

Appellant-petitioner Ricky Lee Jackson appeals from the denial of his petition for post-conviction relief. Specifically, Jackson claims that the post-conviction court erred in denying his motion for summary judgment because the evidence established that he was denied the right to counsel and due process as a matter of law. Alternatively, Jackson claims that he was entitled to post-conviction relief because his trial counsel was ineffective. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

The facts as reported in Jackson's direct appeal are as follows:

On the morning of March 20, 1998, at approximately 8:00 a.m., Jackson's wife Debbie refused to get out of bed. This triggered an argument that continued as Jackson and his wife made three or four circuits of the downstairs of their house. Jackson then looked for his gun to "scare her with." He became angry when he did not find it in the top drawer of their dresser. Debbie located it in the second drawer, handed it to him, and proceeded to the kitchen. Jackson followed. Jackson testified that he then cocked the gun, with an eye to shooting it at the ceiling. According to Jackson, he decided not to fire, but as he was lowering the gun, it discharged, striking Debbie in the head. When Deputy Larry Keller arrived at the scene, Jackson was holding Debbie's head in his hands. Keller ordered Jackson to move away from Debbie, but Jackson responded that if he did Debbie would bleed to death. Keller observed that the living room was in a disarray—a table had been pushed up against the couch and the items on it had fallen to the floor. Keller also observed that the couple's top dresser-drawer was broken and that the pewter buckle on Jackson's belt was broken in half.

Debbie died later that day as a result of the gunshot wound. Jackson maintained throughout the investigation and trial that the shooting was accidental. The jury convicted him of murder.

Jackson v. State, 728 N.E.2d 147, 150 (Ind. 2000).

On November 23, 1998, Jackson was sentenced to fifty-five years of incarceration. Following a direct appeal to our Supreme Court, Jackson's conviction was affirmed, but the

cause was remanded for resentencing because the record failed to provide the trial court's reasons for the sentence that was imposed. Id. at 155. On August 20, 2000, the trial court resentenced Jackson to fifty-five years, and Jackson again appealed. Our Supreme Court affirmed the sentence. Jackson v. State, 752 N.E.2d 45, 47-48 (Ind. 2001).

Additional facts established at the post-conviction hearing were that attorney Michael Simler was a friend of Jackson's sister, and Simler was somewhat acquainted with Jackson prior to the incident. After the shooting, Jackson's sister contacted Simler and asked him to speak with Jackson at the county jail. Simler agreed to do so, but when he arrived at the jail, the police officers explained that he could not immediately speak with Jackson because Jackson had not yet been processed.

Approximately twenty minutes later, Simler was permitted to see Jackson. At that time, Jackson had already given a recorded statement to the police regarding the events of the shooting. However, it was also established that Jackson had been advised of his rights pursuant to Miranda v. Arizona¹ before providing the statement. When Simler told Jackson that he should not have talked with the police until first talking with him, Jackson replied that he had only explained to the police that the shooting was an accident.

Thereafter, Simler informed Don Darnell—Jackson's counsel of record—of the circumstances surrounding the statement that Jackson gave to the police. Darnell did not file a motion to suppress or a motion to dismiss the charges prior to trial, and Jackson continued to maintain that the shooting was accidental.

¹ 384 U.S. 436 (1996).

On September 19, 2001, Jackson filed a pro se petition for post-conviction relief. Thereafter, the petition was amended, and Jackson alleged that he had received ineffective assistance of trial counsel because Darnell did not file a motion to suppress or a motion to dismiss the charge. Jackson further claimed that Darnell was ineffective because Darnell did not object at trial to the admission of his statement to police on the basis that he was denied his right to counsel when he made the statement.

Jackson also alleged that Darnell was ineffective because Darnell did not adequately communicate the terms of a proposed plea agreement that the State had offered. Jackson maintained that because he has a low intelligence level, he was unable to comprehend the plea offer or its significance. Moreover, Jackson claimed that Darnell never asked Jackson if he understood the offer. Finally, Jackson claimed that Darnell should have challenged Jackson's competency to stand trial because of his low intelligence level.

During an evidentiary hearing that was conducted on August 2, 2006, Jackson moved for summary judgment, claiming that the State had changed its position with respect to Jackson's intent. In particular, Jackson claimed that he was entitled to judgment as a matter of law because the "prosecutor's actions demonstrated that they were now of the view [that] what had happened was accidental as opposed to murder." Appellant's Br. p. 4. The post-conviction court denied the motion for summary judgment as well as Jackson's request for relief following the hearing on October 30, 2006. Jackson now appeals.

DISCUSSION AND DECISION

I. Standard of Review

As we consider Jackson’s argument that the post-conviction court improperly denied his petition, we observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

II. Summary Judgment

Jackson claims that the trial court erred in denying his motion for summary judgment. Specifically, Jackson argues that although he was tried for intentionally killing his wife, “the State did a 180 [degree turn during the post-conviction proceedings] and supported Jackson’s theory of accident in order to sustain its conviction.” Appellant’s Br. p. 4. In essence, Jackson argues that the State cannot have it “both ways” and the State’s change of theory deprived him of the right to counsel and due process as a matter of law. Id. at 5.

In resolving this issue, we note that a post-conviction court is required to grant a summary judgment motion only when there is no genuine issue of material fact and the

moving party is entitled to judgment as a matter of law. Trueblood v. State, 715 N.E.2d 1242, 1260 (Ind. 1999). The burden is on the moving party to prove each element of his or her claim and to establish that there are no genuine issues of material fact, and to prove that the moving party is entitled to judgment as a matter of law. Id.

In this case, the deputy prosecutor cross examined Jackson at the post-conviction hearing, eliciting testimony that Jackson had always maintained that the shooting was accidental. Tr. p. 60-63, 88-89. Because of this line of questioning, Jackson asserts that the State changed its theory of the case in favor of his innocence, arguing that he did not have the intent to commit murder. Notwithstanding this claim, it is apparent that the State was merely pointing out to the post-conviction court that Jackson's defense had never changed. Id. at 90. In other words, the State merely sought to demonstrate that Jackson had always maintained that the shooting was an accident.

We further note that the State's purpose in cross-examining Jackson concerning his defense was simply to show that his trial counsel was merely pursuing a reasonable trial strategy in not moving to suppress or objecting to the pretrial statement that Jackson gave. Indeed, the admission of Jackson's statement into evidence bolstered his claim that the shooting was accidental. And the contents of the statement demonstrated that Jackson had remained consistent when relating his version of the events. That said, Jackson's claim that the prosecutor had suddenly changed its theory of the case is without merit, and Jackson has failed to show that the State was attempting to "have it both ways" with regard to his intent. Appellant's Br. p. 4-5. Therefore, Jackson was not entitled to judgment as a matter of law,

and we conclude that the post-conviction court properly denied Jackson's motion for summary judgment.

III. Ineffective Assistance of Counsel

In the alternative, Jackson argues that he was entitled to post-conviction relief because his trial counsel failed to move to suppress the statement that Jackson gave to the police and failed to challenge Jackson's competence to stand trial. Jackson also claims that his request for relief should have been granted because Darnell failed to make certain that Jackson understood the State's plea offer and the consequences of a guilty plea.

We review claims of ineffective assistance of counsel based upon the principles enunciated in Strickland v. Washington, 466 U.S. 668 (1984). Specifically,

[a] claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting Strickland, 466 U.S. at 694).

Although the two parts of the Strickland test are separate inquiries, a claim may be disposed of on either prong. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). Strickland declared that the "object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." 466 U.S. at 697.

We further note that counsel is given wide discretion in determining strategy and

tactics, and, therefore, courts will accord these decisions deference. Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001). A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. Isolated omissions or errors, poor strategy, or bad tactics do not necessarily render representation ineffective. Stevens v. State, 770 N.E.2d 739, 747 (Ind. 2002). The burden is on the petitioner to establish that some action or inaction on the part of trial counsel had no strategic purpose. Clark v. State, 597 N.E.2d 4, 11 (Ind. Ct. App. 1992).

A. Jackson's Statement

With regard to Jackson's claim that he was denied his right to counsel under the Fifth Amendment to the United States Constitution, the record shows that Jackson was informed of his rights pursuant to Miranda.² Jackson expressly waived those rights, including his right to counsel, and he presented no evidence that the waiver was not made knowingly, intelligently, or voluntarily. Thus, Jackson's trial counsel was not ineffective when he did not challenge the admission of the statement on the ground that Jackson was denied his right to counsel under the Fifth Amendment.

We also reject Jackson's contention that his trial counsel was ineffective for failing to move to dismiss the charges because the police refused to permit Simler to interview Jackson at the jail when the request was made. In essence, Jackson maintains that the State engaged

² Although Jackson has presented us with the written transcript of his jury trial, the pages are not numbered. Prior to the statement that Jackson gave to the police, Indiana State Police Detective Wayne Sager informed Jackson of the Miranda warnings. The tape of Jackson's interview, which also contained the warnings given by Detective Sager, was played for the jury.

in outrageous conduct when it refused Simler's request.

In Ajabu v. State, 693 N.E.2d 921, 935 (Ind. 1998), our Supreme Court determined that no due process violation occurred when the police did not inform the defendant that an attorney that he did not request, retain, or even know about, sought to intervene in an interrogation but was not permitted to do so by the police. Here, the record shows that the police merely informed Simler that he would have to wait until Jackson had been processed at the jail, and there is no evidence that the police officers that questioned Jackson actually disallowed Simler to meet with Jackson prior to questioning. Simler Dep. at 8-9. Hence, in light of our Supreme Court's holding in Ajabu, Jackson has failed to demonstrate outrageous governmental conduct that created a due process violation. Therefore, had trial counsel raised the due process claim, the trial court would not have been required to grant a motion to dismiss or motion to suppress on this basis.

Finally, we note that Jackson's reliance on Malinski v. State, 794 N.E.2d 1071 (Ind. 2003), is misplaced. In Malinski, it was determined that law enforcement officials have a duty to immediately inform a custodial suspect when an attorney hired by the suspect's family to represent him is present at the police station seeking access to him. However, the Malinski court observed that the question remains whether withholding information about counsel's presence renders a waiver of the right to counsel invalid. Id.

Notwithstanding Jackson's reliance on Malinski, the rule announced in that case does not apply because the case was decided five years after Jackson's trial ended. For purposes of ineffective assistance of counsel claims, the law requires consideration of legal precedent

available to counsel at the time of his representation of the accused, and counsel will not be deemed ineffective for not anticipating or initiating changes in the law. Gann v. State, 550 N.E.2d 73, 75 (Ind. 1990). Thus, when applying the law that existed at the time of Jackson's trial, the claim that he argues with respect to this issue would not have succeeded.

Moreover, we note that our Supreme Court affirmed the defendant's conviction in Malinski even though the defendant had not been notified that counsel was waiting to see him. The Malinski court observed that

[T]aken as a whole, the record suggests a voluntary and intelligent waiver. First, there is no indication that attorney Martin, retained by Malinski's family, had a previous relationship with Malinski himself. While hardly dispositive, this fact makes it seem less likely that Malinski would have responded to the lawyer's request than would be the case if the request came from someone he already knew.

Second, the police repeatedly read Malinski his rights and he consistently waived them and agreed to talk. Third, Malinski signed a written waiver of his Miranda rights. Indeed, before taking a second recorded statement, the FBI agents showed Malinski his signed waiver and asked him once again whether he understood his rights. Malinski acknowledged his rights and signature on the waiver form, and again chose to provide a statement. Finally, at no time during the interrogations did Malinski request counsel.

...
Numerous factors weigh in favor of finding a knowing, voluntary, and intelligent waiver. In light of all the circumstances, we conclude that Malinski's ignorance of Martin's presence did not convert his waiver into one that was involuntary.

Id. at 1080.

Similar to the circumstances in Malinski, we again note that Jackson was fully advised of his Miranda rights on at least two occasions prior to giving a recorded statement to the police. Moreover, Jackson presented no evidence—and made no claim—that the waiver of

his rights was not made knowingly, intelligently, and voluntarily. Therefore, when considering the circumstances that were present in Malinski, it is apparent that Jackson would not have prevailed on his claim even if Malinski had applied.

As a final note, we again observe that Jackson maintained from the outset that the shooting was accidental. Jackson told the police and testified at trial that he had accidentally shot his wife. Therefore, it is apparent that Darnell made a reasonable strategic decision not to challenge the admissibility of the statement because its exclusion would have gained Jackson nothing. For all of these reasons, Jackson's claim on this issue fails.

B. Mental Incompetency Claim

Jackson also argues that his trial counsel was ineffective for failing to challenge his competency to stand trial. To succeed on this claim, Jackson was required to establish that his trial counsel was presented with evidence of incompetence, that had counsel raised the claim the trial court would have been required to hold a hearing, and that the trial court would have found Jackson incompetent to stand trial. Anderson v. State, 699 N.E.2d 257, 260 (Ind. 1998). It is the defendant's burden to demonstrate his incompetence to stand trial by a preponderance of the evidence. Pruitt v. State, 834 N.E.2d 90, 101 (Ind. 2005). The standard for determining whether a defendant is incompetent to stand trial is based on whether the defendant possesses the ability to consult rationally with counsel and comprehend the proceedings against him. Anderson, 699 N.E.2d at 260-61.

In this case, Jackson's mother testified that she informed Darnell that Jackson had a low intelligence level, could not read or write, and was unable to understand certain

concepts. Tr. p. 83, 108-09. Although Jackson also testified that he informed Darnell of his inability to read and write, Darnell did not recall any conversations with anyone regarding Jackson's intelligence level.

The record reflects that during pretrial hearings, Jackson appropriately answered questions regarding the charges and stated that he understood the charges. Tr. Initial Hearing; Hearing on Appointment of Counsel. Jackson also testified at trial regarding the crime and maintained that the shooting was accidental. Jackson acknowledged that he knew right from wrong, understood that the jury was to hear and consider the evidence, and understood that he was charged with the crime of murder. Tr. p. 59-62. Jackson further testified at the post-conviction hearing that he consulted with his trial counsel, understood what conduct constituted an accident, and generally understood the questions that were asked of him when he testified at trial. Id.

In light of these circumstances, it is apparent that Jackson presented no evidence establishing that Darnell should have requested a competency hearing. Even if it could be said that Jackson's intelligence level was low or that he was not well educated, he has failed to establish his incompetence to stand trial. See Anderson, 699 N.E.2d at 260-61 (recognizing that a prior diagnosis of schizophrenia did not establish that he was incompetent to stand trial). Thus, Jackson's claim that Darnell was ineffective on this basis fails.

C. Comprehension of Plea Offer

Finally, Jackson contends that he was entitled to post-conviction relief because Darnell failed to make certain that Jackson understood the terms of the plea offer and the

consequence of the plea offer. Thus, Jackson claims that Darnell was ineffective on this basis.

Darnell testified that although he was unable to recall the specifics of his contacts with Jackson, he was certain that he would have communicated the plea offer to Jackson and discussed the terms of the agreement with him. Tr. p. 95-97. Even more compelling, Jackson testified that Darnell explained the terms of the plea offer to him and read the State's offer to him. Id. at 82-84.

In sum, the evidence before the post-conviction court established that Darnell presented Jackson with the plea offer and explained its terms to him. Additionally, it is apparent that Jackson understood the terms of the offer. Thus, there is simply no credible evidence that Jackson did not comprehend the plea offer or that Darnell failed to fulfill his duty to advise Jackson of the possible plea and its terms. As a result, Jackson has failed to show that his trial counsel was ineffective on this basis, and we conclude that the post-conviction court properly denied Jackson's request for relief.

The judgment of the post-conviction court is affirmed.

BAILEY, J., and VAIDIK, concur.