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IN THE
COURT OF APPEALS OF INDIANA

ANDRE D. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0609-PC-499
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William H. Albright, Judge
Cause No. 71D03-0407-PC-24

September 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Andre Johnson appeals from the post-conviction court's denial of his petition for post-conviction relief. Johnson argues that the post-conviction court improperly found that Johnson failed to meet his burden of establishing that his trial and appellate representation was ineffective. He raises two issues related to this argument: 1) whether his trial counsel was ineffective for failing to file a motion to dismiss charges that Johnson argues were required to be joined with charges filed in a prior case; and 2) whether his trial counsel was ineffective for failing to move for a dismissal of an habitual offender enhancement in the second case, and whether his appellate counsel was ineffective for not challenging this enhancement on direct appeal. Concluding that Johnson has failed to meet his burden of showing that his representation was deficient, we affirm.

Facts and Procedural History

The underlying facts are contained in our supreme court's opinion addressing Johnson's direct appeal:

> Seventy-four year old Florence Hoke called her niece, Nancy Whiteman, at 8:30 a.m. on April 10, 1990, and told Whiteman that she was going to get license plates for her car. At 12:30 p.m., Whiteman called Hoke twice, but Hoke did not recognize her. Whiteman went to Hoke's apartment, where she discovered Hoke sitting in a chair holding her head. Whiteman called "911." Richard Bourdon, a paramedic, arrived and observed that Hoke was disoriented and unable to communicate. He observed a small bruise and a bump on the back of Hoke's head. At the hospital later that day, Whiteman observed bruises on Hoke's knees and on one elbow.
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> Hoke was diagnosed as suffering a subdural hematoma, "a collection of blood that forms under the external cover of the brain." The treating physician testified that subdural hematomas are caused by trauma, which could result from "a blow to the head, a fall, [or] any type of force." Doctors performed a craniotomy, but Hoke never regained consciousness, and died approximately

> two months later from pneumonia and infection. Hoke's new license plates were found in her apartment, but her purse was missing. A leather bow resembling one that was on Hoke's purse was found on the ground near where Hoke's car was parked.
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> On April 10, 1990, Margaret Jackson resided with Homer Frison. Andre D. Johnson visited that morning and left with Frison. The two told Jackson that when they returned they "would either have some money or would have a way of making some money." When Frison and Johnson later met up with Jackson, they had a purse and a wallet containing credit cards belonging to Hoke. The trio went shopping, Jackson purchased cigarettes with the credit cards, and the trio sold the cigarettes to obtain money to purchase drugs.

Johnson v. State, 653 N.E.2d 478, 478-79 (Ind. 1995).

In relation to Johnson's use of Hoke's credit cards, on April 26, 1990, the State charged Johnson with six counts of fraud, a Class D felony, attempted fraud, a Class D felony, and with being an habitual offender. On June 28, 1990, a jury found Johnson guilty of four counts of fraud, attempted fraud, and determined that he was an habitual offender. Hoke died two days later. On July 6, 1990, the trial court sentenced Johnson to three years for each offense, all but one to run consecutively, and enhanced the sentence by twelve years because of Johnson's habitual offender status. Johnson appealed his sentence, and our supreme court remanded with instructions that the trial court sentence Johnson under the then-existing Class D felony habitual offender statute. Johnson v. State, 593 N.E.2d 1181, 1182 (Ind. 1992).

On March 19, 1992, the State charged Johnson with robbery, a Class A felony, and felony murder. On August 28, 1992, the State added an habitual offender count. On June 30, 1993, the jury found Johnson guilty of robbery, and of being an habitual offender, and not guilty of felony murder. The trial court sentenced Johnson to fifty years for robbery,

enhanced by twenty-five years for his status as an habitual offender, to run concurrently to his sentences for fraud. Our supreme court affirmed Johnson's conviction. Johnson, 653 N.E.2d 478.

On March 21, 1997, Johnson filed a pro se petition for post-conviction relief. On October 20, 2003, Johnson, this time assisted by counsel, filed an amended petition, alleging that Johnson received ineffective assistance of trial and appellate counsel. On May 19, 2006, a hearing was held on this petition. On July 28, 2006, the trial court issued an order denying Johnson's motion. Johnson now appeals.

Discussion and Decision

Post-conviction proceedings are civil in nature. Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002), cert. denied, 540 U.S. 830 (2003). Therefore, to prevail, petitioners must establish their claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Stevens, 770 N.E.2d at 745. When appealing the denial of a petition, a petitioner appeals from a negative judgment. Burnside v. State, 858 N.E.2d 232, 237 (Ind. Ct. App. 2006). Therefore, petitioners must convince this court that the evidence, taken as a whole, leads unmistakably to a conclusion opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. We will review a post-conviction court's findings of fact under a clearly erroneous standard, but will review its conclusions of law de novo. Burnside, 858 N.E.2d at 237.

A petitioner claiming to have received ineffective assistance of counsel must establish the two components of the test set out in Strickland v. Washington, 466 U.S. 668 (1984).

Reed v. State, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel's performance was deficient by demonstrating that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious they resulted in a denial of the Sixth Amendment right to counsel. Id. Under this prong, we will assume that counsel performed adequately, and will defer to counsel's strategic and tactical decisions. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Douglas v. State, 800 N.E.2d 599, 607 (Ind. Ct. App. 2003), trans. denied. Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. A petitioner may show prejudice by showing there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Reed, 866 N.E.2d at 769. We will find a reasonable probability exists if our confidence in the outcome is undermined. Douglas, 800 N.E.2d at 607. If we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel's performance. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002). The same standard of review applies to claims of ineffective assistance of trial counsel and claims of ineffective assistance of appellate counsel. Burnside, 858 N.E.2d at 238.

I. Failure to Move For Dismissal of Robbery Charge

Johnson argues that his trial counsel was ineffective for failing to move to dismiss the

robbery charge[1] based on three statutes. Indiana Code section 35-34-1-9(a) states:

> Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
>
> (1) are of the same or similar character, even if not part of a single scheme or plan; or
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> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Indiana Code section 35-34-1-10 states in relevant part:

> (b) When a defendant has been charged with two (2) or more offenses in two (2) or more indictments or informations and the offenses could have been joined in the same indictment or information under section (9)(a)(2) of this chapter, the court, upon motion of the defendant or the prosecuting attorney, or on its own motion, shall join for trial all of such indictments or informations unless the court, in the interests of justice, orders that one (1) or more of such offenses shall be tried separately. Such motion shall be made before commencement of trial on either of the offenses charged.
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> (c) A defendant who has been tried for one (1) offense may thereafter move to dismiss an indictment or information for an offense which could have been joined for trial with the prior offenses under section 9 of this chapter. The motion to dismiss shall be made prior to the second trial, and shall be granted if the prosecution is barred by reason of the former prosecution.

Indiana Code section 35-41-4-4 provides:

> (a) A prosecution is barred if all of the following exist:
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> (1) There was a former prosecution of the defendant for a different offense or for the same offense based on different facts.
>
> (2) The former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 of this chapter.
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> (3) The instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.
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> (b) A prosecution is not barred under this section if the offense on which it is based was not consummated when the trial under the former prosecution began.

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[1] Because the jury found Johnson not guilty of felony murder, Johnson's trial counsel could not be found ineffective for failing to move to dismiss the felony murder charge, as Johnson suffered no prejudice related to the felony murder charge.

Johnson argues that the robbery charge met the three criteria of section 35-41-4-4, as there were previous fraud charges that resulted in convictions, and the robbery charge was an offense with which the State should have charged Johnson in the fraud prosecution pursuant to sections 35-34-1-9(a) and 35-34-1-10(b), (c). In support of this argument, Johnson cites Williams v. State, 762 N.E.2d 1216 (Ind. 2002) and Wiggins v. State, 661 N.E.2d 878 (Ind. Ct. App. 1996). These cases interpreted section 35-34-1-10 to provide, "'where two or more charges are based on the same conduct or on a series of acts constituting parts of a single scheme or plan, they should be joined for trial.'" Williams, 762 N.E.2d at 1219 (quoting Wiggins, 661 N.E.2d at 880) (emphasis in original). Therefore, had Williams and Wiggins been the law at the time of Johnson's trial and appeal, we would need to determine whether the robbery and frauds constituted a single scheme or plan. However, Williams and Wiggins were not decided until after Johnson's trial and appeal, and counsel is not ineffective for failing to anticipate a change in the law. Reed v. State, 856 N.E.2d 1189, 1197 (Ind. 2006). Our examination of the case law existing at that time leads us to conclude that Johnson's counsel was not ineffective as he could not have anticipated the rulings in Wiggins or Williams based on the existing interpretation of the relevant statutes.[2]

In Seay v. State, 550 N.E.2d 1284 (Ind. 1990), superceded on other grounds, Ind. Code § 35-50-1-2, the defendant made four separate narcotics sales to a police informant. The State charged the defendant with two counts of dealing a controlled substance, and while

[2] We recognize that counsel may be ineffective for "failing to raise an issue of first impression where a plain reading of the statute" demonstrates that the defendant would be entitled to protection. See Reed, 856

the jury was deliberating, filed two additional counts. Our supreme court noted the permissive language of section 35-34-1-9, which indicates that offenses of a similar nature "may" be joined, and held that the State was not required to bring all the charges at once. Id. at 1287. The court then addressed section 35-34-1-10(b), and noted that the statute did not apply to the defendant because the State filed the second information after the first charges had been submitted to the jury. Id. The court explained, "[a]lthough it is, of course, to this very delay in filing that appellant takes exception, the joinder statutes which he cites do not go so far as to require that the State make simultaneous filings of all related charges." Id.; see also Davidson v. State, 580 N.E.2d 238, 242 (Ind. 1991) ("The joinder statutes do not require that the State simultaneously file all related charges."). "Those statutes operate only on those charges which have been filed prior to the commencement of the first trial and which are, at that juncture, amenable to the court's assessment as to whether the conduct in each separately charged offense constitutes part of a common plan which should be tried together." Seay, 550 N.E.2d at 1287. The court finally addressed section 35-41-4-4, and determined that the second two offenses were not offenses with which the defendant "should have been charged," recognizing that "[n]either 35-34-1-10(c) nor 35-41-4-4(a)(3) has been interpreted to automatically bar successive prosecutions for separate offenses which are committed at the same time or during the general criminal episode." Id. Therefore, the court held that the trial court had not erred in denying the defendant's motion to dismiss the

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N.E.2d at 1197. However, as discussed, infra, similar arguments had been raised, and a plain reading of the statutes does not indicate that the robbery prosecution was barred.

subsequent charges.[3] Id.

In Snodgrass v. State, 182 Ind. App. 473, 476-77, 395 N.E.2d 816, 818 (1979), the defendant was acquitted of leaving the scene of an accident, and was subsequently charged with and convicted of exerting unauthorized control of a motor vehicle in a different county. This court held that the subsequent prosecution was not barred by statute:

> Apparently defendant recognized that compulsory joinder of separate and distinct offenses arising from the same 'transaction' has never risen to the level of constitutional significance. He relies solely upon Indiana statutes for his claim that prosecution for this offense is barred because it was not joined in the earlier prosecution for leaving the scene of an accident.
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> Ind. Code § 35-3.1-1-9(a)(2)[4] does provide that offenses 'can be joined' when they '(a)re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,' but this permissive language can hardly be construed as being mandatory.

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[3] We recognize that in Williams, our supreme court characterized its holding in Seay as relying on the fact that the four charges "were sufficiently separated by time and place that joinder was not required and subsequent prosecutions were thus permissible." 762 N.E.2d at 1220. In Seay, in response to the defendant's argument that his four narcotics sales constituted a common scheme or plan, our supreme court held, "[e]ven accepting that proposition as true, [section 35-34-1-10(b)] does not apply to appellant's situation because the trial court is in a position to consider the propriety of joining for trial only those indictments that are filed and pending at the time the motion is made." 550 N.E.2d at 1287.

Our supreme court later stated:

> Neither 35-34-1-10(c) nor 35-41-4-4(a)(3) has been interpreted to automatically bar successive prosecutions for separate offenses which are committed at the same time or during the same general criminal episode. Neither can it be interpreted to bar successive prosecutions for separate offenses arising from temporally distinct criminal episodes. Here, as in Burke and Webb, the State was not obligated to pursue all charges against appellant in a unified action, and the trial court did not err in denying his motion to dismiss.

Id. at 1288 (emphasis added). We also note that, as indicated, infra, Burke and Webb involved situations in which the crimes were clearly committed in the same transaction.

[4] Indiana Code section 35-3.1-1-9(a), the predecessor of section 35-34-1-9(a), stated:

> Two (2) or more crimes can be joined in the same indictment or information, with each crime stated in a separate count, when the crimes, whether felonies or misdemeanors or both;
> (1) Are of the same or similar character, even if not part of a single scheme or plan; or
> (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

See Blair v. State, 173 Ind. App. 558, 560, 364 N.E.2d 793, 796 (1977).

> Moreover, Ind. Code § 35-3.1-1-10(c)[5] states that when two or more offenses [c]ould have been joined, the court shall grant dismissal 'if the prosecution is barred by reason of the former prosecution,' Thus, the failure to join related offenses is not Ipso facto grounds for dismissal.

Id.

In State v. Burke, 443 N.E.2d 859, 860 (Ind. Ct. App. 1983), the defendant was a passenger in a vehicle containing alcohol, phencyclidine, and marijuana. The defendant pled guilty to possession of alcohol by a minor. The State later charged the defendant with possession of marijuana and possession of a controlled substance. The defendant moved to dismiss these charges as barred by his prior prosecution for possession of alcohol. The trial court granted the motion. On appeal, this court reversed the dismissal of charges, holding that neither double jeopardy nor section 35-41-4-4 barred the second prosecution. Id. We noted the permissive nature of joinder under section 35-41-1-9(a), discussed section 35-34-1-10, and held that "there was no requirement compelling the state to charge [the defendant] in one indictment or information with the offenses he committed [at a single time]." Id. at 862.

Several other cases decided at the time of Johnson's trial and appeal noted the permissive nature of the joinder statutes and held that the State was not required to bring charges arising out of the same criminal transaction in the same prosecution. See Webb v. State, 453 N.E.2d 180 (Ind. 1983), cert. denied, 465 U.S. 1081 (1984) (where defendant was

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[5] Indiana Code section 35-3.1-1-10(c), the predecessor to current section 35-34-1-10(c), stated:
> A defendant who has been tried for one crime may thereafter move to dismiss an indictment or information for a crime which could have been joined for trial with the prior crimes under section 9 of this chapter. The motion to dismiss shall be made prior to the second trial, and shall be granted if the prosecution is barred by reason of the former prosecution.

See Miller v. State, 167 Ind. App. 271, 278, 338 N.E.2d 733, 738 (1975).

convicted of felony murder after being found not guilty in a separate proceeding of a murder arising out of the same criminal transaction, the second prosecution was not barred by statutes that allowed, but did not require that charges be brought together); Sharp v. State, 569 N.E.2d 962, 967 (Ind. Ct. App. 1991), trans. denied (recognizing that section 35-34-1-9 "does not necessarily require the State to join all offenses from the same time period in one information or indictment"); Martakis v. State, 450 N.E.2d 128 (Ind. Ct. App. 1983) (where defendant pled guilty to theft, subsequent prosecution for burglary arising out of the same criminal transaction was not barred by 35-34-1-9(a), which permits, but does not require joinder, or 35-34-1-10(c), because the subsequent prosecution did not violate double jeopardy); see also Moore v. State, 697 N.E.2d 1268, 1271 (Ind. Ct. App. 1998) (where defendant was found not guilty of conspiracy to commit robbery and jury failed to reach a verdict on robbery charge, subsequent trial for robbery and felony murder arising out of same incident was not barred because "the State was not obligated to pursue all charges against [the defendant] in a unified action").

In Williams, on the other hand, the trial court had denied a motion for dismissal of charges arising out of the same criminal transaction as charges for which the defendant had already been convicted. Our supreme court did not indicate that a trial court had discretion to deny or grant this motion, and held that the "charges were based on a series of acts so connected that they constituted parts of a single scheme or plan. Therefore, they should have been charged in a single prosecution." 762 N.E.2d at 1220. This holding marked a departure from the case law existing at the time of Johnson's trial and appeal indicating that sections

35-34-1-9, 35-34-1-10, and 35-41-4-4 do not require joinder for offenses arising out of the same criminal transaction, see Webb, 453 N.E.2d at 184, and that dismissal of charges brought after the defendant had already been convicted of charges arising from the same criminal transaction was improper, see Burke, 434 N.E.2d at 862.

The case law available to Johnson's attorney at the time of Johnson's trial and appeal did not indicate that a motion to dismiss would have been successful. Because Johnson's counsel cannot be expected to have anticipated future opinions, counsel's representation was not ineffective.[6]

II. Failure to Move For Dismissal of Habitual Offender Sentence Enhancement

Johnson argues that his counsel was ineffective for failing to file a motion to dismiss the habitual offender enhancement, as our supreme court has held that "the State is barred from seeking multiple, pyramiding habitual offender sentence enhancements by bringing successive prosecutions for charges which could have been consolidated for trial." Seay, 550 N.E.2d at 1289. However, unlike Johnson and the State represent in their briefs, the trial court ordered Johnson's sentence for robbery to run concurrently, not consecutively, to his sentence for the fraud charges. See Appellant's Appendix at 7; Petitioner's Exhibit 2 at 167, 168. The trial court did not sentence Johnson to consecutive habitual offender enhancements; therefore Johnson's counsel was not ineffective for failing to object to such consecutive sentences. Likewise, Johnson's appellate counsel was not ineffective for failing to raise this issue on appeal.

Conclusion

We conclude that Johnson's counsel was not ineffective either for failing to move to dismiss the robbery charge, as existing case law did not indicate that such a motion would be successful, or for failing to object to the imposition of consecutive habitual offender enhancements, as there were no such consecutive enhancements to which he could have objected.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.

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[6] We make no holding as to whether the robbery charge would have been barred under Williams, as such a decision is not necessary to this opinion.