APPELLANT PRO SE:

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IN THE
COURT OF APPEALS OF INDIANA

JEREMY TIDMORE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 27A02-0610-PC-944
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Thomas R. Hunt, Judge
Cause No. 27C01-0411-FC-155

July 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Jeremy Tidmore ("Tidmore") appeals the denial, in substantial part, of his petition for post-conviction relief, which challenged his convictions and sentences for Felony Murder, a felony,[1] and Conspiracy to Commit Robbery, as a Class A felony.[2] We affirm.

Issue

Tidmore presents two issues for review. We address the issue that is not res judicata: whether Tidmore was denied the effective assistance of appellate counsel.[3]

Facts and Procedural History

On direct appeal, our Supreme Court recited the underlying facts as follows:

> Appellant and one Shawn Cook were friends who spent time together and used cocaine. Cook was the middleman who obtained the cocaine from a supplier. On February 17, 1992, appellant and Cook wanted to buy some cocaine but did not have any money. They discussed how they would obtain money. They decided they would commit a robbery by calling in an order for pizza, have it delivered to a vacant house where appellant once lived, and would rob the pizza delivery man when he arrived.

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[1] Ind. Code § 35-42-1-1(2).

[2] Ind. Code §§ 35-42-5-1, 35-41-5-2. Tidmore was convicted of the offense as a Class A felony. The post-conviction court granted Tidmore partial relief by reducing the conviction to a Class C felony and re-sentencing Tidmore accordingly.

[3] Tidmore attempts to present a free-standing claim that his "enhanced sentence is unreasonable." Appellant's Brief at 1. However, on direct appeal of Tidmore's convictions, our Supreme Court addressed Tidmore's claim that his enhanced sentences were manifestly unreasonable. The Court held as follows, "The sentences imposed by the trial court are within the applicable statutes and justified by the evidence in this case as found by the trial judge when he imposed the sentences. We find no error." Tidmore v. State, 637 N.E.2d 1290, 1292 (Ind. 1994). Thus, the issue is res judicata. See Rouster v. State, 705 N.E.2d 999, 1003 (Ind. 1999) (holding in relevant part that an issue raised on direct appeal but decided adversely to the appellant is res judicata).

> Cook obtained an aluminum baseball bat while appellant armed himself with a sawed-off billiard cue. Appellant sat on the front porch of the house awaiting the delivery while Cook hid around the side of the house. When the delivery man arrived, appellant engaged him in conversation while Cook slipped up behind him and hit him on the head with the bat. The victim fell partially on a chair. Appellant pulled him from the chair onto the floor of the porch. Cook handed appellant the bat and proceeded to take money from the victim.
>
> When the victim started making noise and acting as though he were trying to get up, appellant struck him in the head at least three times with the bat. When a car drove in to a neighboring driveway, appellant and Cook fled taking the pizza and money from the victim. They acquired $350 from the victim, spent $100 for cocaine, gave two of their friends $25 each and split the remainder between them. The victim suffered extensive fractures to his skull and severe damage to his brain. He lived for about thirteen days in the hospital where he died of cardiac arrest brought on by the severe brain damage.

Tidmore, 637 N.E.2d at 1291. Tidmore was charged with Robbery, Conspiracy to Commit Robbery, Murder and Felony Murder. On September 3, 1992, a jury acquitted Tidmore of Murder but found him guilty of the remaining charges. Due to double jeopardy concerns, the conviction for Robbery was merged with the Felony Murder conviction, and the trial court entered judgments of conviction upon the Felony Murder and Conspiracy to Commit Robbery charges. Tidmore was sentenced to sixty years and fifty years, respectively. The terms were to be served concurrently.

Tidmore directly appealed to the Indiana Supreme Court, raising three allegations of error: that he was denied the effective assistance of trial counsel, that the trial court found improper aggravators while ignoring proper mitigators, and that his enhanced sentences were manifestly unreasonable. The Court affirmed Tidmore's convictions and sentences. Tidmore, 637 N.E.2d at 1293.

On November 3, 2004, Tidmore filed a petition for post-conviction relief. In his petition, Tidmore alleged that his enhanced sentences were unreasonable, that he was denied the effective assistance of trial and appellate counsel, and that his Class A felony conviction for conspiracy should have been reduced to a Class C felony because the felony murder conviction and the enhancement of the conspiracy charge were based upon the same bodily injury.

A hearing was conducted on June 30, 2005. On September 21, 2005, the post-conviction court issued its findings of fact, conclusions of law, and order. The post-conviction court granted Tidmore partial relief by reducing the conspiracy charge to a Class C felony, and revising Tidmore's sentence from fifty years to eight years, to be served concurrently with the Felony Murder sentence. Tidmore was denied post-conviction relief in all other respects.

On July 6, 2006, Tidmore filed a Motion for Relief from Judgment, contending that his counsel did not receive notice of the post-conviction judgment. On September 25, 2006, the post-conviction court vacated its order of September 21, 2005, and re-entered it. This appeal ensued.

Discussion and Decision

A. Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). Post-conviction proceedings are civil in nature and a

defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief appeals from a negative judgment, and to the extent that his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.

B. Effectiveness of Appellate Counsel

Tidmore contends that his appellate counsel was ineffective for failing to properly support the issue of ineffective assistance of trial counsel with additional allegations, and for failing to raise an issue regarding a mug shot that was admitted into evidence over trial counsel's objection.

A defendant is entitled to the effective assistance of appellate counsel. Id. at 760. Appellate ineffectiveness claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must show two things: (1) the lawyer's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The two prongs of the Strickland test are separate and independent inquiries. Id. at 697. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of

sufficient prejudice . . . that course should be followed." Id.

Failure to Demonstrate Trial Counsel's Ineffectiveness. A defendant who chooses to raise on direct appeal a claim of ineffective assistance of trial counsel is foreclosed from relitigating that claim. Timberlake v. State, 753 N.E.2d 591, 601 (Ind. 2001). However, the petitioner may allege that appellate counsel was ineffective for failure to properly raise and support deficient performance of trial counsel. Id. at 606. In this instance, the petitioner must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. Id.

The petitioner faces a compound burden, because he must establish the two elements of ineffective assistance of counsel as to both trial and appellate counsel. Seeley v. State, 782 N.E.2d 1052, 1059 (Ind. Ct. App. 2003), trans. denied. An assertion of appellate ineffectiveness challenging the quality of counsel's treatment of an issue actually presented must "overcome the strongest presumption of adequate assistance." Bieghler v. State, 690 N.E.2d 188, 196 (Ind. 1997).

Tidmore contends that his appellate counsel failed to fully develop the issue of trial counsel's ineffectiveness because no appellate challenge was made to (1) the lack of a motion to dismiss the conspiracy and murder counts, (2) the lack of a challenge to the elevation of the robbery count, and (3) the lack of an objection to the final instruction on conspiracy. Additionally, he claims that appellate counsel should have filed a motion to

correct error and requested an evidentiary hearing "in order to flesh out the facts supporting this claim [of trial counsel's ineffectiveness]." Appellant's Brief at 14.

Trial counsel did not secure dismissal or revision of any of the charges against Tidmore and appellate counsel did not challenge this omission. However, any double jeopardy concerns have been obviated by the trial court's merger of certain counts prior to sentencing and by the grant of partial post-conviction relief. Tidmore now stands convicted only of Felony Murder and Conspiracy to Commit Robbery, as a Class C felony. Admittedly, appellate counsel failed to request on direct appeal the relief later afforded Tidmore in post-conviction proceedings. Nevertheless, Tidmore is entitled to no additional relief in this regard.

The trial court's final instruction on conspiracy was left unchallenged by trial and appellate counsel. It provides:

> You are instructed that to prove commission of a conspiracy to commit a crime it is not necessary that a formal agreement be shown. An agreement to commit an offense as well as the requisite guilty knowledge and intent may be inferred from circumstantial evidence alone, including overt acts of the parties in pursuance of the criminal act.

(Trial R. 319.) Tidmore complains that the instruction is misleading, relying upon Frias v. State, 547 N.E.2d 809 (Ind. 1989). In Frias, the Indiana Supreme Court reversed a conspiracy conviction after the jury was instructed as follows:

> An agreement may be implied from the conduct of the parties although they acted separately or by different means and did not come together or enter into an express agreement.

Id. at 811. The Frias Court reiterated the well-established rule that the State, when conspiracy has been charged, is not required to prove the existence of a formal express agreement, and a conviction for conspiracy may rest on circumstantial evidence alone. Id. at 812-13. Examining the record of evidence before it, the Court determined that "although it appears there is circumstantial evidence from which a jury could find there was such an agreement between Frias and DeKemper, it nevertheless required a weighing of all of the circumstantial evidence for the jury to reach this conclusion." Id. The instruction "misinformed the jury in the manner in which they were to weigh the evidence" because "[t]he jury was told it need not do this weighing but could find the agreement existed even though there were no facts presented in evidence from which to imply its existence circumstantially." Id.

The instruction at issue here does not suffer from the same infirmity. Nor did the resolution of Tidmore's conspiracy to commit robbery count rest upon the weighing of circumstantial evidence. Rather, there was direct evidence of a conspiracy, as Tidmore's co-conspirator Cook testified at length concerning the joint agreement and overt actions, and Tidmore's own out-of-court statements revealed his participation in the plan. Accordingly, had appellate counsel pursued an argument relying upon Frias to challenge trial counsel's acquiescence to the conspiracy instruction, he would not have prevailed.

Tidmore also alleges that his appellate counsel should have obtained a post-trial hearing and "fleshed out" the claim of ineffective assistance of trial counsel. Appellant's Brief at 14. However, he fails to develop a corresponding argument to explain why the trial

court would have been obliged to grant a post-trial hearing or what further deficiencies of trial counsel might arguably have been revealed in an evidentiary hearing.

Exclusion of Mug Shot Issue. Appellate counsel did not raise an issue regarding a mug shot admitted into evidence at Tidmore's trial over his objection. Appellate courts should be particularly deferential to an appellate counsel's strategic decision to include or exclude issues, unless the decision was "unquestionably unreasonable." Bieghler, 690 N.E.2d at 194. Tidmore must show that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by reasonable strategy. See Stevens, 770 N.E.2d at 760. Appellate counsel is not deficient if the decision to present some issues rather than others was reasonable in light of the facts of the case and the precedent available to counsel when the choice was made. Id. Even if counsel's choice is not reasonable, to prevail, the petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different. Id.

At the time of Tidmore's trial, "mug shots" were not per se inadmissible and would be allowed if they were not unduly prejudicial, and they had substantial independent probative value. Andrews v. State, 536 N.E.2d 507, 509 (Ind. 1989). A "mug shot" was not unduly prejudicial if the State had made efforts to disguise the nature of the photographs. Id. at 509-10. The State was required to make every effort to disguise the "mug shot" by redacting any criminal information, law enforcement insignia, or other information blatantly identifying the photograph with the criminal justice system. Id. at 510.

At trial, Tidmore's counsel objected that the mug shot "showing a man in incarceration [was] prejudicial." (Trial R. 1031.) Tidmore now argues that his appellate counsel should have raised an issue concerning the State's failure to redact criminal information. State's Exhibit 48 depicts Tidmore with a placard that reads "Police Dept. Marion, Indiana 7049 0218 '92." It is apparent that the State made no effort to crop the photograph or otherwise redact information identifying Tidmore with the criminal justice system.

Nevertheless, the admission of mug shots is not always reversible error. James v. State, 613 N.E.2d 15, 28 (Ind. 1993). Prior to submitting Tidmore's "mug shot" the State established that it was taken when Tidmore was arrested in the instant case. Thus, the jury could not have inferred a criminal history from the photograph, and the prejudice to Tidmore is minimal. In light of the overwhelming evidence of Tidmore's guilt, we are not persuaded that the outcome of his appeal would have been different had appellate counsel challenged the admission of the mug shot.

Conclusion

Tidmore has failed to demonstrate that his appellate counsel's performance was deficient and that he suffered resulting prejudice. Accordingly, the post-conviction court did not err in rejecting Tidmore's ineffective assistance claim and denying post-conviction relief in substantial part.

Affirmed.

SHARPNACK, J., and MAY, J., concur.