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IN THE
COURT OF APPEALS OF INDIANA

CEDRIC FORD,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-0903-PC-120
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0602-PC-18

September 3, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Cedric Ford appeals the denial of his petition for post-conviction relief, asserting that the post-conviction court erred in finding that his appellate counsel was not ineffective for failing to raise the issue that his consecutive habitual offender enhancements were unauthorized by statute. We conclude that the imposition of consecutive habitual offender enhancements is improper, and therefore, appellate counsel's failure to raise the issue constitutes ineffective assistance of counsel. We reverse and remand to the post-conviction court with instructions to revise Ford's habitual offender enhancement.

On September 19, 2003, the State charged Ford in cause number 02D04-0309-FA-63 ("FA-63") with class A felony burglary, class B felony criminal confinement, class B felony robbery, and a habitual offender enhancement. A jury found Ford guilty as charged, and the trial court sentenced him to fifty years for burglary, enhanced by thirty years for being a habitual offender, and twenty years each for criminal confinement and robbery. The trial court ordered the sentences to run consecutive to each other and consecutive to cause number 02D04-0309-FA-64 ("FA-64"), in which Ford had been sentenced to fifty years for burglary, enhanced by thirty years for being a habitual offender.

Ford appealed his convictions and sentence in FA-63. His appellate counsel raised three issues: (1) whether the evidence was sufficient to sustain his convictions; (2) whether the trial court abused its discretion in ordering his twenty-year sentence for criminal confinement to run consecutive to his burglary and robbery sentences, and (3) whether the thirty-year habitual offender enhancement was inappropriate because the burglary to which it attached and the burglary in FA-64 were part of a single episode of criminal conduct. *Ford v.*

State, No. 02A05-0508-CR-488, slip op. at 4, 5, 7 (Ind. Ct. App. March 13, 2006). We affirmed Ford's convictions and sentence.

On February 27, 2006, Ford filed a pro se petition for post-conviction relief.[1] On May 2, 2008, he filed a motion to amend his petition, by counsel, arguing that the habitual offender enhancement sentence was illegal in that the trial court had ordered Ford to serve it consecutive to the habitual offender enhancement in FA-64 and that he received ineffective assistance of appellate counsel. The post-conviction court granted the motion to amend, held a hearing, and denied his petition for post-conviction relief.

On appeal, Ford argues that the trial court had no statutory authority to order the habitual offender enhancement in FA-63 to run consecutive to that in FA-64. To prevail on a petition for post-conviction relief, a petitioner must establish his or her claim by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When appealing a denial of a petition, a defendant appeals from a negative judgment. *Burnside v. State*, 858 N.E.2d 232, 237 (Ind. Ct. App. 2006), *trans. denied*. We review a post-conviction court's findings of fact under a clearly erroneous standard, but conclusions of law are reviewed de novo. *Id*.

"To prevail on an ineffective assistance of counsel claim, [the petitioner] must show both deficient performance and resulting prejudice." *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999). Deficient performance is that which falls below an objective standard of reasonableness, with errors so serious that the defendant's right to counsel guaranteed by the

[1] We note that Ford filed his petition for post-conviction relief before his direct appeal was decided. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002) ("Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition."). However, Ford amended his petition after we decided his direct appeal, and the State has suffered no prejudice.

Sixth Amendment is violated. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008). Prejudice exists when a petitioner demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Overstreet v. State*, 877 N.E.2d 144, 165 (Ind. 2007) ("To show prejudice, the petitioner must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.").

Appellate counsel may be considered ineffective in three ways: (1) when counsel's actions deny the defendant his or her 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 or she would be had counsel waived the issue. *Grinstead v. State*, 845 N.E.2d 1027, 1037 (Ind. 2006). To show that counsel was ineffective for failing to raise an issue on appeal, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260-61 (Ind. 2000). To evaluate the performance prong, 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. *Timberlake v. State*, 753 N.E.2d 591, 605-06 (Ind. 2001). If the analysis under this test demonstrates deficient performance, then we evaluate whether the issues which appellate counsel failed to raise would have been

more likely to result in reversal or an order for a new trial. *Hooker v. State*, 799 N.E.2d 561, 571 (Ind. Ct. App. 2003), *trans. denied* (2004).

Here, the State concedes that the issue of the illegality of the consecutive habitual offender enhancements was a significant and obvious issue that was clearly stronger than the raised issues and that, had the issue been raised, this Court would have reversed the trial court's consecutive habitual offender enhancement. In *Starks v. State*, 523 N.E.2d 735, 737 (Ind. 1988), our supreme court held that the trial court exceeded its legislative authorization by imposing consecutive habitual offender enhancements in a single criminal trial because Indiana Code Section 35-50-2-8, the habitual offender statute, and Indiana Code Section 35-50-1-2, governing the authority of courts to order consecutive sentences, do not expressly authorize them. In *Ingram v. State*, 761 N.E.2d 883, 885 (Ind. Ct. App. 2002), this Court held that a trial court is not authorized to impose consecutive habitual offender enhancements in a single sentencing proceeding even if the defendant was charged in two different causes. Later that year, in *Smith v. State*, 774 N.E.2d 1021, 1024 (Ind. Ct. App. 2002), *trans. denied*, we held that the imposition of consecutive habitual offender enhancements is improper even if they were not imposed in the same sentencing proceeding. Recently, in *Breaston v. State*, 907 N.E.2d 992, 992 (Ind. 2009), our supreme court held that absent express statutory authority, a trial court may not order a defendant's habitual offender enhancements to run consecutively, even though the enhancements arose from separate and unrelated trials and sentencing hearings, citing *Smith* with approval.

Therefore, we reverse the post-conviction court's denial of Ford's petition for post-conviction relief and remand with instructions to revise Ford's sentence so that the habitual offender enhancement in FA-63 is concurrent with the habitual offender enhancement in FA-64.

Reversed and remanded with instructions.

MAY, J., and BROWN, J., concur.