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
Nov 13 2009, 10:14 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

BENJAMEN W. MURPHY
Murphy Yoder Law Firm, P.C.
Merrillville, 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

WILLIAM E. RILEY,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 45A03-0903-PC-110
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-9509-CF-184

November 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

William Edward Riley was convicted of two counts of dealing in cocaine, both Class A felonies, dealing in a look-alike substance and possession of cocaine, both Class D felonies, and found to be an habitual offender; he was sentenced to sixty years. After Riley's convictions and sentence were affirmed on direct appeal, Riley filed a petition for post-conviction relief arguing his trial counsel was ineffective for failing to offer into evidence a taped conversation to discredit the confidential informant's testimony. Riley appeals the denial of post-conviction relief, raising a single issue that we restate as whether the post-conviction court properly denied Riley relief on his claim of ineffective assistance of trial counsel. Concluding the post-conviction court properly denied Riley relief, we affirm.

Facts and Procedural History[1]

In 1994, Anthony Young was charged in Lake County with Class C felony possession of cocaine and with being an habitual offender. Young sought to work as a confidential informant. Young told the deputy prosecutor in charge of the drug unit, Thomas Stephaniak, that Riley sold drugs. Young entered a plea agreement, agreeing to plead guilty to cocaine possession in exchange for the State's dismissal of the habitual offender allegation, with the further understanding that if Young as an informant contributed to a prosecutable case against Riley, the State would "ask the court to

[1] We heard oral argument on October 27, 2009, at Benton Central Junior-Senior High School in Oxford, Indiana. We thank Benton Central for its hospitality and counsel for their advocacy.

withdraw his plea of guilty as to the possession of cocaine and dismiss the charges against him." Record of Proceedings at 207.[2]

Stephaniak placed Young under the direction of two Lake County Drug Task Force officers, Anthony Stanley and Reginald Harris, to work with them to investigate Riley. The Officers directed Young to contact Riley and let them know when Riley would be traveling to Lake County from Indianapolis. Officer Harris worked undercover and accompanied Young on three controlled buys, while Officer Stanley watched the buys from a distance. On August 14, 1995, Young and Officer Harris made a purchase from Riley of a look-alike substance known as bogeyman. On August 29, 1995, Young and Officer Harris made a second purchase from Riley, which field-tested positive for cocaine. Finally, on September 1, 1995, Officer Harris alone made a purchase from Riley, which field-tested positive for cocaine.

On September 1, 1995, the State charged Riley with two counts of dealing in cocaine, both Class A felonies; dealing in a look-alike substance, a Class D felony; possession of cocaine, a Class D felony; and being an habitual offender. On September 3, 2005, Stephaniak telephoned Young and tape-recorded their conversation, which included the following exchange:

> Young: "As far as for me coming down and testifying, I got the hell of a mouthpiece. Don't you know that Tom? If I'm going to convict these guys, they through. If I want to get away, give Ed the juice, I know the words to say up on the court Tom . . ."
>
> Stephaniak: "Well you realize regardless of what happens you got to tell the truth. Right?"

[2] The Record of Proceedings ("ROP") is the four-volume record from Riley's direct appeal, docketed under cause number 45S00-9608-CR-538. On June 26, 2009, this court, granting Riley's motion to supplement the record, ordered the ROP included as part of the record for this appeal.

> Young: "I realize that, but there's a lot of ways you could talk on the stand, Tom. You know, just a matter of saying I can't recall, you know, and things like that. But, I'm just saying Tom, I was, trained by the, by the Feds. You know, that was who I first worked for. He trained me well, you know. So when it comes to court, I have no problems. Ed is, Ed and Motown is through; with the tapes and you asking me the questions, if we got them, they through man. I'm not scared to come into court . . . ."

Appellant's Appendix at 60-61.

Riley's jury trial was scheduled to begin Tuesday, February 20, 1996. On October 31, 1995, Riley filed a motion to produce evidence, including all audiotapes. Six audiotapes were made available to Riley on December 7, 1995, and included taped conversations between Young and the Officers. The State advised Riley that other tapes would be made available later. On January 30, 1996, Riley filed a motion requesting funds to hire an expert to enhance the audiotapes, representing the taped conversations were inaudible. On February 13, 1996, one week before trial, four additional audiotapes were made available to Riley's counsel and contained conversations between Young and Stephaniak.

On Friday, February 16, 1996, Riley's counsel filed a verified motion for a one-week continuance of the trial based in part on the late tender of the audiotapes by the State and in part on Young's prior unavailability to be deposed. Riley's counsel stated he "d[id] not believe that he ha[d] sufficient time to prepare his defense" by the scheduled trial date, and "[c]ounsel verily believes that Defendant will be denied the effective assistance of counsel and fundamental due process . . . if counsel is forced to trial on that date." ROP at 41-42. The trial court did not directly rule on the motion for continuance. Also on February 16, 1996, Riley's counsel deposed Young.

On February 20, 1996, the morning of trial, Riley's counsel again filed a motion for continuance, stating he had been "unable to listen to all of the tapes last week," id. at 47, and only over the weekend had become aware the State offered Young a complete dismissal of charges in exchange for testimony. Further, the verified motion stated "the tape of the dismissal offer has speed problems, . . . [and] Defendant has not had the opportunity to find an expert to correct these errors and make the tape clearer and more audible for the jury." Id. The trial court denied Riley's motion for continuance, and the jury trial began that day.

At trial, Riley asserted an entrapment defense. Riley's opening argument focused on Young's role as an agent of law enforcement and asserted "there will be insufficient evidence for you to find beyond a reasonable doubt that Ed Riley was predisposed to commit these offenses." Id. at 170. The State conceded Young's role as a confidential informant, offering into evidence Young's pre-trial agreement, whereby the State agreed to dismiss Young's cocaine possession charge in exchange for testimony against Riley, as well as Young's plea agreement to cooperate with Lake County law enforcement in exchange for dismissal of the habitual offender allegation. Riley's counsel elicited testimony from Stephaniak (now a Lake County Superior Court Judge) that dismissal of Young's cocaine possession charge "entirely hinged and solely hinged upon him bringing . . . a prosecutable case against Ed Riley," id. at 228, and required Young's testimony against Riley in the present case.

Officers Stanley and Harris took the stand for the State. Officer Stanley testified he observed all three controlled buys from a distance. Officer Harris testified he was

present at all three controlled buys and each time handed the buy money to Riley and received the cocaine or bogeyman directly from Riley. As to the first controlled buy, Officer Harris testified he and Riley "had a conversation about purchasing something called bogeyman," id. at 405, and Riley told Harris he "could make nine times the amount of money that [he] paid for it," id. at 407. As to the second controlled buy, Officer Harris related his and Riley's conversation to the effect that "I owed him $270.00 for the rest of the package that I had just got, and then the discussion of the price for the ounces and the ounces of bogeyman." Id. at 418-19. As to the third controlled buy, Officer Harris related he and Young spoke about the size of the cocaine baggies and the amount of money that could be made by reselling them, and Riley stated "he was making a little money" and Officer Harris "was making a lot of money." Id. at 423. Officer Harris further related he and Riley had a "conversation about purchasing more cocaine, more bogeyman" directly from Riley without involving Young, and "[Riley] gave me his phone number and said I could call him directly. Also I was to go back later on that afternoon and get some more cocaine from him." Id. at 425-26.

Young, also called by the State, testified to his plea and pre-trial agreements that he would "help make a case on Mr. Riley" in return for dismissal of the charges against him. Id. at 484. Young admitted he was a drug dealer himself between 1980 and 1994. Young then related his contacts with Riley, his meetings with Officers Stanley and Harris, and the first two controlled buys involving Riley. When asked what terminology he used in speaking with Riley, Young stated, "[j]ust dope terminology, you know, street slang when we talking about the drugs, just like a bogeyman, that's a terminology that

only maybe a drug dealer understand." Id. at 517. Young further testified, "[n]o one ever taught me how to testify in court," and "[n]o one ever taught me how to be a confidential . . . informant." Id. at 521.

Riley's counsel did not introduce into evidence the taped conversation in which Young told Stephaniak he had been trained "by the Feds," bragged he was "the hell of a mouthpiece," and claimed to know "there's a lot of ways you could talk on the stand." Appellant's App. at 60-61. Counsel did not ask Young if he had ever made such statements to Stephaniak.

However, Riley's counsel extensively cross-examined Young. Riley's counsel impeached Young with his criminal record of two prior theft convictions and with his deposition testimony that he had previously been trained in helping police undercover work. Young also admitted he had testified previously as a cooperating witness. Young further admitted he "hated Mr. Riley's actions, yes, some of the things he's done," including what he believed was Riley's involvement in a friend's murder. Id. at 548. Young conceded he would have done anything to bring a case against Riley so his own charges would be dismissed. Riley's counsel also elicited testimony from Stephaniak that he did not trust Young or any informant, as well as testimony from Officer Stanley that Young "would have done anything to stay out of jail," id. at 394, and that Young was "unreliable" and "untruthful," id. at 400-01.

The State's closing argument conceded Young had an interest in testifying against Riley and "is by no means a squeaky clean person," but posited Young's trial testimony should nonetheless be found truthful. Id. at 747-48. Riley's closing argument focused on

the fact Young had an incentive to testify against Riley and wanted revenge against Riley because of his friend's murder. Counsel also pointed to Officer Stanley's testimony Young was unreliable and untruthful. Counsel then asserted Young's testimony was the only evidence Riley was predisposed to deal in controlled substances and the State had presented insufficient evidence of predisposition to rebut Riley's entrapment defense.

Riley was found guilty on all counts and determined to be an habitual offender. The trial court imposed a total sentence of sixty years. Riley appealed, and our supreme court affirmed his convictions and sentence. Riley v. State, 711 N.E.2d 489 (Ind. 1999).

On July 20, 2000, Riley filed a petition for post-conviction relief, and post-conviction hearings were held in March, April, and July 2005. Officer Stanley, now a Sergeant with the Gary Police Department, was the only witness who testified at the hearings. Riley offered and the post-conviction court admitted, among other evidence, Stephaniak's affidavit and deposition, seven audiotapes, and four CDs. Riley did not offer any testimony or affidavit from his trial counsel.

In October 2008, Riley submitted proposed findings of fact and conclusions of law. In December 2008, the State submitted its proposed findings of fact and conclusions of law. The post-conviction court entered findings of fact and conclusions of law on February 10, 2009, concluding Riley had established neither trial counsel's deficient performance nor prejudice, and thereby denied post-conviction relief. Riley now appeals.

Discussion and Decision

I. Standard of Review for Post-Conviction Claims

Post-conviction proceedings are civil in nature. Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002), cert. denied, 540 U.S. 830 (2003). A petitioner for post-conviction relief bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Stevens, 770 N.E.2d at 745. We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we review conclusions of law de novo. Burnside v. State, 858 N.E.2d 232, 237 (Ind. Ct. App. 2006). A petitioner appealing the denial of post-conviction relief appeals from a negative judgment, and to the extent his appeal turns on factual issues, must establish that the evidence as a whole leads clearly and unmistakably to a conclusion opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745.

II. Ineffective Assistance of Trial Counsel

A. Standard of Review

To establish a violation of the right to effective counsel as guaranteed by the Sixth Amendment, the petitioner must establish both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). First, the petitioner must show counsel's performance was deficient, meaning the representation fell below an objective standard of reasonableness, depriving the petitioner of "counsel" within the meaning of the Sixth Amendment. Id. When assessing this prong, we will presume 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." Douglas v. State, 800 N.E.2d 599, 607 (Ind. Ct. App. 2003) (quotation omitted), trans. denied.

Under the second prong, the petitioner must show the deficient representation resulted in prejudice. Wesley, 788 N.E.2d at 1252. Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. We will conclude a reasonable probability exists if our confidence in the outcome is undermined. Douglas, 800 N.E.2d at 607; see Strickland, 466 U.S. at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome . . . . [but] a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."). 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. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

B. Trial Counsel's Performance

At the outset, we observe it is difficult to determine whether trial counsel's failure to use the taped conversation between Young and Stephaniak was a strategic decision or the result of having failed to listen to all the tapes. Trial counsel's verified motions for continuance do not reference the Young-Stephaniak conversation explicitly, and they refer to trial counsel's shortage of time, thereby suggesting trial counsel may not have listened to all the tapes before trial. However, the State points out trial counsel has not offered any affidavit or testimony in the post-conviction proceedings, which under our

precedent raises an inference that trial counsel's testimony, if offered, would not support Riley's contention trial counsel failed to listen to all the tapes. See Conley v. State, 259 Ind. 29, 34, 284 N.E.2d 803, 807 (1972).

If trial counsel indeed failed to listen to all the tapes and was thereby ignorant of the Young-Stephaniak conversation, the fault lies not only with trial counsel but also with the State for the late tender of the tapes and the trial court for denying the requested continuance. The State is constitutionally obligated to turn over exculpatory evidence to the defense, see Stephenson v. State, 864 N.E.2d 1022, 1056 (Ind. 2007), cert. denied, 128 S. Ct. 1871 (2008), and the trial court's denial of a brief continuance, without any explanation in the record, may well have been an abuse of discretion, crediting trial counsel's representations a continuance was necessary to present the audiotapes as part of Riley's defense. See Vasquez v. State, 868 N.E.2d 473, 476-77 (Ind. 2007) (trial court abused its discretion by excluding late-discovered defense witness rather than ordering brief continuance).

These concerns notwithstanding, none are grounds for reversing the post-conviction court's denial of post-conviction relief. The trial court's denial of a continuance, even if an abuse of discretion, did not undermine the structure of a fair trial so as to constitute fundamental error, and our supreme court has further held that freestanding claims of fundamental error are not available in post-conviction proceedings if they could have been, but were not, raised on direct appeal. Martin v. State, 760 N.E.2d 597, 599 (Ind. 2002). On direct appeal, Riley's appellate counsel could have, but did not, raise the denial of a continuance as an issue. See Riley, 711 N.E.2d at 491.

Further, in his briefs and oral argument in this case, Riley declined to argue his appellate counsel was ineffective for not appealing the denial of a continuance. Therefore, we do not address the effect of the trial court's denial of a continuance, as either fundamental error or a claim of ineffective appellate counsel. Further, we need not decide whether trial counsel's performance fell below an objective standard of reasonableness because, as discussed below, we find the prejudice prong of Strickland dispositive of Riley's claim his trial counsel was ineffective.

C. Prejudice From Trial Counsel's Performance

Riley argues he was prejudiced by his trial counsel's failure to establish Young's level of training through the taped conversation because the primary evidence about police persuasion and any predisposition, as relevant to rebutting Riley's entrapment defense, came from Young. The State replies Riley's counsel impeached Young extensively through other methods and alerted the jury to some of Young's prior training, and Riley has not shown how the taped conversation would have undermined the evidence rebutting his entrapment defense. We agree with the State's analysis of the prejudice standard.

In general, "[t]he failure of counsel to introduce the prior inconsistent statement of a witness does not alone meet the standards for reversal under an ineffective assistance of counsel claim." Davenport v. State, 689 N.E.2d 1226, 1231 (Ind. 1997), modified on other grounds on reh'g, 696 N.E.2d 870 (1998). Rather, prejudice results if the impeachment that could have been, but was not, effected would have called into question the credibility of a witness whose credibility was crucial to the State's case. See, e.g., J.J.

v. State, 858 N.E.2d 244, 251-52 (Ind. Ct. App. 2006) (prejudice resulted from counsel's failure to inform jury that co-conspirator-witness had been granted use immunity in exchange for testimony; witness was "of great consequence to a jury's consideration of the case," and prosecutor argued testimony was credible because it was against penal interest); Ellyson v. State, 603 N.E.2d 1369, 1375 (Ind. Ct. App. 1992) (prejudice resulted from counsel's failure to lay foundation for victim-wife's prior inconsistent statements; "[b]ecause the only direct evidence of husband's guilt was contained in wife's testimony, wife's impeachment became an important matter at trial"); see also Rose v. State, 846 N.E.2d 363, 368-69 (Ind. Ct. App. 2006) (prejudice resulted from counsel's failure to object to improper bolstering of victim-witness's credibility in molestation case; evidence apart from victim's testimony was inconclusive as to defendant's guilt).

If, on the other hand, the witness's credibility was not a central issue in the case or was already questioned or undermined by other evidence, Indiana courts have concluded failure to offer additional impeachment does not amount to prejudice. See, e.g., Stephenson, 864 N.E.2d at 1043 (no prejudice resulted from counsel's failure to impeach with prior inconsistent statement a witness who contradicted defense's alibi witness on a point unrelated to the alibi, when inconsistency was already reflected in the record); Carter v. State, 738 N.E.2d 665, 674 (Ind. 2000) (no prejudice resulted from failure to impeach identification witness with prior statement; three other witnesses identified defendant, and witness was subjected to "vigorous cross-examination" regarding memory and perception); Johnson v. State, 832 N.E.2d 985, 1004 (Ind. Ct. App. 2005) (no

prejudice resulted from failure to question co-conspirator-witness about his entire criminal history, when several of witness's prior convictions were already elicited), trans. denied.

This latter group of cases is most on point here, because Young's credibility was called into question in multiple ways, including by the State's witnesses. Most importantly, the jury was fully informed of Young's agreements whereby he received leniency from the Lake County prosecutor's office in exchange for testimony against Riley. Defense counsel cross-examined Young regarding his deposition testimony he had received training in helping police undercover work and had testified previously as a cooperating witness. Young further admitted wanting revenge against Riley for what he believed was Riley's role in a friend's murder. Finally, defense counsel elicited Stephaniak's statement he did not trust Young or any informant, as well as Officer Stanley's concession Young was unreliable and untruthful. This evidence alerted the jury to Young's questionable credibility, his interest in testifying against Riley, and his prior experience testifying for the State, even though defense counsel did not confront Young with his taped conversation with Stephaniak. Although Riley is correct that introducing that conversation, where Young bragged about training with federal law enforcement and his ability to bring Riley down, would have helped Riley's defense, we cannot say it would have introduced a new issue into the trial or necessarily altered the jury's evaluation of the evidence as a whole.

The issue, ultimately, is whether Young's credibility and reliability were so crucial to the State's case that if the jury had heard the taped conversation, the trial's outcome

might reasonably have been different. In light of the entire trial record, we do not think that is the case. Although the State called Young as a witness to relate the controlled buys and testify to Riley's knowledge of drug jargon and prices, which was evidence of Riley's predisposition, the State did not rely on Young's testimony alone. Officer Stanley testified observing all three controlled buys and Officer Harris testified making all the transfers of drugs and money. Officer Harris further testified to his conversations with Riley whereby Riley displayed knowledge of drug jargon and prices and sought to arrange future drug transactions.

On direct appeal, our supreme court held the State presented sufficient evidence of Riley's predisposition: "The evidence most favorable to the judgment is that [Riley] was familiar with drug jargon and prices, that he engaged in multiple transactions, and that he undertook to arrange future transactions. These facts are sufficient to show a predisposition to deal in controlled substances." Riley, 711 N.E.2d at 494. Because these facts were presented to the jury by both Young and Officer Harris, it was not necessary for the jury to credit Young's testimony in order to reject Riley's entrapment defense, and we do not know whether the jury did so rely on Young. Even assuming the taped conversation would have undermined Young to the point the jury would have completely discounted his testimony, the jury still could have relied on Officer Harris's testimony to establish Young's predisposition.

Thus, even if Riley's counsel had offered into evidence the taped conversation between Young and Stephaniak, there is no reasonable probability the jury would have discounted the State's independent evidence Riley engaged in the charged transactions

and was predisposed to commit them. Riley has not established his trial counsel's performance resulted in prejudice, and therefore he has not established ineffective assistance of counsel.

Conclusion

Riley has not established his trial counsel was constitutionally ineffective, and therefore, the post-conviction court properly denied Riley post-conviction relief.

Affirmed.

RILEY, J., and MATHIAS, J., concur.