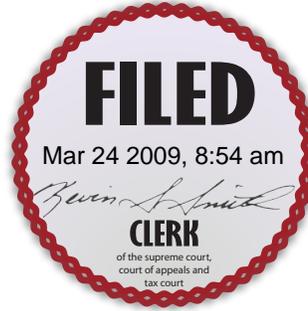


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ANTARIO B. MERCERY,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 71A03-0808-PC-418

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William C. Whitman, Judge
Cause No. 71D05-0210-PC-35

March 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Antario B. Mercery appeals the post-conviction court's partial denial and partial grant of his petition for post-conviction relief. Mercery raises three issues, which we consolidate and restate as:

- I. Whether Mercery was denied the effective assistance of trial and appellate counsel; and
- II. Whether the post-conviction court erred when it revised Mercery's credit time.

We affirm.

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

[O]n the evening of September 18, 1993, Victorio Belcher and his girlfriend, Crystal Jackson, were sitting in Belcher's car in front of Jackson's house after an evening out. Suddenly, the passenger's side door was yanked open and shots were fired into the car. Jackson was shot multiple times in her right and left arms, and in her breasts. Belcher was shot in the side. Belcher was then pulled from the car and shot in the head. Belcher identified Mercery as one of his attackers.

Three weeks earlier, Belcher had had a confrontation with both Mercery and his girlfriend.

Mercery v. State, No. 71A04-9412-CR-498, slip op. at 2 (Ind. Ct. App. Sept. 28, 1995), trans. denied; Appellant's Appendix at 10. Marcus McCray was identified as the other attacker, and James Jennings admitted to driving Mercery and McCray to and from the scene.

The State charged Mercery with two counts of attempted murder as class A felonies. The jury in Mercery's trial was instructed regarding attempted murder and accomplice liability as follows:

To convict the defendant of Attempted Murder, a class A felony, as charged in Count II, the State must have proved each of the following elements beyond a reasonable doubt:

1. The defendant, Antario Mercery;
2. With the intent to commit the crime of Murder, that is: knowingly or intentionally killing another human being;
3. Engaged in conduct which constituted a substantial step toward the commission of the crime of Murder, that is: he shot [the victims] with a gun.

Appellant's Appendix at 182-183.

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person:

- (1) Has not been prosecuted for the offense;
- (2) Has not been convicted of the offense; or
- (3) Has been acquitted of the offense.

A person is responsible for the acts of his accomplice as well as his own. The acts of one person are attributable to all who are acting together during the commission of a crime. Accordingly, the State need not prove, beyond a reasonable doubt, that the defendant personally and acting by himself, committed all of the elements of the crime or crimes with which he is charged. However, the State must prove, beyond a reasonable doubt, that the defendant and the other person or persons, acting together, committed all of the elements of the crime or crimes with which he is charged.

Id. at 185. The jury found Mercery guilty as charged, and the trial court sentenced him to concurrent terms of forty years in the Indiana Department of Correction.

On direct appeal, Mercery argued that fundamental error occurred in instructing the jury regarding the elements of attempted murder. We held that the instruction “sufficiently advised the jury that Mercery must have possessed an intent to kill” and that

the instruction “accurately set forth all the elements of the crime of attempted murder.” Appellant’s Appendix at 12. The Indiana Supreme Court denied transfer.

In October 2002, Mercery filed a petition for post-conviction relief, alleging ineffective assistance of trial and appellate counsel, prosecutorial misconduct, and failure to properly instruct the jury. In January 2007, Mercery amended his petition by adding a claim that the sentencing court failed to include the proper jail credit time and good time credit in its judgment. In June 2007, Mercery amended his petition by arguing that his trial counsel was ineffective by failing to object to allegedly improper aggravating circumstances used by the trial court in sentencing. After an evidentiary hearing, the post-conviction court entered the following findings of fact and conclusions of law:

- A. [] “TRIAL COUNSEL FAILED TO OBJECT TO ERRONEOUS ATTEMPTED MURDER AND ACCOMPLICE LIABILITY INSTRUCTIONS”.

In its September 28, 1995 Memorandum Decision, the Indiana Court of Appeals affirmed the giving of Instructions 1 and 2. Effective assistance of trial counsel does not require objecting to a proper jury instruction.

Likewise, Instruction 4, accurately stated the law. As a result, not objecting to its being read to the jury does not constitute ineffective assistance of trial counsel.

- B. [] “TRIAL COUNSEL FAILED TO TENDER A PROPER INSTRUCTION ON ATTEMPTED MURDER UNDER AN ACCOMPLICE LIABILITY THEORY.”

The rationale here is the same as A., above.

* * * * *

- E. [] “TRIAL COUNSEL FAILED TO OBJECT TO INAPPROPRIATE AGGRAVATING FACTORS CITED BY THE

TRIAL COURT TO ENHANCE RECOMMENDED PRESUMPTIVE SENTENCE.”

Objecting to a judge’s reasons for imposing a sentence would be a questionable practice. The trial court cited its reasons for imposing an enhanced sentence in its May 19, 1994 Sentencing Order and Findings of Fact. She referred to the applicable statutory provisions. Her reasons for imposing the sentence she did were appropriate and within the statute applicable at the time. Trial counsel’s conduct was within the range of competency.

F. [] “THE CONVICTIONS AND SENTENCES [WERE] IN VIOLATION OF THE CONSTITUTION.”

For the reasons set forth above, the court concludes that Mr. Mercery was not denied the effective assistance of appellate counsel.

G. [] “THE SENTENCING COURT FAILED TO INCLUDE . . . CORRECT PRE-SENTENCE JAIL CREDIT . . .”

There was no evidence that the 116 days “confined prior to sentencing” as shown in the abstract is incorrect.

Id. at 172-174. Thus, the post-conviction court denied Mercery’s petition for post-conviction relief.

Mercery then filed a motion to correct error regarding the credit time issue. The trial court granted the motion to correct error and amended its paragraph G as follows: “Mr. Mercery’s Paragraph G is well taken. Consistent with the parties’ agreement Mr. Mercery shall be awarded one hundred twenty-six (126) days at Class I credit prior to sentencing.” Id. at 179. The post-conviction court then issued an amended abstract of judgment, which provided that Mercery had been confined 126 days prior to sentencing

and that the abstract had been amended “from 116 days credit to 126 days Class I credit prior to sentencing.” Id. at 213.

Before discussing Mercery’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. 810 N.E.2d at 679. 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 Mercery was denied the effective assistance of trial and appellate counsel. 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. Williams v. State, 724 N.E.2d 1070, 1078 (Ind. 2000), reh’g denied, cert. denied, 531 U.S. 1128, 121 S. Ct. 886 (2001). 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. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh’g denied), reh’g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001).

A counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). 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. Id. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

A. Trial Counsel.

Mercery argues that his trial counsel was ineffective because he failed to object to the attempted murder instructions, failed to object to the accomplice liability instruction,

failed to tender an appropriate accomplice liability instruction, and failed to object to allegedly improper aggravating factors cited by the trial court in sentencing Mercery.

1. *Attempted Murder Instructions.*

Mercery seems to argue that the attempted murder instructions were erroneous and that his trial counsel should have objected to them. However, this issue was raised in Mercery's direct appeal and decided adversely to Mercery. Mercery argued on direct appeal that the attempted murder instructions resulted in fundamental error. We held that the instructions "sufficiently advised the jury that Mercery must have possessed an intent to kill" and that the instructions "accurately set forth all the elements of the crime of attempted murder." Appellant's Appendix at 12. The Indiana Supreme Court denied transfer.

To the extent Mercery now attempts to raise the same issue in the context of ineffective assistance of trial counsel, his argument fails. "Although differently designated, an issue previously considered and determined in a defendant's direct appeal is barred for post-conviction review on grounds of prior adjudication – *res judicata*." Overstreet v. State, 877 N.E.2d 144, 149 n.2 (Ind. 2007), reh'g denied, cert. denied, 129 S. Ct. 458 (2008). To succeed on his claim of ineffective assistance of trial counsel, Mercery must prove that the instructions were erroneous, his trial counsel should have objected to them, and that he was prejudiced. However, we have already held that the instructions did not result in fundamental error. As such, we conclude that the post-conviction court's denial regarding this issue is not clearly erroneous. See, e.g., id.

(rejecting the petitioner’s ineffective assistance of counsel claim where he had raised the issues on direct appeal in the context of fundamental error).

2. *Accomplice Liability Instructions.*

Mercery argues that his trial counsel was ineffective because he failed to tender a proper accomplice liability instruction and failed to object to the following instruction regarding accomplice liability:

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person:

- (1) Has not been prosecuted for the offense;
- (2) Has not been convicted of the offense; or
- (3) Has been acquitted of the offense.

A person is responsible for the acts of his accomplice as well as his own. The acts of one person are attributable to all who are acting together during the commission of a crime. Accordingly, the State need not prove, beyond a reasonable doubt, that the defendant personally and acting by himself, committed all of the elements of the crime or crimes with which he is charged. However, the State must prove, beyond a reasonable doubt, that the defendant and the other person or persons, acting together, committed all of the elements of the crime or crimes with which he is charged.

Appellant’s Appendix at 185.

According to Mercery, this instruction was erroneous because the jury “was not instructed that the ‘person or persons’ that defendant was aiding, inducing, or causing to kill Belcher and Jackson had to do so with the specific intent *mens rea* to constitute attempted murder.” Appellant’s Brief at 13. Mercery also contends that, because the

instruction did not identify the other “person or persons,” the jurors had “an option to choose between Marcus McCray, James Jennings or both.” Id. at 16.

In Bethel v. State, 730 N.E.2d 1242, 1246 (Ind. 2000), the Indiana Supreme Court “explained for the first time how Spradlin [v. State, 569 N.E.2d 948 (Ind. 1991),] applies to persons ‘convict[ed] for the offense of aiding an attempted murder.’” Williams v. State, 737 N.E.2d 734, 738 (Ind. 2000)). The Court in Bethel held:

In light of Spradlin’s requirement that attempted murder be established by proof of specific intent to kill, we find that, in order to establish that a defendant aided, induced, or caused an accomplice to commit attempted murder, the State must prove that the defendant, with the specific intent that the killing occur, knowingly or intentionally aided, induced, or caused his accomplice to commit the crime of attempted murder. Thus, to convict for the offense of aiding an attempted murder, the State must prove: (1) that the accomplice, acting with the specific intent to kill, took a substantial step toward the commission of murder, and (2) that the defendant, acting with the specific intent that the killing occur, knowingly or intentionally aided, induced, or caused the accomplice to commit the crime of attempted murder.

Bethel, 730 N.E.2d at 1246.

First, the State correctly notes that the accomplice liability instruction applied only to the attempted murder of Belcher. The evidence presented at trial demonstrated that McCray shot Belcher and that Mercery shot Jackson. The accomplice liability instruction would, therefore, apply only to Mercery’s conviction for attempted murder related to Belcher.

Second, even if Mercy's trial counsel should have raised the issue, we conclude that Mercy has not shown he was prejudiced by the accomplice liability instruction.¹ The Indiana Supreme Court has found that a Spradlin error is not prejudicial where the defendant's intent is not at issue. Hopkins v. State, 759 N.E.2d 633, 638 (Ind. 2001). The intent of the shooters, who opened the doors of Belcher's vehicle and repeatedly shot the victims at close range, was not at issue. Rather, Mercy reasonably took advantage of discrepancies in the testimony of eyewitnesses and focused on the identity of the shooters. As a result, we conclude that Mercy was not prejudiced by any error in the accomplice liability instruction, and Mercy has failed to demonstrate ineffective assistance of trial counsel due to trial counsel's failure to object to the accomplice liability instruction or failure to tender a different instruction.

3. *Aggravating Factors.*

Mercy next argues that his trial counsel was ineffective for failing to object to certain aggravators used by the trial court in sentencing him to an enhanced sentence. At the time of Mercy's sentencing, it was within the discretion of the trial court to

¹ We note that "counsel's representation cannot be deemed to have fallen below an objective standard of reasonableness for failing to anticipate a change in the law." Overstreet v. State, 877 N.E.2d 144, 161 (Ind. 2007). Mercy's trial took place in April 1994, well before the Indiana Supreme Court's decision in Bethel. In Woodson v. State, 767 N.E.2d 1022 (Ind. Ct. App. 2002), aff'd on reh'g, 778 N.E.2d 475, one panel of this court found that the issue of jury instructions on attempted murder as an accomplice, which failed to specify that intentional conduct was required, was unavailable to the defendant at the time of his trial and direct appeal in 1995 – after Spradlin was decided but before the court decided Bethel. However, in Cowherd v. State, 791 N.E.2d 833, 838 (Ind. Ct. App. 2003), trans. denied, another panel of this court, quoting the Indiana Supreme Court in Williams, stated that Bethel did not announce a new rule of law and therefore the issue was available to the defendant at the time of his 1996 or 1997 trial and 1998 appeal.

determine the sentence to be imposed upon a defendant, and such a determination would be reversed only upon a showing of manifest abuse of that discretion. Ector v. State, 639 N.E.2d 1014, 1015 (Ind. 1994), reh'g denied. A trial court was required to: 1) identify all significant mitigating and aggravating circumstances; 2) state the specific reasons why each circumstance is considered to be mitigating or aggravating; and 3) balance the mitigating and aggravating circumstances in order to determine whether the aggravating circumstances offset the mitigating circumstances. Pruitt v. State, 622 N.E.2d 469, 474 (Ind. 1993), reh'g denied. The enhancement of presumptive sentences could be supported by a single aggravating circumstance. Davidson v. State, 558 N.E.2d 1077, 1092 (Ind. 1990).

In its written sentencing order, the trial court found no mitigating factors and multiple aggravating factors as follows: (1) Mercery and his companions drove in search of Belcher; (2) Mercery and his companion “intended to shoot Belcher execution style and did so;” (3) regarding Jackson, Mercery said, “Wrong time, wrong place . . . Fuck that bitch;” (4) Jackson was nearly killed merely because she was in the car with Belcher; (5) Jackson has required and will require medical treatment, which has cost in excess of \$100,000.00; (6) imposition of the standard or less than the standard sentence would depreciate the seriousness of the crimes; (7) Mercery had a history of criminal activity involving guns; (8) Mercery was in need of correction that was best served through incarceration; and (9) Mercery fled to Alabama after learning that the victims had survived and was in possession of a weapon when apprehended. Appellant’s Appendix at

206-207. As a result, the trial court sentenced Mercery to concurrent forty-year sentences. The presumptive sentence for a class A felony was thirty years. Ind. Code § 35-50-2-4.

Mercery argues that several of the aggravators were improper because they were material elements of the crimes, that the depreciation of the seriousness of the crime aggravator was improper, that the “in need of correction that is best served through incarceration” aggravator was improper, that Jackson’s \$100,000.00 in medical expenses was not supported by the evidence, that his criminal history did not support an enhanced sentence, and that his fleeing to Alabama did not support an enhanced sentence.

“[A]lthough a material element of a crime may not also constitute an aggravating circumstance to support an enhanced sentence, the particularized individual circumstances of the criminal act may constitute a separate aggravating circumstance.” Ector, 639 N.E.2d at 1015. Four of the trial court’s findings relate to the particularized circumstances of the offenses and are not material elements of the offenses. Specifically, the facts that Mercery and his companions drove in search of Belcher, that Mercery and his companion “intended to shoot Belcher execution style and did so,” that Mercery said, “Wrong time, wrong place . . . Fuck that bitch” regarding Jackson, and that Jackson was nearly killed merely because she was in the car with Belcher are particularized circumstances of the offense, not material elements. Appellant’s Appendix at 206-207. Moreover, fleeing the state after the commission of a crime has been determined to be a proper aggravator. See Simmons v. State, 504 N.E.2d 575, 582 (Ind. 1987).

We need not address Mercery's remaining arguments because a single aggravator is sufficient to enhance a sentence, and the trial court found multiple proper aggravators. We conclude that Mercery has failed to demonstrate that his trial counsel was deficient for failing to raise this issue with the trial court. The post-conviction court's denial of Mercery's petition for post-conviction relief on this issue is not clearly erroneous.

B. Appellate Counsel.

Mercery argues that his appellate counsel was ineffective for failing to argue that the accomplice liability instruction resulted in fundamental error and failing to challenge the enhanced sentence. Where we "have determined that [a petitioner] did not receive ineffective assistance of trial counsel, he can neither show deficient performance nor resulting prejudice as a result of his appellate counsel's failure to raise this argument on appeal." Davis v. State, 819 N.E.2d 863, 870 (Ind. Ct. App. 2004), trans. denied. Having rejected Mercery's arguments regarding the accomplice liability instructions and the enhanced sentence above in the context of ineffective assistance of trial counsel, we also conclude that Mercery's arguments fail in the context of ineffective assistance of appellate counsel.

Mercery also argues that his appellate counsel was ineffective for failing to raise the issue of ineffective assistance of trial counsel. Mercery contends that his appellate counsel should have argued that his trial counsel was ineffective for failing to object to the accomplice liability instruction and failing to object to the aggravators used at sentencing. We have already determined above that Mercery's trial counsel was not

ineffective on those issues. Mercery's ineffective assistance of appellate counsel claims fail, and the post-conviction court's denial of these claims is not clearly erroneous.

II.

The final issue is whether the post-conviction court erred when it revised Mercery's credit time. The post-conviction court granted Mercery's petition regarding his credit time, finding: "Consistent with the parties' agreement Mr. Mercery shall be awarded one hundred twenty-six (126) days at Class I credit prior to sentencing." Appellant's Appendix at 179. The post-conviction court then issued an amended abstract of judgment, which provided that Mercery had been confined 126 days prior to sentencing and that the abstract had been amended "from 116 days credit to 126 days Class I credit prior to sentencing." *Id.* at 213.

On appeal, Mercery argues that the amended abstract of judgment "does not credit Appellate the additional 126 days of class I credit towards his earliest possible release date." Appellant's Brief at 32. We disagree. First, the abstract of judgment is not controlling. Robinson v. State, 805 N.E.2d 783, 794 (Ind. 2004). Second, both the post-conviction court's written order and the amended abstract clearly provide that Mercery was confined 126 days prior to sentencing and that he is entitled to class I credit. Further, the Indiana Supreme Court held in Robinson, 805 N.E.2d at 792, that "[s]entencing judgments that report only days spent in pre-sentence confinement and fail to expressly designate credit time earned shall be understood by courts and by the Department of Correction automatically to award the number of credit time days equal to the number of

pre-sentence confinement days.” Id. at 792. Thus, even if the post-conviction court’s written judgment and amended abstract did not clearly provide that Mercery is entitled to class I credit time for his 126 days of presentencing incarceration, Mercery would automatically be entitled to the class I credit time. The post-conviction court’s order is not clearly erroneous.

For the following reasons, we affirm the post-conviction court’s partial denial and partial grant of Mercery’s petition for post-conviction relief.

Affirmed.

ROBB, J. and CRONE, J. concur