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IN THE
COURT OF APPEALS OF INDIANA

RONALD BURKES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0704-CR-181
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge Pro Tempore
Cause No. 71D01-0405-FB-60

August 17, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Ronald Burkes ("Burkes") was convicted in St. Joseph Superior Court of Class A felony possession of cocaine within 1000 feet of a park. On appeal, Burkes contends that he received ineffective assistance of counsel. We affirm.

Facts and Procedural History

On May 5, 2004, at around 12:45 a.m., South Bend Police Officer Sheldon Scott ("Officer Scott") was conducting surveillance near the city park, East Race. He observed Burkes walking down the middle of the street and peeking into car windows. Officer Scott decided to stop Burkes for the infraction of walking in the middle of the street when a sidewalk was available. When Burkes saw Officer Scott approaching, he threw a white package towards a nearby fence post. Officer Scott ordered Burkes to stop, and Burkes did momentarily stop before taking off at a run. Officer Scott used his taser to stop Burkes, and then he handcuffed him.

When another police officer arrived on the scene, Officer Scott took him over to the fence post and showed him where Burkes had thrown the white package. Once the item was retrieved, the officers saw that about thirty individually packaged rocks of cocaine were wrapped up in a white paper towel. Subsequent testing revealed that there was 6.91 grams of cocaine in the package.

The State charged Burkes with Class A misdemeanor resisting law enforcement and Class A felony possession of cocaine within 1000 feet of a public park. The trial court conducted a jury trial, and on August 24, 2005, Burkes was found guilty on both counts. On December 1, 2006, the trial court sentenced Burkes to one year suspended for the resisting law enforcement conviction and twenty years with fifteen suspended on the

possession of cocaine conviction. Burkes now appeals. Additional facts will be provided as necessary.

Discussion and Decision

On appeal, Burkes contends that his counsel rendered ineffective assistance when he failed to argue the statutory defense that there was no person under the age of eighteen within 1000 feet of the park, thereby reducing the crime to a Class C felony. See Ind. Code § 35-48-4-16 (2004). The well known two-pronged standard for ineffective assistance of counsel comes from Strickland v. Washington, 466 U.S. 668, 698 (1984). To succeed on such a claim, Burkes must demonstrate both that counsel performed deficiently and that prejudice resulted. Jones v. State, 847 N.E.2d 190, 195 (Ind. Ct. App. 2006), trans. denied. To establish deficient performance, Burkes must show that counsel's representation fell below an objective standard of reasonableness. Rose v. State, 846 N.E.2d 363, 366 (Ind. Ct. App. 2006) (citing Strickland, 466 U.S. at 688). In order to establish the second prong of prejudice, Burkes must show "a reasonable probability" that the result of his trial would have been different but for counsel's deficient performance. Id.

Regarding the first prong of deficient performance, we note that whether a lawyer performed reasonably under the circumstances is determined by examining the whole of the lawyer's work on a case. Oliver v. State, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), trans. denied. "A defendant must offer strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense." Id. "The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and

isolated omissions or errors and bad tactics do not necessarily mean that representation was ineffective." Grinstead v. State, 845 N.E.2d 1027, 1036 (Ind. 2006).

Burkes contends that his counsel's performance was deficient because he failed to argue that there would not have been persons under the age of eighteen in the park at that hour because of curfew laws. Burkes is correct that if this defense had succeeded, he would have been convicted of Class C felony possession of cocaine as opposed to Class A felony possession of cocaine. See Ind. Code § 35-48-4-16(b).

However, the decision of whether or not to present a defense can be considered a matter of trial strategy and will not be lightly second-guessed. See Potter v. State, 684 N.E.2d 1127, 1133 (Ind. 1997); Davis v. State, 675 N.E.2d 1097, 1101 (Ind. 1996). "Few points of law are as clearly established as the principle that '[t]actical or strategic decisions will not support a claim of ineffective assistance.'" Hollins v. State, 790 N.E.2d 100, 109 (Ind. Ct. App. 2003), trans. denied (quoting Sparks v. State, 499 N.E.2d 738, 739 (Ind. 1986)). We give great deference to counsel's discretion to choose strategy and tactics, and even the best defense attorneys may disagree on the ideal strategy or most effective approach in any given case. Id. (citing Strickland, 466 U.S. at 689-90).

Our supreme court has expressly stated that "a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense." Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). In Autrey, the court held that trial counsel was not ineffective for failing to request lesser-included offense instructions on a charge of murder because it represented a reasonable "all or nothing" tactical choice by defense

counsel to obtain a full acquittal for the defendant by placing the blame for the victim's death on another person and highlighting the "discordant" testimony of the witnesses. Id. at 1141-42. See also Sarwacinski v. State, 564 N.E.2d 950, 951 (Ind. Ct. App. 1991) (holding that it was not ineffective assistance not to request voluntary manslaughter instruction on a murder charge because it might have undermined defense of self-defense and/or lessened chance of the defendant's acquittal).

Here, Burkes's trial counsel argued that Burkes never possessed the cocaine. Burkes did not have the cocaine on his person when he was arrested, and it was found very near a public park. In the opening statement, Burkes's counsel began by stating, "I didn't do it. These aren't my drugs. I'm not guilty. That's the message that Mr. Burkes is going to ask you to pay attention to today as you hear the evidence." Tr. pp. 165-66. Clearly, his counsel's strategy was an "all-or-nothing" approach, and we conclude that, as in Autrey, it was completely reasonable for Burkes's counsel to attempt to completely absolve Burkes from any possession of cocaine charges.

We will not second-guess that strategy after the fact simply because the jury convicted Burkes of possession of cocaine as a Class A felony. See Autrey, 700 N.E.2d at 1142. Therefore, we conclude that Burkes's counsel's performance was not deficient.

The two prongs of the Strickland test are independent inquiries and, thus, if the defendant makes an insufficient showing on one, we need not address the other. Wieland v. State, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), trans. denied (citing Strickland, 466 U.S. at 697). Thus, we will not consider whether Burkes can show prejudice under Strickland.

Affirmed.

DARDEN, J., concurs.

KIRSCH, J., dissents with separate opininon.

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KIRSCH, Judge, *dissenting*.

I do not think that counsel was faced with an "all or nothing" decision in this case. As a result, I think that counsel's failure to defend on the basis of the statutory defense that there was no person under the age of eighteen within 1000 feet of the park was ineffective assistance. Accordingly, I respectfully dissent.

Our Supreme Court held in *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) that the decision of counsel to mount an "all or nothing" defense is a tactical decision that does not rise to the level of ineffective assistance where it is not successful. In *Autrey*, the tactical decision for counsel was whether to tender instructions on the lesser included offenses of murder. Counsel's defense was that the defendant did not cause the victim's death. Given this defense, the determination not to tender instructions on the lesser included offenses was reasonable because tendering an instruction on a lesser included

offense would be inconsistent with the defense because it would require counsel to argue that the defendant did not kill the victim, but if he did kill the victim, he did so in sudden heat. Arguing that the defendant killed the victim in sudden heat undermines the defense that the defendant did not kill the victim.

Here, the statutory defense that there was no one in the park under eighteen years of age is not inconsistent with, and does not in any way undermine, the defense that the defendant was not in possession of cocaine. As a result, I do not think that counsel faced an "all or nothing" choice. I believe counsel's failure to raise the statutory defense constituted ineffective assistance. I would reverse the trial court's judgment and remand for a new trial.