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**IN THE
COURT OF APPEALS OF INDIANA**

CHAD MICHAEL FARRELL,)

Appellant-Petitioner,)

vs.)

No. 02A04-0712-PC-695

STATE OF INDIANA,)

Appellee-Respondent.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0607-PC-79

June 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Chad Michael Farrell appeals the post-conviction court's denial of his petition for post-conviction relief. Farrell raises one issue, which we restate as whether he received the effective assistance of trial counsel.¹ We affirm.

The relevant facts follow. In 2002, the State charged Farrell with attempted murder, burglary as a class A felony, criminal confinement, and intimidation. Farrell v. State, No. 02A03-0504-CR-144, slip op. at 2 (Ind. Ct. App. Nov. 3, 2005). Farrell agreed to plead guilty to the burglary charge in exchange for the dismissal of the other charges, with the executed portion of the sentence to be capped at the presumptive term of thirty years. Id. at 2-3. The trial court accepted Farrell's guilty plea and sentenced him to an executed term of thirty years. Id. at 3. On direct appeal, Farrell argued that the trial court abused its discretion in sentencing him, and we affirmed. Id. at 2.

Farrell filed a petition for post-conviction relief and later an amended petition. Farrell alleged that he received ineffective assistance of trial counsel because his trial counsel did not request a change of venue, did not address threats that Farrell received from officers in the jail, withheld information from Farrell necessary to his defense and

¹ Farrell's pro se brief is full of references to allegations that are unsupported by the record. We remind Farrell that this court may not consider matters outside of the record. Boczar v. Meridian St. Found., 749 N.E.2d 87, 92 (Ind. Ct. App. 2001). Additionally, Farrell's twenty-six page argument contains almost no paragraph divisions, few transitions between arguments, and a lack of organization and developed argument. Pro se litigants are held to the same standard as attorneys admitted to the practice of law with regard to adhering to our rules. Smith v. State, 822 N.E.2d 193, 203 (Ind. Ct. App. 2005), trans. denied. Our rules require that the argument be supported by cogent reasoning. See Ind. Appellate Rule 46. Farrell's brief fails in this regard. Nonetheless, given our preference for deciding cases on their merits, see Downs v. State, 827 N.E.2d 646, 651 (Ind. Ct. App. 2006), trans. denied, we have tried to discern Farrell's arguments and address them herein.

Farrell's understanding of the case, failed to request a reduction of bail, did not allow Farrell to attend depositions, told Farrell what to say during the guilty plea hearing, posed as a psychiatrist by telling the trial court that Farrell was competent during the guilty plea hearing, coerced Farrell into pleading guilty, informed Farrell that he would get a sentence less than the one imposed, and failed to file for a sentence modification. After an evidentiary hearing, the post-conviction court entered findings of fact and conclusions of law denying Farrell's petition. The trial court found that Farrell had failed to present evidence on many of his claims, that he had failed to prove that his trial counsel's performance was deficient, and that he failed to prove that he was prejudiced by the allegedly deficient performance. Appellant's Appendix at 32-38.

Before discussing Farrell'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.

On appeal, Farrell argues that he received 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. 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). 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.

First, we note that Farrell seeks to invoke United States v. Cronin, 466 U.S. 648, 658-660, 104 S. Ct. 2039, 2046-2047 (1984), which established a narrow exception to the two-part Strickland test. In Cronin, the United States Supreme Court suggested that in limited circumstances of extreme magnitude, “a presumption of ineffectiveness” may be justified and that such circumstances are, in and of themselves, “sufficient [to establish a claim of ineffective assistance] without inquiry into counsel’s actual performance at

trial.” Cronic, 466 U.S. at 662, 104 S. Ct. at 2049. Three situations have been identified that justify this presumption:

(1) when counsel is completely denied; (2) when counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing; and (3) when surrounding circumstances are such that, “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.”

Conner v. State, 711 N.E.2d 1238, 1248 (Ind. 1999) (quoting Cronic, 466 U.S. at 659-660, 104 S. Ct. at 2047), reh’g denied, cert. denied, 531 U.S. 829, 121 S. Ct. 81 (2000).

Farrell seems to contend that his trial counsel entirely failed to subject the State’s case to meaningful adversarial testing. Farrell argues that his trial counsel did not properly investigate his case and only took four depositions. Without citation to authority in the record, Farrell argues that the evidence was insufficient to show that he was guilty of attempted murder, burglary, criminal confinement, or intimidation and that a proper investigation by his trial counsel would have revealed these insufficiencies. We conclude that Farrell’s arguments are unsupported by the record and that Farrell has failed to demonstrate that Cronic is applicable to this case. Consequently, Farrell is not relieved of his burden of demonstrating both deficient performance and prejudice under Strickland. See, e.g., Stevens v. State, 770 N.E.2d 739, 759 (Ind. 2002) (holding that there was no Cronic violation where there was no actual breakdown of the adversarial process), reh’g denied, cert. denied, 540 U.S. 830, 124 S. Ct. 69 (2003).

Because Farrell was convicted pursuant to a guilty plea, we must analyze his claims under Segura v. State, 749 N.E.2d 496, 499 (Ind. 2001). Segura categorizes two main types of ineffective assistance of counsel cases. Smith v. State, 770 N.E.2d 290, 295 (Ind. 2002). The first category relates to “an unutilized defense or failure to mitigate a penalty.” Willoughby v. State, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003), trans. denied. The second category relates to “an improper advisement of penal consequences,” and this category has two subcategories: (1) “claims of intimidation by exaggerated penalty or enticement by an understated maximum exposure”; or (2) “claims of incorrect advice as to the law.” Id.

Farrell contends that his trial counsel was ineffective because he: (1) failed to file a motion for bond reduction; (2) failed to file a motion for change of venue due to threats to Farrell by officers in the jail; (3) failed to request psychiatric testing due to Farrell’s medications, panic attack during the guilty plea hearing, and incompetency; and (4) improperly advised him regarding the sentence he would receive.²

Farrell’s first two claims relate to pretrial motions. Farrell does not explain how the outcome here would have been different had his trial counsel filed either of the

² Farrell also seems to argue that his trial counsel should have filed a motion to suppress, did not perform an investigation, did not present a defense that the stabbing was justifiable or sudden heat, did not talk to Dr. Justice, and did not cross examine Dr. McConnell. Farrell did not raise these issues in his amended petition for post-conviction relief. A petitioner waives an issue by failing to raise the issue in his petition for post-conviction relief. See, e.g., Ind. Post-Conviction Rule 1(8); Saylor v. State, 765 N.E.2d 535, 548 (Ind. 2002), reh’g granted on other grounds by 808 N.E.2d 646 (Ind. 2004). Thus, these issues are waived.

pretrial motions. “[I]n order to establish that the guilty plea would not have been entered if counsel had performed adequately, the petitioner must show that a defense was overlooked or impaired and that the defense would likely have changed the outcome of the proceeding.” Segura, 749 N.E.2d at 499. Farrell fails to demonstrate that the outcome of the proceeding would have been different if his trial counsel had filed a motion to reduce bond or a motion for change of venue. Consequently, the post-conviction court’s denial of his petition for post-conviction relief on these issues is not clearly erroneous.

Farrell’s claim that his counsel was ineffective for failing to request psychiatric testing due to Farrell’s medications, panic attack during the guilty plea hearing, and incompetency seems to fall under the first Segura category – “an unutilized defense or failure to mitigate a penalty.” Willoughby, 792 N.E.2d at 563. In such cases, Segura requires that “the prejudice from the omitted defense, or failure to mitigate a penalty, be measured by (1) evaluating the probability of success of the omitted defense at trial or (2) determining whether the utilization of the opportunity to mitigate a penalty likely would produce a better result for the petitioner.” Id. Thus, Farrell had the burden of showing that he would have obtained a better result if his trial counsel had requested psychiatric testing. Farrell has failed to meet this burden.

The post-conviction court noted the following regarding Farrell’s claims:

At the guilty plea hearing, in response to the question, “Have you ever been treated for any mental illness or to your knowledge do you now suffer from any mental or emotional disability?”, Petitioner said he had been diagnosed

with “[d]epression, anxiety and panic disorder” in the Allen County Jail, and the jail psychiatrist had prescribed medication, which Petitioner thought was “Paxil.” Guilty Plea Transcript, at 5-7. Petitioner had taken the medication in the prescribed dosage and frequency “[e]veryday except for today” when “[t]hey refused to give it to me” [*id.* at 7]. He assured the Court that he felt he was “competent to go ahead with this” [*id.*]. Attorney O’Malley likewise answered “Yes” to the question, “Based upon your dealings with Mr. Farrell, do you feel that he is competent to assist you in these proceedings and he is competent to understand the nature of the proceedings?” [*id.*]. Petitioner assured the Court that his medications were “not affecting [his] ability to understand this” [*id.* at 8]. At no time did Petitioner say anything to indicate to the Court that he was having a “panic attack,” nor that he was having any other difficulty in understanding or participating in the proceeding. Attorney O’Malley did not put himself forth as a psychiatrist, and said nothing about Petitioner’s mental state except for his affirmative answer to the question about Petitioner’s competency.

Appellant’s Appendix at 32-33. Although Farrell now claims that his medications and mental condition affected his ability to understand the proceedings, the post-conviction court was entitled to weigh Farrell’s current testimony against his responses to the trial court’s questions at the guilty plea hearing. Farrell clearly indicated at the guilty plea hearing that he was competent to go forward with the guilty plea and that his medications were not affecting his ability to understand. We conclude that Farrell has failed to demonstrate that his trial counsel’s performance was deficient due to his failure to file a motion for psychiatric testing. Moreover, Farrell has failed to demonstrate that he would have obtained a better result if his trial counsel had requested psychiatric testing. The post-conviction court’s denial of Farrell’s claim on this issue is not clearly erroneous.

Farrell’s last claim is that his trial counsel improperly advised him regarding the sentence he would receive. Specifically, Farrell claims that his trial counsel informed

him that he would receive a sentence of twenty years with eight years suspended. This claim falls under the second Segura category - “claims of intimidation by exaggerated penalty or enticement by an understated maximum exposure.” Willoughby, 792 N.E.2d at 563. In Segura, the Indiana Supreme Court held that, where the claim is that a different result was predicted or guaranteed to result from a plea, “a petition [that] cites independent evidence controverting the record of the plea proceedings and supporting a claim of intimidation by an exaggerated penalty or enticement by an understated maximum exposure” may state a claim. 749 N.E.2d at 504. “[P]ostconviction relief may be granted if the plea can be shown to have been influenced by counsel’s error.” Id. at 505.

Here, Farrell’s brother testified that Farrell’s counsel said that “he may be able to get twenty years with eight suspended” not that he would be able to get that sentence. Post-Conviction Hearing Transcript at 73 (emphasis added). Farrell presented no independent evidence that his trial counsel guaranteed a particular sentence or understated Farrell’s maximum exposure. The post-conviction court’s denial of Farrell’s petition on this issue is not clearly erroneous.

In summary, we conclude that Farrell has failed to demonstrate that he received ineffective assistance of trial counsel, and the post-conviction court’s denial of his petition for post-conviction relief is not clearly erroneous. See, e.g., Oliver v. State, 843 N.E.2d 581, 592 (Ind. Ct. App. 2006) (holding that the post-conviction court did not err

by finding that the petitioner, who pleaded guilty, received effective assistance of counsel), trans. denied.

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

Affirmed.

NAJAM, J. and DARDEN, J. concur