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# IN THE
# COURT OF APPEALS OF INDIANA

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| RONALD WATKINS, | ) | |
| | ) | |
| Appellant/Defendant/Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 29A05-0901-PC-36 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee/Plaintiff/Respondent. | ) | |

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause Nos. 29D01-0509-MR-168, 29D01-0708-PC-91

**October 13, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant/Defendant/Petitioner Ronald Watkins appeals his convictions of two counts of Class A felony Attempted Murder, Class C felony Criminal Recklessness, and Class A misdemeanor Carrying a Handgun Without a License and the denial of his petition for post-conviction relief ("PCR"). We affirm.

## FACTS AND PROCEDURAL HISTORY

After a night of drinking, at approximately 3:00 a.m. on September 17, 2005, Daniel Jones, Jacob Jones, and Michael Griffin left the Silver Dollar Bar in Noblesville and walked in the direction of the nearby Uptown Café. Daniel paused to speak with friend Samantha Powers, who worked at the Uptown Café and had stepped outside the back door to smoke a cigarette. Meanwhile, Jacob and Griffin walked to the front of the café. A grey or light blue Oldsmobile Cutlass passed northbound by Jacob and Griffin, and words were exchanged between the duo and the two men in the car.

The Oldsmobile continued north for a short distance but turned around, returning southbound. As the Oldsmobile passed through the intersection of 8th and Conner, Watkins, the passenger, leaned out of his window over the roof of the car, and fired a shot at Jacob, which Jacob could hear "buzz" by his ear. Tr. p. 342. Watkins fired a second shot, which Griffin could hear "whiz by [his] head." Tr. p. 391. Daniel, who by this time was approximately ten feet from Griffin, "hit the ground" when he saw Watkins shoot at Jacob. Tr. p. 295. When Watkins fired a third shot, Daniel felt something hit his back, which turned out to be "pieces of brick off the brick wall that [he] was standing beside." Tr. p. 296. Jacob dialed 911 and, when police arrived, described the vehicle in which Watkins was a passenger

and in which direction it had been driven.

Noblesville Police Officer Jason Voyak received a dispatch at 3:07 a.m. that shots had been fired from a vehicle near the Silver Dollar Bar and that the vehicle was grey or blue, possibly a Buick, and southbound on 10th Street. Officer Voyak drove north on Allisonville Road, as that was one of the main thoroughfares leading from downtown Noblesville. Approximately one mile south of the shooting, Officer Voyak passed a grey Oldsmobile that "somebody would easily be able to mistake for a grey or light blue colored Buick." Tr. p. 512. Officer Voyak followed the Oldsmobile to the intersection of 146th Street and Allisonville Road, where he stopped it. Watkins was in the vehicle. As Noblesville Police Officer Gerald Fenimore looked in the front window of the Oldsmobile, he noticed a dark-colored handgun on the driver's side floorboard and a handgun magazine on the front seat in front of the armrest. Three shell casings found at the scene of the shooting were determined to have been fired by the handgun found in the Oldsmobile.

On September 19, 2005, the State charged Watkins with three counts of Class A felony attempted murder and Class C felony carrying a handgun without a license. On March 2, 2006, Watkins filed a *pro se* motion to suppress evidence found in the Oldsmobile. (Appellant's App. 8). On August 17, 2006, Watkins filed a speedy trial motion. On October 4, 2006, Watkins filed a motion to exclude untimely discovered evidence, including a one-page statement from witness Samantha Powers, a transcript of an interview with Michael Probst, notice of potential witness Taylor Howard, a sketch of the crime scene prepared by police. On October 6, 2006, after a hearing on the motion to exclude, the trial court denied it

unless Watkins could show prejudice resulting from the late discovery of the evidence at issue. The trial court noted in its order that Watkins declined opportunities to depose Powers, Probst, and the police officer who prepared the crime scene sketch and that Howard had invoked his Fifth Amendment rights not to testify. Also on October 6, 2006, the trial court granted Watkins's motion to withdraw his motion to suppress.

On October 9, 2006, Watkins filed a motion for discharge on the basis that he would be prejudiced by the introduction of some of the evidence that had been the subject of his motion to exclude, specifically the crime scene sketch and the testimony of Samantha Powers and should not be forced to choose between this prejudice and giving up his right to a speedy trial. The trial court denied Watkins's motion to discharge. As it happened, although Powers testified at trial, her statement was not admitted or mentioned, and the crime scene sketch was not admitted or mentioned.

Also on October 9, 2006, Watkins filed a motion to dismiss the three attempted murder charges against him on the basis that they impermissibly charged him with "knowingly or intentionally" attempting to kill Jacob, Daniel, and Griffin. Appellant's App. p. 191. The trial court granted Watkins's motion but gave the State leave to amend its charging information, which it did.

At trial, the trial court, over Watkins's objection to use of the word "towards," gave the following final instruction regarding the elements of the crime of attempted murder:

> The crime of Attempted Murder, which is the basis for COUNT[S 1, 2, and 3], is defined as: A person attempts to commit a murder when, acting with specific intent to kill another person, he engages in conduct that constitutes a substantial step toward killing that person. An attempt to commit murder is a

> Class A felony.
>
> Before you may convict the Defendant of Attempted Murder, the State must have proved each of following essential elements beyond a reasonable doubt:
>
> 1. The Defendant
> 2. acting with the specific intent
> 3. did attempt to kill [Jacob, Daniel, and Griffin]
> 4. by shooting a high point 9MM handgun at or towards [Jacob, Daniel, and Griffin]
> 5. which was conduct constituting a substantial step toward the commission of the intended crime of Murder.
>
> If the State failed to prove each of these essential elements beyond a reasonable doubt, you should find the Defendant not guilty of the crime[s] of Attempted Murder, a Class A Felony, charged in COUNT[S 1, 2, and 3].

Appellant's App. pp. 286, 289, 292.

The jury found Watkins guilty of two counts of attempted murder, Class C felony criminal recklessness as a lesser-included crime of attempted murder, and Class A misdemeanor carrying a handgun without a license. On November 9, 2006, the trial court sentenced Watkins to fifty years of incarceration for each attempted murder conviction, eight years for criminal recklessness, and one year for carrying a handgun without a license, all sentences to be served concurrently.

On December 4, 2006, Watkins filed his notice of appeal. On May 14, 2007, this court granted Watkins's motion to remand to the trial court for the purpose of filing a pre-appeal PCR petition. On December 29, 2008, the post-conviction court denied Watkins's PCR petition.

## DISCUSSION AND DECISION

In this combined direct appeal and appeal from the denial of his PCR petition,

Watkins raises the following issues, which we restate and reorder as (1) whether Watkins's right to a speedy trial was effectively violated when the trial court denied his motions to discharge and dismiss the charges against him, (2) whether the trial court abused its discretion in instructing the jury, and (3) whether Watkins received ineffective assistance of trial counsel.

## I. Whether Watkins's Right to Speedy Trial was Violated

The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 12 of the Indiana Constitution. *Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995). This "fundamental principle of constitutional law" has long been zealously guarded by our courts. *Id*. (quoting *Castle v. State*, 237 Ind. 83, 85, 143 N.E.2d 570, 572 (1957)). To this end, the provisions of Indiana Criminal Rule 4 implement the defendant's speedy trial right. *Id*. Criminal Rule 4(B)(1) provides as follows:

> If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar. Provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as set forth in subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time.

We review a ruling on a Rule 4 motion for abuse of discretion. *Bowman v. State*, 884 N.E.2d 917, 919 (Ind. Ct. App. 2008) (citing *Werner v. State*, 818 N.E.2d 26, 28 (Ind. Ct.

App. 2004)), *trans. denied*. "An abuse of discretion occurs if the court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id*.

We note at the outset that Watkins filed his Rule 4(B) motion on August 17, 2006, and was tried on October 9, 2006. As such, Watkins was tried on the fifty-third day of the seventy-day period and has not shown an actual violation of his right to a speedy trial. Watkins argues, however, that he was effectively denied his right to a speedy trial by being put in a position of having to waive either his speedy trial rights or his challenges to the untimely discovered evidence and the final amendment to the charging information. The Indiana Supreme Court has addressed an equivalent question and concluded that being faced with such a choice does not amount to a denial of one's right to a speedy trial.

In *Haymaker v. State*, 667 N.E.2d 1113 (Ind. 1996), the State filed what the defendant claimed on appeal was an illegal amended habitual offender information the day before trial. *Id*. at 1113. Haymaker, while acknowledging that he did not properly preserve the issue by requesting a continuance, claimed that he had not done so only because he had filed a speedy trial motion pursuant to Rule 4(B) and wanted his trial to proceed as scheduled. *Id*. at 1114. The Indiana Supreme Court, however, concluded that "this fact does not negate waiver[,]" noting that Haymaker could have filed another motion for speedy trial contemporaneously with his continuance request. *Id*.; *Miller v. State*, 563 N.E.2d 578, 582 (Ind. 1990) ("However, a request for a continuance, while chargeable to appellant, would not have forced him to relinquish his speedy trial right. He could have refiled for a speedy trial contemporaneously with his motion for a continuance.").

This case presents equivalent questions, and we therefore reach the same result. As with a challenge to an amendment to a charging information, a defendant must request a continuance to evaluate untimely-discovered evidence or waive the right to complain on appeal that he was unprepared for trial. *See id.*; *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000) ("Failure to alternatively request a continuance upon moving to exclude evidence, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the court's discovery order."). As in *Haymaker*, Watkins did not request a continuance to address either of the situations he now complains of on appeal, thereby waiving the issues for our review, his Rule 4(B) motion notwithstanding. We conclude that the trial court did not abuse its discretion in denying Watkins's motion for discharge.

In any event, Watkins has not established that he was placed in an "untenable" position. Quite simply, there is no indication that Watkins was actually unprepared to go to trial as a result of any discovery violation by the State or the amended charging information. As for the alleged discovery violations, the trial court specifically left open its ruling on Watkins's motion to exclude the evidence in question, providing Watkins with a remedy in the event that he happened to be prejudiced at trial by the alleged discovery violations. In the end, however, no prejudice was ever alleged, much less shown. Moreover, our review of the record contains no hint of unpreparedness or prejudice resulting from the evidence in question. Indeed, neither Powers's statement nor the crime scene sketch were admitted or mentioned at trial, and Watkins does not explain how the late discovery of Powers's

statement might have prejudiced him in any way, nor is any prejudice apparent from the record.

As for the amended charging information, as previously mentioned, the trial court allowed the State to amend its three attempted murder charges against Watkins, which amendments consisted of removing language indicated that he could be convicted of "knowingly" attempting to commit murder. Watkins suggests that he also was put in the untenable position of having to choose between waiving his speedy trial rights and waiving a challenge to the amended charges. Because the record contains no indication that Watkins had a viable challenge to the amendments or that he was prejudiced thereby, we conclude that he was similarly not put in an untenable position by the amended charging information.

Finally, it is by no means clear that Watkins would have had to request a continuance in order to evaluate either the new evidence or the amended charges. We would note that Watkins refused when the trial court asked him if he wanted to depose Powers and the officer who prepared the crime scene sketch, Watkins does not claim (and there is no reason to believe) that the depositions could not have been taken and the amended charges evaluated in the seventeen days the State had left in which to try Watkins. Watkins has failed to establish that he was put in the untenable position of having to choose between his right to a speedy trial and being prepared for trial.

The cases on which Watkins relies are distinguishable. In both *Crosby v. State*, 597 N.E.2d 984 (Ind. Ct. App. 1992), and *Biggs v. State*, 546 N.E.2d 1271 (Ind. Ct. App. 1989), we concluded that the defendants' rights to a speedy trial had been violated. In both of those

cases, however, the defendants were actually tried *outside* the time limits provided for in Rule 4 because State discovery violations had either forced a defendant to seek a continuance or caused the trial court to order one. *See Crosby*, 597 N.E.2d at 988-89 (concluding that delay causing trial date to be set outside seventy-day period was caused by discovery violation and not court congestion, which is the only permissible reason for a continuance under Rule 4(B)), *and Biggs*, 546 N.E.2d at 1275 (concluding that delay could not be charged to defendant for Rule 4(C) purposes where continuance request was result of State's failure to comply with discovery request). Although both *Crosby* and *Biggs* stand for the proposition that one may not be put in the untenable position of having to either waive one's speedy trial rights or go to trial unprepared, they do not help Watkins, as we have already concluded that he was faced with no such dilemma.

**II. Whether the Trial Court Abused its Discretion in Instructing the Jury**

Watkins contends that the trial court improperly instructed the jury that the specific intent to kill could be proved by evidence that he shot "at or towards" his intended victims. Appellant's App. pp. 286, 289, 292. Specifically, Watkins contends that "at" and "towards" are not synonymous and that use of the word "towards" "effectively reintroduce[d] the concept of a knowing or reckless standard." Appellant's Br. p. 11. "Instructing the jury lies within the sole discretion of the trial court." *Gantt v. State*, 825 N.E.2d 874, 877 (Ind. Ct. App. 2005). "Jury instructions are to be considered as a whole and in reference to each other." *Id.* "An error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case." *Id.* "Before a defendant is entitled to

a reversal, he or she must affirmatively show that the erroneous instruction prejudiced his substantial rights." *Id*.

"At" may be defined as "a function word to indicate that which is the goal of an action or that toward which an action or motion is directed[,]" while "towards" may be defined as "in the direction of[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 136, 2417 (Phillip Babcock Gove et al. eds., G.&C. Merriam Company 1964). While the two words might have identical meanings in some contexts, we agree with Watkins that they have a slightly different meaning when the context is firearms. In our view, it is commonly understood that firing a gun "at" a person indicates that striking that person is the "goal of the action" while firing a gun "towards" a person does not necessarily indicate such an intent. In other words, one may fire a gun "towards," or "in the direction of," a person without having the slightest intention of hitting him. To the extent that the word "towards" suggested that one could commit attempted murder without the specific intent to kill, its use was incorrect.

As previously mentioned, however, we will not reverse unless the entire jury charge misled the jury about the applicable law and Watkins can show that his substantial rights were prejudiced. We cannot conclude that the entire charge misled the jury here. The attempted murder charges against Watkins, read to the jury during preliminary instructions, provided, in part, that "Watkins, acting with the specific intent, did attempt to kill another human being[.]" Appellant's App. p. 243. The jury was also informed that, before it could find Watkins guilty of attempted murder, it had to find that he, "acting with the specific intent … did attempt to kill [Jacob, Daniel, and Griffin.]" Appellant's App. pp. 245-47. The

trial court instructed the jury that "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." Appellant's App. p. 249. The trial court's final instructions repeated the charges, again clarified that the jury must find that Watkins acted with "the specific intent" to kill, defined the term "intentionally," and instructed the jury that "[i]n a prosecution for attempted murder, *the State must show a specific intent to kill*." Appellant's App. p. 297 (emphasis added). Despite the erroneous and potentially misleading use of the word "towards," the jury was given the proper information regarding the required *mens rea* for attempted murder many more times, both before and after the presentation of evidence.

Additionally, the jury's verdicts indicate a clear understanding of the difference between reckless and intentional behavior, which is the area about which Watkins claims they might have been misled. The jury found Watkins guilty of attempting to murder Griffin and Jacob, but only of criminal recklessness in the case of Daniel, verdicts consistent with the evidence presented at trial. Jacob and Griffin both testified that they heard a bullet pass by their respective heads, while, in contrast, Watkins did not fire in the direction of Daniel until Daniel had dropped to the ground. Moreover, Daniel did not hear a bullet pass close by his body, and the lowest of the marks on the wall struck by the bullets was three feet and eight inches high, indicating that the third shot missed him by at least approximately three feet. Given this evidence, it was not unreasonable for the jury to conclude that Watkins intended to kill Jacob and Griffin but not Daniel, and the verdicts to that effect indicate a clear understanding of the distinction between intentional and merely reckless behavior. In light of

the myriad instructions that clearly indicate that the State was required to prove the specific intent to kill and the jury's verdicts indicating a clear understanding of the *mens rea* required for attempted murder, Watkins has not established that use of the phrase "at or towards" misled the jury regarding the applicable law. The trial court did not abuse its discretion in instructing the jury.

### III. Whether Watkins Received Ineffective Assistance of Counsel

Watkins also challenges the denial of his PCR petition, contending that he received ineffective assistance of trial counsel. Our standard for reviewing the denial of a PCR petition is well-settled:

> In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court.… Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law.

*Hall v. State*, 849 N.E.2d 466, 468, 469 (Ind. 2006) (internal citations and quotations omitted).

We review claims of ineffective assistance of counsel based upon the principles enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> [A] claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant 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 arises when there is a

"probability sufficient to undermine confidence in the outcome."

*Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). Because an inability to satisfy either prong of this test is fatal to an ineffective assistance claim, this court need not even evaluate counsel's performance if the petitioner suffered no prejudice from that performance. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999).

Watkins contends that his trial counsel was ineffective for withdrawing his *pro se* motion to suppress the evidence found in the Oldsmobile in which he was found when it was stopped. Watkins argues that the police lacked reasonable suspicion to stop the Oldsmobile, necessitating exclusion of all evidence uncovered as a result. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure." *Callahan*, 719 N.E.2d at 434. "In cases involving a warrantless search, the State bears the burden of proving an exception to the warrant requirement." *Id*. (citing *State v. Farber*, 677 N.E.2d 1111, 1116 (Ind. Ct. App. 1997)). "One exception to the warrant requirement is an investigatory stop whereby a police officer can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion, supported by

articulable facts, that criminal activity may be afoot, even if the officer lacks probable cause." *Santana v. State*, 679 N.E.2d 1355, 1359 (Ind. Ct. App. 1997) (citations omitted).

Here, the car in which Watkins was travelling was stopped because of a possible connection with the shootings outside the Uptown Café. In such cases, it has been observed that several factors may be relevant to the question of whether reasonable suspicion supported the stop in question:

> Generally, it may be said that consideration may properly be given to: (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.5(g) (4th ed. 2004, current through 2008 update).

Officer Voyak was told by dispatch that there had been shots fired, possibly at the Silver Dollar Inn; the vehicle from which they had been fired was a grey or blue Buick; and the vehicle had fled southbound on 10th Street. When Officer Voyak received the dispatch, he was near the intersection of State Road 37 and 146th Street, approximately three to four miles from the Silver Dollar Inn. After hearing the dispatch, Officer Voyak drove to Allisonville Road, which is one of the main streets leading from Noblesville and "which turns into 10th Street as you come into Noblesville[,]" and proceeded northbound. PCR Tr. 34. Approximately three minutes later, shortly after 3 a.m. on a morning with "essentially no

traffic on the road[,]" Officer Voyak passed a grey Oldsmobile southbound on Allisonville. Tr. p. 511. Officer Voyak knew that it would take a vehicle leaving the Silver Dollar Inn approximately three minutes to reach the place where he passed the Oldsmobile and that an Oldsmobile could easily be mistaken for a Buick, as they were both General Motors products.

Here, while there was no indication that Officer Voyak observed any suspicious activity by the Oldsmobile or that it had been involved in similar criminal activity, the other four considerations mentioned by Professor LaFave militate strongly in favor of the stop. The stopped vehicle matched the general description of the vehicle involved in the shooting when one takes into account that a Buick can easily be mistaken for an Oldsmobile. *Cf. Wilkinson v. State*, 743 N.E.2d 1267, 1271 (Ind. Ct. App. 2001) ("Our courts have generally found that when there is evidence a crime has taken place, police may stop an individual who fits the description of the violator."). Second, the Oldsmobile was sighted within minutes of the shooting at approximately the distance from the scene one would have expected had it driven away without stopping. Third, and perhaps most compelling, there was essentially no other traffic on Allisonville Road at the time (which is hardly surprising given the time of day), thereby greatly reducing the chances of stopping the wrong vehicle. Finally, the Oldsmobile was spotted going in the same direction on the same road as that used by the vehicle involved in the shooting to flee the scene. When considered together, we conclude that these considerations establish reasonable suspicion that the Oldsmobile was the vehicle from which the shots at the Uptown Café were fired. Because Officer Voyak's stop of the Oldsmobile was proper, a motion to suppress the evidence found therein would not have

properly been granted, and, as such, Watkins's trial counsel was not ineffective for declining to pursue it.

## CONCLUSION

We conclude that Watkins's right to a speedy trial was not violated. Moreover, we conclude that the trial court did not abuse its discretion in instructing the jury. Finally, we conclude that the trial court, sitting as post-conviction court, properly denied Watkins's PCR petition.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.