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IN THE
COURT OF APPEALS OF INDIANA

ANTIONE MCCULLOUGH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0701-PC-48
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
W. T. Robinette, Commissioner
Cause No. 49G03-0110-PC-205325

September 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Antione McCullough appeals the denial of his petition for post-conviction relief (PCR). We affirm.

FACTS AND PROCEDURAL HISTORY

McCullough was charged with and found guilty of murder, Class A felony robbery, and Class A felony conspiracy to commit robbery. The trial court entered a conviction of murder, but reduced the robbery convictions to Class B felonies after it apparently determined the "serious bodily injury" used to enhance the robbery charges to Class A felonies was the same injury that supported the murder charge. We affirmed the convictions and McCullough's petition to transfer was denied.

McCullough sought post-conviction relief, asserting error in the reduction of the robbery convictions to Class B felonies rather than Class C felonies and asserting his appellate counsel was ineffective for failing to raise that issue and a *Blakely* sentencing issue[1] on appeal.

DISCUSSION AND DECISION

1. Reduction of Convictions

McCullough notes Class B felony robbery is not necessarily a lesser included offense of Class A felony robbery with which McCullough was charged, *Kingery v. State*, 659 N.E.2d 490, 496 (Ind. 1995), *reh'g denied*, and argues the jury was not properly instructed about the elements of class B felony robbery. Therefore, he argues, he was convicted of crimes of which the jury had not found him guilty.

[1] *Blakely v. Washington*, 542 U.S. 296, 301 (2004), *reh'g denied* 542 U.S. 961 (2004), held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

Robbery is a Class C felony. If it is committed by someone armed with a deadly weapon or results in bodily injury to any person other than a defendant, it is a Class B felony. It is a Class A felony if it results in serious bodily injury to any person other than a defendant. Ind. Code § 35-42-5-1.

McCullough was charged in Count IV with robbery as a Class A felony, but that charge was explicitly premised in part on his commission of the robbery "while armed with a deadly weapon, that is: a handgun." (Direct Appeal App. at 30). The jury was instructed McCullough had been so charged, (*id*. at 78), and it found him guilty of Count IV.

The jury instruction stating the elements of robbery did not mention the "armed with a deadly weapon" language, but the jury was instructed "it is impractical to embody all applicable law in any one instruction, so in considering any one instruction you should construe it in connection with, and in light of, every other instruction given." (*Id*. at 95.) Another instruction explained the jury could find McCullough guilty if "the State has proven beyond reasonable doubt *the material allegations of the charges*" against him. (*Id*. at 103) (emphasis supplied). Presuming, as we must, that the jury followed its instructions, *Stephenson v. State*, 742 N.E.2d 463, 483 (Ind. 2001), *cert. denied* 534 U.S. 1105 (2002), the jury must have found McCullough committed the robbery while armed with a deadly weapon. The trial court could properly have reduced the robbery convictions to Class B felonies rather than Class C felonies.

2. *Blakely*

Blakely was not decided until after McCullough had been convicted, the convictions had been affirmed, McCullough's petition for rehearing had been denied, and he had petitioned for transfer. About six months after he petitioned for transfer but six months before our Supreme Court denied his petition, *Blakely* was decided. Counsel was ineffective, McCullough asserts, for failing to supplement the petition to transfer to include a *Blakely* claim.

To establish a violation of the Sixth Amendment right to effective assistance of appellate counsel, McCullough must establish the two elements set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied* 467 U.S. 1267 (1984). *Martin v. State*, 760 N.E.2d 597, 600 (Ind. 2002). First, appellate counsel's performance must be shown to be deficient, meaning the representation fell below an objective standard of reasonableness. *Id*. Second, McCullough must show the deficient performance prejudiced his defense. *Id*. The prejudice prong of *Strickland* requires McCullough to demonstrate a reasonable probability that, but for counsel's errors, the result of his direct appeal would have been different. *Id*. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Robinson v. State*, 775 N.E.2d 316, 319 (Ind. 2002).

We must follow that course here, as McCullough has not demonstrated he was prejudiced by counsel's failure to amend the petition for transfer. His argument on the prejudice issue, in its entirety, is:

> If appellate counsel had supplemented McCullough's Petition to Transfer to add the ***Blakely*** issue the outcome of this appeal should have been

> different. McCullough should have won relief on the ***Blakely*** issue on transfer, as did the defendant in ***Smylie v. State*** [823 N.E.2d 679 (Ind. 2005), *cert. denied* --- U.S. ---, 126 S.Ct. 545 (2005)].

As McCullough has not offered argument explaining how he was prejudiced, we cannot find his appellate counsel was ineffective. Nor did the trial court err in reducing his robbery convictions to Class B felonies. We accordingly affirm the denial of McCullough's PCR petition.

Affirmed.

BAILEY, J., and SHARPNACK, J., concur.