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IN THE
COURT OF APPEALS OF INDIANA

RODNEY JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1103-PC-97
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SAINT JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause No. 71D02-0612-PC-42

November 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

After Rodney Johnson initiated a direct appeal of his convictions for murder, a felony, and arson, a class B felony, he filed a *Davis/Hatton* petition, which this court granted. Johnson then filed a petition for post-conviction relief (PCR petition) that the post-conviction court denied. Johnson now appeals the denial of his PCR petition and reinstates his direct appeal. Johnson presents two issues for our review:

1. Did the court err in denying Johnson's PCR petition?

2. Did the trial court abuse its discretion by admitting into evidence hearsay testimony?

We affirm.

In early November 1996, Johnson, Shawn Williams, Aaron Cross, and another accomplice broke into Lyman Diggins's apartment to steal drugs and money. No money or drugs were found. Diggins did not know the identity of the perpetrators, and after the attempted burglary, gave drugs to Williams for safe-keeping due to the break-in. When Diggins asked that his drugs be returned to him, Williams directed Diggins to a storage unit in St. Joseph County.[1]

During the evening of November 5, 1996 or during the early morning hours of November 6, 1996, Diggins, Williams, and Johnson went to the storage unit in Diggins's vehicle. Williams entered the unit, claiming that Diggins's drugs were inside. Williams exited the storage unit, approached Diggins as he sat in his vehicle, and shot Diggins in the head/face. Johnson then shot Diggins three to four times in his chest and abdomen. Diggins died as a result of the gunshot wounds. Johnson and Williams returned later and cleaned the

scene with a broom and hot water, and they also buried the firearms they used to kill Diggins. Johnson and Williams then drove Diggins's vehicle, with Diggins's body inside, to Mishawaka, where they burned Diggins's body and vehicle along the side of the road.

At approximately 6:30 a.m. on November 6, Diggins's vehicle was discovered engulfed in flames. After the flames were extinguished, Diggins's body was found inside the burned-out vehicle. It was determined that Diggins was already dead when the fire started and that the fire was intentionally set by someone who poured gasoline in the passenger compartment of the vehicle.

A plastic gas cap/nozzle found close to the vehicle was examined for fingerprints. The fingerprints taken therefrom were compared with four suspects' fingerprints, but no match was found. Johnson was not a suspect during the initial investigation and therefore his fingerprints were not compared with the fingerprint taken from the gas cap at that time.

In early December 2004, Timothy Decker, a cold-case investigator with the South Bend Police Department, was contacted by federal authorities and informed that Cross had information regarding Diggins's murder. Decker met with Cross on December 15, 2004. Because Cross relayed information about Diggins's murder that had not before been released to the public (such as where Diggins had been shot and the caliber bullet used), Decker reopened the investigation. Diggins identified Johnson and Williams as the individuals that murdered Diggins. During the reopened investigation, Johnson's fingerprints were found to

[1] This was a ruse because Johnson and Williams no longer had the drugs Diggins gave Williams for safekeeping because they had already sold them.

match the fingerprint taken from the gas cap found at the scene of Diggins's burned-out vehicle.

On July 25, 2005, the State charged Johnson with murder, a felony, and arson, a class B felony. On August 22, 2005, the State amended the charging information to include a charge for conspiracy to commit murder, a class A felony. A five-day jury trial commenced on January 6, 2006. During the trial, the State elicited testimony from Cross, Anthony Jackson, Vance Moore, and Hardin Lanier. All four of those men, who were either imprisoned and/or awaiting sentencing on unrelated convictions, testified that they received no agreement for leniency or consideration in exchange for their testimony implicating Johnson in Diggins's murder.

Additionally, Charles Eakins of the South Bend Police Department testified that he matched Johnson's fingerprint to the fingerprint on the gas cap and that he sent his evaluation to a second examiner for verification. Johnson objected to any testimony regarding the conclusions of the second examiner and the trial court sustained the objection. At the conclusion of the evidence, the jury found Johnson guilty of all counts. On February 14, 2006, the trial court sentenced Johnson to sixty years imprisonment for murder and ten years for arson and vacated the conspiracy conviction. The trial court ordered the sentences served consecutively for an aggregate sentence of seventy years.

Johnson timely filed a Notice of Appeal on March 6, 2006. On October 16, 2006, this court granted Johnson's motion to remand for proceedings consistent with *Davis/Hatton* procedures and dismissed the appeal without prejudice to Johnson's right to appeal matters that could have been raised on direct appeal. On December 22, 2006, Johnson filed a PCR

petition. Following an evidentiary hearing, the PCR court entered an order denying Johnson's request for post-conviction relief on March 4, 2011. Johnson filed a Notice of Appeal on March 11, 2011. Johnson is appealing from the denial of his PCR petition and has also presented an issue on direct appeal.

1.

We first address Johnson's challenge to the denial of his PCR petition. Our standard of review is well settled. Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben–Yisrayl v. State,* 738 N.E.2d 253 (Ind. 2000), *cert. denied* 534 U.S. 1164 (2002); *Wieland v. State,* 848 N.E.2d 679 (Ind. Ct. App. 2006), *trans. denied.* The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben–Yisrayl v. State,* 738 N.E.2d 253. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals from a negative judgment. *Fisher v. State,* 878 N.E.2d 457 (Ind. Ct. App. 2007), *trans. denied.* The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the PCR court. *Id.* We will disturb a PCR court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the PCR court has reached the opposite conclusion. *Wright v. State,* 881 N.E.2d 1018 (Ind. Ct. App. 2008), *trans. denied.* The PCR court is the sole judge of the

weight of the evidence and the credibility of witnesses. *Lindsey v. State*, 888 N.E.2d 319 (Ind. Ct. App. 2008), *trans. denied.* We accept the PCR court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Fisher v. State*, 878 N.E.2d 457.

Johnson argues that the State failed to disclose discoverable information relating to the jailhouse informants. Specifically, Johnson asserts that there were promises, benefits, and agreements both of an informal and formal nature between the State of Indiana, the federal government, and the jailhouse informants who testified against him. Johnson maintains that the State's failure to disclose such information constituted a violation of his rights under the Sixth Amendment to the United States Constitution and article 1, section 11 of the Indiana Constitution.

We begin by noting that the Sixth Amendment of the United States Constitution guarantees a defendant the right to confront witnesses against him. *Tolliver v. State*, 922 N.E.2d 1272 (Ind. Ct. App. 2010) (citing *McCorker v. State*, 797 N.E.2d 257 (Ind. 2003)), *trans. denied*. This right is secured for defendants in state criminal proceedings through the Fourteenth Amendment. *Id.* The Indiana Supreme Court has previously determined that any beneficial agreement between an accomplice and the State, even when the agreement is not reduced to writing, must be revealed to the jury. *McCorker v. State*, 797 N.E.2d 257. "'This rule serves to help the jury better assess the reliability and honesty of the felon-witness.'" *Id.* at 266 (quoting *Morrison v. State*, 686 N.E.2d 817, 819 (Ind. 1997)). The full extent of the benefit offered to a witness is relevant to the jury's determination of the weight and credibility of the witness's testimony. *Id.*

The duty to disclose, however, arises only when there is an agreement or "confirmed promise" of leniency in exchange for testimony. *Wright v. State*, 690 N.E.2d 1098, 1113 (Ind. 1997); *Seketa v. State*, 817 N.E.2d 690 (Ind. Ct. App. 2004). An express agreement requiring disclosure does not exist if a witness testifies favorably in the hope of leniency, and the State neither confirms nor denies leniency to the witness. *Wright v. State*, 690 N.E.2d 1098. Similarly, hopes and expectations of a state witness coupled with evidence that a prosecutor/witness deal may have been consummated after the in-court testimony is insufficient to establish a duty to disclose a beneficial agreement. *Wright v. State*, 690 N.E.2d 1098.[2]

Johnson is correct that the testimony of Cross, Jackson, Moore, and Lanier was crucial to the State's case and that the State relied heavily upon the testimony of the four jailhouse informants to prove Johnson's role in the murder. Cross, a federal prisoner at the time, testified that Johnson admitted to him that he killed Diggins. Jackson, another federal prisoner, testified that he overheard a conversation wherein Williams discussed Diggins's murder and Johnson, within earshot of Williams, questioned Williams as to why he would

[2] In his brief, Johnson does not cite to or attempt to distinguish relevant case law regarding the duty to disclose promises of leniency in exchange for testimony. In arguing that his due process rights were violated, Johnson presents vague arguments relating to discovery violations and prosecutorial misconduct. We would be well within our discretion to find that Johnson waived the precise argument he has presented, but choose instead to address the merits.

discuss their involvement in the murder. Moore and Lanier both testified that Johnson admitted to killing Diggins during a conversation between the men while they were held in the St. Joseph County Jail in the same cell block as Johnson. Johnson maintains that each of the jailhouse informants received substantial benefit for the testimony implicating him in Diggins's murder that they provided during his trial.

Contrary to Johnson's assertions, the uncontroverted evidence from both the trial and the PCR hearing proved that Cross, Jackson, Moore, and Lanier did not receive any agreements in exchange for their respective testimonies. All four men testified that they had not received any promises of leniency or consideration in exchange for their testimony. The attorneys for Cross, Jackson, Moore, and Lanier substantiated their claims that no agreements were made to induce the men to testify. Johnson's trial counsel also investigated whether agreements existed prior to the four men providing their testimony during Johnson's trial, and he too was unable to discover any evidence of agreements. As the PCR court stated, "[n]o evidence was adduced that [Cross, Jackson, Moore, and Lanier] received any advance promises of leniency, or a reduction in sentences, for testifying in Johnson's trial." *Post-Conviction Relief Appendix* at 19. In fact, the PCR court specifically concluded that the "only evidence introduced at the . . . hearing with respect to such promises was that no such promises were made." *Id*. Because no agreements were in place, it appears the witnesses testified merely in hope of leniency, and therefore, no disclosure was necessary. *See Wright v. State*, 690 N.E.2d 1098; *Seketa v. State*, 817 N.E.2d 690.

In sum, although each witness received some reduction in their sentence or accepted a plea bargain to reduced charges after testifying in Johnson's trial, there were no agreements

beforehand, and thus, nothing for the State to disclose. Johnson's argument in this regard is based merely on conjecture. We further note, as did the PCR court, all four witnesses were questioned about agreements and their legal status during trial, and the jury could thus evaluate their credibility based upon that information. Based on the foregoing, we conclude that the PCR court did not err in denying Johnson's PCR petition.

2.

Johnson also presents an issue on direct appeal. Specifically, Johnson argues that the trial court abused its discretion in admitting hearsay evidence that a second fingerprint examiner compared the fingerprint on the gas cap with Johnson's fingerprint and confirmed Eakins's opinion that the fingerprint on the gas cap belonged to Johnson.

Questions regarding the admission of evidence are within the sound discretion of the trial court, and we review the court's decision only for an abuse of discretion. *State v. Seabrooks*, 803 N.E.2d 1190 (Ind. Ct. App. 2004). A trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before it, or if the court has misinterpreted the law. *Id.* Additionally, errors in admitting evidence are to be disregarded as harmless error unless they affect the substantial rights of the party. *Turben v. State*, 726 N.E.2d 1245 (Ind. 2000); Ind. Trial Rule 61. A trial court's ruling on the admissibility of evidence will be upheld if it is sustainable on any legal theory supported by the record, even if the trial court did not use that theory. *Gonser v. State*, 843 N.E.2d 947 (Ind. Ct. App. 2006).

During trial the State elicited testimony from Charles Eakins, who examined the gas cap for fingerprints and compared the latent fingerprint found thereon with Johnson's

fingerprints. Eakins testified that Johnson's fingerprint was on the gas cap. He was then asked about the procedure followed in making an identification using fingerprints.

> Q. In order to finally close out the file reported as a match, is there any procedure you have to follow before you close that file?
> A. Yes, we always send it to a second examiner for what we call a verification. Which amounts to an independent examination on their own- -

Trial Transcript at 719. Johnson objected to any testimony by Eakins concerning the second examiner's conclusion as to the identification of the fingerprint on the gas cap, claiming a violation of his confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004). The court found the issue was simply hearsay, and sustained the objection on that ground.[3] The court, however, permitted the State to use leading questions to further question Eakins about the initials of the second examiner found on the evidence because such was pertinent to establishing that proper procedures were followed.

Following the sidebar conference concerning Johnson's objection, the State elicited the following testimony from Eakins:

> Q. You said there were certain procedures that had to be followed before you could report a match and close your file; is that correct?
> A. That's correct.
> Q. Were those procedures followed in this case?
> A. Yes.
> Q. When you sent these . . . did you send the evidence itself out, the black plastic ring?
> A. Yes, I did.
> Q. And the fingerprint cards as well?
> A. Yes.
> Q. Did you eventually receive back the black plastic ring and the fingerprint cards that you had sent?

[3] The trial court specifically stated: "But as to what any other examiner found in this case, that's just flat out hearsay." *Id*. at 721.

A. Yes.
Q. Were there some extra initials on those items, either on the box for the fuel filler ring or on the fingerprint card that you got back?
A. Yes.
Q. And did you recognize those initials?
A. Yes, I did.
Q. They were from a different examiner?
A. Correct.
Q. Other than those extra initials from that other examiner, were there any other changes to the black plastic cap, print card or any of the other stuff that you had sent?
A. No.

Id. at 722-23. Other than his first objection, Johnson made no further objections to Eakins's testimony, did not move to strike any portion of Eakins's testimony, and did not request an admonishment. Thus, to the extent Johnson argues that the trial court abused its discretion in admitting hearsay testimony that another fingerprint examiner conducted a subsequent examination and confirmed Eakins's conclusion, Johnson has not preserved his challenge to the admissibility of the evidence. *See Brown v. State*, 929 N.E.2d 204 (Ind. 2010) (holding that a contemporaneous objection at the time evidence is introduced at trial is required to preserve issue for review).

Waiver notwithstanding, contrary to Johnson's claim, none of Eakins's testimony following Johnson's objection indicated that the second examiner confirmed Eakins's conclusion that the latent fingerprint on the gas cap belonged to Johnson. We thus find no error in the admission of Eakins's testimony.

Judgment affirmed.

DARDEN, J., and VAIDIK, J., concur.