

Case Summary

Edward G. Sallee appeals the denial of his petition for post-conviction relief. We affirm.

Issue

Sallee raises three issues, which we consolidate and restate as whether the post-conviction court erred in denying his petition.

Facts and Procedural History

On April 9, 2001, Sallee and his wife, Sherry, approached an eighteen-year-old woman, C.T., at a Martinsville gas station. Sallee told her that his car had broken down, and he asked her to give the couple a ride. C.T. agreed, and Sallee and Sherry got into her car. She drove in the direction they indicated until they asked her to pull off along a gravel road. After C.T. stopped the car, the couple forced her into the back seat, and Sherry began to drive while Sallee duct-taped a t-shirt around C.T.'s head as a blindfold. They drove her to a house, led her inside, removed her clothes, and forced her to perform and submit to various sexual acts. They also forced her to smoke and snort what they called "crank." Numerous times, Sallee and Sherry told C.T. that they would kill her if she told anyone about what they had done to her. After several hours, the couple took C.T. back to her car and dropped her off along the side of a road. They told her that her car would be in the nearby Wal-Mart store parking lot. As C.T. walked toward town, her roommate happened to drive by. C.T. flagged her down and told her that she had been raped. The roommate took C.T. to the police department and then to the hospital. Approximately one month later, Sallee and Sherry were arrested after being seen in the parking lot of the same gas station.

On May 14, 2001, the State charged Sallee with class B felony deviate conduct by force, class A felony rape with deadly force, class C felony sexual battery with a deadly weapon, and class D felony confinement. In November 2001, Sallee was tried jointly with his wife. On November 19, 2001, a jury found Sallee guilty on all charges. On January 8, 2002, the trial court sentenced Sallee to an aggregate sentence of 103 years. Sallee appealed his convictions and sentence to this Court on several grounds, including insufficiency of the evidence and double jeopardy. We affirmed his convictions and sentence in *Sallee v. State*, 777 N.E.2d 1214 (Ind. Ct. App. 2002), *trans. denied* (2003).

On February 3, 2003, Sallee filed a pro se petition for post-conviction relief. On January 27, 2006, the court held a hearing on the petition, and on March 30, 2006, the trial court issued an order denying Sallee's petition. Sallee 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 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; therefore, a defendant must establish his claims by a preponderance of the

evidence. *Id.*

Sallee claims that the court erred by denying his petition for post-conviction relief. In this type of appeal, our standard of review is a rigorous one. *Id.*

The reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. Furthermore, while we do not defer to the post-conviction court's legal conclusions, we accept its factual findings unless they are clearly erroneous. To prevail on appeal, the petitioner must establish that the evidence is uncontradicted and leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.

Id. (citations omitted). Sallee asks us to reverse the post-conviction court's denial of his petition because, he says, the evidence leads unerringly and unmistakably to the conclusion that he received ineffective assistance of trial counsel and appellate counsel, and there is newly discovered evidence which warrants a new trial.

A. Ineffective Assistance of Trial Counsel

First, Sallee claims that he was deprived of his right to counsel under the Sixth Amendment to the United States Constitution due to the ineffective assistance of his trial lawyer, R. Stephen Donovan. To prevail on his claim, Sallee must establish the two components in *Strickland v. Washington*, 466 U.S. 668 (1984). First, he must show that his counsel's performance "fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." *Wesley v. State*, 788 N.E.2d 1247, 1252 (Ind. 2003) (citing *Strickland*, 466 U.S. at 687-88). There is a strong presumption that counsel rendered adequate assistance and made all decisions by exercising reasonable professional judgment. *Walker v. State*, 843 N.E.2d 50, 54 (Ind. Ct. App. 2006), *trans. denied, cert. denied* (2007).

Counsel's representation is not rendered ineffective by isolated mistakes, poor strategy, inexperience or bad judgment. *Id.*

Second, Sallee must show that his counsel's deficient performance prejudiced the defense. *Id.* This is proven by showing that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.* at 55. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The two prongs are separate and independent inquiries, and if a court can dispose of an ineffectiveness claim for lack of sufficient prejudice, that course should be followed. *Id.*

Sallee specifies many alleged errors made by his trial counsel. It appears that most, if not all, of these claims are waived, however, for failure to raise them prior to this appeal, failure to make a cogent argument, and/or lack of supporting authority. *See* Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citation to the authorities, statutes, and the Appendix or parts of the Record on Appeal."); *see also Cooper v. State*, 854 N.E.2d 831, 842 n.1 (Ind. 2006). Waiver notwithstanding, we will briefly address each of Sallee's specific claims.

First, Sallee alleges that Morgan County Sheriff's Department Detective Larry D. Sanders "committed perjury and fabricated evidence" in the probable cause affidavit and that his counsel erred in failing to file a motion to dismiss the affidavit. Appellant's Br. at 3. Sallee presents no supporting authority for this assertion. Moreover, if the probable cause affidavit were deficient, then Sallee's only remedy would have been release from pre-trial detention predicated on an illegal arrest. *See Flowers v. State*, 738 N.E.2d 1051, 1055 (Ind.

2000); *see also Felders v. State*, 516 N.E.2d 1, 2 (Ind. 1987) (“An invalid arrest does not affect the right of the State to try a case nor does it affect the judgment of conviction.”) Further, Sallee concedes that the arrest warrants and search warrants obtained by Detective Sanders at the probable cause hearing failed to produce any evidence against him; therefore, his claim, even if proven, would be unpersuasive. Appellant’s Br. at 3; *see Flowers*, 738 at 1055 (holding that the illegality of an arrest is of consequence at trial only as it affects the admission of evidence obtained through a search incident to the arrest).

Second, Sallee contends that his counsel failed to impeach Detective Sanders’s testimony regarding: (1) an alleged witness who could positively identify Sallee as one of the persons who left the gas station with C.T., (2) the police’s recovery of a roll of duct tape, and (3) a surveillance tape that was never offered into evidence. At the post-conviction hearing, Donovan testified that his defense strategy, in cooperation with Sallee’s wife’s counsel, was that C.T. had consented to the sexual acts with the couple. When asked why he did not object to certain testimony which was questionable as to its admissibility, Donovan testified that on some occasions he did not object because the testimony was consistent with the theory of consent and that on other occasions he did not object because he did not want to draw the jury’s attention to certain statements. Sallee has failed to establish a reasonable probability that the jury would have reached a different result if Donovan had pursued a different strategy, and therefore we find no prejudice on this issue.

Third, Sallee contends that Donovan was ineffective because he failed to object when the trial court “coach[ed]” the prosecution “over sixteen (16) times” at trial. Appellant’s Br. at 4. As examples, he cites many pages of the record which include communications

between the trial court and the prosecutor. Because Sallee did not present this claim to the post-conviction court, however, it is unavailable here. *See Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001) (“Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal.”); *see also* Ind. Post-Conviction Rule 1(8) (“All grounds for relief available to a petitioner under this rule must be raised in his original petition.”) Waiver notwithstanding, Sallee provides no explanation or legal authority to support his allegation that the judge’s comments were inappropriate or that his defense was prejudiced by Donovan’s decision not to object.

Fourth, Sallee claims that Donovan was ineffective in failing to object to the State’s motion to consolidate cases. He states that his wife’s counsel made comments during trial that “inflamed [sic] the jury against Sallee.” Appellant’s Br. at 4-5. Again, he waived this claim on appeal by failing to raise it before the post-conviction court. *See Allen*, 749 N.E.2d at 1171. Even if we were to consider this argument, however, it would fail because Sallee does not cite any of these alleged comments and he does not present any legal authority to support his claim that these comments prejudiced his defense.

Fifth, Sallee alleges that his counsel “completely failed to object to over (17) seventeen instances of testimony that was without doubt, hearsay.” He cites a section of the transcript that is more than four hundred pages long, with no specific citations to these alleged hearsay statements. As a result, his claim is waived for review. *See Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997) (stating that “court which must search the record and make up its own arguments because a party has not adequately presented them runs the risk of becoming an advocate rather than an adjudicator”).

Seventh, Sallee claims that his counsel was ineffective for failing to investigate a plea agreement offered by the State immediately prior to trial. He claims that his counsel failed to explain the offer to him and rushed him in making a decision. Again, Sallee waived this claim because it was not raised before the post-conviction court. *See Allen*, 749 N.E.2d at 1171. Moreover, there is no evidence of prejudice here, and, waiver notwithstanding, his claim would fail.

Eighth, Sallee contends that his counsel was ineffective in failing to argue against the prosecution's "false" opening and closing statements, but he fails to identify the alleged falsehoods or how his counsel's failure to object to them prejudiced his defense. Appellant's Br. at 5.

Ninth, Sallee claims that his counsel was ineffective in failing to argue that C.T. had had sex with an unknown individual, which he claims would have created reasonable doubt with regard to the charges against him. As Sallee did not raise this argument in his petition for post-conviction review, it is waived. *See Allen*, 749 N.E.2d at 1171. Waiver notwithstanding, this claim would fail. The decision not to make this argument clearly involved strategy on Donovan's part, and as stated above, isolated mistakes or bad judgment will not render his performance ineffective. Moreover, Sallee fails to explain why his counsel's decision not to pursue this argument was a mistake, and he also fails to show that he was prejudiced as a result.

Tenth, Sallee claims that his counsel was ineffective because he failed to move for a mistrial when Detective Sanders "blurted out a direct lie about a B.P. Gas Station surveillance tape." *Id.* Again, Sallee fails to identify the alleged statement to which he

refers, and he fails to show how his counsel's failure to object prejudiced his defense. Again, this argument is waived for failure to raise it to the post-conviction court.

Finally, in his amended appellant's brief, Sallee claims that his trial counsel was ineffective with regard to his plea agreement.¹ Again, this claim is waived for Sallee's failure to raise it before the post-conviction court. Waiver notwithstanding, we will briefly address this issue. Immediately prior to the beginning of trial on November 13, 2001, Sallee and Sherry entered into plea agreements with the State. Sallee agreed to plead guilty to criminal deviate conduct as a class B felony in exchange for a sentence of twenty years, with ten years suspended and eight years of probation. The trial court reviewed the terms of the agreements with each of the defendants. Before the court accepted their guilty pleas, however, Sherry's counsel stated that Sherry wanted to go to trial. The trial court immediately swore in the court reporter and proceeded with voir dire instructions, and Sallee and Sherry were tried jointly, resulting in Sallee's convictions on all charges and a sentence of 103 years.

While it is true that Sallee's counsel did not challenge the court's decision to proceed with a trial for Sallee following Sherry's decision not to plead guilty, we cannot conclude that this decision to remain silent was ineffective assistance. A criminal defendant has no absolute right to have a guilty plea accepted, and a trial court may reject a plea in the exercise of sound judicial discretion. *Beeks v. State*, 839 N.E.2d 1271, 1273 (Ind. Ct. App. 2005),

¹ On May 7, 2007, Sallee filed a motion to file an amended appellant's brief, which we granted on September 28, 2007. On September 28, 2007, we also granted Sallee's motion to file a reply brief.

trans. denied (2006). It is clear from the hearing transcript that Sallee's counsel made the trial judge aware of Sallee's desire to plead guilty and that the trial court had before it the written plea agreement. It was within the court's discretion to reject Sallee's plea agreement. Thus, even if Sallee had not waived this claim, it would not succeed on its merits.

In sum, Sallee has failed to establish, for any of his eleven claims of ineffective assistance, that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.²

B. Ineffective Assistance of Appellate Counsel

Sallee fails to present a separate argument regarding the performance of his appellate counsel, and therefore this issue is waived for review.

C. Newly-Discovered Evidence

Finally, Sallee alleges that C.T.'s appearance on *The Montel Williams Show* in October 2002, constitutes new evidence that entitles him to a new trial. Our supreme court has stated,

[N]ew evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at

² Sallee includes within his many claims of ineffective assistance of trial counsel a few allegations that do not fit within that category. For example, Sallee argues that he asked Donovan to withdraw his appearance because Sallee believed that Donovan had a conflict of interest, although Sallee fails to identify the source of this alleged conflict. Sallee also alleges that the trial judge should have recused himself because he had prosecuted a previous case against Sallee. Furthermore, he contends that the trial court improperly sentenced him. All three of these claims were clearly available to Sallee at the time of his direct appeal, and therefore, they are waived. See *Shanabarger v. State*, 846 N.E.2d 702, 707 (Ind. Ct. App. 2006) ("If an issue was known and available but not raised on direct appeal, it is waived by procedural default."), *trans. denied*.

retrial. This Court analyzes these nine factors with care, as the basis for newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized. The burden of showing that all nine requirements are met rests with the petitioner for post-conviction relief.

Taylor v. State, 840 N.E.2d 324, 329-30 (Ind. 2006) (citations and quotation marks omitted).

Sallee does not acknowledge the existence of these nine factors, nor does he attempt to demonstrate any of them. His sole argument on this issue of newly discovered evidence is that C.T.'s statements on *The Montel Williams Show* "clearly contradicted her trial testimony." Appellant's Br. at 8. Therefore, we cannot find that the trial court erred when it denied Sallee's request for a new trial because "[a]t best, this 'evidence' may be characterized as 'merely impeaching[.]'" and it would probably not produce a different result at trial. Appellant's App. at 61.

We affirm the denial of Sallee's petition for post-conviction relief.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.