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IN THE
COURT OF APPEALS OF INDIANA

JAMES R. VADEN, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A01-0812-PC-608
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Cecile A. Blau, Judge
Cause No. 10D02-9607-CF-131

October 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

James R. Vaden, Jr., appeals the denial of his petition for post-conviction relief and presents the following restated issue for our review: Did the post-conviction court err by denying Vaden's *pro se* petition for post-conviction relief after ordering the parties to proceed by affidavit?

We affirm.

The underlying facts from Vaden's direct appeal are as follows:

> On July 15, 1996, Vaden was arrested by an undercover narcotics officer, who, acting on information provided by a confidential informant, had arranged to purchase a half-ounce of cocaine from Vaden for $775. Vaden was charged with two counts of dealing in cocaine, a Class A felony, possession of cocaine, a Class C felony, and carrying a handgun without a license, a Class A misdemeanor. On January 20, 1998, a jury convicted Vaden of all the charges, and the trial court sentenced him to fifty years on each count of dealing in cocaine, and one year for carrying a handgun without a license, to run concurrently with each other but consecutively to Vaden's sentence for federal charges in Kentucky.

Vaden v. State, 712 N.E.2d 522, 523 (Ind. Ct. App. 1999), *trans. denied*. Vaden's convictions were affirmed.

Vaden, *pro se*, filed a petition for post-conviction relief and elected not to be represented by the Public Defender. The post-conviction court issued an order concluding that pursuant to Indiana Post-Conviction Rule 1(9)(b), the cause would be submitted upon affidavit as no evidentiary hearing was needed. The court gave Vaden thirty days in which to file additional affidavits in support of his petition, and stated that Vaden's petition for post-conviction relief would be treated as an affidavit. Vaden did not tender any affidavits in support of his claim that he was denied effective assistance of counsel, and failed to submit

the transcript from his trial. On October 29, 2008, the post-conviction court denied Vaden's petition, and Vaden now appeals.

Defendants who have exhausted the direct appeal process may challenge their convictions and sentence by filing a post-conviction relief petition. Ind. Post-Conviction Rule 1(1). Post-conviction proceedings do not afford defendants the opportunity for a super-appeal. *Badelle v. State*, 754 N.E.2d 510 (Ind. Ct. App. 2001), *trans. denied*. "The scope of the relief provided for in these procedures is limited to 'issues that were not known at the time of the original trial or that were not available on direct appeal.'" *Allen v. State*, 749 N.E.2d 1158, 1164 (Ind. 2001) (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied*, 534 U.S. 1164 (2002)).

A petitioner challenging the denial of a petition for post-conviction relief appeals from a negative judgment. *Wesley v. State*, 788 N.E.2d 1247 (Ind. 2003). In order to prevail, a petitioner must convince this court that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id*. We will disturb the post-conviction court's decision only where the evidence is without conflict and leads to but one conclusion and the post-conviction court reached the opposite conclusion. *Id*.

First, P-C.R. 1(9)(b) provides that when a petitioner chooses to proceed *pro se*, the post-conviction court has the discretion to order the cause submitted upon affidavit. The post-conviction court need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing. *Smith v. State*, 822 N.E.2d 193 (Ind. Ct. App. 2005), *trans. denied*. Vaden argues

that the post-conviction court abused its discretion by failing to hold an evidentiary hearing and to order Vaden's personal presence on his claims because Vaden alleged ineffective assistance of trial and appellate counsel, claims which involve mixed questions of law and fact.

Vaden correctly cites to cases which hold that effective representation of counsel is a mixed question of fact and law, thus often requiring an evidentiary hearing to develop the facts relevant to the claim. *See Strickland v. Washington*, 466 U.S. 668 (1984) (effective representation of counsel is a mixed question of law and fact); *Hough v. State*, 690 N.E.2d 267 (Ind. 1997) (evidentiary hearing is typically required on an ineffective assistance of counsel claim), *cert. denied*, 525 U.S. 1021 (1998). Vaden argues that since his petition alleged ineffective assistance of trial and appellate counsel, raising issues of fact, a hearing was required.

Unlike *Hough*, this is not a case involving the summary disposition of Vaden's petition for post-conviction relief under Post-Conviction Rule 1(4)(g) (providing that an evidentiary hearing is required when a material issue of fact is raised). Affidavits are sworn testimony and constitute "competent evidence" in post-conviction proceedings. *Gould v. State*, 578 N.E.2d 382, 384 (Ind. Ct. App. 1991), *trans. denied*. "Factual statements in affidavits often raise issues of fact, and to require a full evidentiary hearing any time affidavits submitted under Rule 1(9)(b) create issues of fact would defeat the purpose of Rule 1(9)(b)." *Smith v. State*, 822 N.E.2d at 201. Rather, P-C.R. 1(9)(b) allows for more

flexibility in both the presentation of evidence and the review of post-conviction claims when a petitioner elects to proceed *pro se*. *Smith v. State*, 822 N.E.2d 193.

Consequently, we review this argument for an abuse of discretion on the part of the post-conviction court. Yet, Vaden has failed to show us how an evidentiary hearing would have benefitted him. Vaden was given the opportunity to present evidence by affidavit or to file an affidavit in which he set forth the names and expected testimony of witnesses he intended to subpoena in support of his claims. P-C.R. 1(9)(b). Vaden failed to do so. We also note that Vaden did not submit to the post-conviction court the trial record or transcript or the appellate record. We therefore conclude that the post-conviction court did not abuse its discretion when it chose not to hold an evidentiary hearing on Vaden's claims.

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *Walker v. State*, 779 N.E.2d 1158 (Ind. Ct. App. 2002), *trans. denied*. As for counsel's performance, we give considerable deference to counsel's discretion in choosing strategy and tactics. *Id*. Accordingly, a petitioner must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience; the defense as a whole must be inadequate. *Law v. State*, 797 N.E.2d 1157 (Ind. Ct. App. 2003). To prevail on a claim of ineffective assistance of trial counsel, Vaden must show (1) that counsel's performance fell below an objective standard of reasonableness as determined by prevailing professional norms, and (2) that the lack of reasonable representation prejudiced him. *See Shane v. State*, 769 N.E.2d 1195 (Ind. Ct. App. 2000). Essentially, Vaden must show that but for counsel's deficient performance, the

result of the proceedings would have been different. *See Law v. State*, 797 N.E.2d 1157. We will find prejudice when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unjust or unreliable. *Id*. If we can easily dismiss an ineffectiveness claim based upon the prejudice, we may do so without addressing whether counsel's performance was deficient. *Id*. We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Williams v. State*, 724 N.E.2d 1070 (Ind. 2000), *cert. denied*, 531 U.S. 1128 (2001).

Here, Vaden bore the burden of convincing the post-conviction court via affidavit that he was entitled to relief. Vaden was given the opportunity to submit his evidence, but failed to tender affidavits or the record of the proceedings below in support of his petition.[1] "A post-conviction court may not take judicial notice of the transcript of the evidence from the original proceedings unless exceptional circumstances exist." *Bahm v. State*, 789 N.E.2d 50, 58 (Ind. Ct. App. 2003), *trans. denied*. Vaden claims that he was precluded, by deadlines imposed on him, from filing a complete clerk's record. To the extent this might be interpreted to suggest that Vaden submitted evidence below not appearing before this court, we note that the post-conviction court's order explicitly refers to Vaden's failure to submit additional evidence in support of his petition to the post-conviction court. All of this leads us

[1] As our Supreme Court has noted, "[i]t is practically impossible to gauge the performance of trial counsel without the trial record. . . ." *Tapia v. State*, 753 N.E.2d 581, 588 n.10 (Ind. 2001). Further, absent a trial record, we cannot assess the other issues appellate counsel may have raised and whether the issues Vaden claims should have been raised were significant, obvious, and clearly stronger than the issue raised on direct appeal. *See Taylor v. State*, 882 N.E.2d 777 (Ind. Ct. App. 2008).

to conclude that the post-conviction court properly denied Vaden's petition for post-conviction relief.

Judgment affirmed.

BAKER, C.J., and RILEY, J., concur.