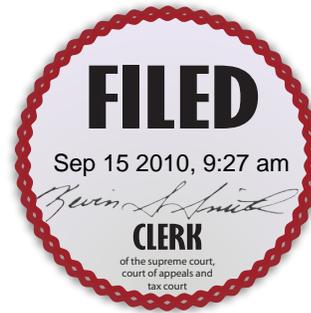


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DENNIS ROBERSON,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 27A04-1001-PC-102

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0710-MR-222

September 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Dennis Roberson appeals the trial court's denial of his petition for post-conviction relief filed after he pleaded guilty to one count of murder and one count of attempted murder. We affirm.

Issue

The sole issue for our review is whether the post-conviction court erred in denying Roberson's petition.

Facts and Procedural History

On October 27, 2007, thirty-three-year-old Roberson spent the evening drinking alcohol with his wife and some friends at a bar in Marion, Indiana. Twenty-two-year-old friends James Mack and Justin Riddle were at a nearby table drinking alcohol with their friends. Riddle worked for his family's business, and Mack was an Indiana University student. During the course of the evening, Roberson approached Mack and Riddle's table several times. According to witnesses, Roberson and Riddle became involved in a "pissing contest" about who had the biggest gun. (Tr. 93.) Roberson eventually drove home, got his .40 caliber Glock, returned to the bar, and opened fire on Mack and Riddle's table. Mack was killed instantly by a shot that pierced his heart. Riddle, who was shot eight times, survived. Roberson was charged with the murder of Mack and the attempted murder of Riddle.

One year later, Roberson entered into a plea agreement with the State. The agreement provided sentencing would be left to the trial court's discretion with a seventy-five-year

maximum cap on the executed time. The plea agreement further provided as follows:

The Defendant acknowledges that his execution of this agreement evidences the fact that he is knowingly, intelligently, and voluntarily waiving his right to challenge the sentence imposed by the Court, pursuant to this agreement, on the basis that such executed sentence is erroneous. The Defendant further agrees that by his execution of this agreement he is waiving his right to challenge the Court's finding and balancing of mitigating and aggravating factors as well as his right to have the Court of Appeals review the sentence imposed herein under Indiana Appellate Rule 7(B).

Appellant's App. 60.

At the guilty plea hearing, the trial court advised Roberson that by pleading guilty, he was giving up several constitutional rights, including his rights to 1) a public and speedy jury trial; 2) confront, physically face, and cross-examine witnesses against him; 3) exercise the court's subpoena power to require witnesses to appear and testify on his behalf; 4) require the State to prove its case beyond a reasonable doubt; 5) remain silent; and 6) an appeal represented by counsel. Roberson stated he understood he was waiving or giving up each of these rights. The court reviewed with Roberson the range of penalties for murder and attempted murder, and Roberson stated he understood and had no questions about the penalties.

The trial court also reviewed the three-page guilty plea agreement with Roberson. Roberson told the court he read the agreement before he signed it and understood its terms. He also told the court he discussed the terms of the agreement with his attorneys, his attorneys answered his questions about the agreement, and he had no questions for the court about the agreement. In addition, the trial court reviewed with Roberson the provision of the

agreement wherein Roberson waived his right to appeal his sentence. Roberson told the court he had no questions about the waiver provision. Roberson further stated his plea agreement included all of the terms of his agreement with the State, and that nobody had promised him anything that was not contained in the written agreement or anything different from what Roberson discussed with the court that day. Lastly, Roberson pleaded guilty to both charges and established a factual basis for his plea.

At the subsequent sentencing hearing, the trial court found Roberson's criminal history to be an aggravating circumstance. The court also found the nature and circumstances of Roberson's deliberate and calculating crimes to be an aggravating circumstance. Specifically, the trial court pointed out that after an initial dispute with the victims, Roberson left the bar to retrieve a gun at his house, returned to the bar and fired fifteen shots at the victims. Roberson then reloaded his weapon, all of this despite the fact that the victims did not initiate or return fire. The trial court concluded Roberson's actions spoke to his character and the risk and danger he presented to society as a whole. The trial court further found as a weighty aggravator that there were multiple victims.

The trial court found as mitigating circumstances Roberson's remorse, the hardship to his family, the fact that he pleaded guilty and took responsibility for his actions, and the fact he had led a law abiding life for a substantial period before committing the offenses. The trial court sentenced Roberson to sixty years for Mack's murder, with fifteen years suspended, and thirty-five years for the attempted murder of Riddle, with five years suspended, for a total executed sentence of seventy-five years.

In July 2009, Roberson filed a petition for post-conviction relief. At the November 2009 hearing on the petition, Roberson testified his attorneys told him he was “looking at between sixty (60) an’ fifty (50) years,” and that all DOC inmates “got a third of their time cut.” (PCR Hearing Tr. 10.) Later in the hearing, Roberson admitted that his attorneys reviewed the plea agreement with him and advised him he faced a possible maximum sentence of 115 years. Roberson also admitted he understood the effect of his plea agreement was that he was waiving his right to appeal his sentence.

Trial counsel Bruce Elliot testified he told Roberson in “DOC time you get two (2) for one (1).” PCR Hearing Tr. 24. He denied telling Roberson all DOC inmates get a third of their time cut in addition to the two-for-one credit. Elliot further explained he had made it very clear to Roberson that the seventy-five-year executed sentence was a very possible outcome. Trial defense counsel Larry Gallaway, Jr., testified he had explained to Roberson it was standard in every plea submitted by the Grant County Prosecutor’s Office to have a paragraph in the agreement wherein the defendant waives his right to challenge his conviction and/or sentence. Gallaway typically tells his clients if they do not want to waive these rights, the clients can reject the plea agreement. Gallaway further testified he “went out of [his] way to make sure [Roberson] knew that, to prepare himself both mentally an’ emotionally for doing seventy-five . . . years. Not to count on doing less than that.” (PCR Hearing Tr. 42.) Further, Gallaway denied telling Roberson there might be an additional one-third time cut from DOC if he would take the plea deal. Following the hearing, the trial court issued an order denying Roberson’s post-conviction petition. Roberson appeals.

Discussion and Decision

Standard of Review

A petitioner who has been denied post-conviction relief faces a rigorous standard of review on appeal. Dewitt v. State, 755 N.E.2d 167, 170 (Ind. 2001). The post-conviction court's denial of relief will be affirmed unless the petitioner shows that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Id. We consider only the probative evidence and reasonable inferences therefrom that support the post-conviction court's determination and will not reweigh the evidence or judge the credibility of witnesses. Bigler v. State, 732 N.E.2d 191, 194 (Ind. Ct. App. 2000), trans. denied.

Roberson argues that the post-conviction court erred in denying his petition because 1) his guilty plea was involuntary; 2) his trial counsel was ineffective; and 3) the waiver of his right to have his sentence reviewed for appropriateness was either void or voidable as a matter of law. We address each of his contentions in turn.

Guilty Plea

Roberson first argues that the trial court erred in denying his petition because his guilty plea was not voluntary. Before accepting a guilty plea, a trial court judge is required to take steps to ensure a defendant's plea is voluntary. Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003), trans. denied. For example, Indiana Code section 35-35-1-2 provides the court shall not accept a guilty plea without first determining that the defendant: 1) understands the nature of the charges against him, 2) has been informed that by his plea he

waives his rights to a) a public and speedy jury trial, b) confront and cross-examine witnesses against him, c) have compulsory process for obtaining witnesses in his favor, and d) require the state to prove his guilt beyond a reasonable doubt at a trial at which the defendant may not be compelled to testify against himself; and 3) has been informed of the maximum and minimum sentences for the crimes charged and any possibility of the imposition of consecutive sentences. In addition, Indiana Code section 35-35-1-3 provides the trial court must also determine that the plea is voluntary, and was not induced by any promises, force, or threats. Generally speaking, if the trial court undertakes these steps, a post-conviction petitioner will have a difficult time overturning his guilty plea on collateral attack. State v. Moore, 678 N.E.2d 1258, 1265 (Ind. 1997), cert. denied, 523 U.S. 1079 (1998).

However, defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor, or defense counsel will present colorable claims for relief. Id. at 1266. To assess whether the plea was voluntary, we review the post-conviction record, including any testimony, and the direct appeal record, including the transcript of the sentencing hearing, the plea agreement, and any other exhibits. Id.

Here, our review of the record of the proceedings reveals the trial court took the required steps to ensure Roberson's plea was voluntary. Specifically, the trial court advised Roberson that by pleading guilty, he was giving up several constitutional rights, including his rights to 1) a public and speedy jury trial; 2) confront, physically face, and cross-examine witnesses against him; 3) exercise the court's subpoena power to require witnesses to appear and testify on his behalf; 4) require the State to prove its case beyond a reasonable doubt; 5)

remain silent; 6) and an appeal represented by counsel. Roberson stated he understood he was waiving or giving up each of these rights. The court reviewed with Roberson the range of penalties for murder and attempted murder, and Roberson stated he understood and had no questions about the penalties.

The trial court also reviewed the three-page guilty plea agreement with Roberson. Roberson told the court he read the agreement before he signed it and understood its terms. He also told the court he discussed the terms of the agreement with his attorneys, his attorneys answered his questions about the agreement, and he had no questions for the court about the agreement.

Nevertheless, Roberson contends his plea was involuntary because “he was advised by counsel that he would received a 1/3 time cut if he accepted the plea agreement[, and] he later learned that such a time cut only applied to 1/3 of 12 years, and he would not have accepted the plea agreement if the correct information had been provided by counsel.” Appellant’s Br. 5-6.

However, our review of the post-conviction and direct appeal records reveals at the guilty plea hearing, the trial court reviewed with Roberson the range of penalties for murder and attempted murder. Roberson told the court he understood the penalties and had no questions. He did not mention being advised he would receive a 1/3 time cut from DOC if he accepted the plea agreement. Further, at the sentencing hearing, Roberson told the court he had discussed the agreement with his attorneys, the agreement included all terms of his agreement with the State, and that nobody had promised him anything that was not contained

in the written agreement or anything different from what he discussed with the court that day. Again, Roberson did not mention being told he would receive a 1/3 time cut if he accepted the plea agreement. Lastly, both defense counsel denied telling Roberson he would receive a 1/3 time cut if he accepted the plea agreement. The post-conviction court concluded Roberson's guilty plea was "entered freely and voluntarily and was not the result of any promises or coercion." Appellant's Br. 12. The evidence does not lead unerringly and unmistakably to a decision opposite that reached by the post-conviction court. See Dewitt, 755 N.E.2d at 170.

Ineffectiveness of Trial Counsel

Roberson also argues the trial court erred in denying his petition because he received ineffective assistance of trial counsel. Ineffective assistance of counsel claims are governed by the two-part test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Perez v. State, 748 N.E.2d 853, 854 (Ind. 2001). According to this test, a defendant must first show that counsel's performance was deficient Id. To demonstrate deficient performance, the defendant must show that his trial counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of defendant's Sixth Amendment Right to Counsel. Id. Second, a defendant must demonstrate that the deficient performance prejudiced his defense. Id. In order to establish prejudice, the defendant must show that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to

undermine confidence in the outcome. Id.

When considering a claim of ineffective assistance of counsel a strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Morgan v. State, 755 N.E.2d 1070, 1072 (Ind. 2001). Evidence of isolated poor strategy, inexperience, or bad tactics will not support a claim of ineffective assistance of counsel. Clark v. State, 668 N.E.2d 1206, 1211 (Ind. 1996), cert. denied, 520 U.S. 1171 (1997). Moreover, if a defendant is convicted pursuant to a guilty plea, and later claims that his counsel rendered ineffective assistance because counsel overlooked or impaired a defense, the defendant must show that a defense was indeed overlooked or impaired and that the defense would have likely changed the outcome of the proceeding. Segura v. State, 749 N.E.2d 496, 499 (Ind. 2001).

Roberson argues trial counsels were ineffective because they 1) advised Roberson to accept a plea agreement that contained provisions waiving Roberson's right to challenge his sentence; and 2) failed to object to the trial court's improper consideration of elements of the crimes in sentencing Roberson. As to the first contention, we agree with the State that trial counsels never "advised" Roberson to accept the plea agreement. Rather, Roberson testified at the post-conviction hearing that his attorneys reviewed the plea agreement with him. Roberson also testified his attorneys answered his questions about the agreement. At no time did Roberson testify that his attorneys advised him to accept the plea agreement. Further, trial counsel Gallaway testified that he had explained to Roberson it was standard in every plea submitted by the Grant County Prosecutor's Office to have a paragraph in the agreement

wherein the defendant waives his right to challenge the conviction and/or sentence. Gallaway typically tells his clients if they do not want to waive their rights to challenge their convictions and/or sentences, they can reject the plea agreement. The evidence does not support Roberson's contention that trial counsel advised him to accept a plea agreement that contained a provision waiving Roberson's right to challenge his sentence.

As to the second contention, Roberson claims trial counsel was ineffective for failing to object at the sentencing hearing to what he contends was the trial court's improper use of elements of the offenses as aggravating circumstances. It is true that a material element of a crime may not be used as an aggravating factor to support an enhanced sentence. Ellis v. State, 707 N.E.2d 797, 804 (Ind. 1999). However, when evaluating the nature of the offense, the trial court may properly consider the particularized circumstances of the factual elements as aggravating factors. McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001). The trial court must then detail why the defendant deserves an enhanced sentence under the particular circumstances. Vasquez v. State, 762 N.E.2d 92, 98 (Ind. 2001).

Here, the trial court found the nature and circumstances of Roberson's deliberate and calculating crimes to be an aggravating circumstance. Specifically, the trial court pointed out that after an initial dispute with the victims, Roberson left the bar to retrieve a gun at his house, returned to the bar and fired fifteen shots at the victims. Roberson then reloaded the weapon, all of this despite the fact the victims did not initiate or even return fire. The trial court concluded Roberson's actions spoke to his character and the risk and danger he presented to society as a whole. The trial was simply considering the particularized

circumstances of the factual events, and did not use material elements of the crime as aggravating factors.

The post-conviction court concluded Roberson was not denied effective assistance of counsel. The evidence does not lead unerringly and unmistakably to a decision opposite that reached by the post-conviction court.

Waiver of Right to Challenge Sentence as Inappropriate

Lastly, Roberson contends the waiver of his right to have his sentence reviewed for appropriateness under Indiana Appellate Rule 7(B) was either void or voidable as a matter of law. Specifically, he argues Appellate Rule 7(B) is simply “independent of trial courts and prosecuting attorneys who seek to structure such waivers into plea agreements.” Appellant’s Br. 17.

However, the Indiana Supreme Court has held that a defendant may waive his right to appellate review of his sentence as part of a written plea agreement. Creech v. State, 887 N.E.2d 73, 74 (Ind. 2008). This includes waiving appellate review of the appropriateness of a sentence pursuant to Indiana Appellate Rule 7(B). See id. (Indiana Supreme Court affirmed Creech’s waiver of his right to appeal the appropriateness of his sentence). Roberson’s waiver of his right to have his sentence reviewed for appropriateness was neither void nor voidable as a matter of law.

Conclusion

The post-conviction court did not err in denying Roberson’s petition.

Affirmed.

RILEY, J., and KIRSCH, J., concur.