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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIE JONES,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-0701-PC-49
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0312-PC-219539

OCTOBER 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Willie Jones (“Jones”) is appealing from the denial of his petition for post-conviction relief.

We affirm.

ISSUES

Jones states the issues as:

- I. “Whether the plea was knowingly, intentionally and intelligently entered into?”
- II. “Whether there was insufficient factual basis for the acceptance of the plea and the plea was the result of coercion and based upon information the State knew was false?”
- III. “Whether Trial (Defense) counsel was ineffective for failing to present the favorable testimony of Jucinta Roland and for advising Appellant Jones to plead guilty to an offense that he maintained he was innocent of?”

FACTS

Jones, who had two Class C felony convictions for robbery, was stopped by the police when he failed to signal a turn while driving. When asked for his identification, Jones reached for the glove compartment, but then hesitated. Jucinta Roland, who was in the front passenger seat, opened the glove compartment. The police saw a pistol partially covered with papers. The papers were documents containing Jones’ name.

Jones entered into a plea agreement whereby he entered a guilty plea to the Class B felony of possession of a handgun by a serious violent felony, and would receive a sentence of eighteen years executed in the Indiana Department of Correction. No direct appeal was taken from the judgment. As a part of the plea agreement the state and federal authorities agreed to dismiss other pending charges.

Supplemental facts are added in the discussion of Issue I.

DISCUSSION AND DECISION

Ind. Appellate Rule 46(A)(8)(b) requires a concise statement of the applicable standard of review. Jones fails to do this.

The purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. *Emerson v. State*, 812 N.E.2d 1090, 1095 (Ind. Ct. App. 2004). Post-conviction relief is not a “super-appeal” which allows the rehashing of prior proceedings regardless of the circumstances surrounding them. *Id.* The petitioner bears the burden of establishing the grounds for relief by a preponderance of the evidence. *Id.* Where the post-conviction court denies relief, the petitioner appeals from a negative judgment and faces the rigorous burden of showing that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Id.* “In other words, the defendant must convince this Court that there is *no* way within the law that the court below could have reached the decision it did.” *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). (Original emphasis.)

Issue I.

The reason Jones contends that his guilty plea was not intelligently given was because his trial counsel did not inform him of the provisions of Ind. Code §35-41-2-1(b), a statute which deals with voluntary conduct. The statute reads “if possession of property constitutes any part of the prohibited conduct it is a defense that the person who possessed the property was not aware of his possession for a time sufficient for him to have terminated his possession”. Jones is not entitled to assert a defense under that statute.

“Although this language when read literally is not workable, it is we believe easy to ascertain the intent of the legislature to state a defense if a person unknowingly gains possession then after having become aware of his possession does not have sufficient time to

terminate it.”

Fyock v. State, 436 N.E.2d 1089, 1096 (Ind. 1982).

When asked at the guilty plea hearing to establish a factual basis, the following colloquy occurred:

THE STATE: If we were to proceed to trial, the State would prove beyond a reasonable doubt that on 12-16-03 at approximately 11:20 p.m., Officer McPherson with the Indianapolis Police Department was in the 3200 block of East 38th Street. At that time, that officer observed a red 1989 two-door Cadillac bearing and Illinois plate fail to signal a turn as it turned northbound on to North Dearborn from 38th Street. The license plate came back to a 1989 Mazda van, which is registered to Willie Jones. That vehicle was stopped for that traffic violation of failing to signal and the plate coming back to a different vehicle.

And he was stopped and the officer asked for identification from the driver, and the driver at that time was Willie Jones, the defendant in this matter. That traffic stop occurred at the 3200 block of East 39th Street. The officer asked for registration for the vehicle that Mr. Jones was driving, and at that point, Mr. Jones reached towards the glove box and suddenly stopped in his mid-reach saying something that the officer could not understand.

As Mr. Jones' stopped, the passenger in Mr. Jones' vehicle, who was later identified as Jucinta Roland, opened the glove box. The officer, Officer McPherson of Indianapolis Police Department, noticed immediately through his training and experience, that there was a butt of a firearm sticking out underneath a piece of paper in the glove box of the vehicle driven by Willie Jones. The officer, after getting back-up to arrive, asked the occupants of that vehicle to get out of the car. The car was searched, and a Ruger 22 caliber semi-automatic handgun was found in the glove box of that vehicle. On top of that hand gun was a service agreement from Beeper Express between Beeper Express and Willie Jones, and also an IRS tax form addressed to Willie Jones. All of these events, as described, happened in Marion County, State of Indiana.

Additionally, Your Honor, it was learned that Willie Jones had a previous conviction for robbery, a class C felony, in Circuit Court, Cook County, Criminal Division, under cause number 89CR-22184, on or about January 10th, 1990. And additionally, another conviction for robbery, a class C felony, in the same court, under 89-CR-22183, on the same day, January 10th, 1990, which made him the status of a serious violent felon.

THE COURT: Did you hear what the prosecutor said?

THE DEFENDANT WILLIE JONES: Yes, I did.

THE COURT: Are those things true?

THE DEFENDANT WILLIE JONES: Yeah.

THE COURT: You are guilty of this offense?

THE DEFENDANT WILLIE JONES: Yeah.

Appellant's App. pp. 39-41. Additionally, Jones' trial counsel explained the charges against him to him.

A review of the foregoing facts show that Jones transferred license plates from one vehicle to another; Jones hesitated to open the glove box; and, the weapon was covered by papers addressed to him. The inference is clear that Jones knew, and had known, of the weapon's presence.

“However, even with this interpretation of [I.C. 35-41-2-1] of the statute, we hold under the facts as above recited appellant cannot avail himself of such a defense. In the case where the evidence and inferences drawn therefrom indicate the possessor took affirmative action to acquire property it defies logic to allow him to assert at the same time that he was unaware of his possession. We hold there is evidence from which a reasonable inference can be drawn to support a finding that appellant acted affirmatively to acquire the property. We further hold he is therefore precluded from using the defense we have construed to exist in I.C. 35-41-2-1.”

Fyock, 436 N.E.2d at 1096.

We likewise hold that no defense is available to Jones under Ind. Code §35-41-2-1. Any advice to Jones by trial counsel about the availability of such a defense is not required.

Issue II.

Jones next contends that there was an insufficient factual basis for the acceptance of the plea, and that the plea was the result of coercion and based on information the State knew was false.

A trial court may not accept a plea of guilty unless it determines that a sufficient factual basis exists to support the plea. *Dewitt v. State*, 755 N.E.2d 167, 172 (Ind. 2001). A factual

basis exists when there is evidence about the elements of the crime from which a trial court could reasonably conclude that the defendant is guilty. *Id.* The factual basis of a guilty plea need not be established beyond a reasonable doubt. *Id.* Rather, relatively minimal evidence can be adequate. *Id.* To be entitled to post-conviction relief, the defendant must prove that he was prejudiced by the lack of a factual basis. *Id.*

A portion of the guilty plea hearing relating to a factual basis is quoted in the discussion of the previous issue. It is clear that a factual basis as required by Ind. Code §35-35-1-3(b) was established.

Jones twists the argument by way of a collateral attack of the plea agreement by saying that the State did not have the authority to dismiss the federal charges. He claims that he was coerced into pleading guilty by the alleged misinformation that the State had the authority to dismiss the federal charges as part of Jones' guilty plea. Testimony at the guilty plea hearing indicated that Jones was facing a twenty-five year to life sentence in federal court.

Prejudice must be established before post-conviction relief can be granted on grounds of failure to establish a factual basis for a guilty plea. *State v. Eiland*, 723 N.E.2d 863, 864 (Ind. 2000). We typically review claims of error about pleas under an abuse of discretion standard. *Oliver v. State*, 843 N.E.2d 581, 588 (Ind. Ct. App. 2006).

Jones fails to show prejudice in that we are not directed to where there is a showing in the record that the federal charges were, or were not, dismissed. *Dewitt*, 755 N.E.2d at 172. Therefore, Jones' argument along those lines is of no avail.

Issue III.

Jones next alleges ineffective assistance of trial counsel.

A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in

Strickland v. Washington, 466 U.S. 668, 104 SW. Ct. 2052, 80 L. Ed. 674 (1984). First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. To establish prejudice, a defendant must show 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 is a probability sufficient to undermine confidence in the outcome.

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The *Strickland* Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. The two prongs of the *Strickland* test are separate and independent inquiries. Thus, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice that course should be followed.

McCann v. State, 854 N.E.2d 905, 909 (Ind. Ct. App. 2006) (citations omitted), quoting *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind.2001).

The first portion of Jones' argument is that his trial attorney failed to solicit the favorable testimony of Jucinta Roland. The trial court's finding of facts indicate that Jones' trial attorney inquired about the possibility of speaking with Ms. Roland about the case, but Ms. Roland's counsel would not permit this to occur.¹ Jones does not advise this court what else his trial attorney could do to legally compel Jucinta Roland's testimony.

Jones maintains his innocence, even though such a position runs counter to his admissions of guilt. He suggests that his trial attorney allowed him to plead guilty to a crime he

¹ Roland was also charged with a misdemeanor arising out of the events in this case.

did not commit; however, his trial counsel testified at the post-conviction hearing that the decision was Jones'. His trial counsel conferred with a deputy federal public defender, and Jones was told of the possibility of the federal circumstances. Much of Jones' argument on this issue is a rehash of previous arguments.

We are of the opinion that Jones has failed to prove the prejudice element for ineffective assistance of counsel under the *Strickland* test.

CONCLUSION

Jones' guilty plea was knowingly, intentionally, and intelligently entered into. There was a sufficient factual basis for the acceptance of the guilty plea. Jones' trial counsel was not ineffective.

Judgment affirmed.

MAY, J., and BARNES, J., concur.