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Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LARRY WASHINGTON,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A03-0603-PC-103

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jenny Pitts Manier, Judge
Cause No. 71D06-8903-CF-207

November 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Larry Washington appeals the post-conviction court's denial of his successive petition for post-conviction relief. Washington raises three issues, which we revise and restate as:

- I. Whether the post-conviction court's denial of Washington's claim that the police stop of his vehicle and resulting seizure of cocaine violated his rights under the Fourth Amendment is clearly erroneous;
- II. Whether the post-conviction court's denial of Washington's claim regarding documents used to establish his status as an habitual offender is clearly erroneous;
- III. Whether Washington was denied the effective assistance of trial and appellate counsel; and
- IV. Whether Washington was denied the effective assistance of post-conviction counsel.

On cross appeal, the State raises one issue, which we restate as whether the post-conviction court abused its discretion by allowing Washington to amend his successive petition for post-conviction relief. We affirm.

The relevant facts as stated in Washington's direct appeal follow:

[I]n the early morning hours of March 12, 1989, Officer Paul Bradfield of the South Bend Police Department observed a blue Mustang and a gold Honda parked in the middle of a street. When the vehicles drove off in opposite directions, Officer Bradfield followed the Mustang and radioed for assistance in stopping the Honda. Officer Terry Santa heard the radio broadcast and observed the Honda pull out into an intersection. When Officer Santa activated his overhead lights, the Honda did not stop but accelerated in speed. After a 14- to 16-block chase, appellant, the driver of the Honda, exited the vehicle and ran down an alley. Prior to jumping a fence, appellant removed his white jacket and threw it to the ground. Officer James Dennin, an officer who had become involved in the vehicle chase, chased appellant on foot and eventually apprehended him on the porch of a house.

Officer Phil Trent, another officer who had become involved in the foot chase, found appellant's jacket near the fence as he was returning to his squad car. In the jacket pocket, he found a brown paper sack containing 5 plastic bags, each of which contained a white powdery substance. Officer Trent transported the jacket and sack to the police station where Officer Donald Miller emptied the contents of the bags into one evidence envelope so that the police could process the bags for fingerprints. On March 29, 1989, Officer Miller transported the evidence envelope to the police laboratory where Susan Leslie, a forensic drug chemist, analyzed the contents. Leslie determined that the envelope contained 139.3 grams of a substance which tested positive for cocaine.

Washington v. State, No. 71A03-0990-CR-373 at 2-3 (Ind. Ct. App. July 15, 1991), reh'g denied, trans. denied; Appellant's Supp. Appendix Volume II at 2-3.

Following a jury trial, Washington was found guilty of dealing in cocaine as a class A felony and being an habitual offender. The trial court sentenced Washington to twenty years in the Indiana Department of Correction for his dealing in cocaine conviction enhanced by twenty years for his status as an habitual offender.

Washington filed a direct appeal and raised numerous issues as follows: (1) whether the trial court erred by admitting evidence obtained after the police stopped his vehicle; (2) whether the evidence was sufficient to sustain his conviction for dealing in cocaine; (3) whether the trial court erred by admitting the cocaine; (4) whether the trial court erred by excluding testimony regarding drugs missing from the police evidence room; (5) whether the trial court erred by giving two of the State's instructions and refusing one of Washington's instructions. This court affirmed Washington's convictions. In particular, this court held:

Appellant first claims any evidence the police obtained after stopping his vehicle was inadmissible because the stop was in violation of

his 4th Amendment rights. Officer Bradfield testified that appellant's vehicle and another vehicle were parked in the middle of a street. Parking in the middle of a street constitutes an infraction under IND. CODE § 9-4-1-112(a) (1988 Ed.) and IND. CODE § 9-4-1-127.1(b) (1989 Supp.). Officer Bradfield was therefore justified in stopping the vehicles for the purpose of issuing a traffic citation. The fact that another officer actually stopped appellant's vehicle did not render the stop illegal. Police officers who are called upon to assist in an investigation may rely upon information obtained by another officer. The stop did not violate appellant's 4th Amendment rights; therefore, the evidence the police obtained after stopping appellant's vehicle was not inadmissible.

Washington, No. 71A03-0990-CR-373 at 3-4; Appellant's Supp. Appendix Volume II at 3-4 (internal citations omitted).

Washington then filed a petition for post-conviction relief in 1992 and an amended petition in 1997. When neither party appeared for a November 1997 hearing, the post-conviction court continued the hearing without a date subject to being reset at the request of either party. In May 1998, the post-conviction court issued the following order:

Until the court received Mr. Dvorak's letter dated May 4, 1998, it was unaware that the absence of the parties on November 13, 1997 was the signal that no evidence was forthcoming and that it was to rule based on the written materials filed. Apologies are tendered to the parties for the misunderstanding.

The defendant's P.C.R. was filed on February 14, 1992. It was amended on October 3, 1997.

POINT I. ASSISTANCE OF COUNSEL. The defendant presented no evidence to buttress his claims that his trial attorney and the attorney for his appeal were ineffective.

POINT II. PRIOR CONVICTION – HABITUAL OFFENDER The defendant adduced no evidence suggesting, nor can the court discern any rationale supporting, his claim that he was not properly apprised of the convictions upon which the State was relying to enhance his sentence.

AMENDED POINT II. Here the defendant claims that the court erroneously sentenced him under I.C. 35-50-2-8, when it should have applied I.C. 35-50-2-7.1, a provision applicable in 1990 but later repealed Unfortunately for this argument, a fair reading of the statute as well as Johnson v. State (1992) 593 N.E.2d 1181, cited by the State, do not support it

AMENDED POINT III. The issue of the vehicle stop and ensuing search was addressed by the Indiana Court of Appeals in its Memorandum Decision of July 15, 1991 disposing of the defendant's appeal. Now, he argues U.S. v. Hernandez (1995) 55 F.3d 443, decided on May 17, 1995, would have altered that decision. Having read both opinions this judge is not persuaded that it would have altered the decision to admit the evidence in question at trial or the Court of Appeals' review of that decision due to the diverse factual scenarios presented in this case and in Hernandez.

The defendant's Petition for Post-Conviction Relief, filed on February 14, 1992, and as amended on October 3, 1997, is denied. Judgment is entered in favor of the State accordingly.

Appellant's Supp. Appendix Volume I at 25-26.

In 1999, Washington requested permission from this court to file a successive petition for post-conviction relief. Washington's proposed petition included an allegation that he was denied the effective assistance of post-conviction counsel. Washington's proposed petition also mentioned:

Other issues to be litigated are as follows:

- 1) Ineffective assistance of trial counsel so that counsel can be subpoenaed to establish Record.
- 2) Ineffective assistance of Appellate Counsel so that counsel can be subpoenaed to establish Record for Appeal.
- 3) Suppression of evidence, where the prosecution withheld police report that would have brought new light to the case, that would possibly resulted [sic] in a different outcome of the trial.
- 4) Illegal search and seizure, where police searched petitioner and property (vehicle) without search warrant.

- 5) Erroneous jury instructions, and the trial Court refusing instruction that would have shedded [sic] new light to the jury in reaching a decision.

Appellant's Supp. Appendix Volume II at 77. This court granted Washington's petition to file a successive petition for post-conviction relief.

Washington filed his successive petition and later filed a motion to amend his successive petition, which the post-conviction court granted. The amended successive petition alleged that: (1) the arrest of Washington and the seizure of his jacket violated the Fourth Amendment and Article I, Section 11 of the Indiana Constitution; (2) the habitual offender conviction violated Washington's due process rights; and (3) Washington was denied the effective assistance of trial, appellate, and post-conviction counsel. After a hearing, the post-conviction court denied Washington's successive petition as follows:

* * * * *

2. The Petitioner is entitled to no relief on his claim that the trial court erred in admitting evidence the police obtained after stopping appellant's vehicle. Petitioner's claim that the attempted stop of his vehicle was unconstitutional was raised at trial and on direct appeal and decided adversely to him. It was also raised again during the Petitioner's First Amended Petition for Post-conviction Relief presented by Petitioner's counsel Dvorak and decided adversely to Petitioner by the Post-Conviction court. Thus, the claim is barred by the doctrine of res judicata.

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4. The Petitioner is entitled to no relief on his claim that the trial court erred by admitting non-certified records to support the habitual offender conviction. Petitioner's claim was available to be raised on direct appeal, but was not raised. Thus, the claim is barred by the

doctrine of waiver. See Timberlake v. State, 753 N.E.2d [591,] 597 [(Ind. 2001)]. Additionally, a review of the record of the trial proceedings shows that documents introduced into evidence to prove Petitioner's prior convictions were, indeed, certified.

* * * * *

6. The Petitioner is entitled to no relief on his claim that the trial counsel and appellate counsel was ineffective. Petitioner alleges trial counsel was deficient by failing to: 1) object to the evidence obtained from the stop; and b) object to the evidence used during the habitual stage. Petitioner alleges appellate counsel was deficient by failing to raise these issues on appeal.

* * * * *

Before turning to the individual instance of allegedly deficient performance, the Court finds that trial counsel's performance included: meeting with defendant; formulating specific theories of defense; meeting with witnesses and conducting an investigation to support those theories; cross-examining the State's witnesses; preserving potential errors for direct appeal by objecting to the admission of evidence; making an opening statement and closing argument consistent with the theories of defense; or presenting evidence in support of the theories of defense; and tendering instructions that were given by the Court. The Court finds that trial counsel subjected the State's evidence to meaningful adversarial testing and clearly performed with the objective standard of reasonable performance. Thus, the Court finds that trial counsel was effective. Childers v. State, 719 N.E.2d [1227, 1231 (Ind. 1999)].

- A. **Trial Counsel's failure to object to evidence obtained from stop.** In order to prove ineffective assistance of trial counsel due to the failure to object, Petitioner must prove that an objection would have been sustained if made and that he was prejudiced by the failure. Wrinkles v. State, 749 N.E.2d 1179, 1992 (Ind. 2001). Petitioner cannot satisfy this burden because he presented no evidence to prove that such an objection would have been sustained. The evidence shows that the stop and the recovery of Defendant's jacket and the contents of its pocket were legal and therefore the Court finds that any objection to the admission of the evidence would

have been overruled. The admission of the evidence obtained from the stop was raised by appellate counsel on appeal and therefore the Petitioner was not denied due process.

B. Failure to object to evidence admitted during the habitual offender stage. Petitioner is challenging the sufficiency of the evidence supporting his habitual offender status. Unfortunately, the adequacy of the evidence supporting the finding of being an habitual offender cannot be challenged on post-conviction relief. Weatherford v. State, 619 N.E.2d 915 (Ind. 1993). Instead, Petitioner must demonstrate that he was not an habitual offender under the laws of the state and that his various convictions did not in fact occur in the required order. Id. at 918. Petitioner has failed to meet this burden, as no evidence was admitted to show Petitioner was not an habitual offender, and therefore has not shown any prejudice by the failure to object to this evidence. Indeed, Petitioner testified during the first phase of his trial that he was convicted of the prior crimes.

7. The Court finds that Petitioner is not entitled to relief on his claim that appellate counsel performed ineffectively. The Court finds that appellate counsel's performance included: briefing and presentation of nine separate issues to the Court of Appeals, filed a Petition for Rehearing, and a Petition for Transfer to the Supreme Court. The standard for gauging appellate counsel's performance is the same as that for trial counsel from Strickland. Allen v. State, 749 N.E.2d 1158, 1166-67 (Ind. 2001). Therefore, "[t]o prevail on an ineffective assistance of counsel claim, [the petitioner] must show both deficient performance and resulting prejudice." Id. The Petitioner has failed to prove that he was not an habitual offender as required.
8. Finally, the Court finds that Petitioner is not entitled to relief for his claim that Post-conviction counsel performed ineffectively. Post-conviction counsel testified that the issues raised were purely legal in nature and no evidence was needed to present those issues to the Court. Post-Conviction counsel presented a brief to the Court on the legal issues and did not abandon Petitioner. To the extent that post-conviction counsel may have been ineffective by not presenting evidence to the Court, the remedy is to allow Petitioner a second hearing to present evidence on the issues. As Petitioner has already obtained a hearing at which evidence was received on all the issues

raised by Petitioner, no further relief would be required even if post-conviction counsel were ineffective. See Graves v. State, 823 N.E.2d 1193 (Ind. 2005).

Appellant's Appendix at 41-45.

We begin by addressing the State's cross appeal issue. The State argues that the post-conviction court abused its discretion by allowing Washington to amend his successive petition for post-conviction relief. The State correctly notes that Washington was required to request permission from this court to file a successive petition for post-conviction relief. See Ind. Post-Conviction Rule 1, §12. Washington did so and was granted permission from this court to seek successive post-conviction relief.

It is not completely clear which issues Washington was given permission to bring in his successive petition. However, Washington later sought permission from the post-conviction court to amend his successive petition and was granted permission to do so. It is clear that at least one of the issues presented in his amended successive petition was not included within the permission given by this court. Specifically, Washington was not given permission by this court to bring his claim related to the documents supporting his habitual offender status. However, the State did not raise this issue with the post-conviction court and did not object to Washington's request to amend the successive petition. Given the apparent confusion regarding the issues that Washington was permitted to raise and the State's failure to object to his motion to amend the petition, we will attempt to address Washington's arguments on the merits.

Before discussing Washington’s allegations of error, we note the general standard under which we review a post-conviction court’s denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

I.

The first issue is whether the post-conviction court’s denial of Washington’s claim that the police stop of his vehicle and resulting seizure of cocaine violated his rights under the Fourth Amendment is clearly erroneous. Washington argues that the officers’ stop of his vehicle violated the Fourth Amendment and that the cocaine discovered as a result is fruit of the poisonous tree. The post-conviction court found that Washington’s

claim was barred by res judicata because it was presented in both his direct appeal and post-conviction relief proceedings.

The Indiana Supreme Court has held that if an issue is raised on direct appeal, but decided adversely, it is res judicata in post-conviction proceedings. Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001), reh'g denied, cert. denied, 537 U.S. 839, 123 S. Ct. 162 (2002).

The doctrine of res judicata bars a later suit when an earlier suit resulted in a final judgment on the merits, was based on proper jurisdiction, and involved the same cause of action and the same parties as the later suit. Annes v. State, 789 N.E.2d 953, 954 (Ind. 2003). As a general rule, when a reviewing court decides an issue on direct appeal, the doctrine of res judicata applies, thereby precluding its review in post-conviction proceedings. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). The doctrine of res judicata prevents the repetitious litigation of that which is essentially the same dispute. Sweeney v. State, 704 N.E.2d 86, 94 (Ind. 1998). And, a petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error. State v. Holmes, 728 N.E.2d 164, 168 (Ind. 2000). “[W]here an issue, although differently designated, was previously considered and determined upon a criminal defendant’s direct appeal, the State may defend against defendant’s post-conviction relief petition on grounds of prior adjudication or res judicata.” Cambridge v. State, 468 N.E.2d 1047, 1049 (Ind. 1984) (emphasis in original).

Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006).

Here, Washington raised the issue of Fourth Amendment violations regarding the police stop in both his direct appeal and his first post-conviction proceeding. This court rejected his argument in the direct appeal, and the post-conviction court rejected his argument in that proceeding. As a result, the doctrine of res judicata applies, precluding review of this argument in the successive post-conviction proceedings. The post-

conviction court's denial of Washington's petition on this issue is not clearly erroneous. See, e.g., State v. McManus, 868 N.E.2d 778, 790 (Ind. 2007) (holding that the petitioner's competency argument was barred by res judicata).

II.

The next issue is whether the post-conviction court's denial of Washington's claim regarding documents used to establish his status as an habitual offender is clearly erroneous. Washington contends that the trial court committed fundamental error when it admitted uncertified copies of records concerning his prior convictions in the habitual offender phase of his trial. The post-conviction court rejected this argument because the claim was available to be raised on direct appeal but was not raised.

The Indiana Supreme Court has held that it is "wrong to review [a] fundamental error claim in a post-conviction proceeding." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). Rather, 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." Id.; see also Canaan v. State, 683 N.E.2d 227, 235-236 n.6 (Ind. 1997) (holding that the availability of the fundamental error exception as an exception to the waiver rule in post-conviction proceedings is generally limited to "deprivation of the Sixth Amendment right to effective assistance of counsel, or . . . an issue demonstrably unavailable to the petitioner at the time of his [or her] trial and direct appeal"), reh'g denied, cert. denied,

524 U.S. 906, 118 S. Ct. 2064 (1998). If an issue was known and available, but not raised on direct appeal, it is waived. Timberlake, 753 N.E.2d at 597.

Washington's fundamental error claim regarding the documents was available at the time of his direct appeal but was not presented. Consequently, Washington's claim is unavailable on post-conviction relief and is waived. See, e.g., Sanders, 765 N.E.2d at 592 (holding that it was wrong to review the fundamental error claim in the post-conviction proceeding).

III.

The next issue is whether Washington was denied the effective assistance of trial and appellate counsel. Again, Washington raised the issue of ineffective assistance of trial and appellate counsel in his first petition for post-conviction relief. The post-conviction court addressed and rejected these issues. "It has long been the rule that a defendant who raises a claim of ineffective assistance of trial counsel on direct appeal is foreclosed from subsequently relitigating that claim in a post-conviction proceeding." McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002), reh'g denied. Having raised the issues of ineffective assistance of trial and appellate counsel in previous proceedings, Washington is barred by res judicata from raising the issues in his successive petition. See, e.g., id. (holding that the petitioner's claim of ineffective assistance of trial counsel was res judicata).

IV.

The final issue is whether Washington was denied the effective assistance of post-conviction counsel. The right to counsel in post-conviction proceedings is guaranteed by neither the Sixth Amendment of the United States Constitution nor Article I, § 13 of the Constitution of Indiana. Daniels v. State, 741 N.E.2d 1177, 1190 (Ind. 2001), reh'g denied. “A petition for post-conviction relief is not generally regarded as a criminal proceeding and does not call for a public trial within the meaning of these constitutional provisions.” Baum v. State, 533 N.E.2d 1200, 1201 (Ind. 1989). “It thus is not required that the constitutional standards be employed when judging the performance of counsel when prosecuting a post-conviction petition at the trial level or at the appellate level.” Id.

We review claims of ineffectiveness of post-conviction counsel “under a standard that is responsive more to the due course of law or due process of law principles which are at the heart of the civil post-conviction remedy.” Daniels, 741 N.E.2d at 1190. “[I]f counsel in fact appeared and represented the petitioner in a procedurally fair setting that resulted in a judgment of the court, it is not necessary to judge his performance by the rigorous standard set forth in Strickland v. Washington[, 466 U.S. 668, 104 S.Ct. 2052 (1984)].” Id.

Here, Washington’s post-conviction counsel filed an amended petition for post-conviction relief. The State then filed a memorandum of law requesting a summary denial of Washington’s petition. Apparently, at some point, Washington’s counsel and the State agreed to submit the matter to the trial court for determination based upon the memorandums. Washington’s post-conviction counsel testified at the successive hearing

that “[i]t was a legal argument and not an argument where we needed to present evidence.” Transcript at 83. When neither party appeared for a November 1997 hearing, the post-conviction court continued the hearing without a date subject to being reset at the request of either party. In May 1998, the post-conviction court issued the following order:

Until the court received Mr. Dvorak’s letter dated May 4, 1998, it was unaware that the absence of the parties on November 13, 1997 was the signal that no evidence was forthcoming and that it was to rule based on the written materials filed. Apologies are tendered to the parties for the misunderstanding.

Appellant’s Supp. Appendix Vol. I at 25. The post-conviction court then proceeded to enter findings denying Washington’s petition for post-conviction relief.

Washington argues that his post-conviction counsel was ineffective. However, the specifics of his argument are not clear. Washington seems to argue that his counsel was ineffective for failing to appear at the post-conviction hearing. However, Washington does not specify what evidence his post-conviction counsel should have presented or why the matter could not be submitted to the post-conviction court based upon the arguments in the memorandums. The successive post-conviction court concluded that “[p]ost-conviction counsel testified that the issues raised were purely legal in nature and no evidence was needed to present those issues to the Court. Post-Conviction counsel presented a brief to the Court on the legal issues and did not abandon Petitioner.” Appellant’s Appendix at 45. Under these circumstances, we cannot say that Washington’s post-conviction counsel abandoned him or that the successive post-

conviction court's finding is clearly erroneous. See, e.g., Graves v. State, 823 N.E.2d 1193, 1197 (Ind. 2005) (affirming the post-conviction court's rejection of petitioner's claim that his post-conviction counsel was ineffective).

For the foregoing reasons, we affirm the post-conviction court's denial of Washington's petition for post-conviction relief.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur