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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD PINKHAM,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 67A05-0612-PC-749

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Diana LaViolette, Judge
Cause No. 67C01-0003-CF-35

December 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Richard Pinkham was convicted of two counts of Conspiracy to Commit Burglary¹ as class B felonies and one count of Burglary² as a class B felony, and he was determined to be a Habitual Offender.³ In the instant appeal, Pinkham, pro se, challenges the denial of his petition for post-conviction relief, presenting four issues for review, which we consolidate and restate as follows:

1. Did Pinkham receive ineffective assistance of trial counsel?
2. Did Pinkham receive ineffective assistance of appellate counsel?

We affirm in part, reverse in part, and remand.

The facts underlying the convictions were set out as follows by this court in Pinkham's direct appeal:

On October 3, 1997, Pinkham, his brother Jerry, and his ex-girlfriend Jennifer Ann Clark-Kentile left Indianapolis in Pinkham's white Monte Carlo. They traveled to Putnam County, where Pinkham's father lived. Pinkham directed Clark-Kentile to drive. He told her they were going to drive around and find a house, and she was to knock on the door to determine whether anyone was home. If no one was home, "they were going to be ass out," meaning he was planning on burglarizing the house.

At the first house, Jamie Holsapple answered the door and Clark-Kentile asked directions to a certain road. Pinkham and his brother were not in the car at that time. A neighbor, Elaine Pearson, became suspicious. She stopped Clark-Kentile and asked what she was doing. Clark-Kentile replied that she was asking for directions. Pearson noted the license plate number and called the police.

¹ Ind. Code Ann. § 35-41-5-2 (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007) (conspiracy); Ind. Code Ann. § 35-43-2-1 (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007) (burglary).

² I.C. § 35-43-2-1.

³ Ind. Code Ann. § 35-50-2-8 (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007).

Pinkham and the group next stopped at Samuel Edwards' home. Clark-Kentile knocked on the door. Edwards was asleep and it took him about thirty seconds to answer the door. Clark-Kentile asked for directions, but she had to call for Pinkham because he had already gone to the back of Edwards' house.

The three continued into Hendricks County where they finally found a house with no one home, and they burglarized it.

Putnam County Sheriff's Deputy Michael Biggs investigated the attempted Putnam County burglaries and identified Pinkham as a suspect based on the license plate number Pearson provided. Edwards and Pearson identified Pinkham from a photo array. A subsequent search of Pinkham's current girlfriend's house in Hendricks County yielded items stolen from Dennis White's residence on October 9, 1997. White lived in rural Putnam County and his house had been burglarized during the daytime while no one was home.

Pinkham v. State, No. 67A01-0202-CR-47, slip op. at 2-3 (Ind. Ct. App. June 27, 2003) (footnote and citation to record omitted).

The search during which the items stolen from the White residence were retrieved occurred on October 10, 1997 and was made pursuant to a search warrant based, in part, upon a confidential informant's statement that on October 3, 1997, he had purchased a stolen handgun from Pinkham at the apartment where the search occurred. The attesting officer stated that it had been confirmed that the handgun had been stolen during a daylight burglary on October 2, 1997. Pinkham's girlfriend at the time of the search testified at trial that Pinkham brought the items taken from the White residence to her apartment within hours after the burglary of the White residence.⁴

⁴ In his appellant's brief, Pinkham maintains that the search was conducted at his home.

In 2000, the State charged Pinkham with two counts of conspiracy to commit burglary as class B felonies (arising out of the incidents occurring at the Holsapples' and Edwards' homes), one count of burglary as a class B felony (stemming from the burglary of the White residence), and one count of theft as a class D felony (also stemming from the burglary of the White residence). The State also alleged Pinkham was a habitual offender. Following a jury trial, Pinkham was convicted of both conspiracy charges and the burglary charge and found to be a habitual offender. Although the jury also found Pinkham guilty of theft, at the sentencing hearing the trial court vacated that conviction due to double jeopardy concerns "finding that [Pinkham] was previously convicted of that count in Hendricks County" when Pinkham pleaded guilty in 1998 to receiving stolen property (relating to items taken from the White residence).⁵ *Exhibits* at 33. The trial court sentenced Pinkham to the maximum term of twenty years for each B felony conviction and ordered the sentences served concurrently. On the habitual offender determination, the trial court sentenced Pinkham to five years, all suspended.

On direct appeal, Pinkham argued (1) that the trial court erred by failing to join the counts in the instant case with an earlier prosecuted offense, (2) that he was unduly prejudiced by the admission of evidence relating to the theft conviction which was

⁵ Prior to trial, Pinkham's trial counsel filed a motion to dismiss the burglary and theft charges, arguing that those charges were barred by prior prosecution. Specifically, Pinkham's trial counsel referenced a prior prosecution in Putnam County for receiving stolen property and a prior prosecution in Hendricks County, which culminated in a guilty plea to two counts of receiving stolen property. Pinkham's counsel argued that those prior prosecutions were based on the same facts and circumstances underlying the burglary and theft charges in the instant cause, i.e., Pinkham's possession of items taken from the White residence. We note that only the prior prosecution in Hendricks County was based on items taken from the White residence. The offense charged in the prior Putnam County prosecution occurred on a different date and involved a different victim.

subsequently vacated by the trial court, and (3) that the trial court erred in denying his motion to sever the burglary and theft charges from the conspiracy charges. This court rejected each of Pinkham's contentions and thus, affirmed his convictions.

On October 20, 2006, Pinkham filed an amended petition for post-conviction relief. The court held a hearing on Pinkham's petition on November 2, 2006 and thereafter issued an order denying Pinkham's request for post-conviction relief on November 8, 2006.⁶ Pinkham timely filed his notice of appeal on November 22, 2006.

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentence by filing a post-conviction petition. Ind. Post-Conviction Rule 1(1). Post-conviction proceedings, however, do not afford a petitioner with a super-appeal. *Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002). In post-conviction proceedings, complaints 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. *Sanders v. State*, 765 N.E.2d 591 (Ind. 2002).

In a post-conviction proceeding, the petitioner must establish the grounds for relief by a preponderance of the evidence. P-C.R. 1(5); *Wesley v. State*, 788 N.E.2d 1247 (Ind.

⁶ Pinkham did not include a copy of the order denying his petition for post-conviction relief in his appellant's brief as required by Ind. Appellate Rule 46(A)(10). The State, however, provided us with the court's order in its appellee's brief. The post-conviction court summarily denied each of Pinkham's claims without making specific findings of fact and conclusions of law. *See* Ind. Post-Conviction Rule 1(6) ("The court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held").

On July 22, 2007, Pinkham filed a motion requesting that this court, while retaining jurisdiction, remand the cause to the trial court for entry of specific findings of fact and conclusions of law. Concluding that remand is not necessary because we can adequately review Pinkham's claims from the record before us, we have denied Pinkham's motion by separate order dated November 9, 2007.

2003). When challenging the denial of post-conviction relief, the petitioner appeals a negative judgment, and in doing so faces a rigorous standard of review. *Wesley v. State*, 788 N.E.2d 1247. To prevail, the petitioner must convince this court that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.* We will disturb the post-conviction court's decision only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court reached the opposite conclusion. *Id.*

Upon appeal, Pinkham argues that he received the ineffective assistance of trial and appellate counsel.⁷ Our standard of review of claims of ineffective assistance of counsel follows:

We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Failure to satisfy either prong will cause the claim to fail.

Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)) (internal citations omitted), *trans. denied*.

1.

Pinkham argues that he received ineffective assistance of trial counsel because his trial counsel failed to file a motion to suppress or later object to the admission of

⁷ The same attorney represented Pinkham at trial and on direct appeal.

evidence seized as a result of a search of his residence. Pinkham maintains that trial counsel should have challenged whether the search warrant was supported by probable cause.

We agree with the State that it appears Pinkham's trial counsel made a strategic decision not to challenge the search of the apartment. Specifically, Pinkham's trial counsel sought evidence at trial indicating that Pinkham did not live at the apartment where the items from the White residence were discovered. Trial counsel also solicited evidence that Pinkham's then-girlfriend was the only individual on the lease and further appeared to suggest that it was Pinkham's girlfriend that burglarized the White residence. To then challenge the search of the apartment would have been inconsistent with counsel's theory of defense because Pinkham would have had to admit that he had a possessory interest in the apartment to establish standing to challenge the search. We give counsel wide discretion in determining strategy and tactics and will accord those decisions deference. *Timberlake v. State*, 753 N.E.2d 591. Given the record before us, we cannot say that Pinkham's trial counsel's strategy was deficient.

Regardless of the wisdom of trial counsel's strategy, Pinkham has not established that a challenge to the search of the apartment would have been successful. Specifically, Pinkham has not established that the search warrant was not supported by probable cause.

Probable cause to issue a search warrant exists where the facts and circumstances would lead a reasonably prudent person to conclude that a search of those premises will uncover evidence of a crime. *State v. Foy*, 862 N.E.2d 1219 (Ind. Ct. App. 2007), *trans. denied*. Upon review of a probable cause determination, a reviewing court's duty is to

ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id.* In determining whether a substantial basis existed, the reviewing court, giving deference to the magistrate's determination, considers whether reasonable inferences drawn from the totality of the evidence supports the determination of probable cause. *Id.*

Here, the search of Pinkham's apartment, which was executed on October 10, 1997, was made pursuant to a search warrant. The probable cause affidavit submitted in support of the warrant provided that a confidential informant purchased a handgun on October 3, 1997 from a man named "Richard". *Appendix* at 16. It had been determined that the handgun had been stolen during "a day light [sic] burglary" in Montgomery County that had occurred on October 2, 1997. *Id.* The confidential informant provided the address of the seller's residence and a physical description of the seller and the seller's vehicle. The affidavit further provided that the mother of the confidential informant advised that the seller's last name was "Pinkham" and gave an address and a description of Pinkham's vehicle, which matched that given by the confidential informant. The mother of the confidential informant further indicated that she had personally been in the seller's apartment because her daughter lived there and that she had observed several guns. The attesting officer stated that he believed the confidential informant was reliable because the confidential informant had given reliable and credible information in the past. Further, the attesting officer noted that the information provided by the confidential informant and the confidential informant's mother matched information about a potential perpetrator of a series of residential burglaries that the

attesting officer had gathered during his investigation of other burglaries. Based upon this information, a magistrate issued the search warrant.

The information provided to the issuing magistrate clearly provided a substantial basis for the magistrate's conclusion that a search of the apartment would uncover evidence of a crime. Given counsel's apparent strategic decision and in light of the fact that the search warrant was supported by sufficient probable cause, we cannot find Pinkham's trial counsel ineffective for not challenging the search of the apartment through a motion to suppress or by objecting to the admission of evidence seized as a result of the search.

2.

Pinkham also argues that he received ineffective assistance of appellate counsel. Ineffective assistance claims at the appellate level of proceedings generally fall into three categories: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues competently. *See Bieghler v. State*, 690 N.E.2d 188 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998). Pinkham's claims of appellate counsel's ineffectiveness fall into the second category. Essentially, Pinkham's arguments are that his appellate counsel was ineffective for failing to challenge on direct appeal: (1) the validity of his burglary conviction with respect to the state prohibition against double jeopardy; (2) the

sufficiency of the evidence with respect to the burglary conviction; and (3) the reasonableness of his sentence.⁸

When reviewing a claim of ineffective assistance of appellate counsel regarding the selection and presentation of issues, a defendant must overcome the strongest presumption of adequate assistance. *Seeley v. State*, 782 N.E.2d 1052 (Ind. Ct. App. 2003), *trans. denied*. In determining whether appellate counsel’s performance was deficient, we consider the information available in the trial record or otherwise known to appellate counsel. *Id.* To prevail upon the claim of ineffective assistance of appellate counsel, the petitioner must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. *Id.*

Pinkham claims that his appellate counsel was ineffective for failing to effectively argue that his conviction for burglary of the White residence in the instant cause and his conviction for receiving stolen property in Hendricks County, based upon his possession of items taken from the White residence, violated the State’s prohibition against double jeopardy. Specifically, Pinkham argues that both convictions were based on “the stolen items recovered from his home”, i.e., his unexplained possession of property recently stolen from the White residence.

⁸ Because of our resolution of the double jeopardy issue, we need not address the issue of whether Pinkham’s appellate counsel was ineffective for failing to challenge the sufficiency of the evidence with regard to his burglary conviction.

Pinkham states in his appellant's brief that his appellate counsel presented a double jeopardy argument challenging his burglary conviction on direct appeal. Moreover, his appellate counsel testified during the post-conviction hearing that he remembered making a double jeopardy argument. It does not appear, however, that a double jeopardy argument was in fact advanced on direct appeal as grounds for reversal of Pinkham's burglary conviction.

Upon direct appeal, this court noted that, "Pinkham also argues the trial court should have dismissed the burglary charge because the theft prosecution was barred by double jeopardy, and without the evidence of theft the burglary charge cannot be proved." *Pinkham v. State*, slip op. at 7 n.6. The court found this argument moot based upon its conclusion that Pinkham was not unduly prejudiced by admission of evidence relating to the theft, which conviction was vacated at sentencing because "[t]he evidence of the theft was directly related to the burglary charge." *Id.* at 7. There is no indication in this court's treatment of the issue that Pinkham's appellate counsel presented for this court's review the separate issue of whether Pinkham's burglary conviction was illegal as being in violation of double jeopardy principles.⁹ To the extent Pinkham's counsel testified at the post-conviction hearing that he remembered presenting a double jeopardy argument, counsel's testimony is in the context of what arguments were made to the trial court, not to this court on appeal. We will therefore proceed with our review as if appellate counsel did not present the issue of whether Pinkham's burglary conviction

⁹ Complicating matters is that Pinkham has not presented us with the appellate brief submitted in support of his direct appeal.

should have been vacated as being in violation of the State’s prohibition against double jeopardy. The issue thus becomes whether Pinkham’s appellate counsel was ineffective for failing to present such argument on direct appeal.

The Double Jeopardy Clause in the Indiana Constitution is embodied in Article 1, Section 14, and provides, “No person shall be put in jeopardy twice for the same offense.” Our Supreme Court has concluded this provision was intended to prohibit, among other things, multiple punishments for the same actions. *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). In *Richardson*, our Supreme Court established a two-part test for analyzing double jeopardy claims. According to that test, multiple offenses are the same offense in violation of article 1, section 14, “if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” *Id.* at 49. To establish a violation under the actual evidence test, a defendant “must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the elements of a second challenged offense.” *Id.* at 53.

Analyzing *Richardson* and its progeny, this court held in *Alexander v. State*, 768 N.E.2d 971, 974 (Ind. Ct. App. 2002), *aff’d on reh’g*, 772 N.E.2d 476, *trans. denied*, that a double jeopardy violation occurs “where the evidentiary facts establishing an essential element of one offense also establish all of the essential elements of the second challenged offense.” This view seems to be in accordance with Justice Sullivan’s separate concurrence in *Richardson* wherein he stated that double jeopardy

considerations prohibit “[c]onviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished.”¹⁰ 717 N.E.2d at 55.

In the instant cause, Pinkham was charged with breaking and entering the White residence “with intent to commit a felony therein to-wit: Theft.” *Exhibits* at 17. The State’s evidence supporting the burglary conviction consisted of White’s testimony that his home was broken into through a backdoor during the daytime and that certain items were taken. The State also presented evidence of a series of rural daytime burglaries in Putnam County which occurred in a similar manner. Pinkham’s girlfriend at the time the White burglary occurred further testified that Pinkham brought the items taken from the White residence to her apartment within hours after the burglary of the White residence. The State also relied on Pinkham’s recent, unexplained possession of the items taken from the White residence.

Pinkham’s recent, unexplained possession of items taken from the White residence was key to establishing the burglary charge. This same evidence served as the factual basis for his guilty plea to receiving stolen property in Hendricks County.¹¹ Thus, to

¹⁰ In cases subsequent to *Richardson*, our Supreme Court has recognized and applied Justice Sullivan’s five categories defining double jeopardy violations, including the one set forth above, while at the same time referring to the actual evidence test set forth in *Richardson*. See *Miller v. State*, 790 N.E.2d 437 (Ind. 2003); *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002).

¹¹ The State asserts that Pinkham has not met his burden to prove his claim of double jeopardy because he has not shown what evidence supported his Hendricks County plea. Specifically, the State claims that Pinkham has not established that his prior conviction for receiving stolen property was based on property stolen from the White residence. We note, however, that in the present case the trial court vacated the theft conviction, which was based upon Pinkham’s possession of items taken from the White residence, because it constituted a double jeopardy violation in light of his previous conviction for receiving stolen

prove that Pinkham committed burglary of the White residence, the State relied upon the same conduct that constituted the basis of the offense to which he had already pleaded guilty. We therefore conclude there was a reasonable possibility that the jury relied upon the same evidence (Pinkham's possession of White's property) in finding Pinkham guilty of burglary that was used as the factual basis for Pinkham's prior conviction for receiving stolen property in Hendricks County.¹² Pinkham's burglary conviction is therefore illegal because it is in violation of the prohibition against double jeopardy.

Additionally, we note that this issue was obvious to appellate counsel because in pre-trial motions Pinkham's trial counsel, who also served as his appellate counsel, argued that the burglary conviction should be dismissed upon double jeopardy grounds. There is no reasonable strategic explanation for counsel's failure to present such a significant and obvious issue on direct appeal, which, if raised, would have resulted in a reversal of his class B felony burglary conviction. We therefore conclude that Pinkham received ineffective assistance of appellate counsel in this regard and reverse Pinkham's burglary conviction, remanding to the trial court to vacate the conviction and sentence thereon.¹³

property. This informs us that the receiving stolen property conviction in Hendricks County was based on Pinkham's possession of items taken from the White residence.

¹² Indeed, even this court noted on direct appeal that the evidence of the theft, i.e., Pinkham's possession of property stolen from the White residence, was "directly related to the burglary charge." Slip op. at 7.

¹³ We recognize the unusual circumstances presented in that we must vacate a conviction for a greater offense on double jeopardy grounds. Hypothetically speaking, if burglary, theft, and/or receiving stolen property offenses had been tried in the same cause and a double jeopardy violation was found to exist, the lesser offense(s) would have been vacated in favor of entering a conviction for the greater offense of burglary.

Pinkham next argues that his appellate counsel was ineffective for failing to challenge his sentence as manifestly unreasonable. Pinkham maintains that he is not the worst offender and that his convictions do not represent the worst of offenses.

Effective January 1, 2002, and thus effective at the time of Pinkham's direct appeal and this appeal, our standard of appellate review for sentences is that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B).

The trial court determined that the maximum sentence of twenty years should be imposed on each of Pinkham's class B felony convictions¹⁴ with the sentences to be served concurrently. The trial court also sentenced Pinkham to an additional five years for the habitual offender determination, but ordered that sentence suspended. In sum, the trial court imposed an aggregate sentence of twenty years for Pinkham's two remaining class B felony convictions and the determination that he is a habitual offender. In its sentencing order,¹⁵ the trial court identified Pinkham's criminal history, the many opportunities afforded to him to change his behavior, and that he had been out of jail for

Here, although the Hendricks County prosecution commenced in 1997, shortly after the search of the apartment (which was located in Hendricks County), the subsequent prosecution in Putnam County (where the White residence was located) was not instituted until March of 2000. In the Hendricks County cause, Pinkham pleaded guilty to D felony receiving stolen property based upon his possession of items stolen from the White residence and was sentenced accordingly. By the time Putnam County commenced the instant action and brought Pinkham to trial, Pinkham had served the sentence imposed in Hendricks County.

¹⁴ Ind. Code Ann. § 35-50-2-5 (West 2004) (subsequently amended effective April 25, 2005).

¹⁵ The transcript of the sentencing hearing was not included in the record on appeal.

only a short time when he committed the burglary of the White residence. The trial court identified no mitigating circumstances.

Pinkham's counsel explained that he chose not to challenge Pinkham's sentence on direct appeal in light of his extensive criminal history and the fact that the trial court suspended the five-year habitual offender sentence when the trial court had discretion to impose a harsher sentence. Pinkham's appellate counsel's assessment of the circumstances supporting the sentence imposed by the court is accurate. The evidence at trial demonstrated that Pinkham was engaged in a series of daytime burglaries spanning several counties and the record further demonstrates that Pinkham is no stranger to the criminal justice system. We cannot say that the sentence imposed is inappropriate in light of the nature of the offense and the character of the offender. Pinkham has therefore failed to demonstrate that he was prejudiced by appellate counsel's decision not to challenge his sentence on direct appeal.

Judgment affirmed in part, reversed in part and remanded with instructions.

SHARPBACK, J., and RILEY, J., concur.