

Appellant-petitioner Thedell Polk appeals the denial of his petition for post-conviction relief. Specifically, Polk contends that the post-conviction court erred by concluding that he did receive effective assistance of trial counsel and that he has failed to present additional evidence that was not available or known at trial. Finding no error, we affirm the decision of the post-conviction court.

FACTS

The underlying facts, as stated by a panel of this Court in Polk's direct appeal are as follows:

On October 28, 2001, Toriono Johnson received a telephone call inviting him to Janice Kelly's house. Johnson and Gordon Armour drove to Kelly's house. Only Johnson went inside. Kelly, Polk and Ladarrin Roberts were at the house playing cards. Johnson sat down at the table. Polk stood up, pulled out a handgun, and hit Johnson on the head with the gun. Johnson fell to the floor and Polk asked him whether he had any money. Johnson said that he did not have any money. Polk checked Johnson's pockets and took approximately \$600 from Johnson, while Johnson remained on the floor.

Then Armour walked in the back door of the residence. Polk left through the back door. Roberts pulled Johnson from the floor by his collar. Johnson was bleeding from a wound to his head. Armour saw Johnson on the floor bleeding and saw a gun on the table. When Armour turned around everyone had left the residence. Armour returned Johnson's car to Johnson's home.

Johnson went to a nearby bar, where the police were called. Police discovered Johnson, dazed and bleeding, in the bar parking lot. Johnson said that he had been struck in the head with a gun and robbed. Johnson saw Polk in a car that drove by the parking lot. The police stopped the car, and Johnson identified Polk as the person who struck and robbed him. Johnson's head wound was treated at the hospital.

At the trial, Johnson acknowledged that at a previous hearing, while under oath, he had given a different version of events than that he attested to at trial. He stated that he did not want to be in court and did not want to testify against Polk.

After a trial by jury, Polk was convicted as noted above. In a bifurcated proceeding, the jury determined that Polk was an habitual offender. Polk was sentenced to concurrent twenty-year terms of imprisonment for the robbery and the confinement convictions. He was sentenced to a concurrent three-year term for the theft conviction. Pursuant to the habitual offender finding, a twelve-year term was appended to the robbery conviction for a total of thirty-two years.

Polk v. State, 783 N.E.2d 1253, 1255-56 (Ind. Ct. App. 2003).

Polk made four allegations of error on appeal. First, he argued “that his Sixth Amendment right to confrontation through cross-examination was violated because the State failed to disclose the existence of a statement by Ladarrin Roberts made to Officer Rayford until after Roberts had completed his testimony.” 783 N.E.2d at 1256. More particularly, Roberts testified that he did not see any incident. Id. When the deputy prosecutor queried Roberts about statements made to Officer Rayford after the incident, Roberts admitted to having spoken with the officer, but stated that he told the officer that he had not observed anything happen. Id.

Immediately following Roberts’s testimony, the State moved to call Officer Norman Rayford as a rebuttal witness and to place into evidence Officer Rayford’s notes summarizing Roberts’s statements to him. Id. at 1257. Polk’s counsel objected, arguing that Officer Rayford was not listed as a potential witness and that she had not been provided with the statement. Id. The trial court allowed Officer Rayford to testify with a

limiting instruction that his testimony was to be used solely for impeaching Roberts's testimony. Id.

Additionally, Polk's three other claims were that there was insufficient evidence supporting his convictions, that his convictions for robbery and confinement violated double jeopardy, and that his sentence was manifestly unreasonable because of irregularities with regard to the habitual offender enhancement. Id. at 1258-1262. A panel of this Court vacated the convictions for criminal confinement and theft on double jeopardy grounds but affirmed in all other respects. Id. at 1262.

On January 27, 2004, Polk filed a pro se petition for post-conviction relief, to which the State responded to on February 2, 2004. The Indiana Public Defender appeared on Polk's behalf on February 6, 2006, and on February 22, 2006, Polk filed an amended petition for post-conviction relief. In this amended petition, Polk claimed that he was denied the effective assistance of trial counsel and that new evidence of material facts not presented or previously heard required vacation of Polk's convictions and sentence.

With respect to Polk's claim of ineffective assistance of trial counsel, Polk argued that trial counsel was ineffective because counsel allowed the State to procure improper testimony. Specifically, although Polk's trial counsel had objected to Officer Rayford's testimony, counsel had failed to object to Roberts's testimony. The new evidence, according to Polk, consisted of the transcript of a probation revocation hearing and

conflicting witness statements. Polk alleged in his post-conviction relief petition that this newly-discovered evidence required that his convictions and sentences be vacated.

A hearing on Polk's petition was held on June 12, 2006, November 12, 2007, and June 22, 2009.¹ Polk and the State filed proposed findings of fact and conclusions of law and on March 19, 2010, the post-conviction court denied Polk's petition. Polk now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Polk argues that the post-conviction court erred by denying his petition for post conviction relief because he was denied the effective assistance of trial counsel and because there is newly-discovered evidence, which requires that his convictions and sentence be vacated. In post-conviction proceedings, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Helton v. State, 907 N.E.2d 1020, 1023 (Ind. 2009); see also Ind. Post-Conviction Rule 1(5). Because the post-conviction court denied relief, Polk is appealing 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." Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993).

Post-conviction relief is not a substitute for a direct appeal. Holt v. State, 656 N.E.2d 495, 496 (Ind. Ct. App. 1995). Rather, post-conviction relief is reserved for those

¹ The time lapse between hearing dates appears to be due to the case being mired by discovery.

issues not known at the time of trial and direct appeal or for some reason not available to the defendant at that time. Id. A petitioner seeking post-conviction relief must show that the issues raised were unascertainable at the time of trial and direct appeal or the allegations arising therefrom are waived. Id.

II. Ineffective Assistance of Trial Counsel

Polk argues that he received ineffective assistance of trial counsel when his counsel failed to object to Roberts's testimony, which was later impeached by the testimony of Officer Rayford. Polk points out that counsel "cannot impeach his own witness for the sole purpose of getting otherwise impermissible evidence in front of the jury." Appellant's Br. p. 11.

To establish a claim of ineffective assistance of counsel, a petitioner must satisfy the two-part test announced in Strickland v. Washington, 466 U.S. 668 (1984). More particularly, the petitioner must demonstrate that counsel's performance was deficient and that this deficiency prejudiced the petitioner. Helton, 907 N.E.2d at 1023.

As to the first prong, counsel is afforded considerable discretion in choosing strategy and tactics, and this Court grants those decisions considerable deference. Pruitt v. State, 903 N.E.2d 899, 906 (Ind. 2009). Indeed, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. Id.

Regarding the second prong, deficient performance is prejudicial when there is a reasonable probability that but for counsel's unprofessional errors, the result of the

proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Here, although Polk is correct that counsel may not call a witness for the sole purpose of impeaching him to enter otherwise inadmissible evidence, we cannot agree that he has correctly applied it to these circumstances. Specifically, Polk does not point to anything in the record indicating that either the State or Polk could have predicted that Roberts would testify as he did. Put another way, without knowing that the State expected that Roberts's testimony would contradict his statement to Officer Rayford, the basis for the objection that Polk now asserts his counsel should have made was not available in the first place. To be sure, the State most likely made Roberts a witness because he had previously implicated Polk in the crime when speaking with the police.

Even assuming solely for argument's sake that Polk's counsel believed that the State called Roberts to later call Officer Rayford to impeach Roberts, the subsequent use of Officer Rayford's testimony does not render counsel's performance ineffective, inasmuch as counsel objected to Officer Rayford's testimony. When that objection was overruled, counsel requested a curative, limiting instruction, which was given.

Moreover, Polk has failed to demonstrate prejudice insofar as the jury was still left with Johnson's testimony, which was sufficient to convict Polk. Consequently, this claim fails.

III. Newly-Discovered Evidence

Polk argues that the his convictions should be vacated because of newly-discovered evidence, namely, transcript testimony from Polk's probation revocation hearing in which the victim, Johnson, stated that he did not know who had attacked him. This testimony contradicted Johnson's subsequent trial testimony implicating Polk in the attack. Additionally, Polk points to conflicting witness statements that were not entered into evidence.

Claims of newly-discovered evidence should be received with great caution and carefully scrutinized. Taylor v. State, 840 N.E.2d 324, 329-30 (Ind. 2006). A defendant who claims that such evidence warrants a new trial must show: (1) the evidence has been discovered since 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 retrial of the case; and (9) it will probably produce a different result at retrial. Id.

In this case, during Polk's trial, Johnson was questioned about his testimony at Polk's probation revocation hearing and it was made clear to the jury that it was inconsistent with his trial testimony. Accordingly, to the extent that the transcript from the probation revocation hearing was relevant, the jury was aware of its relevance. Likewise, although Roberts's prior inconsistent statements were not admitted as substantive evidence, their inconsistency made them relevant, inasmuch as they were used to impeach his testimony. Consequently, there is nothing about this evidence that is

new in any material or relevant way, and we affirm the decision of the post-conviction court.

The judgment of the post-conviction court is affirmed.

KIRSCH, J., and BROWN, J., concur.