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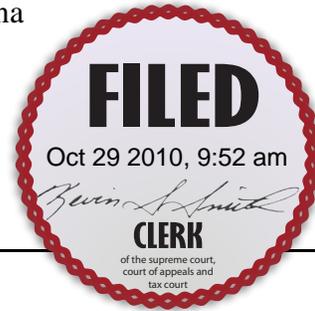
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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)
)
Appellant-Respondent,)
)
vs.) No. 49A02-1003-PC-644
)
LYNN WILSON,)
)
Appellee-Petitioner.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0509-PC-160665

October 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

The State appeals the post-conviction court's grant of Lynn Wilson's petition for post-conviction relief. The State presents a single issue for our review, namely, whether the post-conviction court erred when it granted Wilson's petition despite its conclusion that he could not show the likelihood of a different outcome had his appellate counsel raised an omitted issue on direct appeal.

We reverse.

FACTS AND PROCEDURAL HISTORY

In Wilson's direct appeal of his conviction for possession of a firearm by a serious violent felon, a Class B felony, and his adjudication as an habitual offender, we stated the facts and procedural history as follows:

On September 19, 2005, Indianapolis Police Officer Wetzell Hill was dispatched to 2441 East Wade Street on a report of a domestic disturbance. Officer Hill did not have any additional information regarding the dispatch. When he approached the area of the residence approximately three minutes after the dispatch, he observed a car pulling out of a parking spot and starting to drive away in the 2400 block of East Wade Street. Because his experience has taught him that parties involved in domestic disturbances frequently leave the scene, Officer Hill exited his car and approached the open passenger window of the other car. Officer Hill asked the driver, who was the car's only occupant, whether he had just left 2441 East Wade Street, and the driver, Wilson, responded affirmatively. Then, Officer Hill asked Wilson, "[C]ould you please back up so I can figure out what's going on here[?]" Transcript at 48. Wilson agreed and parked his car.

Officer Hill asked Wilson to exit his car, and he complied. As Wilson approached him, Officer Hill asked Wilson to show him his hands to "make sure [he did not] have any weapons." *Id.* at 50. Wilson initially complied, but when Officer Hill began a pat-down search for weapons, Wilson put his arms down and appeared to be reaching for his right pants' pocket. Officer Hill asked Wilson what he was doing, and he replied that he wanted to get a cigarette. Officer Hill told Wilson to wait and asked him to put his hands back up in the air. Wilson complied, but then he abruptly

put his arms down again. At that point, another officer arrived to assist Officer Hill, and the officers grabbed Wilson by his arms and placed him in handcuffs. Officer Hill asked Wilson why he was reaching for his pocket, and he ultimately admitted that he had a handgun.

The State charged Wilson, who had a prior conviction for voluntary manslaughter, with possession of a firearm by a serious violent felon, carrying a handgun without a license, resisting law enforcement, and being an habitual offender. On the first day of trial, the State dismissed the charges for carrying a handgun without a license and resisting law enforcement. In addition, Wilson moved to suppress the evidence, alleging that the stop was illegal. The trial court denied that motion following a hearing. The jury found Wilson guilty of possession of a firearm by a serious violent felon, but the jury deadlocked on the habitual offender count, and the trial court declared a mistrial as to that count only. After Wilson was retried on that count, he was adjudicated an habitual offender. The trial court entered judgment accordingly and sentenced Wilson to a total term of twenty-three years.

Wilson v. State, Cause No. 49A05-0608-CR-463, (Ind. Ct. App. April 23, 2007).

On appeal, Wilson's appellate counsel raised two issues for our review: whether the trial court abused its discretion when it admitted into evidence a handgun police found in his pants' pocket in the course of a Terry stop, and whether the trial court evidenced bias against Wilson at sentencing. This court affirmed.

In his petition for post-conviction relief, Wilson argued that his appellate counsel was ineffective for failing to raise the following issue: whether the trial court erred when it imposed an enhanced sentence for his adjudication as an habitual offender by proof of the same felony used to establish that Wilson was a serious violent felon. At the hearing on the petition, the only testimony Wilson proffered was his own; he did not call appellate counsel to testify. The post-conviction court made the following relevant conclusions in granting Wilson's petition:

Wilson claims in his petition that appellate counsel should have argued as did trial counsel that the holding in Conrad v. State, 747 N.E.2d 575 (Ind. Ct. App. 2001), was the applicable law and despite a legislative change to the habitual offender statute in 2001 allegedly resolving the issue before the court, that in fact more clarification was required. This Court agrees.

At the time that Wilson committed the charged offenses through the time that his appeal was decided, the State argues that the Indiana Court of Appeals³ affirmatively provided that a defendant convicted of unlawful possession of a firearm by a serious violent felon could have his sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a serious violent felon. Townsend v. State, 793 N.E.2d 1092, 1096-97 (Ind. Ct. App. 2003), trans. denied.⁴ Although Mr. Mohler[, Wilson's trial counsel,] had argued that Conrad was controlling and not Townsend, the State at the trial level noted that Conrad was decided under a previous version of the habitual offender statute prior to the 2001 amendment of the habitual offender statute in effect when Wilson committed his crime, and the State persuasively argued to the trial court that Conrad therefore did not apply. . . .

[INTERNAL FOOTNOTE 3:] The Indiana Supreme Court denied transfer on Townsend but never specifically addressed the issue regarding the double enhancement for SVF until Mills v. State, 855 N.E.2d 296 (Ind. Ct. App. 2006), vacated on transfer, 868 N.E.2d 446 (Ind. 2007)].

[INTERNAL FOOTNOTE 4:] But see Conrad v. State, 747 N.E.2d 575, 595 (Ind. Ct. App. 2001), trans. denied, (holding that the State may not enhance a defendant's sentence for being a serious violent felon under the general habitual offender statute by using a conviction that was also used to prove the defendant was a serious violent felon).

As noted earlier the legislature amended the Habitual Offender Statute two months after Conrad (in 2001) but did not specifically address the Serious Violent Felon (SVF) scenario. The State argues that the legislative silence created an implied right to proceed on the SVF and the Habitual Offender using the same prior felony. Mr. Mohler argued that the silence meant Conrad still applied and because a different three judge Appellate panel decided Townsend and not the Indiana Supreme Court then that opinion did not rise to the level of stare decisis and should not be followed (App. 81). Despite Mr. Mohler's assertions, the State's argument to the trial court on the Habitual Offender Enhancement was consistent

with the reasoning in the Townsend opinion,⁵ and the trial court denied Mr. Mohler’s Motion to Dismiss the Habitual Offender [sic].

[INTERNAL FOOTNOTE 5:] Townsend reasoned that, because the serious violent felon enhancement situation was not enumerated in the 2001 habitual offender amendment as an impermissible double enhancement, and because the introductory phrase reads: “Except as otherwise provided in this section, the State may seek to have a person sentenced as an habitual offender . . .” that the Legislature intended that the same prior felony could support an SVF charge and an habitual offender enhancement. Townsend, 793 N.E.2d at 1096-97.

In the year after Wilson was sentenced and nearly two months after Wilson’s appeal was complete, the Indiana Supreme Court in Mills v. State, 868 N.E.2d 446 (Ind. 2007)¹¹ changed the law on this issue back to its holding in Conrad finding as they did in that case that “[A] defendant convicted of unlawful possession of a firearm by a serious violent felon may not have his or her sentenced enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a ‘serious violent felon.’” Mills at 452. While Wilson could argue that our Supreme Court might have changed the law in his case instead of in the Mills case, such speculation is not a sufficient basis to show ineffective assistance. . . .

While Mills returned Indiana law to the rule initially set forth in Conrad, this Court is unconcerned with the role of hindsight specifically and concerned more definitively with the less than careful assessment by appellate counsel of the record in Mr. Wilson’s case and the great care, time and effort put forth by trial counsel in adequately preserving the issue at hand.

In review of the Appendix filed in the Court of Appeals, the Court notes that 44 pages, or nearly one-quarter of the total, are dedicated to the adjudication of the Habitual Offender Enhancement. Court further notes that this issue is the only issue that trial counsel deemed worthy enough to put into a written motion followed by a full brief in support, producing a written response by the state and ultimately two full hearings (App. 10-11). Further, trial counsel objected at every stage of the proceedings where this issue was applicable and continued to argue it at sentencing. While the Court recognizes great latitude on the part of appellate counsel in determining “winnable” issues—it is hard to reconcile the decision not to explore the single greatest issue presented and preserved by trial counsel.

It is very possible, indeed likely, that the issue, if raised at the time, still may not have resulted in an overturned verdict despite the closeness in time to the Supreme Court's ultimate finding that the law on this topic was unclear and would now be resolved in petitioner's favor. There is a very real possibility that despite the lack of specificity in the Habitual Offender Statute under which Wilson was convicted and sentenced and the existence of the Townsend opinion, that the Court of Appeals may have affirmed. However, the issue was never raised, so we have no way of knowing what might have happened.

The Court finds that Appellate counsel's failure to address the Habitual Offender Enhancement in light of the record on this topic, is below the standards of reasonableness. Even a cursory reading of Conrad, Townsend and the applicable Habitual Offender Statutes could leave one to question the state of the law, even without forty-four pages of appendix, two hearings on the matter and a myriad of objections preserving the issue to draw one's attention to it. Given the level of dedication by trial counsel to the issue, this Court believes this to be a "**significant and obvious**" issue and the failure to raise it "cannot be explained by any reasonable strategy."

CONCLUSION

Petitioner has shown deficient performance on the part of his appellate counsel for failing to raise the Habitual Offender Enhancement in his sole appellant brief.

The law is with the Petitioner and against the State.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Petition for Post-Conviction Relief is hereby GRANTED in part.

Appellant's App. at 132-35 (one footnote omitted, some emphases original). This appeal ensued.

DISCUSSION AND DECISION

In State v. Hammond, 761 N.E.2d 812, 814 (Ind. 2002), our Supreme Court set out the applicable standard of review:

When reviewing a judgment granting post-conviction relief we follow the standard prescribed by Indiana Trial Rule 52(A):

On appeal of claims tried by the court without a jury or with an advisory jury, at law or in equity, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

See Spranger v. State, 650 N.E.2d 1117, 1119 (Ind. 1995).

In determining whether the judgment is clearly erroneous, we neither reweigh the evidence nor determine the credibility of witnesses. Id. Rather, we consider only the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence. Id.

Here, the State contends that the post-conviction court clearly erred when it granted Wilson's petition despite its conclusion that he "likely" would not have prevailed if his appellate counsel had raised the omitted issue regarding the habitual offender enhancement. The State maintains that the post-conviction court "essentially granted relief merely on the basis of deficient performance without the necessary finding of resulting prejudice." Brief of Appellant at 9. We must agree.

A claim of ineffective assistance of counsel must satisfy two components. Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show deficient performance: representation that 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. at 687-88. Second, the defendant must show prejudice: 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. at 694.

Further, our Supreme Court has stated:

Ineffectiveness is rarely found when the issue is failure to raise a claim on direct appeal. Bieghler v. State, 690 N.E.2d 188, 193-94 (Ind. 1997). “The decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.” Id. (quoting Lissa Griffin, The Right to Effective Assistance of Appellate Counsel, 97 W. Va. L. Rev. 1, 26 (1994)). We give considerable deference to appellate counsel’s strategic decisions and will not find deficient performance in appellate counsel’s choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. Bieghler, 690 N.E.2d at 194. We review the totality of appellate counsel’s performance to determine whether the defendant received constitutionally adequate assistance. Id.

Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999) (emphases added).

Here, the post-conviction court placed great emphasis on the fact that trial counsel was diligent in preserving the habitual offender enhancement issue, which the court describes as “the single greatest issue presented and preserved by trial counsel.” While we agree with the post-conviction court that this was a significant and obvious issue, here, as the court recognized, the precedent available to Wilson’s appellate counsel on direct appeal was not in Wilson’s favor. In Conrad, this court held “that a defendant convicted of unlawful possession of a firearm by a serious violent felon may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a ‘serious violent felon.’” 747 N.E.2d 575, 595 (Ind. Ct. App. 2001) (emphasis added), trans. denied, superseded by statute as stated in Townsend, 793 N.E.2d at 1097. But two years later, in Townsend, we held that

Because Conrad was not available to the legislature when it considered the [2001] amendments [to the habitual offender statute], the legislature did not have an opportunity to provide the clear, express guidance sought by this Court regarding double enhancements and the habitual offender statute. Nevertheless, when reading the plain language of the current habitual

offender statute, we cannot ignore its opening phrase—“[e]xcept as otherwise provided in this section.” Ind. Code. § 35-50-2-8. The use of the same prior felony to create the underlying felony of unlawful possession of a firearm by a serious violent felon and support the habitual offender enhancement does not appear “in this section.”

Thus, we held in Townsend that Conrad was superseded by the 2001 statutory amendments and the double enhancement was permitted under the habitual offender statute.

Indeed, this court followed Townsend in Mills v. State, 855 N.E.2d 296 (Ind. Ct. App. 2006), vacated on transfer, 868 N.E.2d 446 (Ind. 2007), which opinion was issued by this court on October 16, 2006, just a few months before Wilson filed his brief in his direct appeal. Wilson’s appellate counsel would have reasonably relied on Townsend as precedent in deciding to forego the double enhancement issue on appeal, regardless of how strongly trial counsel had argued otherwise. Given the case law applying the statute at the time of Wilson’s direct appeal, we must conclude that Wilson’s appellate counsel acted reasonably in not raising this issue. And because the case law during Wilson’s direct appeal was not in his favor, he cannot rely on subsequent case law to demonstrate prejudice from his appellate counsel’s strategic decision.

In sum, the post-conviction court’s conclusion that Wilson would likely not have prevailed on the issue of the double enhancement in his direct appeal does not support its conclusion that Wilson’s appellate counsel’s decision fell below the standards of reasonableness. Neither does the evidence support a determination that the second prong of Strickland has been met since, even by the post-conviction court’s own conclusion, Wilson cannot show that the outcome of his direct appeal would have been different but

for his appellate counsel's omission. The post-conviction court's grant of Wilson's petition for post-conviction relief is clearly erroneous.

Reversed.

BAKER, C.J., and MATHIAS, J., concur.