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**IN THE
COURT OF APPEALS OF INDIANA**

TYRONE LASALLE NOBLE,)

Appellant-Petitioner,)

vs.)

STATE OF INDIANA,)

Appellee-Respondent.)

No. 45A03-0702-PC-56

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Natalie Bokota, Magistrate
Cause No. 45G02-0308-PC-19

August 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Tyrone Lasalle Noble appeals the denial of his petition for post-conviction relief. We affirm.

Issue

Noble presents two issues which we consolidate and restate as whether the post-conviction court erred by denying his petition.

Facts and Procedural History

In Noble's direct appeal, we stated the facts underlying Noble's murder conviction as follows:

At approximately noon on February 17, 1997, Daniel Bennett was shot and killed during a robbery of a drug house in Hammond, Indiana. Prior to the robbery and murder, Noble, his mother, Tahwana Noble, Shantay Barnes, Johnny Thames, Amy Josway, Kayster McDaniel, Cheyenne Campbell, and Ruth Campbell, Cheyenne's grandmother, met at Noble's house to plan a robbery for drugs and money. On the morning of the crime, all eight individuals piled into Ruth Campbell's Chevrolet Chevette to drive to the house. Several of the individuals were armed with weapons, including guns and a knife. Noble along with Josway and Thames entered the upstairs apartment, where Noble struggled with a man for money and drugs. During the course of the robbery in the upstairs apartment, Kayster McDaniel, who was downstairs as a look-out shot Bennett in the head. After the shooting, while Bennett lay outside in the snow, Noble approached Bennett, kicked him in the head multiple times, and pronounced that he was not dead yet.

Noble v. State, No. 45A05-0107-CR-305, slip op. at 2-3 (Ind. Ct. App. May 30, 2002).

On July 1, 1998, the State charged Noble with felony murder. On September 27, 2000, Noble filed a notice of alibi, which stated that he was "at the home of his grandmother"

on the date of Daniel Bennett's murder. Appellant's App. at 91.¹ The State filed a motion to strike alibi defense on the basis that it was not timely filed.² The trial court granted the State's motion on October 3, 2000. On October 20, 2000, a jury found Noble guilty as charged. On May 31, 2001, the trial court sentenced him to sixty years. On May 30, 2002, this Court affirmed Noble's conviction and remanded the case to the trial court for further consideration on a sentencing issue.

On September 26, 2003, Noble filed a petition for post-conviction relief. Noble alleged that his trial counsel was ineffective for failing to timely file a notice of alibi and for failing to object to the prosecutor's comments at trial. Noble also claimed that his appellate counsel was ineffective for failing to allege on direct appeal that he received ineffective assistance from his trial counsel. On August 1, 2006, the post-conviction court denied Noble's petition. Noble now appeals.

Discussion and Decision

A defendant who has exhausted the direct appeal process may challenge the correctness of his convictions and sentence by filing with the trial court a petition for post-conviction relief. *Eichelberger v. State*, 852 N.E.2d 631, 634 (Ind. Ct. App. 2006), *trans. denied*. Post-conviction petitions are not "super-appeals," however. *Id.* Rather, they create a narrow remedy for subsequent collateral challenges based on grounds enumerated in the

¹ We remind Noble that Indiana Appellate Rule 51(C) requires that "[a]ll pages of the Appendix shall be numbered at the bottom consecutively[.]"

² Pursuant to Indiana Code Section 35-36-4-1, a defendant charged with a felony must file his notice of alibi no later than twenty days prior to the omnibus date. In this case, the omnibus hearing was held on June 21, 1999, and Noble filed his notice of alibi on September 26, 2000. Noble does not dispute that the notice was untimely filed.

post-conviction rules. *Id.* “[C]omplaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective assistance of counsel or issues demonstrably unavailable at the time of trial or direct appeal.” *Id.* (quoting *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002)) (alteration added).

Post-conviction proceedings are civil in nature, and therefore, to prevail, a petitioner must establish his claims by a preponderance of the evidence. *Terry v. State*, 857 N.E.2d 396, 402 (Ind. Ct. App. 2006), *trans. denied* (2007). On appeal from a denial of a petition for post-conviction relief, the petitioner must convince this Court that the evidence, taken as a whole, leads unmistakably to a conclusion opposite that reached by the post-conviction court.

Id.

When reviewing ineffective assistance of counsel claims, Indiana courts use the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the first prong, the petitioner must establish that counsel’s performance was deficient; that is, the performance fell below an objective standard of reasonableness, thereby denying the petitioner the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution. We presume that counsel provided adequate assistance and defer to counsel’s strategic and tactical decisions. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Under the second prong, the petitioner must demonstrate prejudice; that is, petitioner must demonstrate a reasonable probability that the result of the trial would have been different if counsel had not made the errors. If our confidence that the result would have been the same is undermined, we will find that a reasonable probability exists. If we can reject an ineffective assistance of counsel claim based on lack of prejudice, we need not address whether counsel provided deficient performance.

Id. at 402-03 (quotations marks and some citations omitted).

A. Ineffective Assistance of Trial Counsel

Noble argues that his trial counsel was ineffective for failing to timely file a notice of alibi. As discussed below, however, this Court has already ruled in Noble’s direct appeal upon the issue at the heart of this ineffectiveness claim.

In Noble’s direct appeal, he argued that the trial court erred by granting the State’s motion to strike his notice of alibi. He claimed that there was “good cause” for his failure to timely file the notice of appeal, namely that it was his counsel’s responsibility to file the notice on time. *See* Ind. Code § 35-36-4-3 (“If at the trial it appears that the defendant has failed to file and serve an original statement of alibi in accordance with section 1 of this chapter, and if the defendant does not show good cause for his failure, then the court shall exclude evidence offered by the defendant to establish an alibi.”)

In considering Noble’s argument, however, another panel of this Court noted that at the hearing on the State’s motion to strike, Noble’s counsel explained that while his grandmother would testify that Noble was living with her in February of 1997, she would not testify that he was someplace other than the scene of the crime on February 17, 1997. During the hearing, the trial court found that Noble’s grandmother was not an alibi witness and therefore struck the notice of alibi. Upon review, another panel of this Court concluded that the trial court did not err in granting the State’s motion to strike. *See Noble*, slip op. at 6. Applying that ruling to the current appeal, we must conclude that the proffered evidence would not have been admissible regardless of whether a notice of alibi had been timely filed. Thus there could not have been prejudice resulting from the late filing, and Noble’s ineffectiveness claim must fail.

Noble now claims that we should again review the trial court's ruling on the notice of alibi because the prior panel of this Court relied on incorrect facts in making its determination.³

Facts established at one stage of a proceeding which were part of an issue on which judgment was entered and appeal taken, unalterably and finally established as part of the law of the case and may not be relitigated at a subsequent stage. This is part of the law of the case principle. In this sense it is similar to *res judicata* in that it furthers a timely termination of disputes and avoids otherwise endless litigation. Even if the judgment is erroneous, it nevertheless becomes the law of the case and thereafter binds the parties unless successfully challenged on appeal. Thus, all issues decided directly or by implication in a prior decision are binding in all further portions of the same case.

Cunningham v. Hiles, 439 N.E.2d 669, 676 (Ind. Ct. App. 1982).

We acknowledge that while courts generally refuse to reopen what has previously been decided, the law of the case doctrine is a discretionary rule of practice. *Otte v. Otte*, 655 N.E.2d 76, 83-84 (Ind. Ct. App. 1995), *trans. denied* (1996). "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances." *Id.* at 84. Finding no such extraordinary circumstances in the instant case, however, we will not accept Noble's invitation to second-guess this Court's prior holding.

Noble also contends that his trial counsel was ineffective for failing to object to certain statements made by the prosecutor in the State's closing argument. He claims that the prosecutor's statements about certain witnesses resulted in improperly shifting the burden of

³ A post-conviction proceeding is not the proper forum for challenging an alleged error in a Court of Appeals decision. Following the issuance of the memorandum opinion on May 30, 2002, Noble had the opportunity to raise the issue with the deciding panel via a petition for rehearing. He did not. Noble also had

proof to Noble. On direct appeal, Noble alleged prosecutorial misconduct, citing the same comments. This Court stated:

Here, the State did not attempt to shift the burden of proof to Noble. The clear import of the prosecutor's comments was that, but for Noble's association and friendship with the State's witnesses, no trial would have occurred and the jury would not have heard their testimony. The jurors understood that the State called the witnesses.

Noble, slip op. at 9. To find that Noble's counsel was ineffective for failing to object to the prosecutor's comments, we would have to ignore this Court's prior determination that the comments were not improper. Again, the law of the case doctrine prohibits us from revisiting this issue, and Noble's claim must fail.

B. Ineffective Assistance of Appellate Counsel

The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in her performance and that the deficiency resulted in prejudice. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006) (citing *Strickland*, 466 U.S. at 686). Indiana courts recognize three categories of alleged appellate counsel ineffectiveness: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Id.* Ineffectiveness is rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal. *Id.* The decision of what issue or issues to raise is one of the most important strategic decisions made by appellate counsel. *Id.* at 1196.

Noble alleges that his appellate counsel was ineffective for failing to claim on direct

the opportunity to request that our supreme court review that decision by filing a petition for transfer. On July 1, 2002, Noble did in fact file a petition for transfer, which our supreme court denied on August 22, 2002.

appeal that Noble's trial counsel was ineffective for failing to object to the above-referenced prosecutorial comments. As noted above, this Court concluded that the prosecutor's comments were not improper in the context of Noble's prosecutorial misconduct argument on direct appeal. Moreover, a claim of ineffectiveness of trial counsel may be raised for the first time in a petition for post-conviction relief, and, in fact, our supreme court has held that "a post-conviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim." *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998), *cert. denied* (1999). Therefore, the failure of Noble's appellate counsel to raise ineffectiveness of trial counsel on direct appeal did not result in prejudice, and we cannot conclude that Noble's appellate counsel was ineffective.

Affirmed.

DARDEN, J., and MAY, J., concur.