

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

APPELLANT PRO SE:

ALVARNAZ MOORE
Westville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MATTHEW D. FISHER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ALVARNAZ MOORE,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)

No. 20A03-0607-PC-342

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Stephen E. Platt, Judge
Cause No. 20D02-0506-PC-10

August 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Alvarnaz Moore brings this pro se appeal from the denial of his petition for post conviction relief challenging his conviction for Class A felony dealing in cocaine. We affirm.

Issues

The issues before us are:

- I. whether Moore's appellate counsel was ineffective for not making a chain of custody argument; and
- II. whether the State knowingly admitted false testimony at the post-conviction hearing

Facts

On January 2, 1995, Moore was convicted of dealing in cocaine, a Class A felony. During trial, Moore's attorney stipulated to the admission of the cocaine samples and laboratory reports that supported his conviction. Moore filed a direct appeal, and on September 20, 2001, this court affirmed Moore's conviction and sentence. See Moore v. State, No. 20A03-0102-CR-56 (Ind. Ct. App. Sept. 20, 2001).

On September 21, 2005, Moore filed an amended petition for post-conviction relief. During the post-conviction hearing, laboratory analyst Dewey Murdick, testified, "Purity [of the cocaine samples] is irrelevant." Tr. p. 15. On January 24, 2006, the post-conviction court denied Moore's petition. Moore now appeals.

Analysis

The standard of review in appeals from post-conviction judgments is well established. A post-conviction petitioner appealing from a negative judgment must establish that the evidence is without conflict and, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision. Conner v. State, 711 N.E.2d 1238, 1244 (Ind. 1999), cert. denied. The reviewing court accepts the trial court's findings of fact unless "clearly erroneous," but does not defer to the trial court's conclusions of law. Id. at 1245. We examine only the probative evidence and reasonable inferences that support the post-conviction court's determination and do not reweigh the evidence or judge the credibility of the witnesses. Id. (citing Butler v. State, 658 N.E.2d 72, 75 (Ind. 1995)).

I. Ineffective Assistance of Appellate Counsel

The first issue raised is whether Moore received ineffective assistance of appellate counsel. Our supreme court has recognized three categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues competently. Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001), cert. denied. When reviewing a claim of ineffective assistance of appellate counsel regarding the selection and presentation of issues, the defendant must overcome the strongest presumption of adequate assistance. Seeley v. State, 782 N.E.2d 1052, 1059 (Ind. Ct. App. 2003), trans. denied. To prevail, Moore must show from the information available in the trial record or otherwise known to appellate counsel that counsel failed to present a significant and obvious issue and that this failure cannot be explained by any

reasonable strategy. See id. Our supreme court has determined, “Isolated poor strategy, bad tactics, a mistake, carelessness or inexperience do not necessarily amount to ineffective counsel unless, taken as a whole, the defense was inadequate.” Davis v. State, 675 N.E.2d 1097, 1100 (Ind. 1996).

Moore claims that appellate counsel’s failure to challenge the chain of custody of the cocaine samples supporting his conviction represents a Sixth Amendment violation of his right to effective counsel. Moore’s appellate counsel is given broad latitude to make strategic decisions regarding what claims to raise on appeal. Beighler v. State, 690 N.E.2d 188, 194 (Ind. 1997), cert. denied. Accordingly, we give considerable deference to appellate counsel’s strategic decisions and “will not find deficient performance in appellate counsel’s choice of some issues over others when the choice was reasonable in light of the facts of the case.” Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999).

Here, Moore has not shown a reasonable probability that the outcome of the direct appeal would have been different if the chain of custody issue had been raised. Moore’s appellate counsel, Charles Talmage, noted that trial counsel stipulated to the admission of the cocaine samples and related laboratory reports. Although Talmage acknowledged the chain of custody’s significance to Moore’s drug conviction, he chose not to pursue the claim because “the chain looked appropriate” and “did not feel that we could prevail on the issue.” Tr. p. 42, 46. Talmage’s decision not to pursue the chain of custody claim after reviewing the trial records was an informed and strategic one and does not represent a violation of Moore’s Sixth Amendment right to counsel.

Moore also presented evidence at the post-conviction hearing to suggest the chain of custody was inadequate. The purpose of the rule requiring the State to show a continuous chain of custody of fungible evidence is to demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence. Orr v. State, 472 N.E.2d 627, 630 (Ind. Ct. App. 1984), trans. denied. However, it is not necessary to account for every minute or every hand through which the sample passes. A proper showing requires only the production of evidence from which the trial court may reasonably conclude that the specimen passed through time and various hands in a relatively undisturbed fashion to the point where it is subjected to analysis. Id.

Moore argues that the cocaine admitted at trial was unaccounted for on two separate occasions. The first occasion, Moore alleges, is an eleven-day period between his arrest and when the cocaine samples were submitted for testing. Moore fails to offer any evidence to support his contention that a proper chain of custody was not maintained. Therefore, his argument concerning the eleven-day time period must fail. The second occasion, Moore alleges, occurred over a twenty-two day period after the laboratory analysis but before the trial began. Again, Moore has failed to offer any evidence supporting his contention that the cocaine admitted at trial was tampered with, lost, substituted, or otherwise lacked sufficient indicia of reliability.

Moore had to show that appellate counsel should have raised the chain of custody issue on appeal. Moore has not met his burden in this regard and his ineffectiveness claim must fail.

II. False Testimony

The second issue raised is whether the State knowingly permitted false testimony at the post-conviction hearing. The United States Supreme Court has determined that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and a corruption of the truth-seeking function of the trial process. United States v. Agurs, 427 U.S. 97, 103-04, 96 S. Ct. 2392, 2406 (1976). Therefore, if the prosecution has knowingly used perjured testimony, whether that perjury relates to the defendant's guilt or to the credibility of a State's witness, the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Carey v. State, 416 N.E.2d 1252, 1257 (Ind. 1981).

Here, Moore has failed to show that the State admitted false testimony at the post-conviction hearing. Specifically, Moore claims that the laboratory analyst, Dewey Murdick, committed perjury when he testified that "purity [of the cocaine sample] is irrelevant" and that he analyzed both cocaine samples that supported Moore's conviction. Tr. p. 15. Indiana Code Section 35-48-4-1 provides in part, "a person who knowingly or intentionally delivers cocaine, pure or adulterated, commits dealing in cocaine or narcotic drug." Moreover, our supreme court has determined that the "total weight of the delivered drug and not its pure component is to be considered in prosecutions under Ind. Code § 35-48-4-1." Tobias v. State, 479 N.E.2d 508, 511 (Ind. 1985). In other words, the percentage amount of pure cocaine in a sample is not required to sustain a dealing conviction. Id. Accordingly, Murdick's testimony that "purity is irrelevant" does not constitute a false statement. Tr. p. 15.

Moore also claims that Murdick falsely testified that he analyzed both of the samples that supported Moore's conviction. The evidence reveals that the sample supporting Moore's conviction was submitted for testing in two parts. The laboratory report recorded the combined weight of the sample at 3.564 grams and determined that the sample contained cocaine hydrochloride. Although the laboratory report does not specifically indicate that both samples were separately tested for cocaine, it does not indicate otherwise. Moore has not produced or pointed to any evidence that Murdick perjured himself or that the State implored him to do so. Moore's claim in this regard is without merit.

Conclusion

Moore has not established the elements of ineffective assistance of appellate counsel and has not proven that the State knowingly submitted false testimony. We affirm the denial of post-conviction relief.

Affirmed.

NAJAM, J., and RILEY, J., concur.