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.

FILED
Oct 15 2009, 9:21 am
CLERK
of the supreme court, court of appeals and tax court

APPELLANT PRO SE:

ADAM GAUNT
Greencastle, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ADAM GAUNT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0904-PC-177
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN COUNTY SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0602-FB-31

October 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Adam Gaunt appeals the post-conviction court's denial of his pro se petition for post-conviction relief. Gaunt raises three issues, which we revise and restate as whether Gaunt was denied effective assistance of trial counsel. We affirm.

The relevant facts follow. In February 2006, Gaunt was "going out with" and lived with C.L. Appellant's Appendix at 49. Gaunt and C.L. began to argue, and Gaunt struck C.L. "in the face and about the head," which caused C.L. extreme pain. Id. At some point, C.L. attempted to call 911, and Gaunt pulled the telephone cord out of the wall. C.L. later went to the hospital and received medical care.

On February 27, 2006, the State charged Gaunt with criminal confinement as a class B felony, battery as a class C felony, and interference with the reporting of a crime as a class A misdemeanor. On March 1, 2006, the trial court appointed a public defender to represent Gaunt, and an omnibus date was set for April 10, 2006. On March 21, 2006, a private attorney filed an appearance to represent Gaunt, and the trial court scheduled a jury trial for June 14, 2006.

On April 18, 2006, the prosecutor and Gaunt's attorney met and discussed a possible habitual offender charge. The prosecutor told Gaunt's attorney that the State was "trying to secure records at that time from out of State." Transcript Volume I at 19.

On the morning of April 21, 2006, the State filed an information alleging that Gaunt was an habitual offender based upon convictions in Arizona. On April 27, 2006, the trial court held an initial hearing, and Gaunt's attorney stated that the habitual offender information "might be a tad outside the filing," and he asked the trial court to

"show my technical objection on that basis." Petitioner's Exhibit 1 at 3. The trial court then stated, "Show a preliminary plea of not guilty then on Count IV, the Habitual Offender information." Id. at 3-4. On May 10, 2006, the State filed an amended information regarding the habitual offender charge. On May 31, 2006, the State and Gaunt filed a joint motion for continuance. The trial court granted the motion and rescheduled the trial for August 8, 2006.

On August 4, 2006, Gaunt pled guilty to battery as a class C felony, interference with the reporting of a crime as a class A misdemeanor, and being an habitual offender. The trial court dismissed the charge of criminal confinement as a class B felony and sentenced Gaunt pursuant to the guilty plea. Specifically, the trial court sentenced Gaunt to eight years in the Indiana Department of Correction with six years suspended and five years of probation for battery as a class C felony. The trial court sentenced Gaunt to one year for interference with the reporting of a crime as a class A misdemeanor. The trial court sentenced Gaunt to ten years for being an habitual offender. The trial court ordered that the sentences be served consecutively.

On November 19, 2007, Gaunt filed an amended petition for post-conviction relief.[1] In a brief in support of his petition for post-conviction relief, Gaunt argued that the State filed the habitual offender count after the time period allowed by Ind. Code § 35-34-1-5 without establishing good cause for the untimely filing. Gaunt also alleged

[1] Both parties state that Gaunt filed a petition for post-conviction relief on January 29, 2007. See Appellant's Brief at 2; Appellee's Brief at 2. The record does not contain a copy of Gaunt's petitions for post-conviction relief, and it appears that the chronological case summary contained in the Appellant's Appendix is missing the page corresponding to January 2007. See Appellant's Appendix at 88-90.

that his trial counsel was ineffective and that his Sixth and Fourteenth Amendment rights were violated.

At the post-conviction hearing, the following exchange occurred during the cross examination of Gaunt's trial counsel:

> Q . . . Do you recall in your professional experience, do you have any opinion what would be the likely outcome if you did demand a showing of good cause?
>
> A My opinion would be that the court, whether it be the Magistrate or the Judge assigned to the case for trial, would allow a belated filing. I don't know that I have seen in any of my cases where it's been denied and situations such as this with out of State convictions, unfortunately I think those are typical situations where the State could show cause.
>
> Q Would that in terms of the added difficulty and delay in getting the certified copies and things from out of State rather than in State?
>
> A That's why we say that. It causes a bit of a time lag to obtain records.
>
> Q Okay. Based on your professional experience, do you have an opinion about what would have likely happened in this case if you had demanded a showing of good cause? To the extent that you haven't already answered that.
>
> * * * * *
>
> A My thinking is that the habitual enhancement in this case would have been allowed.

Transcript Volume I at 16-17.

The prosecutor testified that the habitual offender information was filed late because the offenses were from "out of State and generally those take longer" and "the

State that it was from called the charges different things, they had different levels." Transcript Volume II at 11. The prosecutor also testified that "it look[ed] like our officer got some faxed information on the afternoon or approximately the afternoon on April 18th," and that "on the 19th there was an entry by the investigator that they had received the fax and prepared the habitual offender charge." Id. The prosecutor also stated:

> I do not know why it was not filed until the 21st in the morning. I don't know whether it was on my desk to be reviewed or whether . . . I don't know, is the answer from the 19th until the 21st, I do not know. I just know on the 21st, I looked at it and it was not done and I filed it immediately.

Id. The prosecutor testified that the fax was "very difficult to read," which is one of the reasons why it's good to follow it up with certifieds." Id. at 13. The prosecutor also testified that "[w]e did request certifieds to follow up those facts so that we could verify everything." Id. After the hearing, the post-conviction court denied Gaunt's petition for post-conviction relief.

Before discussing Gaunt's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that

reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

The sole issue is whether Gaunt was denied the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for 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. Perez v. State, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. French, 778 N.E.2d at 824.

Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Gaunt argues that his trial counsel was ineffective for "not aggressively pursuing the late habitual offender filing," and because he "made no move to dismiss nor filed a motion to dismiss after the court stated the habitual offender count was filed one (1) day late." Appellant's Brief at 4. To establish that his trial counsel was ineffective, Gaunt must show that a motion to dismiss the State's habitual offender filing would have been granted. See Sauerheber v. State, 698 N.E.2d 796, 807 (Ind. 1998).

Ind. Code § 35-34-1-5 governs the amendment of an information to include an habitual offender charge and provides:

> An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8 must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.

Ind. Code § 35-34-1-5(e) (2004).[2] "The purpose of [Ind. Code § 35-34-1-5(e)] is to allow a defendant sufficient time to prepare a defense for an habitual offender charge." Haymaker v. State, 667 N.E.2d 1113, 1114 (Ind. 1996).

Here, the omnibus date was set for April 10, 2006. The State filed an information alleging that Gaunt was an habitual offender on April 21, 2006 or eleven days after the omnibus date and one day after the ten-day period allowed by Ind. Code § 35-34-1-5(e). Thus, Ind. Code § 35-34-1-5(e) governs.

[2] Subsequently amended by Pub. L. 178-2007, § 1 (eff. May 8, 2007).

At the post-conviction hearing, the prosecutor testified that the habitual offender information was filed late because the offenses were from "out of State and generally those take longer" and "the State that it was from called the charges different things, they had different levels." Transcript Volume II at 11. The prosecutor also testified that "it look[ed] like our officer got some faxed information on the afternoon or approximately the afternoon on April 18th," and that "on the 19th there was an entry by the investigator that they had received the fax and prepared the habitual offender charge." Id. The prosecutor also stated:

> I do not know why it was not filed until the 21st in the morning. I don't know whether it was on my desk to be reviewed or whether . . . I don't know, is the answer from the 19th until the 21st, I do not know. I just know on the 21st, I looked at it and it was not done and I filed it immediately.

Id. The prosecutor testified that the fax was "very difficult to read," which is one of the reasons why it's good to follow it up with certifieds." Id. at 13. The prosecutor also testified that "[w]e did request certifieds to follow up those facts so that we could verify everything." Id.

Gaunt does not direct our attention to a case in which similar circumstances did not constitute good cause, and we cannot say that the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. We conclude that Gaunt failed to demonstrate that a motion to dismiss necessarily would

have been granted. Thus, the failure of Gaunt's trial counsel to move to dismiss the State's habitual offender charge does not amount to ineffective assistance of counsel.[3]

For the foregoing reasons, we affirm the post-conviction court's denial of Gaunt's petition for post-conviction relief.

Affirmed.

MAY, J., and CRONE, J., concur.

---

[3] Gaunt relies upon Attebury v. State, 703 N.E.2d 175 (Ind. Ct. App. 1998), and Hooper v. State, 779 N.E.2d 596 (Ind. Ct. App. 2002). Attebury and Hooper did not involve claims of ineffective assistance. In Attebury, the State sought to add the habitual offender count more than two months after the omnibus date and three days before the defendant's trial. 703 N.E.2d at 178-179. The court held that "[t]he trial court erred in allowing the State to file the habitual offender count three days prior to trial without making a finding of good cause for the untimely addition." Id. at 180. In Hooper, the defendant argued that the trial court erred by permitting the State to file an habitual offender enhancement four months after the original omnibus hearing date. 779 N.E.2d at 601. The court held that the trial court erred by allowing the late filing of the habitual offender enhancement because the State did not offer any showing of good cause for the late filing. Id. at 602. We do not find these cases instructive because they did not involve a claim of ineffective assistance of counsel and the record here indicates that Gaunt has failed to demonstrate that a motion to dismiss the State's habitual offender charge necessarily would have been granted.