

Case Summary

Anthony Williams, *pro se*, appeals the post-conviction court's denial of his petition for post-conviction relief. He contends that the post-conviction court erred by denying his request for subpoenas, denying his request for transcripts of the post-conviction evidentiary hearings in order to prepare his proposed findings and conclusions, and finding that his trial counsel was not ineffective. Concluding that the post-conviction court did not err by denying his request for subpoenas, denying his request for transcripts of the evidentiary hearings, or finding that his trial counsel was not ineffective, we affirm.

Facts and Procedural History

The underlying facts of this case, taken from this Court's memorandum decision in Williams' direct appeal, are as follows:

The facts most favorable to the conviction reveal that at approximately 12:30 a.m. on July 23, 2003, Indianapolis Police Department Officer Christopher Reed was dispatched to a burglary in progress at 2840 North Delaware. When he arrived at the scene and walked to the back of the house to secure the area, Officer Reed noticed a man in the backyard of the house at 2836 North Delaware. The man, later identified as Williams, disappeared around the corner of the house. Officer Reed pursued Williams and ordered him to stop. Williams briefly stopped, dropped a flashlight, and fled. He ran through an alley where he was apprehended. A pat down search of Williams revealed a tape measurer, a screwdriver, and a hypodermic needle. When Officer Reed returned to the house at 2836 North Delaware, he noticed a broken window. He also noticed some jacks that appeared to have been taken out of the house and stacked next to a fence. Williams was charged with burglary as a Class B felony, possession of a controlled substance as a Class D felony, resisting law enforcement as a Class A misdemeanor, and possession of paraphernalia as a Class A misdemeanor.

Williams v. State, No. 49A02-0312-CR-1094, slip op. at 2-3 (Ind. Ct. App. Oct. 21, 2004).

The trial court appointed Attorney Raymond Casanova to represent Williams. Attorney Casanova told Williams that if the burglarized house was not a dwelling, any resulting burglary conviction should be a Class C and not a Class B felony. *See* Ind. Code § 35-43-2-1(1)(B)(i). Attorney Casanova went to the house at least a week after the burglary to determine if it was habitable. According to him, the back door and back windows had been removed, and the first floor of the house was in a state of disrepair and being remodeled. Attorney Casanova took photographs of the house. When he later withdrew his representation, he gave the photographs to Attorney Jeff Neel, who succeeded him.

During Williams' bench trial, the owner of the house testified regarding his use of the house:

Jeff Sullivan testified that he purchased the house at 2836 North Delaware in early June 2003. He immediately replaced broken pipes in the basement so that he had running water on the first floor, and the broken toilet on the first floor so that he had a working toilet. Shortly thereafter, in mid-June 2003, Sullivan moved into the house. Sullivan had a refrigerator, a stove, and a microwave. He cooked food and ate meals at the house. He also kept his personal possessions there. Sullivan considered the house to be his residence. He was not at home the morning of the burglary because someone had stolen the compressor to his air conditioning system and it was a hot night. If he had had an air conditioner, he would have been in the house that morning. Sullivan also testified that someone had broken into his house four nights before and taken most of his electronics as well as other personal items.

Williams, slip op. at 3. Attorney Neel did not offer the photographs of the house into evidence. The trial court found Williams guilty as charged.

In his direct appeal, Williams contended that the evidence was insufficient to support his Class B felony burglary conviction. Specifically, he contended that there was insufficient evidence that the house was a dwelling. Williams also contended that his sentence was inappropriate and that the trial court erred by ordering him to pay a \$200.00 public defender reimbursement fee. This Court found sufficient evidence to support the Class B felony burglary conviction and that Williams' sentence was not inappropriate. *Id.* at 6, 8. We also found that the trial court abused its discretion by ordering Williams to pay a \$200.00 public defender fee and thus reversed that portion of the court's order and remanded with instructions for the court to reduce the fee to \$100.00. *Id.* at 9.

Williams, *pro se*, filed a petition for post-conviction relief. One of his ineffective assistance of trial counsel claims was that "[t]rial counsel failed to attack the credibility of Detective Nelson's account of allegedly Mirandizing Petitioner Williams." Appellant's App. p. 52. Williams asserted that Indianapolis Police Detective Leonard Nelson's trial testimony that he gave Williams *Miranda* warnings was inconsistent with Detective Nelson's statement in the probable cause affidavit that Indianapolis Police Officer Bryan Zotz gave Williams *Miranda* warnings.

Williams filed a request for the post-conviction court to issue subpoenas to Detective Nelson and Officer Zotz. According to his affidavits, he wanted to ask the officers whether they administered him *Miranda* warnings. The post-conviction court denied the request, finding that Williams failed to demonstrate how the officers' testimony was relevant to his claims. *Id.* at 159; Tr. p. 6-7. Williams filed another request for subpoenas for the two officers, which the court denied.

The post-conviction court held two evidentiary hearings. At the first hearing, no evidence was presented, and the court granted Williams' motion for continuance. At the second hearing, Williams presented Attorney Casanova, his first attorney, as a witness. The State presented no evidence.

Following the hearings, Williams wrote a letter to the trial court clerk requesting transcripts of the evidentiary hearings in order for him to "prepare the findings of facts and conclusion[s] of law the Court has ordered to be prepared." Appellant's App. p. 135. The post-conviction court initially granted the request, noting, "Petitioner indigent ref any transcripts of evidentiary hearings on PCR." *Id.* After Williams filed a motion to compel production of the transcripts, the post-conviction court "corrected and denied" Williams' original request for the transcripts, *id.*, and denied the motion to compel. Williams then filed a motion to reconsider his motion to compel, which the post-conviction court denied, stating, "Parties will not be provided with transcript of 'all hearings' conducted concerning the petition." *Id.* at 140.

The post-conviction court entered findings of fact and conclusions of law denying relief. Williams now appeals.

Discussion and Decision

Williams appeals the denial of his petition for post-conviction relief. In a post-conviction proceeding, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Henley*, 881

N.E.2d at 643. The reviewing court will not reverse the judgment unless the petitioner shows that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. *Id.* at 644. 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 accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.*

Williams contends that the post-conviction court erred by denying his request for subpoenas for Detective Nelson and Officer Zotz, denying his request for transcripts of the post-conviction evidentiary hearings in order to prepare his proposed findings and conclusions, and finding that Attorney Casanova was not ineffective.

I. Denial of Subpoenas

Williams first contends that the post-conviction court erred by denying his request for subpoenas for Detective Nelson and Officer Zotz.

Indiana Post-Conviction Rule 1(9)(b) provides in pertinent part:

If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness' testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena.

The court has discretion to determine whether to grant or deny the petitioner's request for a subpoena. *Allen v. State*, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003), *trans. denied*. An abuse of discretion occurs when the court's decision is against the logic and effect of the facts and circumstances before the court. *Id.*

Williams' post-conviction petition claimed that trial counsel was ineffective for, among other things, failing to "attack the credibility of Detective Nelson's account of allegedly Mirandizing Petitioner Williams." Williams asserted that Detective Nelson's trial testimony that he gave Williams *Miranda* warnings was inconsistent with Detective Nelson's statement in the probable cause affidavit that Officer Zotz gave Williams *Miranda* warnings.

We do not find that Detective Nelson's testimony at trial is inconsistent with his statement in the probable cause affidavit. It is possible that both officers gave Williams *Miranda* warnings. In addition, the probable cause affidavit, prepared by Detective Nelson, shows that Officer Zotz gave Williams *Miranda* warnings, Detective Nelson arrived on the scene, and Williams then made an incriminating statement to Detective Nelson. Appellant's App. p. 44. Thus, even if it were true that Detective Nelson did not give Williams *Miranda* warnings, Williams incriminated himself only after Officer Zotz gave him *Miranda* warnings.

To the extent Williams argues that he was never given *Miranda* warnings by any officer, he fails to show that the testimony of Detective Nelson or Officer Zotz would be relevant to and probative of whether trial counsel was ineffective for failing to impeach the officers. There is no indication that either officer would have provided testimony any

different from the evidence already in the record. Williams has made no showing other than his own self-serving claim that trial counsel's failure to impeach the officers constituted ineffective assistance.

In denying Williams' request for subpoenas, the post-conviction court found that Williams failed to demonstrate how the officers' testimony was relevant to his claims. We cannot say that the post-conviction court abused its discretion.

II. Denial of Post-Conviction Evidentiary Hearing Transcripts

Although Williams was provided with transcripts of the post-conviction evidentiary hearings for purposes of this appeal, he contends that the post-conviction court erred by denying his request for these transcripts in order to prepare his proposed findings of facts and conclusions of law.

Indiana Post-Conviction Rule 1(9)(b) provides in pertinent part that petitioners who are indigent are "entitled to a record of the post-conviction proceeding at public expense for appeal of the denial or dismissal of the petition." Williams, however, cites no rule, and we find none, that provides a petitioner with a transcript of the post-conviction proceeding at public expense *before* the denial or dismissal of a petition. Furthermore, Williams was present at both short hearings where he was the only party who presented evidence, which consisted only of brief testimony from Attorney Casanova.

Nonetheless, Williams contends that *Rush v. United States*, 559 F.2d 455 (7th Cir. 1977), "guarantees the production of transcripts by the court in a post conviction relief proceeding." Appellant's Br. p. 5. In *Rush*, the Seventh Circuit held that indigent and

incarcerated *pro se* petitioners who were preparing a collateral attack on their convictions had an absolute personal right to the trial transcript that had been previously generated for their direct appeal. 559 F.2d at 458. *Rush* is distinguishable. The petitioners in *Rush* requested the trial transcript, which was already in existence, in order to prepare a collateral attack on their convictions. Here, however, Williams requested transcripts of the evidentiary hearings in the post-conviction proceedings, which were not yet in existence, in order to prepare proposed findings and conclusions. We find *Rush* inapplicable to the facts here.

We conclude that the post-conviction court did not err by denying Williams' request for transcripts of the evidentiary hearings in order to prepare his proposed findings and conclusions.

III. Ineffective Assistance of Trial Counsel

Williams finally contends that the post-conviction court erred by finding that Attorney Casanova was not ineffective. Specifically, Williams argues, "Trial counsel Casanova's actions in obtaining pictures of the property in question, blatantly prejudiced the Appellant in obtaining a fair and just trial. The pictures would have shown the property to be inhabitable, thus lessening the degree of felony the Appellant was convicted of." Appellant's Br. p. 5.

We view ineffectiveness of counsel as an issue ultimately turning on the overall performance of counsel; therefore, where more than one attorney is involved, it is the collective performance that counts. *Woods v. State*, 701 N.E.2d 1208, 1211 n.1 (Ind. 1998), *reh'g denied*. We thus understand Williams as contending that Attorney Casanova

provided ineffective assistance by improperly obtaining pictures of the house and that Attorney Neel provided ineffective assistance by failing to admit the photographs into evidence.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel performed deficiently and the deficiency resulted in prejudice. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Id.*; *see also Strickland*, 466 U.S. at 697 (“[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.”). In order to prove prejudice stemming from ineffective assistance, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of his criminal proceeding would have been different. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009) (citing *Strickland*, 466 U.S. at 694).

Williams alleges that Attorney Casanova's actions in obtaining photographs of the house were improper. The post-conviction court's ruling notes:

The Petition makes broad and unsupported allegations that there was a “conspiracy between the State Prosecutor's Office, the State Public Defender's Office and the Marion County Judiciary” to suppress the photographs and/or that . . . Mr. Casanova had a matter with the disciplinary commission. No post-conviction evidence was properly admitted to prove said assertion, and no relief is justified on this basis. Nor do these allegations provide any basis for Williams' claim of ineffective assistance of trial counsel.

Appellant's App. p. 181 (citation omitted). Upon review of the record, we agree with the post-conviction court that no evidence was properly admitted to show that Attorney Casanova engaged in any misconduct. Williams' ineffective assistance claim as to Attorney Casanova thus fails.

Assuming without deciding that Attorney Neel's failure to offer the photographs into evidence was deficient, Williams has failed to meet his burden of showing the deficiency resulted in prejudice. First, Attorney Casanova took the photographs at least a week after the burglary and acknowledged at the evidentiary hearing that he could not testify as to the condition of the house at the time of the burglary. Moreover, the photographs are not a part of the record and we thus have no way of knowing whether they would have corroborated his description of the house. Further, even if the photographs did corroborate Attorney Casanova's description at the evidentiary hearing of the house after the burglary, the owner's testimony at trial provided evidence that the house at the time of the burglary was a dwelling.

Williams has failed to show a reasonable probability that, even if Attorney Neel's performance was deficient, the result of his criminal proceeding would have been different.

Affirmed.

MAY, J., and ROBB, J., concur.