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IN THE
COURT OF APPEALS OF INDIANA

DAVID I. SHIRLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 22A01-0812-PC-567
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable Terrence J. Cody, Special Judge
Cause No. 22D01-9612-CF-368

November 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

David Shirley appeals the denial of his petition for post-conviction relief. On appeal, Shirley presents one issue for our review: Did he receive ineffective assistance of trial and appellate counsel?

We affirm.

The facts, as set out in a memorandum decision by this court in Shirley's direct appeal, are as follows:

> On December 5, 1996, Delilah Esarey (Esarey) was working at a drug store in New Albany, Indiana. Before the end of her shift, Esarey went to the parking lot and started her van to warm it up. She left the driver's door unlocked and returned inside the store. Soon thereafter, Officer Juliann Condra (Officer Condra) of the New Albany Police Department pulled into the parking lot adjacent to the store. As Officer Condra was entering the store, she noticed someone in Esarey's van. Officer Condra purchased some items in the store and exited with Esarey. When Officer Condra realized the van belonged to Esarey, she told Esarey someone was in the van. Officer Condra looked inside the van and observed Shirley lying in the van covered with pillows which obscured him from being seen from the driver's seat. When Esarey screamed, Shirley ran out of the car. Officer Condra chased Shirley, apprehending him in the parking lot. In response to police questioning, Shirley claimed he was homeless and was seeking refuge from the cold in Esarey's van. He also claimed that his car had broken down that that he was unaware of the car's location. Police later discovered Shirley's truck in the parking lot, directly behind Esarey's van. The truck had been in the parking lot for several hours and was operable.

Shirley v. State, 22A01-9712-CR-399, slip op. at 2 (Ind. Ct. App. July 31, 1998).

On December 6, 1996, the State charged Shirley with attempted rape and attempted robbery, both as class B felonies. The State also alleged Shirley to be a habitual offender. On June 4, 1997, a mistrial was declared in Shirley's first trial when the jury failed to reach a verdict. On June 17, 1997, the State filed an amended information charging Shirley with Count I, attempted rape, and Count II, attempted criminal confinement, both as class B

felonies. The State again alleged Shirley to be a habitual offender. A second jury trial resulted in Shirley being found guilty as charged in the amended information and adjudicated a habitual offender. On August 21, 1997, the trial court sentenced Shirley to twenty years on each conviction with the sentences to be served consecutively. The trial court enhanced the sentence by thirty years for the habitual offender determination, for a total sentence of seventy years imprisonment.

Shirley appealed his convictions to this court, arguing that the evidence was insufficient to support his convictions and that it was fundamental error for the trial court to admit evidence of his prior rape conviction. In a memorandum decision issued July 31, 1998, this court affirmed Shirley's convictions.

On October 19, 1999, Shirley filed a *pro se* petition for post-conviction relief and a motion for change of venue from the Floyd Superior Court 1. On July 13, 2005, a special judge was appointed to hear Shirley's post-conviction petition. The petition was amended twice by counsel, and a hearing was subsequently held on September 7, 2006. The post-conviction court filed its findings of fact and conclusions of law denying Shirley's requested relief on October 7, 2008. This appeal ensued.

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentence by filing a post-conviction petition. Ind. Post-Conviction Rule 1(1). Post-conviction proceedings, however, do not afford a petitioner with a super-appeal. *Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002). In post-conviction proceedings, complaints that something went awry at trial are

generally cognizable only when they show deprivation of the right to effective assistance of counsel or issues demonstrably unavailable at the time of trial or direct appeal. *Sanders v. State*, 765 N.E.2d 591 (Ind. 2002).

The petitioner in a post-conviction proceeding must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Fisher v. State*, 810 N.E.2d 674 (Ind. 2004). "When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Fisher v. State*, 810 N.E.2d at 679. To succeed on appeal from the denial of relief, the petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite to the one reached by the post-conviction court. *Johnson v. State*, 832 N.E.2d 985 (Ind. Ct. App. 2005), *trans. denied*.

On appeal, Shirley argues that the post-conviction court erred in concluding that he was not denied the effective assistance of trial and appellate counsel.[1] Specifically, Shirley maintains that his trial counsel rendered ineffective assistance by failing to object to the convictions and sentences imposed on these convictions on grounds that they violated double jeopardy.[2] Shirley further claims that his appellate counsel rendered ineffective assistance by not raising the issue of a double jeopardy violation under the Indiana Constitution on direct appeal as fundamental error.

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[1] Shirley was represented by different counsel at the trial and at the direct appeal state of the proceedings.

[2] The double jeopardy clause in the Indiana Constitution is embodied in article 1, section 14, and provides, "No person shall be put in jeopardy twice for the same offense."

Our standard of review of claims of ineffective assistance of trial and appellate counsel follows:

> We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective 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. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. 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. Failure to satisfy either prong will cause the claim to fail.

Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)) (internal citations omitted), *trans. denied*. Claims of ineffective assistance of appellate counsel generally fall into one of three categories: (1) denying access to appeal; (2) failing to raise issues; and (3) failing to present issues competently. *Bieghler v. State*, 690 N.E.2d 188 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998).

Here, Shirley was charged with attempted rape and attempted robbery. The amended charging information provided as follows:

> COUNT I, ATTEMPTED RAPE, CLASS B FELONY, IC 35-42-4-1, IC 35-41-5-1
>
> Officer Julie Condra, being duly sworn upon her oath, says on or about the 5th day of December, 1996, in Floyd County, State of Indiana, David I Shirley did intentionally engage in conduct that constituted a substantial step toward commission of the crime of rape, to-wit: intentionally entering the vehicle of Delilah Esarey, hiding in the back seat with a belt in his pocket, with intent to engage in sexual intercourse with a member of the opposite sex, to-wit: Delilah Esarey when Delilah Esarey is compelled by the imminent use of force.

> COUNT II, ATTEMPTED CRIMINAL CONFINEMENT, CLASS B FELONY, IC 35-42-3-3
>
> Officer Julie Condra, being duly sworn upon her oath, says on or about the 5th day of December, 1996, in Floyd County, State of Indiana, David I Shirley did intentionally attempt to remove another person, to wit: Delilah Esarey by force or threat of force from one place to another by taking a substantial step, to wit: intentionally entering Esarey's van, hiding in the back of the van, and holding a leather belt, to wit: a deadly [sic] weapon.

Transcript at 264-65. The language employed in the charging information tracks the statutory language defining the crimes.

Relying upon *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999),[3] Shirley argues that his convictions violate double jeopardy because the evidence admitted at trial that supported the substantial step toward the completion of the crime of rape and completion of the crime of criminal confinement was the same. Shirley acknowledges that *Richardson* was decided after his trial and direct appeal were complete. Shirley does not, however, acknowledge our Supreme Court's decision in *Taylor v. State*, 717 N.E.2d 90, 95 (Ind. 1999), decided the same day as *Richardson.* In *Taylor*, our Supreme Court noted that the body of case law on double jeopardy was characterized by "substantial inconsistencies" and that the new methodology for analyzing claims under the Indiana double jeopardy clause formulated in *Richardson* constituted a new rule of criminal procedure that is not available for retroactive application in post-conviction proceedings. *Id*.

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[3] In *Richardson*, our Supreme Court formulated a new methodology for analyzing claims under the Indiana double jeopardy clause, establishing a two-part test. According to that test, multiple offenses are the same offense in violation of article 1, section 14, "if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Id*. at 49. To establish a violation under the actual evidence test, a defendant "must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the elements of a second challenged offense." *Id*. at 53.

Shirley directs us to two cases that he claims could have supported an argument by his trial or appellate counsel to the effect that the actual evidence presented at trial should be considered in the double jeopardy analysis (much like the test that was established in *Richardson*). *See Wethington v. State*, 560 N.E.2d 496 (Ind. 1990); *Jones v. State*, 523 N.E.2d 750 (Ind. 1988), *abrogated by Richardson v. State*, 717 N.E.2d 32. With regard to double jeopardy claims, however, the prevailing analysis at the time of Shirley's sentencing and appeal was set forth in *Games v. State*, 684 N.E.2d 466 (Ind. 1997), *reh'g granted on other grounds*. In *Games*, our Supreme Court adopted the analysis for federal double jeopardy claims set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), as the analysis for claims under the Indiana double jeopardy clause. The *Blockburger* test requires only a comparison of the statutory elements. *Games v. State*, 684 N.E.2d 466. "'[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied . . . is whether each provision requires proof of an additional fact which the other does not.'" *Games v. State*, 684 N.E.2d at 475 (quoting *Blockburger v. United States*, 284 U.S. at 304). That is, "'[t]he test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes . . . if each statute requires proof of an additional fact which the other does not . . . .'" *Id*. (quoting *Blockburger v. United States*, 284 U.S. at 304). Thus, the *Blockburger* test focused on the statutory elements and the proof necessary to prove the statutory elements, rather than on the actual evidence presented at trial.

Here, when the trial court entered the judgment of convictions and sentenced Shirley, *Games* had been decided approximately one month before and clearly set forth the Supreme Court's then-current view of the appropriate analysis for claims under Indiana's Double Jeopardy Clause. A comparison of the statutory language for rape and criminal confinement reveals that there could be no double jeopardy violation because each statute required proof of an additional fact that the other did not. With the precedent available at the time and given the crimes for which Shirley was convicted and sentenced, we cannot find that Shirley's trial counsel rendered deficient performance in not arguing that his convictions were in violation of double jeopardy principles.

The same holds true for our review of appellate counsel's performance. Here, appellate counsel did not raise the issue of double jeopardy on appeal. Our Supreme Court has held that when counsel fails to raise an issued on appeal, a reviewing court should be deferential to appellate counsel and "should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." *Bieghler v. State*, 690 N.E.2d at 194. On direct appeal, Shirley's appellate counsel challenged the sufficiency of the evidence and the propriety of the trial court's admission of evidence concerning his prior conviction for rape. These issues were clearly stronger than an argument challenging his convictions on double jeopardy grounds given the Supreme Court's recent analysis in *Games* regarding double jeopardy claims. In light of *Games*, there was no reasonable probability that a double jeopardy argument would have succeeded on appeal. Giving due deference to trial and

appellate counsel's decisions considering the precedent available to them and the facts of the case, Shirley has failed to establish that either his trial or appellate counsel's performance was deficient. The post-conviction court properly denied Shirley's petition for post-conviction relief.

Judgment affirmed.

BAKER, C.J., and RILEY, J., concur.