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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH D. BLAIR,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A04-0904-PC-218
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0605-PC-94740

November 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Joseph D. Blair appeals the denial of his petition for post-conviction relief ("PCR"). We affirm.

Issues

Blair raises two issues, which we restate as follows:

I. Whether he waived his claim that his habitual offender finding was unsupported by the evidence; and

II. Whether the post-conviction court committed clear error in denying his request for additional credit time.

Facts and Procedural History

On May 25, 2006, the State charged Blair with class C felony auto theft, class D felony criminal recklessness, and class A misdemeanor criminal recklessness. On July 19, 2006, the State filed a habitual offender enhancement. On August 23, 2006, Blair pled guilty to class C felony auto theft and to the habitual offender count. The trial court sentenced Blair to two years for his auto theft conviction, enhanced by four years for the habitual offender finding, to be served consecutive to Blair's sentence in cause number 49G01-0505-FC-90791. Blair did not pursue a direct appeal.

On October 10, 2008, Blair, pro se, filed an amended PCR petition, alleging that the State failed to prove the commission and conviction dates of the predicate offenses for the habitual offender count and that he was entitled to additional credit time. On December 23, 2008, Blair appeared in court for a post-conviction status hearing. The post-conviction court offered to set his petition for a post-conviction evidentiary hearing. Blair declined a hearing

and rested on the habitual offender charging information. The post-conviction court took judicial notice of its file. Blair called no witnesses and presented no additional evidence. On March 20, 2009, the post-conviction court denied Blair's petition.

Discussion and Decision

Standard of Review

We observe that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. *Timberlake v. State*, 753 N.E.2d 591, 597-98 (Ind. 2001) (citing Ind. Post-Conviction Rule 1(1)). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. *Kien v. State*, 866 N.E.2d 377, 381 (Ind. Ct. App. 2007), *trans. denied*. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. *Bahm v. State*, 789 N.E.2d 50, 57 (Ind. Ct. App. 2003), *trans. denied*. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than was reached by the post-conviction court. *Ivy v. State*, 861 N.E.2d 1242, 1244 (Ind. Ct. App. 2007), *trans. denied*.

I. Habitual Offender Finding

The State asserts that Blair waived his challenge to his habitual offender finding. "Issues available but not raised on direct appeal are waived[.]" *Pruitt v. State*, 903 N.E.2d 899, 905 (Ind. 2009). Here, Blair's claim that the State failed to prove the commission and conviction dates for the habitual offender count was available on direct appeal. Accordingly, this claim is waived.

Waiver notwithstanding, Blair's claim must fail. Blair correctly asserts that the State must prove that (1) the commission, conviction, and sentencing on his first offense preceded the commission of the second offense and that (2) the commission of the principal offense followed the commission, conviction, and sentencing on his second offense. *See Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993); Ind. Code § 35-50-2-8(c). However, when a post-conviction petitioner alleges that the State failed to produce sufficient evidence of the sequence of the prior felony convictions, the petitioner must demonstrate that his convictions did not in fact occur in the required order. *Id*. at 918. Put another way, the PCR petitioner, not the State, bears the burden of proof on that issue at the post-conviction stage. *Id*.

Blair failed to produce evidence other than the habitual offender charging information. He failed to carry his burden of proof, and therefore, we conclude that the post-conviction court properly denied Blair's PCR petition on this ground.

II. Credit Time

Blair was arrested on May 24, 2006, and was in custody until his sentencing on August 23, 2006. He argues that he is entitled to pretrial credit time, which he did not receive.

The post-conviction court concluded as follows:

> The abstract of judgment reflects that Blair was entitled to and provided zero days credit for pre-trial detention. The abstract of judgment also shows that the sentence on this cause was to be served consecutively to another cause, 49G01-0505-FC-090791. Blair did not present transcripts of his guilty plea or sentencing hearings to show whether this issue was discussed. In addition, Blair's criminal history in the court's file reflects at least two other convictions in other courts around the same time period as the instant case. (Blair was convicted of theft as a Class D felony under 49G01-0505-FD-077511 and sentenced on August 16, 2005, to 365 days executed; Blair was also convicted of auto theft as a class C felony under 49G01-0505-FC-090791 and sentenced on August 16, 2005, to 4 years suspended and 2 years probation.) It is likely that any days in jail that Blair accrued, prior to his sentencing hearing, were applied to serving a sentence or a violation of probation under a different cause. Without transcripts and/or additional documentary evidence regarding other cause numbers, Blair has failed to prove that he is entitled to additional credit time under the cause.

Appellee's App. at 51-52.

A defendant earns one day of jail credit time for each day he is imprisoned awaiting trial or sentencing. Ind. Code §§ 35-50-6-3, -4. However,

> [i]t is well-settled that where a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, I.C. 35-50-6-3 entitles him to receive credit time applied against each separate term. However, where he receives consecutive terms he is only allowed credit time against the total or aggregate of the terms.

Stephens v. State, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), *trans. denied*. Blair has failed to carry his burden to show that the post-conviction court committed clear error as to this issue.[1]

Affirmed.

MAY, J., and BROWN, J., concur.

[1] Blair cites *Muff v. State*, 647 N.E.2d 681 (Ind. Ct. App. 1995), but we have concluded that *Muff* has been "impliedly overruled" by *Corn v. State*, 659 N.E.2d 554, 558-59 (Ind. 1995). *Diedrich v. State*, 744 N.E.2d 1004, 1006 (Ind. Ct. App. 2001).