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IN THE COURT OF APPEALS OF INDIANA

TERRY C. BROWN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 34A05-0703-PC-137
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
Cause No. 34C01-0401-PC-20

October 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Terry Brown appeals the denial of his petition for post-conviction relief. On appeal, Brown raises three issues, which we restate as whether Brown waived his freestanding claim of trial error by failing to raise it on direct appeal, whether the post-conviction court properly denied Brown relief based on his claim of ineffective assistance of trial counsel, and whether the post-conviction court properly denied Brown relief based on his claim of ineffective assistance of appellate counsel. We affirm, concluding that Brown waived his freestanding claim of trial error and that Brown did not receive ineffective assistance of trial or appellate counsel.

Facts and Procedural History

On Brown's direct appeal, our supreme court related the following facts:

> At approximately 2:20 p.m. on July 16, 2000, Kokomo police officers Michael Banush and Greg Baldini were on bike patrol when they heard a gunshot. As they approached the scene, the officers saw Defendant run into a barbershop at 901 East North Street, exit the barbershop, and hurriedly leave the scene. Defendant was carrying what appeared to be a white document and another object. No other person was seen entering or exiting the barbershop.
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> The officers found Charles Young, Jr.[,] laying on the sidewalk with a bullet hole in the left side of his neck. Officer Baldini stayed at the scene, while Officer Banush rode northbound after Defendant. Officer Baldini heard noises inside the barbershop. He and Officer Brannon Carpenter entered the building and located Robert Hunter, who was bleeding from an apparent gunshot wound to the head.
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> Meanwhile, Officer Banush apprehended Defendant. After handcuffing Defendant, Officer Banush found a black leather glove on the ground and a matching glove on Defendant. In addition, Defendant had blood on his clothing, which later proved to match that of Young. Officer Banush did not see the object that he had observed Defendant carrying from the barbershop. However, a search of the area near the barbershop revealed a bag with two guns, a gun sight, and a white piece of paper. The document appeared to have blood on it. One of the guns, a .38 caliber revolver, had six empty shell

> casings in it. The other gun, a 9mm semiautomatic, was loaded and had one round in the chamber and one round missing. Bullet fragments were removed from the bodies of both Young and Hunter. In addition, the officers recovered bullets and a 9mm shell casing at the scene.

Brown v. State, 783 N.E.2d 1121, 1123-24 (Ind. 2003). The State charged Brown with two counts of murder, both felonies, and also sought life imprisonment without parole based on the murder of Hunter. The jury found Brown guilty on both counts and also recommended a sentence of life imprisonment without parole. The trial court accepted the jury's recommendation and sentenced Brown to two concurrent sentences of life imprisonment without parole. On direct appeal, the supreme court remanded to the trial court because of deficiencies in the trial court's sentencing order. On remand, the trial court again sentenced Brown to two concurrent sentences of life imprisonment without parole, but modified its sentencing order to cure the deficiencies. The supreme court affirmed Brown's convictions, but vacated Brown's sentence and remanded to the trial court to impose consecutive sentences of fifty-five years for each count. Brown, 783 N.E.2d at 1129.

Following the supreme court's decision, Brown filed a pro se petition for post-conviction relief, which he later amended. The post-conviction court conducted a hearing at which Brown, the trial judge, and Brown's trial counsel testified. The post-conviction court issued findings of fact and conclusions of law denying Brown's petition for relief. Brown appeals.

Discussion and Decision

Post conviction proceedings are civil in nature and "create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules." Williams v. State, 706 N.E.2d 149, 153 (Ind. 1999), cert. denied, 529 U.S. 1113 (2000). To obtain relief, a petitioner bears the burden of establishing his claims by a preponderance of the evidence. Id.; Ind. Post-Conviction Rule 1, § 5. We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). Moreover, when the petitioner appeals from a denial of relief, the denial is considered a negative judgment and the petitioner therefore must establish "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002), cert. denied, 540 U.S. 830 (2003).

Brown's post-conviction claims for relief concern a statement made in front of the courthouse on the second day of Brown's trial and another statement made in the gallery during trial that afternoon, both of which were made by Corey Young, the mother of victim Charles Young, Jr. When the trial judge was notified of these statements, he addressed the gallery outside the presence of the jury:

> [Trial Judge]: It has been reported to the court that one of the people in the gallery of this trial on two occasions has made a statement [that] has been overheard that this whole situation is racist and the second situation which was made this morning on the courthouse steps was the situation being racist, this courthouse should be treated similar to the World Trade Center and the whole place should be bombed. Now you have a constitutional right to an open court

> but I will not tolerate such comments. Now one of you made that statement, according to the witness which I just interviewed. I'm going to recess. If you wish to come up to me and tell me that you did, that's fine. There's no repercussions.
> [Young]: Yes, I did.
> [Trial Judge]: O-k. Then you are excused from this trial. Thank you.
> [Young]: Thank you.

Transcript of Trial at 234-35. The trial court did not conduct a hearing to determine whether any juror heard the statements and, if so, whether the statement had any prejudicial impact. Moreover, Brown's trial counsel did not request that the trial court conduct a hearing. Nor did Brown's appellate counsel raise an issue of trial error regarding the statements on direct appeal. Thus, Brown argues he is entitled to post-conviction relief because 1) the trial court erred in not conducting a hearing to determine whether the statements prejudiced any juror; 2) trial counsel was ineffective for failing to request a hearing to determine whether the statements prejudiced any juror; and 3) appellate counsel was ineffective for failing to raise on appeal trial counsel's error regarding the failure to request a hearing. We will address each of Brown's arguments in turn.

I. Trial Error

Brown argues as a freestanding claim of error that the trial court should have sua sponte conducted a hearing to determine the prejudicial impact the statements had on the jury. "In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). This rule applies even if the alleged error is fundamental. Id.

Thus, because Brown's freestanding claim of error was available on direct appeal, his failure to raise it at that time constitutes waiver.

II. Ineffective Assistance of Counsel

A. Standard of Review

To establish a violation of the right to effective counsel as guaranteed by the Sixth Amendment, the petitioner must establish both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). First, the petitioner must show counsel was deficient. Id. "Deficient" means that counsel's errors fell below an objective standard of reasonableness and were so serious that counsel was not functioning as "counsel" within the meaning of the Sixth Amendment. Id. In this regard, counsel is presumed to have "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Stevens, 770 N.E.2d at 746. Second, the petitioner must show that counsel's deficiency resulted in prejudice. Wesley, 788 N.E.2d at 1252. Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. We need not address whether counsel's performance was deficient if we can resolve a claim of ineffective assistance based on lack of prejudice. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002). Moreover, the same standard of review applies to claims of ineffective assistance of trial counsel and claims of ineffective assistance of appellate counsel. Burnside v. State, 858 N.E.2d 232, 238 (Ind. Ct. App. 2006).

B. Assistance of Counsel

1. Trial Counsel

Brown argues he was denied effective assistance of trial counsel because counsel failed to request a hearing to determine whether the statements made by Young prejudiced the jury. To establish that trial counsel's performance was deficient, Brown must show that a request for a hearing would have been granted. See Anderson v. State, 699 N.E.2d 257, 261 (Ind. 1998). In Lindsey v. State, 260 Ind. 351, 358-59, 295 N.E.2d 819, 824 (1973), our supreme court explained the process a trial court must follow when a jury may have been exposed to prejudicial information during trial. Although the prejudicial information in Lindsey concerned a newspaper article that contained factually incorrect information about the trial, the Lindsey procedure has been applied to a variety of cases involving potentially prejudicial information. See Ridenour v. State, 639 N.E.2d 288, 292 (Ind. Ct. App. 1994) (citing cases). The Lindsey procedure states in pertinent part:

> Upon a suggestion of improper and prejudicial publicity, the trial court should make a determination as to the likelihood of resulting prejudice, both upon the basis of the content of the publication and the likelihood of its having come to the attention of any juror. If the risk of prejudice appears substantial, as opposed to imaginary or remote only, the court should interrogate the jury collectively to determine who, if any, has been exposed.

260 Ind. at 358-59, 295 N.E.2d at 824. Thus, a trial court's decision to conduct a hearing requires a threshold determination that the information presents a substantial risk of

prejudice.[1] Ridenour, 639 N.E.2d at 292.

Brown claims two statements presented a substantial risk of prejudice: the statement made in the gallery during trial and the statement made on the courthouse steps. Regarding the statement made at trial, the post-conviction court made the following finding:

> Brown speculates that members of the jury may have heard [Ms.] Young's statement "that the situation was racist[,"] spoken from the gallery during testimony of a state's witness. [Ms.] Young's comment was not a direct reflection upon Brown's guilt or innocence of the crimes charged, but was an opinion of a general nature. It is speculative at best as to what [Ms.] Young's comment referred to. In his cross examination testimony at the post conviction hearing, Brown speculated that [Ms.] Young was expressing her displeasure at the Kokomo Police Department's treatment of her son, victim Charles Young, Jr.[] [Ms.] Young and Charles Young are of African-American heritage, as is Terry Brown.

Appellant's Appendix at 136. Regarding the statement made from the courthouse steps, the post-conviction court found it was to the effect that "the courthouse should be treated similar to the World Trade Center and the whole place should be bombed." Id. at 134.

We note initially the post-conviction court found "[t]here has been no showing to suggest that any juror heard or was aware of the statement [Ms.] Young made outside the courthouse." Id. at 137. We therefore decline to address whether this statement presented a substantial risk of prejudice. See Worthington v. State, 273 Ind. 499, 502, 405 N.E.2d 913,

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[1] Relying on Threats v. State, 582 N.E.2d 396 (Ind. Ct. App. 1991), trans. denied, Brown argues the trial court was required to grant a hearing regardless of the risk of prejudice. Although this court did not address in Threats whether the information to which the jury was exposed presented a substantial risk of prejudice, our supreme court has stated there must be evidence of a substantial risk of prejudice before invoking the Lindsey procedure. See Jarvis v. State, 441 N.E.2d 1, 8 (Ind. 1982) ("Defendant's motion to interrogate the jury was not supported by any showing of a substantial risk of prejudice and was, accordingly, properly denied."). We therefore decline to read Threats to require the trial court to conduct a hearing regardless of the risk of prejudice.

916 (1980), cert. denied, 451 U.S. 915 (1981) ("Absent a basis for believing that the jury may have been subjected to improper out-of-court stimuli, there is no need to employ the procedure outlined in Lindsey.").

We also share the post-conviction court's skepticism as to whether any juror heard the statement Young made during trial. Brown testified a juror could have heard the statement based on Young's proximity to the jury box. Brown's counsel also testified it was his "belief that a comment regarding race was made from the back of the gallery at least one time while the jury was present in the room," transcript of post-conviction hearing at 29, and that "it would definitely have been possible for [a juror] to hear anything that was said" from the gallery, id. at 24-25. Thus, the post-conviction court found that "Brown only speculates that jurors may have overheard [Ms.] Young's comment spoken during trial." Appellant's App. at 137.

Even assuming a juror heard Young's statement, Brown has not explained why an isolated statement about "the situation being racist" presented a substantial risk of prejudice. Id. at 136. Nor does the post-conviction court's finding indicate the statement presented a substantial risk of prejudice; instead, the court described the statement as "an opinion of a general nature." Id. Absent evidence the statement presented a substantial risk of prejudice, we are not convinced the trial court would have granted a request for a hearing. Cf. Bruce v. State, 268 Ind. 180, 224, 375 N.E.2d 1042, 1066 (1978), cert. denied, 439 U.S. 988 (1978) (concluding the trial court properly denied counsel's motion for a hearing on potential jury prejudice after a gallery member fainted during trial). Because Brown cannot establish that

the trial court would have granted a hearing, trial counsel's performance was not deficient. Thus, it follows that Brown did not receive ineffective assistance of trial counsel.

2. Appellate Counsel

Brown argues he was denied effective assistance of appellate counsel because, on direct appeal, appellate counsel failed to raise trial counsel's error regarding the failure to request a hearing.[2] To establish that appellate counsel's assistance was deficient, Brown must show 1) that the unraised issue was significant and obvious from the face of the record and 2) that the unraised issue was "clearly stronger" than the raised issues. Bieghler v. State 690 N.E.2d 188, 194 (Ind. 1997), cert. denied, 525 U.S. 1021 (1998) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). However, in determining whether appellate counsel's performance was deficient, our supreme court has cautioned that

> the reviewing court should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

Bieghler, 690 N.E.2d at 194.

For the same reasons we determined that Brown's trial counsel's performance was not deficient, we conclude that Brown has not established that his appellate counsel's performance was deficient. That is, Brown's appellate counsel presumably was aware of Lindsey and its requirement that a hearing would be granted only if the information to which

the jury was exposed presented a substantial risk of prejudice. 260 Ind. at 358-59, 295 N.E.2d at 824. However, as we explained, the record does not indicate Young's statement presented a substantial risk of prejudice. Thus, we conclude this issue was not significant and obvious from the face of the record. Because Brown cannot establish that appellate counsel's performance was deficient, it therefore follows that counsel's assistance was not ineffective.

Conclusion

Brown waived his freestanding claim of trial error because he did not raise it on direct appeal. Moreover, Brown did not receive ineffective assistance of trial or appellate counsel.

Affirmed.

KIRSCH, J., and BARNES, J., concur.

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[2] Trial counsel and appellate counsel are the same person, but are described separately for the sake of clarity.