

Case Summary

Pro-se Appellant-Petitioner William J. VanHorn (“VanHorn”) appeals the denial of his petition for post-conviction relief, which challenged his conviction following his plea of guilty to Burglary. We affirm.

Issue

VanHorn presents the issue of whether he was denied the effective assistance of trial counsel because counsel failed to adequately prepare for trial. We restate the issue as whether VanHorn’s claim of ineffectiveness in trial preparation is foreclosed by his guilty plea.¹

Facts and Procedural History

On February 4, 2003, the State charged VanHorn with Burglary, as a Class B felony.² On February 24, 2003, the State alleged that VanHorn was a habitual criminal. During the pendency of the charge and allegation, VanHorn was represented by two successive public defenders.

On April 8, 2003, VanHorn pled guilty to Burglary pursuant to a plea agreement providing that the habitual offender allegation was to be dismissed and VanHorn’s sentence was to be capped at fifteen years. VanHorn received an advisement of rights including the advisement that he waived the right to a trial by pleading guilty. On May 8, 2003, Van Horn

¹ We do not address VanHorn’s freestanding claims that the trial court denied him a fair trial by not resetting the omnibus date after a speedy trial date was set, or by refusing to grant his motions for continuances. See Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) (recognizing that freestanding fundamental error claims are not reviewable in a post-conviction proceeding).

² Ind. Code § 35-43-2-1.

was sentenced to thirteen years imprisonment.

On July 27, 2009, VanHorn filed a pro se Petition for Post-Conviction Relief, amended December 28, 2009, alleging that he had been denied the effective assistance of trial counsel. On January 25, 2010, the post-conviction court conducted an evidentiary hearing. On February 3, 2010, the post-conviction court entered its findings of fact, conclusions of law, and order denying VanHorn's petition. VanHorn now appeals.

Discussion and Decision

VanHorn contends that the post-conviction court improperly denied his petition for relief, because "the public defenders assigned to his case completely failed to subject the State's case to adversarial testing, by providing only perfunctory representation." Appellant's Brief at 9. He asserts that his counsel did not depose potential defense witnesses, did not move to suppress his pretrial statement, and did not secure an omnibus date precluding amendment of the charging information.

A petitioner appealing from the denial of post-conviction relief stands in the position of one appealing from a negative judgment. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). On appeal, we will not reverse unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. Id.

Ineffectiveness of counsel 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 both deficient performance and resulting prejudice. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). A deficient performance is a performance which falls below an objective standard of reasonableness. Id. Prejudice exists when a claimant shows “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694.

Segura v. State, 749 N.E.2d 496, 504 (Ind. 2001) addresses the appropriate showing required by a defendant upon a review of a claim of ineffective assistance of counsel following a guilty plea. There are two permissible categories of claims: (1) an unutilized defense or failure to mitigate a penalty, or (2) an improper advisement of penal consequences. Willoughby v. State, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003), trans. denied. When a post-conviction allegation of ineffectiveness relates to trial counsel’s failure to raise a defense or mitigate a penalty, Segura requires that the prejudice from the omitted defense, or failure to mitigate a penalty, be measured by (1) evaluating the probability of success of the omitted defense at trial or (2) determining whether using the opportunity to mitigate a penalty would likely produce a better result for the petitioner. Id. In order to set aside a conviction because of an attorney’s failure to raise a defense, a petitioner who has pled guilty must establish that there is a reasonable probability that he or she would not have been convicted had he or she gone to trial and used the omitted defense. Id. (citing Segura, 749 N.E.2d at 499 and State v. Van Cleave, 674 N.E.2d 1293 (Ind. 1996)).

VanHorn makes no assertion that he received incorrect advice as to the penal consequences of his decision to plead guilty; rather, he complains that his attorneys failed to

undertake his defense. Thus, arguably the first Segura category is implicated. Nonetheless, while VanHorn complains that his attorneys did “virtually nothing” and “the lack of effort from Mr. Denney and Mr. Rowland was the driving force behind VanHorn’s fear and subsequent plea of guilty,” Appellant’s Brief at 19, he does not identify an omitted defense or show a reasonable probability of acquittal had the defense been used.

VanHorn pled guilty after specific advisement that he would be giving up his right to a trial and his right to call witnesses on his behalf. A plea of guilty constitutes a waiver of the right to trial. Gosnell v. State, 439 N.E.2d 1153, 1155 (Ind. 1982). Accordingly, VanHorn’s decision to plead guilty foreclosed counsel’s ability to continue with trial preparations or develop a defense. Indeed, VanHorn does not contend that he had a viable defense that counsel could have pursued.

VanHorn has not demonstrated deficient performance by counsel due to alleged failure to prepare for trial. Additionally, VanHorn’s bald assertion that he “would not have pled guilty” but for counsel’s permitting the State to add an habitual offender allegation, Appellant’s Brief at 12, does not satisfy the requisite proof required by Segura.³

The post-conviction court properly denied VanHorn’s petition for post-conviction

³ VanHorn appears to assume that, because he had moved for a speedy trial and had obtained a change of his July 14, 2003 initial trial date to March 17, 2003, he was entitled to a revision of the March 24, 2003 omnibus date such that the State was precluded from amending the information to add the habitual offender allegation (which was added twenty days after the original charge). However, VanHorn develops no cogent argument with citation to relevant authority suggesting that his trial counsel could have maneuvered the State into having less than twenty days to amend its charging information. See Ind. Code § 35-34-1-5(e) (providing that an amendment of an indictment or information to include a habitual offender allegation must be made not later than ten days after the omnibus date but, upon a showing of good cause, the court may permit the filing at any time before the commencement of trial).

relief.

Affirmed.

RILEY, J., and KIRSCH, J., concur.