



## **Case Summary**

Ricky Renee Patterson appeals the denial of his petition for post-conviction relief. Patterson claims that he was denied the effective assistance of both trial and appellate counsel, and therefore the post-conviction court erred when it denied his petition for relief. Finding that the evidence does not lead unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court, we affirm.

## **Facts and Procedural History**

On June 20, 1996, the State charged Patterson with class B felony conspiracy to commit robbery, class B felony robbery, and class B felony criminal confinement. On October 28, 1996, the State additionally charged Patterson with being a habitual offender. A jury trial was held on December 17 through 19, 1997. After the jury found Patterson guilty as charged on the first three counts, the trial proceeded to the habitual offender phase. Patterson's trial counsel objected to the admission of several exhibits introduced by the State, claiming that those exhibits contained extraneous information "concerning other matters not charged by the State in the habitual offender information, which . . . are not relevant to the proceedings before this Court." Tr. at 963. The State agreed to redact the exhibits. Thereafter, without objection, the trial court admitted into evidence redacted Exhibit 15A, which proved that Patterson was convicted in 1976 for attempted burglary and petit larceny; redacted Exhibit 16A, which proved that Patterson was convicted in 1987 of robbery; and redacted Exhibit 17A, which proved that Patterson was convicted in 1983 of robbery. Thereafter, the jury found Patterson to be a habitual offender.

Following a hearing on March 12, 1998, the trial court sentenced Patterson to twenty years for each of his felony counts, to be served concurrently, and an additional thirty years on the habitual offender count, for an aggregate sentence of fifty years. During sentencing, the trial court found numerous aggravating factors including Patterson's disrespectful attitude to the court, the violent nature of his crimes, his clear involvement in the planning of the crimes, his position as a ringleader to others involved in his crimes, his criminal history, his lack of remorse, and that the likelihood of future criminal activity necessitated housing in a correctional facility. The trial court found no mitigating factors.

On direct appeal, this Court affirmed Patterson's convictions by memorandum decision. *Patterson v. State*, No. 29A05-9807-CR-351 (Ind. Ct. App. May 13, 1999). Patterson filed a pro se amended petition for post-conviction relief on March 3, 2008. Counsel then appeared on Patterson's behalf and filed an amended verified petition for post-conviction relief on December 23, 2009. An evidentiary hearing was held on April 1, 2010. The post-conviction court entered its findings of fact, conclusions of law, and judgment denying Patterson's petition on June 11, 2010. This appeal ensued.

### **Discussion and Decision**

Patterson appeals from the denial of his petition for post-conviction relief. Our standard of review in this regard is well settled:

In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction

court.... Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law.

*Hall v. State*, 849 N.E.2d 466, 468-69 (Ind. 2006) (citations and quotations omitted).

Patterson contends that he is entitled to post-conviction relief because both his trial counsel and his appellate counsel rendered ineffective assistance. We address each argument in turn.

### ***I. Ineffective Assistance of Trial Counsel***

To establish a violation of the Sixth Amendment right to effective assistance of counsel, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When analyzing a claim of ineffective assistance, we begin with the presumption that counsel was effective. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998). Although the performance prong and the prejudice prong are separate inquiries, a defendant's failure to satisfy either prong will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). If this Court can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient. *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002).

During the habitual offender phase of Patterson's trial, counsel objected to several of the State's exhibits because they contained evidence of dismissed and other charges filed against Patterson that were not alleged by the State as part of the habitual offender charge.

The State agreed to redact the exhibits. Thereafter, without objection, the trial court admitted into evidence the redacted exhibits.

Patterson argues that trial counsel was ineffective by failing “to ensure that all of the prejudicial extraneous information included in the Habitual Offender exhibit packets was removed before being distributed to the jury.” Appellant’s Br. at 6. Patterson claims that, even after redaction, the exhibits contained prejudicial information which included details of the offenses, details regarding his personal life, and details regarding his psychological state. Patterson argues that counsel’s failure to ensure the removal of all extraneous information was especially important in light of trial counsel’s strategy of urging the jury to exercise its power of jury nullification.

Counsel’s strategy during the habitual offender phase was to urge the jury to disregard the uncontroverted proof of Patterson’s prior unrelated convictions and to exercise their power of jury nullification and refuse to find him to be a habitual offender. This was not an improper strategy. *See Walden v. State*, 895 N.E.2d 1182, 1185 (Ind. 2008) (permissible for jury to refuse to make habitual offender finding irrespective of uncontroverted proof of prior felonies because habitual offender is a “status” determination and not a “guilt or innocence” determination). Patterson argues that the extraneous information that remained in the exhibits even after redaction made it highly unlikely that the jury would exercise its nullification power. We disagree.

The record reveals that, in his closing argument during the habitual phase, trial counsel argued that jury nullification was appropriate because Patterson’s most recent

conviction was ten years old. Counsel also argued that Patterson's criminal history involved primarily petty crimes against property and did not demonstrate a propensity for violence on his part which would justify additional punishment. The extraneous information Patterson points to that remained in the exhibits did not substantially contradict this strategy. The extraneous information detailed Patterson's nonviolent criminal history and further documented his troubled childhood. As noted by the State, the extraneous information also documented Patterson's involvement in the military, which resulted in an honorable discharge after injury. While some of the other remaining information may be viewed as unflattering to Patterson, it did not detract from counsel's argument that the jury's option to refuse to find a nonviolent offender such as Patterson to be a habitual offender was a viable one.

Patterson has not shown that he was prejudiced by counsel's failure to demand further redaction of the State's exhibits, as he has not met his burden to show that there was a reasonable probability that the jury would have refused to find Patterson to be a habitual offender had counsel done so. Thus, Patterson has not shown that the result of the proceedings would have been different but for counsel's alleged errors. The post-conviction court properly determined that trial counsel was not ineffective.

## ***II. Ineffective Assistance of Appellate Counsel***

We next address Patterson's claim that he received ineffective assistance of appellate counsel. When reviewing such claims, we apply the same standard applicable to claims of ineffective assistance of trial counsel. *Fisher v. State*, 810 N.E.2d 674, 676 (Ind. 2004). The

defendant must show that appellate counsel was deficient in his or her performance and that such deficiency resulted in prejudice. *Id.* at 677. Claims of ineffective assistance of appellate counsel generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Id.* Patterson's claim falls into the second category.

Patterson asserts that his appellate counsel was ineffective by failing to challenge the trial court's sentencing statement because the statement failed to specifically balance aggravating and mitigating factors in determining the appropriate sentence. The trial court sentenced Patterson in March of 1998. The law at that time provided that the trial court could increase or decrease a presumptive sentence for a crime at its discretion depending upon the aggravating and mitigating circumstances present. *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993).<sup>1</sup> The trial court's sentencing statement was required to (1) identify all of the *significant* mitigating and aggravating circumstances relied upon by the trial court, (2) state the specific reason why each circumstance was considered aggravating or mitigating, and (3) demonstrate that the court balanced the aggravating and mitigating circumstances and determined that the aggravators outweighed the mitigators. *Battles v. State*, 688 N.E.2d 1230, 1235 (Ind. 1997). However, in the absence of mitigating factors, the trial court's sentencing statement need not articulate the balancing process between

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<sup>1</sup> At that time, a class B felony carried a presumptive sentence of ten years which could be enhanced up to an additional ten years based upon aggravating circumstances. *See* Ind. Code § 35-50-2-5 (1993). A habitual offender finding carried an additional fixed term not less than the presumptive sentence for the underlying felony and not more than three times the presumptive sentence. *Williams v. State*, 676 N.E.2d 1074, 1076 (Ind. Ct. App. 1997) (citing Ind. Code § 35-50-2-8).

aggravating and mitigating factors. *Smith v. State*, 549 N.E.2d 1101, 1107 (Ind. Ct. App. 1990).

The trial court here found the presence of several aggravating circumstances but no mitigating factors. Although *Patterson* implies that the trial court noted “mitigation” when pronouncing his sentence, the trial court specifically stated that it did not find any of the circumstances urged by *Patterson* as mitigating. Tr. at 1033. In the absence of mitigating factors, the trial court was under no obligation to articulate a balancing process. Moreover, as noted by the State, “[w]hen the record indicates that the trial judge engaged in the evaluative process but simply did not sufficiently articulate his reasons for enhancing the sentence and the record indicates that the sentence imposed was not manifestly unreasonable, then the purpose underlying the specificity requirement have been satisfied.” *Mitchem v. State*, 685 N.E.2d 671, 679 (Ind. 1997) (citing *Adkins v. State*, 532 N.E.2d 6, 9 (Ind. 1989)(quoting *Henderson v. State*, 489 N.E.2d 68, 72 (Ind. 1986)). The sentencing statement at issue here contained a thorough recitation of facts and circumstances which clearly indicated that the trial judge engaged in a thoughtful evaluative process. Tr. at 1029-34. The record further indicates that the fifty-year aggregate sentence imposed was not manifestly unreasonable in light of the aggravating factors.<sup>2</sup>

We are highly deferential to appellate counsel’s decisions as to what issues to raise on direct appeal. *See id.* Under the circumstances presented, a challenge to the trial court’s

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<sup>2</sup> The trial court specifically noted that it would have been reasonable to impose a ninety-year sentence under the circumstances. However, in its discretion, the court determined that a fifty-year aggregate sentence was most appropriate. Tr. at 1033.

sentencing statement would have been unsuccessful. Thus, Patterson cannot show that the result of his appeal would have been different had his appellate counsel challenged the trial court's sentencing statement. Therefore, we cannot say that appellate counsel was ineffective in failing to raise this issue on direct appeal. The post-conviction court properly denied Patterson's petition for relief.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.