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FILED
Sep 10 2009, 9:00 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

TONY A. WARREN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A04-0905-PC-267
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 1
The Honorable Kurt Eisgruber, Judge
The Honorable John Jay Boyce, Master Commissioner
Cause No. 49G01-0411-PC-206215

September 10, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Tony A. Warren (Warren), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUE

Warren raises one issue which we restate as: Whether Warren received ineffective assistance of trial and appellate counsel when his trial counsel failed to object to a jury instruction on accomplice liability and his appellate counsel failed to argue that the instruction was fundamental error on appeal.

FACTS AND PROCEDURAL HISTORY

In our memorandum decision resulting from Warren's direct appeal we stated the facts as follows:

> On October 31, 2004, Adam Whitney and Tony Warren arranged to buy marijuana from Jacob Mecatl. Warren drove Whitney to meet Mecatl. Once they arrived at the designated location, Mecatl sat down in the front passenger seat of Warren's car, and Whitney sat immediately behind Mecatl in a rear passenger seat. Warren got out of the driver's seat and sat next to Whitney in the back seat, and Jairo Ramirez, who was with Mecatl, sat in the driver's seat.
>
> Warren told Ramirez to drive a short distance, and Ramirez complied. Ramirez then stopped the car and got out. Warren also got out of the car and talked to Ramirez. Both men established that the other was not armed with a gun. Warren then got into the driver's seat of the car, and Mecatl told Ramirez that he was uncomfortable with Warren sitting in the driver's seat. When Ramirez relayed that information to Warren, Warren drove the car away from where Ramirez was standing. After Mecatl tried to grab the steering wheel, Mecatl was shot three times. Warren and Whitney dumped Mecatl's body in a grocery store parking lot located on Pike Plaza Road, drove to a friend's house, and divided the three pounds of marijuana they had stolen from Mecatl.

> Ramirez subsequently looked at a police photo array and identified Whitney as the man sitting behind Mecatl in the car right before the shooting. Ramirez identified Warren as the driver of that car. An autopsy of Mecatl's body revealed that he died as a result of the gunshot wounds.
>
> The State charged Warren with murder, felony murder, robbery, and carrying a handgun without a license. Whitney and Warren were tried together. At the close of the State's evidence, Warren moved for judgment on the evidence on his carrying a handgun without a license charge. The trial court granted that motion. Thereafter, Whitney testified that Warren was the one who shot Mecatl. The trial court instructed the jury in part that the need to render a verdict on the carrying a handgun without a license charge against Warren had been "removed from [the jury's] consideration" and that the jury "must not speculate on the reason for [that] or consider it in [the jury's] consideration of the remaining charges as to either defendant." Appellant's App. at 90. The trial court further instructed the jury that the defendants may be found guilty of murder either under Indiana Code Section 35-42-1-1 or under the accomplice liability statute, Indiana Code Section 35-41-2-4. The jury found Warren guilty of murder, but hung on the charges of felony murder and robbery. The trial court entered a judgment of conviction on the murder charge and declared a mistrial on the felony murder and robbery charges. This appeal ensued.

Warren v. State, No. 49A05-0512-CR-702, slip op., 2-3 (Ind. Ct. App. Sept. 15, 2006). We concluded that the evidence was sufficient to support Warren's convictions, but also acknowledged by footnote that the jury found Warren guilty "presumably under an accomplice liability theory." *Id*. at 5 n.2.

Warren filed a petition for post-conviction relief, which was amended on September 17, 2008. Warren's amended petition alleged that the trial court gave an erroneous instruction on accomplice liability (Final Instruction 28(B)), which prejudiced Warren by relieving the State from proving an essential element of accomplice liability. Warren's trial counsel had not objected to the instruction, and Warren's appellate counsel did not raise any

argument based on the instruction. Therefore, Warren contended that both his trial and appellate counsels provided ineffective assistance of counsel. On November 18, 2008, the trial court held an evidentiary hearing, where both his trial and appellate counsels testified their failure to object to or argue against the instruction on accomplice liability was not due to strategy.

On March 23, 2009, the trial court denied Warren's petition. The trial court concluded that Final Instruction 28(B):

> [S]ufficiently informed the jury as to the requirement of finding affirmative action on the part of the defendant before he could be convicted as an accomplice . . . . Moreover, the final instruction specifically stated, 'To aid is to knowingly support, help or assist in the commission of a crime.' [] Further, the instruction explained, '[T]he mere presence of a defendant where a crime is being committed, or the acquiescence by a defendant in criminal conduct of others, is not sufficient to establish aiding, inducing or causing a crime.' [] By identifying such passive acts as insufficient in and of themselves to establish accomplice liability, the Court properly instructed the jurors they must find the petitioner acted affirmatively in furtherance of the murder before they could find him guilty as an accomplice.

(Appellant's App. pp. 92-93).

Warren now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

The petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). Because Warren is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no

way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

Post-conviction hearings do not afford defendants the opportunity for a "super appeal." *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. Rather, post-conviction proceedings provide a narrow remedy for collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Ross v. State*, 877 N.E.2d 829, 832 (Ind. Ct. App. 2007), *trans. denied*. This Warren has done by alleging that his trial and appellate counsels provided ineffective performance in violation of Article 1, Section 13 of the Indiana Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. *See* Post-Conviction Rule 1 (1)(a).

In order to demonstrate ineffective assistance of counsel Warren must establish both prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*. *Lee v. State*, 880 N.E.2d 1278, 1280 (Ind. Ct. App. 2008). The defendant must prove (1) his or her counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's failure to meet prevailing professional norms, the result of the proceeding would have been different. *Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *reh'g denied, trans.*

denied (citing *Strickland*, 466 U.S. at 690). Essentially, the defendant must show that counsel was deficient in his or her performance and the deficiency resulted in prejudice. *Johnson*, 832 N.E.2d at 1006. Because all criminal defense attorneys will not agree on the most effective way to represent a client, "isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Bieghler v. State*, 690 N.E.2d 188, 199 (Ind. 1997), *reh'g denied*, *cert. denied*, 525 U.S. 1021 (1998). Thus, there is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id*.

II. *Effectiveness of Counsel*

Warren argues that his trial counsel was ineffective for failing to object to Final Instruction 28(B), and that his appellate counsel was ineffective for failing to argue that the instruction caused fundamental error. When a petitioner bases an ineffective assistance claim on counsel's failure to object at trial, the petitioner must demonstrate that had the proper objection been made, it would have been sustained. *Jackson v. State*, 683 N.E.2d 560, 563 (Ind. 1997). When considering appellate counsel's failure to raise an issue, "[r]elief is only appropriate when the appellate court is confident it would have ruled differently." *Beighler*, 690 N.E.2d at 196.

Before we begin our analysis of whether an objection by Warren's counsel would have been sustained, we note that Warren's argument assumes that he "was convicted of

murder based upon the [S]tate's claim of accomplice liability." (Appellant's Br. p. 10). Warren was convicted of murder, and we previously concluded when considering Warren's direct appeal that the evidence was sufficient to prove that Warren "knowingly or intentionally aided in the commission of Mecatl's murder." *Warren*, slip op. at 5. Furthermore, we presumed that the jury found Warren guilty "under accomplice liability theory." *Id*. at 5 n.5. Therefore, we must accept Warren's assumption that he was convicted based on his acts as an accomplice, despite the fact that some evidence would tend to show that he might have been more than just an accomplice.

Moving on to the merits of Warren's contentions, we note that: "The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Gravens v. State*, 836 N.E.2d 490, 493 (Ind. Ct. App. 2005). Therefore, we will look to Indiana law on accomplice liability first.

Indiana Code section 35-41-2-4 defines accomplice liability as follows:

> A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person:
>
> (1) has not been prosecuted for the offense;
>
> (2) has not been convicted of the offense; or
>
> (3) has been convicted of the offense.

Appellate court case law has developed additional considerations which aid in the application of our accomplice liability law. The following factors are considered when determining

whether a defendant aided another in the commission of a crime: (1) presence at the scene of the crime; (2) companionship with another at the scene of the crime; (3) failure to oppose the commission of the crime; and (4) the defendant's course of conduct before, during, and after the occurrence of the crime. *Vitek v. State*, 750 N.E.2d 346, 352 (Ind. 2001). "It is not necessary for the jury to infer that [the] defendant participated in every element of the crime." *Id*.

The instruction which Warren alleges resulted in ineffective assistance of counsel due to his counsel's failure to object stated as follows:

INSTRUCTION NO. 28(B)

> A person who aids, induces, causes another to commit an offense is just as guilty of that offense as if he committed it himself.
>
> You may find the defendant guilty under this statute if you find beyond a reasonable doubt that the State has proved that another person actually committed an offense with which the defendant is charged and that the defendant aided, induced or caused the other person to commit the offense.
>
> The first requirement is that you find, beyond a reasonable doubt, that another person has committed the crime charged. If you do find that a crime was committed, then you must consider whether the defendant aided, induced or caused the commission of the crime. To aid is to knowingly support, help, or assist in the commission of the crime. A defendant does not have to personally participate in the crime, companionship with the person committing the offense, and conduct before and after the offense may be considered in determining whether aiding, inducing or causing may be inferred.
>
> However, the mere presence of a defendant where a crime is being committed, or the acquiescence by a defendant in criminal conduct of others, is not sufficient to establish aiding, inducing or causing a crime. You must not convict the defendant of aiding, inducing, or causing an offense unless you find beyond reasonable doubt that the defendant knowingly or intentionally participated in some conduct of an affirmative nature.

(Appellant's App. pp. 111-112). Warren argues that this instruction does not properly convey the appropriate *mens rea* requirements of accomplice liability.

Warren compares Final Instruction 28(B) to Indian Pattern Jury Instruction 2.11, which addresses accomplice liability.[1] We have before stated that the "preferred practice is to use the pattern jury instructions." *Gravens*, 836 N.E.2d at 493. However, there is no prohibition against using appellate decision language in jury instructions. *Id*. at 494 (citing *Hurt v. State*, 553 N.D.2d 1243, 1249 (Ind. Ct. App. 1990), *overruled on other grounds by Ham v. State*, 826 N.E.2d 640 (Ind. 2005)).

Closely examining Final Instruction 28(B), we note that initially it merely instructs on the knowing culpability requirement for 'aiding,' leaving out any language on the culpability required for 'inducing' or 'causing.' This is a much narrower culpability requirement than

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[1] Indiana Pattern Jury Instruction 2.11 reads as follows:

> Aiding, inducing or causing an offense is defined by statute as follows:
>
> A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person has not been prosecuted for the offense, has not been convicted of the offense, or has been acquitted of the offense.
>
> To convict the defendant, the State must have proved each of the following elements:
> 1. [name other person] committed the crime of [name crime aided, induced or caused] in that [name other person] [insert elements of the crime alleged to have been aided, induced or caused]
> and the defendant
> 2. knowingly or intentionally
> 3. aided [name other person] in committing the [name crime]
> [or]
> induced [name other person] to commit the [name crime]
> [or]
> caused [name other person] to commit the [name crime].
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the defendant not guilty.
>
> If the State did prove each of these elements beyond a reasonable doubt, you should find the defendant guilty of [name crime], a Class [insert class of crime] [misdemeanor] [felony].

that contained in the statute. Indiana Code section 35-41-2-4 would permit a jury to find a defendant to be an accomplice if the jury concludes that the defendant: (1) knowingly or intentionally aided; (2) knowingly or intentionally induced; or (3) knowingly or intentionally caused. Because of this, we acknowledge that the instruction is not artfully drafted. That being said, the ultimate sentence of Final Instruction 28(B) instructed the jury in mandatory language that it "must not convict the defendant of aiding, inducing, or causing" unless it found that Warren "knowingly or intentionally participated in some conduct of an affirmative nature." (Appellant's App. p. 112). Our supreme court concluded that this language was "a correct statement of law" which "did not mislead the jury" when addressing a challenge to an accomplice liability instruction in *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002). Moreover, we conclude that this part of the instruction conveys the correct *mens rea* requirement of knowingly or intentionally as required to find accomplice liability. Jury instructions are to be read as a whole, and will not be reversed unless the entire jury charge misleads the jury as to the law. *See Atwood v. State*, 905 N.E.2d 479, 485 (Ind. Ct. App. 2009). Thus, any failing in the first part of the jury instruction is cured when the instruction is read as a whole. Because we conclude that Final Instruction 28(B) correctly

stated the *mens rea* requirement for accomplice liability, neither Warren's trial or appellate counsel could have been ineffective for failing to argue that the instruction was in error.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err when denying Warren's petition for post-conviction relief.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.