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APPELLANT PRO SE:

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IN THE
COURT OF APPEALS OF INDIANA

DERRICK R. DAVIS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 48A05-1008-PC-571
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0307-FB-00318

SEPTEMBER 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Petitioner-Appellant Derrick R. Davis appeals the denial of his petition for post-conviction relief. We affirm.

ISSUE

Davis presents two issues for our review, which we consolidate and restate as: whether the post-conviction court erred by denying Davis' claim of ineffective assistance of trial counsel.

FACTS AND PROCEDURAL HISTORY

Davis was convicted of armed robbery, five counts of criminal confinement, and pointing a firearm for his involvement in the robbery of a Dairy Queen in Anderson in 2003. He was sentenced to an enhanced sentence of twenty years for his armed robbery conviction, enhanced sentences of twenty years for each of his five criminal confinement convictions, and an enhanced sentence of three years for his pointing a firearm conviction. Davis' sentences for his criminal confinement convictions and his pointing a firearm conviction were to be served concurrently to each other but consecutively to his sentence for his armed robbery conviction for an aggregate sentence of forty years. Davis filed a direct appeal, and, on January 25, 2005, this Court affirmed his convictions and sentences in a memorandum decision.

In October 2006, Davis filed a pro se petition for post-conviction relief, which he later amended on September 15, 2009. The post-conviction court held a hearing on

Davis' petition on May 10, 2010, after which it issued an order denying Davis' request for post-conviction relief. This appeal ensued.

DISCUSSION AND DECISION

Davis first contends that the post-conviction court erred by denying his claim of ineffective assistance of trial counsel for failure to strike a juror. We note that Davis had a direct appeal in which he raised issues regarding his convictions and sentences. Although he had different counsel on appeal, Davis did not raise issues of ineffective assistance of trial counsel in his direct appeal. Ineffective assistance of trial counsel may be raised on direct appeal, but if it is not, it is available in post-conviction proceedings irrespective of the nature of the issues claimed to support the competence or prejudice prongs. *Woods v. State*, 701 N.E.2d 1208, 1216 (Ind. 1998). Therefore, although Davis raised no issues of ineffective assistance of trial counsel in his direct appeal, the issues are not waived here in post-conviction proceedings.

A post-conviction petition under Indiana Post-Conviction Rule 1 is a quasi-civil remedy, and, as such, the petitioner bears the burden to prove by a preponderance of the evidence that he or she is entitled to relief. *Mato v. State*, 478 N.E.2d 57, 60 (Ind. 1985); Ind. Post-Conviction Rule 1, § 5. The judge who presides over a post-conviction hearing possesses exclusive authority to weigh the evidence and determine the credibility of the witnesses. *Stewart v. State*, 517 N.E.2d 1230, 1231 (Ind. 1988).

Upon review of a denial of post-conviction relief, this Court neither weighs the evidence nor determines the credibility of the witnesses. *Capps v. State*, 709 N.E.2d 24,

25 (Ind. Ct. App. 1999), *trans. denied*. To the extent the post-conviction court has denied relief, the petitioner appeals from a negative judgment and faces the rigorous burden of showing that "the evidence as a whole leads unerringly and unmistakably" to a conclusion opposite that reached by the post-conviction court. *Harris v. State*, 762 N.E.2d 163, 166 (Ind. Ct. App. 2002), *trans. denied*. Thus, we will not set aside the post-conviction court's ruling unless the evidence is without conflict and leads solely to a result different from that reached by the post-conviction court. *Stewart*, 517 N.E.2d at 1231. In making this determination, we consider only the evidence that supports the decision of the post-conviction court together with any reasonable inferences. *McCullough v. State*, 672 N.E.2d 445, 447 (Ind. Ct. App. 1996), *trans. denied*. In summary, "the defendant must convince this Court that there is *no* way within the law that the court below could have reached the decision it did." *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002).

In general, claims of ineffective assistance of counsel are reviewed under a two-part test: (1) a demonstration that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms and (2) a showing that the deficient performance resulted in prejudice. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Prejudice occurs when the defendant demonstrates that there is a reasonable probability that, if not for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability occurs when there is

a probability sufficient to undermine confidence in the outcome. *Id*. Counsel is afforded considerable discretion in choosing strategy and tactics, and we will give deference to those decisions. *Rose v. State*, 846 N.E.2d 363, 366 (Ind. Ct. App. 2006).

At the hearing on his post-conviction petition, Davis called his trial counsel to testify. Upon questioning by Davis, his trial counsel stated that he made notes at the time of trial regarding the issue with the juror. He explained that a potential juror worked at the juvenile facility where Davis had been and that she had indicated she might recognize Davis' name. Davis' trial counsel asked Davis if he knew the juror, and Davis stated he did not. His trial counsel, along with the prosecutor, then interviewed the juror in-camera and determined that he "liked her attitude" and "thought she would be a fair juror." Tr. p. 29. The juror assured Davis' trial counsel that if she later recalled that she did know Davis from the juvenile facility, she would not mention that fact to the other jurors. Davis' trial counsel then discussed the situation with Davis, and they agreed not to strike the juror. Davis' trial counsel testified, "[I]f [Davis] had told me to strike her I absolutely positively would have struck her." *Id*. at 30. Davis' trial counsel further explained, "she seemed to have a very defense friendly attitude," and "[s]he seemed very concerned about making sure peoples' rights were fully protected." *Id*. at 31, 46. "So that's why I talked it over with [Davis] and we decided to keep her. But if he'd had [sic] said I want her struck, I absolutely would have struck her." *Id*. at 31. In response to this testimony, Davis argued that he initially told his trial counsel that he did know the juror.

Davis has failed to show that his trial counsel's performance was sub-standard with regard to this issue.

Second, Davis alleges that the trial court erred by denying his claim that his trial counsel was ineffective for failing to raise certain mitigating circumstances at his sentencing hearing. Specifically, Davis argues that his trial counsel should have argued that his mental health, his young age of twenty-two, his lack of education, his difficult up-bringing, his drug addiction, and his dependent child were mitigating circumstances.

In support of this argument, Davis points to his Pre-Sentence Investigation Report for information regarding his emotional issues, education, drug abuse, and dependent child. However, Davis has failed to make any showing on either prong of the two-part test for determining the effectiveness of counsel. Thus, with regard to both claims of ineffective counsel, we are unable to conclude that the evidence Davis presented is without conflict and leads solely to a result different from that reached by the post-conviction court.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the post-conviction court did not err by denying Davis' claims of ineffectiveness of trial counsel.

Affirmed.

RILEY, J., and BAILEY, J., concur.