



## STATEMENT OF THE CASE

Omond Smith was convicted of Murder and Possession of a Handgun by a Convicted Felon, and he was adjudicated an habitual offender. On direct appeal, our Supreme Court affirmed his convictions. See Smith v. State, 765 N.E.2d 578 (Ind. 2002) (“Smith I”). Smith subsequently petitioned for post-conviction relief, which the post-conviction court denied. He now appeals, challenging the post-conviction court’s judgment, and he raises the following issues for our review:

1. Whether he was denied the effective assistance of appellate counsel.
2. Whether the post-conviction court abused its discretion when it excluded an exhibit at the hearing on his petition.

We affirm.

## FACTS AND PROCEDURAL HISTORY

The facts and procedural history as stated by our Supreme Court in Smith’s direct appeal are as follows:

Smith was charged with the murder of David Riggs. Smith’s first trial resulted in a conviction that was reversed by this Court. Smith v. State, 721 N.E.2d 213 (Ind. 1999). After the first trial, Tommy Lampley pleaded guilty to the Class C felony of Assisting a Criminal and became the principal witness in Smith’s retrial. The State proceeded on the theory that Smith killed Riggs, but also tendered a jury instruction on accomplice liability, apparently believing the jury might find that Lampley had killed Riggs and Smith had aided Lampley. The only evidence supporting this theory was the testimony of Randall Byrd, who testified that Lampley had told him that Lampley killed Riggs, but would say that Smith was the killer. Although not evidence, during Lampley’s testimony Smith accused Lampley of the killing in an outburst before the jury.

The following quite different version of these events is derived largely from Lampley’s testimony. Some time after midnight on January 11, 1997, Lampley was walking to a Village Pantry store in Anderson, Indiana, when Smith drove up in a black truck and offered Lampley a ride. Lampley

accepted, and Smith drove them to Smith's house at 2223 Park Avenue. According to Lampley, Lampley remained in the truck as Smith entered the house. After waiting several minutes, Lampley got out of the truck and stuck his head into the house, where he observed Riggs sitting on the couch and Smith walking around the living room, apparently looking for something. Smith then requested and received Riggs' permission to search Riggs, and discovered a bag of crack cocaine in Riggs' pocket. Smith accused Riggs of stealing the cocaine, a scuffle ensued, and Smith retrieved a brown suede bag. Lampley testified he saw the handle of a gun sticking out of the bag, backed away from the house, and began walking toward nearby railroad tracks.

Lampley soon heard footsteps behind him, turned around, and saw Riggs running and then hiding behind a bush. Smith soon pulled up in the black truck, pointed the headlights at the bush, and exited the truck, gun in hand. Lampley continued to walk away, and soon heard gunshots. After taking cover behind a dumpster for fifteen to twenty minutes, Lampley returned to find Riggs lying in the street, covered with blood. Riggs had been shot four times and died as a result of the wounds.

In the retrial, Smith was convicted of murder, possession of a handgun without a permit, and possession of a handgun by a convicted felon.<sup>[1]</sup> This appeal followed.

Smith I, 765 N.E.2d at 581-82. On appeal, our Supreme Court affirmed Smith's convictions. And the post-conviction court denied Smith's petition for post-conviction relief following a hearing. This appeal ensued.

## **DISCUSSION AND DECISION**

The petitioner bears the burden of establishing his grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Harrison v. State, 707 N.E.2d 767, 773 (Ind. 1999), cert. denied, 529 U.S. 1088 (2000). To the extent the post-conviction court denied relief in the instant case, Smith appeals from a negative judgment and faces the rigorous burden of showing that the evidence as a whole "leads

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<sup>1</sup> The trial court merged the two possession convictions for sentencing purposes.

unerringly and unmistakably to a conclusion opposite to that reached by the [] court.” See Williams v. State, 706 N.E.2d 149, 153 (Ind. 1999) (quoting Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993)), cert. denied, 529 U.S. 1113 (2000). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. Bivins v. State, 735 N.E.2d 1116, 1121 (Ind. 2000).

### **Issue One: Appellate Counsel**

Smith first contends that he was denied the effective assistance of appellate counsel. The standard for determining the effective assistance of appellate counsel is the same as for allegations of ineffective assistance of trial counsel. Gann v. State, 570 N.E.2d 976, 977-78 (Ind. Ct. App. 1991), trans. denied. Ineffective assistance is very rarely found in cases involving appellate counsel’s failure to raise issues on appeal. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997), cert. denied, 525 U.S. 1021 (1998). When assessing this type of ineffectiveness claim, we should be particularly deferential to counsel’s strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable. Id. at 194. Appellate lawyers must make difficult judgment calls in narrowing a broad range of possible claims to a select few that are thought to have the best chance of success. Woods v. State, 701 N.E.2d 1208, 1221 (Ind. 1998), cert. denied, 528 U.S. 861 (1999). In this winnowing process, possibly valid claims may be eliminated due to page limits or the strategic judgment that the perceived strongest contentions not be diluted. Id.

When the issue of ineffective assistance of appellate counsel is based upon appellate counsel's failure to properly raise and support a claim of ineffective assistance of trial counsel, the petitioner faces a compound burden. Seeley v. State, 782 N.E.2d 1052, 1059 (Ind. Ct. App. 2003). Petitioner must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. Id. The petitioner must establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. Id.

Here, Smith's appellate counsel raised two issues on direct appeal, including that Smith was denied the effective assistance of trial counsel because his counsel failed to object to (1) comments about Smith's previous trial for this murder, (2) cross-examination of defense witnesses regarding their failure to give information to the police, (3) testimony concerning fears of witnesses, and (4) cross-examination for which the prosecutor had not established a factual predicate. In addressing Smith's argument on those points, our Supreme Court concluded in relevant part:

In sum, only one of Smith's proposed objections, if properly made, would have been sustained. We do not find the errant admission of testimony of unspecified concerns of witnesses to rise to the level of defective performance necessary to support a claim of ineffective assistance of counsel under Strickland.

Smith I, 765 N.E.2d at 588.

In this appeal, Smith contends that his appellate counsel was deficient when he did not raise the following with regard to his ineffective assistance of trial counsel claim on direct appeal: (1) his counsel failed to tender an instruction on accomplice liability and

did not argue that mere presence is insufficient to find guilt; (2) his counsel failed to question Puckett regarding the State's inducement to Lampley to testify against Smith; (3) his counsel failed to file a motion in limine or object to Jana Brandle's testimony that Smith had previously pointed a gun at her head; and (4) his counsel failed to impeach Bobby Baccus with his testimony at Smith's first trial that he could not identify Smith.

When a petitioner claims the denial of effective assistance of appellate counsel because counsel did not raise issues the petitioner argues should have been raised, 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. McCann v. State, 854 N.E.2d 905, 914 (Ind. Ct. App. 2006) (quoting Taylor v. State, 840 N.E.2d 324, 338 (Ind. 2006) (citations and quotation marks omitted). But this does not end our analysis. Even if we determine that counsel's choice of issues was not reasonable, a petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different in order to prevail. Id. (quoting Taylor, 840 N.E.2d at 338). We must determine "(1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are 'clearly stronger' than the raised issues." Id. (quoting Gray v. State, 841 N.E.2d 1210, 1214 (Ind. Ct. App. 2006), trans. denied).

Smith makes no argument that the omitted instances of his trial counsel's alleged deficiencies are "clearly stronger" than the issues his appellate counsel raised in his direct appeal. And our review of the evidence in support of Smith's argument in this appeal

does not convince us that his appellate counsel was deficient in not raising those issues or that Smith was unduly prejudiced thereby.

Smith's appellate counsel, David Stone, IV, testified at the post-conviction hearing. With regard to Smith's allegation that he should have raised the issue of trial counsel's failure to tender an accomplice liability instruction, Stone stated that he "didn't think the claim would have any chance of success." Transcript at 36. He explained further that the evidence did not support an instruction on a defendant's "mere presence" being insufficient to support a conviction given that Smith "had the handgun" and he "was the one chasing Riggs and firing at him." *Id.* at 37. Thus, Stone's decision was appropriately based upon strategy.<sup>2</sup> And Smith did not question Stone regarding the other allegations of ineffective assistance of trial counsel he now claims Stone should have asserted on direct appeal.

But Smith's trial counsel, Donald Hurst, and Deputy Prosecutor David Puckett also testified at the post-conviction hearing. With regard to Smith's contention that Hurst was deficient in not challenging Puckett's testimony that he released Lampley from jail because he feared for Lampley's life, Puckett's testimony at the post-conviction hearing does not support Smith's argument on this point. Puckett testified that he was aware of other means of protecting Lampley, but he believed that releasing him on bond was the most appropriate option, even given the nature of his offense. To the extent that Smith contends Hurst's line of questioning was deficient, Smith has not shown that he suffered any prejudice.

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<sup>2</sup> Further, Hurst testified at the post-conviction hearing that in his opinion, the prosecutor did not misstate the law regarding accomplice liability.

With regard to Hurst's failure to object to Jana Brandle's testimony that Smith pointed a gun to her head, Hurst testified that he did not object because he believed that testimony indicated Brandle's bias against Smith. In addition, Brandle testified that she was not scared when Smith pointed the gun to her head, which could reasonably imply that it was not a serious attempt to threaten Brandle. We conclude that Stone was not deficient in not raising that issue on appeal.

Finally, with regard to Hurst's failure to impeach Bobby Baccus with his testimony from Smith's first trial that he could not identify Smith, Hurst explained that impeaching Baccus "probably [wouldn't have] matter[ed] in the long run anyway because Mr. Baccus frankly wasn't that important of a witness, as I recall." Transcript at 31. Hurst testified that it was a strategic decision not to impeach Baccus. Indeed, Baccus' identification of Smith as the man who bought a nine millimeter handgun from him was not the only evidence that Smith had a gun prior to Riggs' murder. We cannot say that Stone was deficient for not raising this issue on direct appeal.

In sum, Smith has not demonstrated either that his trial counsel was deficient or that the result of his appeal would have been different had Stone asserted the various grounds for alleged ineffective assistance of trial counsel on direct appeal. Smith has not convinced us that the proffered issues are clearly stronger than the issues Stone asserted or that Stone's decision to exclude certain issues was unquestionably unreasonable. We hold that the post-conviction court did not err when it concluded that Smith was not denied the effective assistance of appellate counsel.



## Issue Two: Exclusion of Exhibit

Smith next contends that the post-conviction court abused its discretion when it excluded from evidence a transcript showing that Lampley pleaded guilty to possession of cocaine within 1000 feet of a school. The State objected to that exhibit on relevancy grounds. The trial court sustained the objection and excluded the exhibit from evidence.

On appeal, Smith maintains that the transcript was relevant to the issue of whether his appellate counsel was ineffective for failing to raise the issue of his trial counsel's ineffectiveness for not impeaching Puckett.<sup>3</sup> We review a trial court's ruling to exclude or admit evidence under an abuse of discretion standard. In re D.H., 859 N.E.2d 737, 740 (Ind. Ct. App. 2007). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id. Moreover, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Ind. Evidence Rule 103)(a).

Here, the facts regarding Lampley's conviction for drug possession were not disputed at the post-conviction hearing. Accordingly, Smith cannot show that the exclusion of the transcript affected his substantial rights. Any error in the trial court's exclusion of the evidence was harmless.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.

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<sup>3</sup> In essence, Smith was trying to show that Puckett's purported reason for releasing Lampley from jail, namely, fear for his life, was not credible in light of the seriousness of his drug conviction. Smith argued that Lampley's release was inducement for his testimony against Smith. But at the post-conviction hearing, Puckett insisted that the nature of Lampley's drug conviction would not have deterred him from ordering his release.