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IN THE
COURT OF APPEALS OF INDIANA

JAMAR ALSTON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-1103-PC-307
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G20-0810-PC-245200

October 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner Jamar Alston appeals the denial of his petition for post-conviction relief ("PCR"), claiming ineffective assistance of trial counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

Our opinion in Alston's direct appeal instructs us as to the underlying facts leading to this post-conviction appeal:

> At approximately 4:15 a.m. on October 29, 2008, Indianapolis Metropolitan Police Officer Noreen Cooper saw Alston's car stopped with its flashers on in the right northbound lane of the 2300 block of North Keystone Avenue in Indianapolis. Officer Cooper approached the car to assist the driver and noticed Alston slumped over the steering wheel. Officer Cooper opened the unlocked driver's side door and unsuccessfully attempted to wake Alston. She called for backup, and the assisting officers were able to wake Alston. When Alston got out of the car, he was unsteady and smelled of alcohol. Because he lived close by, Officer Cooper decided to let Alston go but decided to have his car towed because of the impending rush hour traffic.
>
> As another officer prepared the paperwork for the tow, Officer Cooper conducted an inventory search of Alston's car. Looking for items of value, [Officer Cooper] observed a torn paper bag on the passenger side floor that contained what appeared to be plastic baggies of cocaine. The contents of the paper bag were in plain view, and Officer Cooper "didn't have to unveil anything to see it." Tr. p. 67. The contents of the bag were later determined to be three larger baggies containing a total of 13.92 grams of cocaine and fifteen smaller baggies containing a total of 1.85 grams of cocaine. Officer Cooper did not conduct an inventory search of the trunk of Alston's car. During Alston's arrest, the arresting officer discovered ten "bricks" of money wrapped in rubber bands totaling $9,215.00 in Alston's coat pockets. Tr. p. 125.

Alston v. State, 49A02-0906-CR-501 slip op. pp. 2-3 (Ind. Ct. App. January 12, 2010), *trans. denied*.

On October 30, 2008, the State charged Alston with Class A felony dealing in cocaine ("Count 1"), Class C felony possession of cocaine ("Count 2"), and Class B misdemeanor public intoxication (Count 3"). On March 20, 2009, the State filed a motion to amend the

charging information seeking to amend Count 2 to charge Alston with Class A felony possession of cocaine, alleging that his possession of at least three grams of cocaine occurred within 1000 feet of a juvenile detention center. Following a hearing, the trial court denied the State's motion to amend Count 2.

On April 22, 2009, Alston as tried before a jury on the original three-count information that was filed on October 30, 2008. At the conclusion of trial, the jury found Alston guilty as charged. Citing double jeopardy concerns, the trial court entered a judgment of conviction on Counts 1 and 3, but not Count 2. On May 11, 2009, the trial court imposed a thirty-year sentence with five years suspended on Alston's Class A felony dealing in cocaine conviction.

On June 2, 2009, Alston filed a notice of appeal. In Alston's direct appeal, this court affirmed the judgment of the trial court, concluding that "the trial court did not abuse its discretion in admitting the cocaine into evidence," and that the evidence was "sufficient to support Alston's Class A felony dealing in cocaine conviction." *Id*. at 8. Alston filed a petition for transfer, which was unanimously denied by the Indiana Supreme Court.

On June 21, 2010, Alston filed a *pro se* PCR petition. On August 31, 2010, Alston, by counsel, filed an amended PCR petition. On February 15, 2011, Alston, by counsel, filed a second amended PCR petition. The post-conviction court conducted an evidentiary hearing on Alston's amended PCR petition on February 18, 2011. During this hearing, Alston, by counsel, presented argument in support of his second amended PCR petition. On March 11, 2011, the post-conviction court issued an order denying Alston's request for PCR. Alston

now appeals.

DISCUSSION AND DECISION

Post-conviction procedures do not afford the petitioner with a super-appeal. *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules. *Id*. A petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on appeal. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001); *Collier v. State*, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999), *trans. denied*.

Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from the denial of a PCR petition, a petitioner must convince this court that the evidence, taken as a whole, "leads unmistakably to a conclusion opposite that reached by the post-conviction court." *Stevens*, 770 N.E.2d at 745. "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*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We therefore accept the post-conviction court's findings of fact unless they are clearly erroneous but give no deference to its conclusions of

law. *Id*.

Ineffective Assistance of Counsel

The right to effective counsel is rooted in the Sixth Amendment to the United States Constitution. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "'The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.'" *Id*. (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel's performance was deficient by demonstrating that counsel's representation "fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Id*. We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or most effective way to represent a client and therefore under this prong, we will assume that counsel performed adequately, and will defer to counsel's strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id*. Under the second prong, the petitioner must show that

the deficient performance resulted in prejudice. *Reed*, 866 N.E.2d at 769. A petitioner may show prejudice by demonstrating that there is "a reasonable probability (*i.e*. a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id*.

A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams*, 706 N.E.2d at 154. Therefore, if we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel's performance. *See Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002). Further, the same standard applies to claims of ineffective assistance of trial counsel and claims of ineffective assistance of appellate counsel. *Burnside v. State*, 858 N.E.2d 232, 238 (Ind. Ct. App. 2006).

Alston challenges the post-conviction court's determination that his trial counsel was not ineffective. Specifically, Alston claims that his trial counsel was ineffective "for failing to challenge [Alston's] conviction for [Class] A felony possession with intent to deal cocaine" because the jury was not instructed on the element regarding possession within 1000 feet of a youth detention center. Appellant's Br. p. 6. The State argues that the post-conviction court properly denied Alston relief because he was charged with, and convicted of, Class A felony possession of cocaine with the intent to deliver, in an amount greater than three grams, not possession of cocaine with the intent to deliver within 1000 feet of a youth detention center.

Indiana Code section 35-48-4-1(a) provides that a person who possesses cocaine, with

intent to deliver, commits dealing in cocaine, a Class B felony. The offense is a Class A felony if: (1) the amount of the drug involved weighs three grams or more; (2) the person delivered or financed the delivery of the drug to a person under eighteen years of age at least three years junior to the person; *or* (3) the person manufactured, delivered, or financed the delivery of the drug on a school bus or in, on, or within 1000 feet of school property, a public park, a family housing complex, or a youth program center. Ind. Code § 35-48-4-1(b) (emphasis added). Because Indiana Code section 35-48-4-1(b) is written in the disjunctive, the State need only prove one of those alternatives, not all three, in order for the offense to rise to the level of a Class A felony. *See In re Adoption of J.P.*, 713 N.E.2d 873, 875 (Ind. Ct. App. 1999) (providing that when a statute is written in the disjunctive, a party needs to prove only one factor to meet the statutory requirement).

In the instant matter, the charging information alleged that Alston "on or about October 29, 2008, did knowingly possess with intent to deliver a controlled substance, that is cocaine, in an amount greater than three (3) grams" in violation of Indiana Code section 35-48-4-1. Thus, in order to convict Alston of Class A felony dealing in cocaine, the State was required to, and did, prove that Alston possessed more than three grams of cocaine with the intent to deliver. Moreover, with respect to Alston's Class A felony dealing in cocaine conviction, at no point did the State allege or even attempt to allege that the crime was committed within 1000 feet of a juvenile detention center.[1] Accordingly, because Alston was

[1] Alston's claim on appeal appears to confuse his conviction for Class A felony dealing in cocaine under Count 1 with the State's unsuccessful attempt to amend the wholly separate possession of cocaine charge

not charged with or convicted of Class A felony possession of at least three grams of cocaine within 1000 feet of a juvenile detention center, we conclude that he has failed to show that he was prejudiced by his trial counsel's failure to object to or challenge his Class A felony dealing in cocaine conviction on that ground.

The judgment of the post-conviction court is affirmed.

ROBB, C.J., and BARNES, J., concur.

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under Count 2 to assert the elements necessary to raise his possession of more than three grams of cocaine to the level of a Class A felony.