entirely accurate to claim that appellate counsel did not raise the issue.

Notwithstanding such technicality, we note that in deciding Wheeler's sentencing claims, this court found that Wheeler had been "arrested and charged" with the September 11 offenses and that such had occurred while Wheeler was out on bond. *Wheeler v. State*, slip op. at 7. This court did not find that Wheeler actually committed the offenses. This is a fair reading of the trial court's sentencing statement. Further, the record is clear that all parties and the trial court were aware that the charges had been dismissed because of the convictions in this case and the victim's reluctance to testify. The argument Wheeler now seeks to put forth is unavailing as it requires a very narrow reading of parts of the record in isolation.

As found by the post-conviction court, Wheeler's appellate counsel presented "four pertinent and well-developed issues" on direct appeal, including two arguments relating to the sentence imposed. *Appellant's Appendix* at 8. Although this court recognized that

Wheeler's argument based upon the specificity of the trial court's sentencing statement had some validity, the court held that such did not entitle Wheeler to reversal. Rather, this court addressed the merits of Wheeler's claim. With regard to appellate counsel's decision to present an ineffective assistance of trial counsel claim on direct appeal, such is not *per se* deficient performance, especially if trial counsel's performance can be evaluated based upon the trial record. *See, e.g.*, *Lewis v. State*, 929 N.E.2d 261 (Ind. Ct. App. 2010) (citing *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998)). Appellate counsel's trial counsel ineffectiveness claims could be and were evaluated based upon the trial record – that is, trial counsel did not move for a directed verdict and presented a truncated defense. Finally, Wheeler's appellate counsel challenged the sufficiency of the evidence and raised incredible dubiosity as grounds for reversal of Wheeler's convictions. These arguments were reasonable appellate arguments given trial counsel's attempts to impugn the victim's character as an exotic dancer who used a fake name, who made thirty-nine corrections to her deposition with the help of the prosecutor, who told Wheeler that she did not want him to be a "regular customer" (*Transcript* at 480), and who gave conflicting reports as to what Wheeler looked like. Wheeler's proffered argument concerning the trial court's finding that the September 11 offenses were "committed" while he was on bond is not clearly stronger than the arguments appellate counsel chose to present to this court on direct appeal. Wheeler has not carried his burden of establishing his appellate counsel rendered ineffective assistance for failing to argue that the trial court relied upon an improper factor in sentencing him.

Moreover, even if appellate counsel had presented the argument in more explicit terms, Wheeler has not shown that his sentence would have been reversed. As noted above,

it is clear from the record that the parties and the trial court were well aware that the charges against Wheeler for the September 11 incident had been dismissed. The State presented evidence during the sentencing hearing explaining that the charges were being dismissed in part because of the convictions in this case as well as the reluctance of the victim of the September 11 offenses to testify. Based on the trial court's sentencing statement, this court concluded that the fact that Wheeler was "arrested and charged" for the September 11 offenses was a proper consideration for sentencing purposes. Wheeler does not deny the fact that he was arrested and charged for the September 11 incident and does not argue that such fact could not be considered as support for imposition of enhanced and consecutive sentences.

2.

Wheeler argues that his appellate counsel was ineffective for abandoning him by failing to seek rehearing and/or transfer. We first note that the record indicates that Wheeler, pro se, filed a petition for rehearing that was denied by this court, as well as a petition for transfer that was denied by our Supreme Court. Wheeler did not submit either petition as evidence during the post-conviction proceedings; hence, they are not in the record on appeal. Without the petitions, we are not privy to what arguments Wheeler presented in support of his petition for rehearing and petition for transfer. In this vein, Wheeler has waived any claim that his appellate counsel was ineffective for failing to seek rehearing or transfer.

Waiver notwithstanding, Wheeler's arguments are unavailing. Wheeler first argues that appellate counsel should have sought rehearing because this court made a "misstatement[] of fact" (*Appellant's Brief* at 19) when it concluded that the "specific fact"

(*Wheeler v. State*, slip op. at 8) the judge found that supported the imposition of enhanced and consecutive sentences was that "Wheeler was arrested and charged with the '9/11/88 offense'" (*id*.) when the trial court had found that the September 11 offenses were "committed" (*Transcript* at 241) when Wheeler was on bond in this case. As we explained above, this court's reading of the trial court's sentencing statement comports with the record. A challenge on this basis would not have changed the result.

Wheeler also argues that appellate counsel should have sought rehearing and/or transfer in light of *Tunstill v. State*, 568 N.E.2d 539 (Ind. 1991), decided two weeks after this court's decision in this case was handed down, which Wheeler claims represents contravening authority to this court's decision on direct appeal. That a Court of Appeals opinion contravenes Supreme Court precedent is a valid ground for seeking transfer. Here, the Court of Appeals decision did not contravene *Tunstill* as Wheeler claims. In *Tunstill*, our Supreme Court held that it was reversible error where a sentencing court infers that a defendant committed another crime based upon a record of arrests. The Court reiterated that a record of arrests may validly be considered as an aggravating circumstance. Wheeler has failed to establish that a challenge to his sentence in light of *Tunstill* would have lead to a different result.

For all of the forgoing reasons, we conclude that Wheeler has not met his burden of proving by a preponderance of the evidence that his appellate counsel's performance was deficient.

Judgment affirmed.

DARDEN, J., and VAIDIK, J., concur.