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IN THE
COURT OF APPEALS OF INDIANA

DAVID DEWHITT,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0701-PC-82
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Nancy Broyles, Judge Pro Tempore
Cause No. 49G05-0303-PC-35958

July 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

David DeWhitt was convicted for Criminal Recklessness, as a Class D felony, following a jury trial. On direct appeal, this court affirmed his convictions. See DeWhitt v. State, 829 N.E.2d 1055, (Ind. Ct App. 2005) ("DeWhitt I"). De Whitt subsequently petitioned for post-conviction relief, which the court denied. He now appeals, challenging the post-conviction court's judgment, and he raises one issue for our review, namely, whether he was denied the effective assistance of appellate counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts supporting DeWhitt's convictions come from our prior opinion:

> The facts most favorable to the jury's verdict reveal that on March 3, 2003, DeWhitt drove his Ford Expedition to work at Fort Benjamin Harrison in Indianapolis. DeWhitt parked his vehicle in the employee parking lot, but because there was snow and ice on the lot, he claimed it was difficult to see the parking spaces. DeWhitt parked his vehicle next to another parked vehicle and went to work. Later that morning, Ginger Miller, an employee of Lawrence Towing, got a call from police at Fort Harrison that some vehicles were improperly parked and needed to be towed away. Miller dispatched a tow-truck driver who returned with DeWhitt's Ford.
>
> When DeWhitt went back to the lot to look for his vehicle, he discovered that his vehicle was missing and eventually learned that it had been towed away. DeWhitt then placed a call to Lawrence Towing and told Miller that he wanted his car brought back to the Fort. Miller told DeWhitt that if they brought the vehicle back for DeWhitt that he would be charged an additional towing fee. DeWhitt hung up the phone.
>
> DeWhitt had someone drop him off at Lawrence Towing approximately one hour later. DeWhitt did not enter the office but instead went straight to the impound lot. Two employees of Lawrence Towing, Walter Taylor and James Eads, went outside to the lot to talk to DeWhitt. They told DeWhitt that he needed to pay for the towing and complete some paperwork before he could reclaim his vehicle. DeWhitt refused to comply. DeWhitt entered his vehicle and began to drive out of the lot without paying. Ms. Miller

> later testified that she heard a car door shut, the engine start, and tires spinning. Eads shut the lot gate, but before he could get the gate completely shut, DeWhitt hit it. DeWhitt drove through the gate and struck Eads in his right leg above the knee with the bumper of the truck. DeWhitt quickly exited the lot. Miller telephoned the police, and Eads was later taken to the hospital.

Id. at 1058-59. The court held a jury trial in February 2004. DeWhitt's theory of defense as presented in opening argument was that Eads—rather than DeWhitt—acted recklessly when Eads attempted to shut the gate as DeWhitt drove through it.

After the evidence, DeWhitt's trial counsel tendered the following instructions:

> In general, prohibited conduct may be excused when it is the result of an accident. This defense contains three elements:
> 1. The conduct must be without unlawful intent or evil design on the part of the accused;
> 2. The act resulting in injury must not have been a unlawful act;
> 3. The act must not have been done recklessly, carelessly, or in wanton disregard of the consequences.
>
> The State has the burden of disproving this defense beyond a reasonable doubt.
>
> * * *
>
> To prove a person was reckless, the State must prove that the party was more than merely negligent.
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> * * *
>
> Negligence is defined as:
> (1) a duty on the part of one person to another.
> (2) failure on the part of the person to conform his conduct to the requisite standard of care required by the relationship; and
> (3) an injury to the other person resulting from that failure.
> The requisite standard of care is reasonable care under the circumstances.

Petitioner's Ex. 5. The State objected to those instructions stating, "This isn't a case about accident. This is a case about criminal recklessness. . . . And this is not a

negligence case." Petitioner's Ex. 3 at 250. The court rejected DeWhitt's tendered instructions without stating a reason.

In closing argument, DeWhitt's trial counsel argued:

> First, [DeWhitt] had a legal right. Whether you agree with it or not, the state legislature had given him the legal right to go and get his vehicle back. And the second way that you can reconcile the evidence on the theory of innocence is that Mr. DeWhitt was driving his vehicle which is cumbersome and slow through the gate when Mr. Eads tried to shut the gate on him. And if Mr. Eads was in fact injured or was in fact struck by the vehicle, it wasn't Mr. DeWitt's fault. It was because Mr. Eads was trying to stop him from lawfully taking his vehicle back.

Id. at 287. The jury convicted DeWhitt of criminal recklessness, as a Class D felony.

Appellate counsel represented DeWhitt at his sentencing hearing on May 20. The court sentenced him to three years with one year to be served on home detention. The court suspended the remaining time and placed DeWhitt on probation. The court also imposed a $10,000 fine and suspended DeWhitt's driver's license. The court declined to impose a restitution order but made "restitution in an amount determined by the pending civil litigation" a condition of DeWhitt's probation as requested by counsel. Petitioner's Ex. 4 at 40. The court also informed DeWhitt that it would consider a petition for reduction of the conviction to an A misdemeanor if he fully paid his fine and restitution and complied with all his other probation conditions.

Appellate counsel filed a Motion to Correct Error, and the court held a hearing on that motion on October 20. Appellate counsel argued that DeWhitt's sentence—including his fine—violated the rule announced in Blakely v. Washington, 542 U.S. 296 (2004). The court denied the motion.

On DeWhitt's direct appeal, appellate counsel raised four issues: 1) whether the evidence sufficiently supported his conviction; 2) whether the court erred in denying his motion for judgment on the evidence; 3) whether trial counsel was ineffective; and 4) whether the court violated Blakely when it sentenced DeWhitt. DeWhitt I, 829 N.E.2d at 1058. This court affirmed his conviction but found that the court had violated Blakely when it sentenced DeWhitt to the maximum three years. Id. at 1068. This court remanded the case to the trial court with instructions to impose the presumptive one and one-half year sentence. Id. Regarding the fine:

> As stated, Blakely defined the relevant "statutory maximum" as the maximum sentence a judge may impose without any additional findings. The relevant sentencing statute here provides that a person convicted of a Class D felony "may be fined not more than ten thousand dollars ($10,000)." Unlike an enhanced sentence, there is no requirement that a fine be supported by aggravating factors. Thus, the "statutory maximum" fine for Blakely purposes is truly the statutory maximum fine of $10,000.

Id. at 1068 (citation omitted).

DeWhitt filed his pro se Petition for Post-Conviction Relief on April 21, 2006. On September 13, 2006, the trial court held an evidentiary hearing on DeWhitt's petition. The court denied relief in a written order on November 30, 2007. This appeal ensued.

DISCUSSION AND DECISION

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by petitioning for post-conviction relief. Hoaks v. State, 832 N.E.2d 1061, 1063 (Ind. Ct. App. 2005), trans. denied. Because he is appealing from a negative judgment, DeWhitt bears the burden of establishing grounds for relief by a preponderance of the evidence. Id. We will not reverse the post-

conviction court's judgment unless the evidence as a whole unerringly and unmistakably leads to an opposite conclusion. Id. A post-conviction court's findings and judgment will be reversed only upon a showing of clear error, which leaves us with a definite and firm conviction that a mistake has been made.[1] Id. We accept the court's findings of fact unless clearly erroneous, but we accord no deference to the court's legal conclusions. Id.

DeWhitt claims his appellate counsel rendered ineffective assistance of counsel for failing to raise two specific claims on direct appeal: a) whether the trial court erroneously refused to instruct the jury on accident and negligence; and b) whether the trial court erroneously imposed the maximum fine as part of his sentence. The well known two-pronged standard for ineffective assistance comes from Strickland v. Washington, 466 U.S. 668, 698 (1984). 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. Burnside v. State, 858 N.E.2d 232, 238 (Ind. Ct. App. 2006) (citations omitted). Effectiveness of counsel is a mixed question of law and fact. Oliver v. State, 843 N.E.2d 581, 591(Ind. Ct. App. 2006), trans. denied.

Specific to appellate counsel claims, our Supreme Court has adopted a two-part test to evaluate the deficiency prong: whether the unraised issues are significant and obvious from the face of the record; and whether the unraised issues are clearly stronger than the raised issues. Burnside, 858 N.E.2d at 238-39 (citing Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997), cert. denied, 525 U.S. 1021 (1998)). Appellate counsel's

[1] DeWhitt asks us to employ a lower standard of review because the post-conviction court adopted the State's proposed findings. Our Supreme Court has instructed that a post-conviction court's wholesale adoption of one party's findings does not create bias, even though such practice is "not encourage[d]." Saylor v. State, 765 N.E.2d 535, 565 (Ind. 2002). "The critical inquiry is whether the findings adopted by the court are clearly erroneous." Id. We employ that standard of review.

failure to raise a specific issue on direct appeal rarely constitutes ineffective assistance. Id. Reviewing courts "should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable." Taylor v. State, 840 N.E.2d 324, 338 (Ind. 2006) (quoting Bieghler, 690 N.E.2d at 194). Even if the court determines that counsel's choice of issues was unreasonable, a petitioner will not prevail unless he can also demonstrate a reasonable probability that the outcome of the direct appeal would have been different. Id.

Again, appellate counsel raised four issues during DeWhitt's direct appeal: 1) whether the evidence sufficiently supported his conviction; 2) whether the trial court erroneously denied his motion for judgment on the evidence; 3) whether trial counsel was ineffective; and 4) whether the trial court violated Blakely when it sentenced him, relative to both the imposition of the maximum term and fine. DeWhitt I, 829 N.E.2d at 1058. And appellate counsel prevailed on part of the sentencing issue, when we held that the trial court improperly imposed the maximum sentence in violation of Blakely and remanded the case with instructions for the trial court to impose the presumptive term. Id. at 1067-68. Thus, DeWhitt carries the burden of proving that the claims he now raises are stronger than one that provided relief. Burnside, 858 N.E.2d at 238-39.

The post-conviction court found that neither of the issues that DeWhitt now identifies prejudiced him to the extent that he was denied the effective assistance of appellate counsel. As discussed below, those conclusions are not clearly erroneous.

A. Jury Instructions

First, DeWhitt claims that appellate counsel rendered ineffective assistance by failing to argue that the trial court improperly refused his tendered jury instructions on accident and negligence. The giving of instructions is within the trial court's discretion, and we review the refusal to give a tendered instruction for an abuse of that discretion. Springer v. State, 798 N.E.2d 431, 433 (Ind. 2003). Jury instructions are to be considered as a whole and in reference to each other, and an error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). A defendant is not entitled to a reversal unless he can that show the instructional error prejudiced his substantial rights. Id.

In determining whether the court improperly refused DeWhitt's tendered instructions, "[w]e consider (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given." Springer, 798 N.E.2d at 433 (quoting Forte v. State, 759 N.E.2d 206, 209 (Ind. 2001)). Initially, we note that DeWhitt failed to cite any authority to support his assertion that his tendered jury instructions are a correct statements of the law. A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record. Davis v. State, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005). Nevertheless, we address the merits of his claim.

In Springer, the defendant raised a similar argument. While carrying a loaded weapon, Springer demanded entrance into a house because his son had been beaten there the night before. Springer, 798 N.E.2d at 432. Once inside, Springer fired the gun and shot a young man. Id. The State charged Springer with criminal recklessness. Id. At trial, Springer admitted that he entered the house with a bullet in the chamber of his gun, but he claimed that he had the safety engaged and the weapon fired accidentally. Id. at 432-33. The State's evidence, however, showed that Springer's gun could not have fired accidentally. Id. Springer tendered two instructions, the first defining "recklessly," and the second defining "negligence," both of which the trial court refused. Id. at 433.

On appeal, our Supreme Court found that the trial court did not abuse its discretion in refusing those instructions, in part, because "[n]egligence, as used by Defendant here, is an argument not a legal defense." Id. at 435. The court also noted that the jury had been properly instructed on the definition of criminal recklessness and that the argument that defendant acted negligently was really an argument that the State did not prove he acted recklessly. Id. "While the jury had the responsibility of determining whether Defendant's conduct was reckless, there was no legal question of negligence at stake." Id. at 436.

The opinion in Springer, which was available to appellate counsel, is similar to DeWhitt's case and disposes of his claim. The court did not abuse its discretion in refusing the negligence instructions because the evidence does not support either legal defense of accident or negligence. Like Springer, DeWhitt was seeking to right a perceived wrong on his own terms, and, also like Springer, DeWhitt was angry. All the

evidence at trial, including DeWhitt's testimony, shows that DeWhitt deliberately drove his car off the lot without paying, over the protests of Eads and Turner, and while knowing that Eads was attempting to close the gate.

Moreover, DeWhitt's theory of defense at trial is inconsistent with his argument on appeal that he was merely negligent. In opening argument trial counsel argued to the jury that DeWhitt had a legal right to take his car and that Eads acted recklessly by trying to close the gate. DeWhitt presented no evidence to prove that he failed to conform his conduct to the requisite standard of care required by his relationship with Eads. Indeed, DeWhitt testified that Eads acted illegally by towing his car and that DeWhitt had permission to remove his car from the lot because the gates were open.

DeWhitt also cannot show that he was prejudiced by the court's refusal of his negligence instructions. DeWhitt defended against the charge with his own testimony and cross-examination of the State's witnesses. Again, his theory of defense was that he had a legal right to take his car and that Eads—not DeWhitt—was reckless. And the court instructed the jury on the use of reasonable force over the State's objection. The court also correctly instructed the jury on the elements of criminal recklessness and the definition of recklessness.

We also reject DeWhitt's argument that his case is like Cichos v. State, 243 Ind. 187, 184 N.E.2d 1 (1962), and Sipp v. State, 514 N.E.2d 330 (Ind. Ct. App. 1987). "Both of those cases involved conduct that can be undertaken with due care—the conduct of driving a motor vehicle." Springer, 798 N.E.2d at 436. It does not follow, however, that because DeWhitt's conduct included driving his car, his conduct involved due care. Such

logic ignores some inconvenient facts: DeWhitt drove his motor vehicle, which had been towed, out of the impound lot while Eads and Taylor attempted to stop him. The jury was permitted to consider whether DeWhitt's conduct was justified, and through its verdict, the jury voiced its opinion that DeWhitt's conduct was criminally reckless.

The court did not state its reasons for refusing the tendered instructions. The discussion immediately prior to the court's ruling, however, gives rise to the inference that the court did not believe the evidence supported the instructions. And we agree. DeWhitt states "the tendered instructions in question . . . were based on the evidence," Appellant's Brief at 16, but he does not support this claim with specific citation to the record. The evidence does not support DeWhitt's claim in this appeal that his defense was either accident or negligence. Therefore, we cannot say that the trial court abused its discretion when it refused DeWhitt's negligence instructions. Springer, 798 N.E.2d at 438.

B. Fine

DeWhitt also contends that appellate counsel was ineffective for failing to make the specific arguments, addressed below, related to his fine. Again, we note that appellate counsel did, in fact, raise DeWhitt's sentence, including his fine, as error on direct appeal. DeWhitt, 829 N.E.2d at 1067-68.

The first argument DeWhitt makes—that his fine violates Article 1, Section 16, of the Indiana Constitution—provides him no relief. Article 1, Section 16 of the Indiana Constitution states:

> Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.

This constitutional directive does not place a limitation "upon the discretion of a trial court acting within the framework of a statute imposing penalties for the offense." Inman v. State, 393 N.E.2d 767, 772 (Ind. 1979). Rather, the prohibition against cruel and unusual punishment is a limitation upon the acts of the General Assembly. Id.

In Ford v. State, 394 N.E.2d 250 (Ind. Ct. App. 1979), we rejected the defendant's argument that his $10,000 fine for a Class D felony conviction was contrary to our constitution's prohibition against excessive fines. Ford, 394 N.E.2d at 256. "Since the statute under which defendant was charged is constitutional, then the punishment, being within the limits as fixed, is lawful and not contrary to [Section] 16 of Article 1." Id. DeWhitt does not argue that Indiana Code Section 35-50-2-7, the court's statutory authority for imposing the fine, is unconstitutional. Nor does he argue that the court applied the statute against him in an unconstitutional manner. Appellate counsel did not perform deficiently by failing to raise this claim.

DeWhitt also claims that appellate counsel was ineffective for failing to argue that the fine was inappropriate under Appellate Rule 7(B). That rule applies to appellate review of fines as well as of incarceration. Johnson v. State, 845 N.E.2d 147, 152 (Ind. Ct. App. 2006), trans. denied. Although we generally review the imposition of a fine for an abuse of discretion, we have the authority to "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Id.

(quoting App. R. 7(b)). In reviewing the inappropriateness of DeWhitt's fine, we use the "practicality-focused analysis" from Cooper v. State, 831 N.E.2d 1247, 1254-55 (Ind. Ct. App. 2005), trans. denied.

In Cooper, we found that the imposition of a $2,500 fine was inappropriate, in large part, because the trial court knew that Cooper was indigent. Id. at 1254-55. Cooper testified that she had lost her job and she had no money to pay outstanding obligations. Id. Further, the court did not hold a hearing on Cooper's ability to pay the fine as required by Indiana Code Section 35-38-1-18(a), and the court appointed appellate counsel for Cooper after it pronounced sentence. Id.

But DeWhitt's case is very different from Cooper. First, there is no question that DeWhitt was not indigent. DeWhitt was represented by private counsel and had hired a second private counsel to handle his sentencing and appeal.[2] Second, the evidence presented at his sentencing hearing through his wife's testimony shows that DeWhitt was "a very successful and highly respected self-taught computer software engineer [who] has continued to maintain employment." Petitioner's Ex. 4 at 18. She also testified that DeWhitt "pays all his bills on time" and they were starting a commercial riding stable. Id. at 21. The information before the court at the time of sentencing supports its conclusion that DeWhitt was a man of means, unlike the indigent Cooper.

Also, "Cooper had 'no criminal record whatsoever' prior to her conviction" for battery. Cooper, 831 N.E.2d at 1250. DeWhitt, on the other hand, has a criminal history that includes a 1999 conviction for Battery as a Class D felony, which was reduced to a

[2] DeWhitt is also represented by private counsel during his post-conviction procedure.

misdemeanor, and "two prior arrests for combative incidents involving vehicles and somewhat violent conduct." DeWhitt, 829 N.E.2d at 1067. In imposing sentence, the court stated "with this record of three incidents with such similar patterns of rage followed by violence I'm afraid that there's a good chance that there will be a recurrence unless there's something added to the State's response to this type of behavior." Petitioner's Ex. 3 at 38.

The court found DeWhitt's criminal history to be an aggravator, particularly given that all three incidents were related to a car and included "rage followed by violence." Id. at 38. The court imposed both the maximum sentence and the maximum fine after determining that the aggravator outweighed the mitigator. After the court imposed DeWhitt's sentence, counsel asked for the basis of the fine. The court responded:

> The seriousness of the injury, the criminal history that I previously sited [sic], and it's another way of getting through to Mr. DeWhitt. I would hope that since he's a man of means he might be able to see the gravity of the issue in terms of the amount of the fine. It's another way of attempting to get his attention. So that is the reason why I imposed such a large fine.

Id. at 46.

DeWhitt also compares himself to Cooper because, in Cooper, we found it significant "that failure to pay the fine could seriously jeopardize the possibility that Cooper's conviction might in the future be reduced to a class A misdemeanor." Cooper, 831 N.E.2d at 1254. DeWhitt claims that he "was unable to successfully complete probation due to non-payment of the fine."[3] Appellant's Brief 20. DeWhitt's argument relies heavily on his own testimony at the post-conviction hearing, information that was

[3] The record citations DeWhitt provides do not support this statement. Although the Case Chronology Summary does show at least two probation violations, it does not give the reasons the court determined that DeWhitt had violated the conditions of his probation.

not available for his direct appeal. More importantly, however, the post-conviction testimony does not establish that he was unable to pay the fine. DeWhitt's activities to challenge his conviction—including hiring an accident reconstructionist and two different private counsel—lead us to the conclusion that he chose to spend his money on things other than his fine. Unlike Cooper, DeWhitt apparently could have paid his fine.

The trial court considered the nature of DeWhitt's offense, specifically the fact that it followed the same pattern of DeWhitt's other criminal episodes, and found the nature of his offense to be an aggravating circumstance supporting the imposition of the maximum fine. The court also considered DeWhitt's financial position based on his evidence and found him to be a "man of means." We cannot say that DeWhitt's $10,000 fine for his criminal recklessness, while armed with a deadly weapon and where an individual suffered an injury, is inappropriate in light of the nature of his offense and what it reveals about his character.

Conclusion

Although both issues could have been raised on direct appeal, neither issue is significant or clearly stronger than the issues appellate counsel raised during his appeal. Neither of the issues would have produced a different result had appellate counsel raised them on direct appeal, and DeWhitt cannot establish either deficient performance or prejudice. Thus, appellate counsel did not render ineffective assistance, and the post-conviction court correctly determined that DeWhitt is not entitled to relief.

Affirmed.

RILEY, J., and BARNES, J., concur.