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IN THE
COURT OF APPEALS OF INDIANA

VAN JOHNSON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 48A02-0905-PC-451
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-9006-CF-57

October 30, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Van Johnson appeals the denial of his petition for post-conviction relief, arguing that the post-conviction court erroneously concluded that he did not receive the ineffective assistance of appellate counsel. Finding no error, we affirm.

FACTS

This court has described the facts underlying Johnson's conviction as follows:

> On the evening of June 10, 1990, Johnson shot and killed James Wagner ("Wagner") when Wagner rang Johnson's doorbell to collect money for Wagner's children's paper route. Johnson was subsequently convicted of voluntary manslaughter and sentenced to a term of forty years with ten years suspended. In 1995, our Supreme Court reversed Johnson's conviction and remanded for a new trial.
>
> Prior to his second trial on the same charges, Johnson made a motion for $600 to purchase a suit; a motion for a private investigator; and a motion requesting another attorney. The trial court denied all of these motions. The trial court refused to provide the $600 requested by Johnson, but did offer to provide less expensive clothing as was its practice with other indigent defendants. Johnson did not accept the trial court's offer. On June 20, 1996, the jury in the second trial found Johnson guilty of voluntary manslaughter. The trial court sentenced Johnson to the same forty-year sentence as it had done before.

Johnson v. State, No. 48A02-9610-CR-664, slip op. at 2 (Ind. Ct. App. Feb. 24, 1998). Johnson raised a number of issues on direct appeal, including ineffective assistance of trial counsel based on his attorney's failure "to get appropriate clothing for Johnson," arguing that his attorney had "allowed Johnson to be dressed in jail clothing throughout the trial in the presence of the jury." Id. at 12. This court affirmed the conviction and sentence, and our Supreme Court later denied transfer.

On July 6, 2007, Johnson filed a second amended pro se petition for post-conviction relief.[1] Among other things, Johnson argued that the trial court erred by compelling Johnson to appear before the jury in jail clothing and that his appellate attorney was ineffective for failing to argue trial court error in this regard. Following a hearing on the petition—at which Johnson did not call his appellate attorney to testify—the post-conviction court denied Johnson's petition. Johnson now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Perry, 904 N.E.2d at 307. 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. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Perry, 904 N.E.2d at 307; see also P-C.R. 1(1).

II. Ineffective Assistance of Appellate Counsel

[1] Johnson filed his first pro se petition on June 6, 2000, and a first amended petition on June 26, 2006.

Johnson's only argument on appeal is that the post-conviction court should have found that he received the ineffective assistance of appellate counsel. Specifically, Johnson contends that counsel should have argued, in his direct appeal, that the trial court erred by compelling him to wear jail clothing in front of the jury.[2]

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id.

To show that counsel was deficient for failing to raise an issue on direct appeal, i.e., waiving the issue, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000). We apply this scrutiny because the decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). Thus,

[2] To the extent that Johnson raises a free-standing claim of error on this basis herein, we decline to address the argument, inasmuch as it is waived. See Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) (holding that a free-standing claim that was available on direct appeal may not be raised in a post-conviction proceeding; instead, it must be raised as an ineffective assistance of counsel claim). Furthermore, to the extent that Johnson argues that his trial counsel was ineffective for this reason, we note that he has waived this claim as well because it was raised in his direct appeal. See Woods v. State, 701 N.E.2d 1208, 1210 (Ind. 1998) (holding that an ineffective assistance of trial counsel claim is foreclosed in post-conviction proceedings if it was raised on direct appeal).

ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id.

Here, Johnson contends that his attorney should have argued that the trial court committed error by compelling him to wear jail clothing in front of the jury. As noted above, however, appellate counsel did raise this issue in the context of an ineffective assistance of trial counsel claim. This court did not find the argument to be persuasive:

> Prior to trial, Johnson requested $600 from the trial court to purchase clothing commensurate with his status as a medical doctor. The trial court denied this request, stating that it would not provide such a large sum of money, but would instead provide a lesser sum as was its practice with indigent defendants. Johnson's attorney, just prior to the start of the trial, asked permission to purchase a suit, shirt, and tie from Goodwill. The trial court agreed to this, but Johnson did not take advantage of this opportunity. In fact, during trial Johnson refused an offer for more appropriate clothing. From the record, it appears that Johnson chose to wear the clothing provided him by the jail instead of taking advantage of the trial court's offer to purchase more suitable clothing. Johnson was not compelled to wear the clothing he did and, thus, there was no constitutional error. Moreover, Johnson's attorney did precisely what Johnson claims he did not do; he obtained permission to buy more suitable clothing. We find no error.

Johnson, slip op. at 6-7.

If a defendant is truly compelled to go to trial in jail garb, then his rights under the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution have been violated. Hackett v. State, 716 N.E.2d 1273, 1275 (Ind. 1999) (citing Estelle v. Williams, 425 U.S. 501, 505 (1976)). Here, however, the record clearly establishes that Johnson was not compelled to wear prison garb. The trial court made multiple offers to Johnson to aid in the purchase of affordable or secondhand

clothing, but Johnson, preferring instead to procure a new $600 suit, declined. It was Johnson's decision to appear before the jury in prison garb,[3] and the trial court committed no error in this regard. Therefore, Johnson's appellate counsel was not ineffective for deciding not to raise this issue in his direct appeal.

The judgment of the post-conviction court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.

[3] Additionally, we note that the jail clothes consisted of a dark blue shirt and light blue pants and did not have any jail markings on them. Appellee's Br. p. 9.