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IN THE COURT OF APPEALS OF INDIANA

ANDRE WHITE,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A04-1009-PC-616
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jeffrey L. Marchal, Judge
Cause No. 49G06-0009-PC-163435

June 21, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Andre White ("White") filed a petition for post-conviction relief in Marion Superior Court, which the court denied. White appeals and presents several issues, which we renumber and restate as the following three:

I. Whether the post-conviction court erred in concluding that White failed to establish his claims of ineffective assistance of trial counsel and appellate counsel;

II. Whether the post-conviction court erred in concluding that White's guilty plea was made knowingly and voluntarily; and

III. Whether the post-conviction court erred in denying White's request for certain documents.

We affirm.

Facts and Procedural History

On the night of August 3, 2000, police officers responded to a call of a shooting in Marion County. When they arrived on the scene, the officers found the body of Ahmad Wilburn ("Wilburn") lying in the street. Wilburn had been shot in the back. According to witnesses, White, Wilburn, and several others had been involved in a dispute that led to a physical confrontation. White, who was inside a car, fired one shot from his handgun into a group of people that included Wilburn. White fled from the scene before the police arrived, but a warrant for his arrest was later obtained. Several weeks after the shooting, the police apprehended White in a house where he had been staying. After apprehending White, the police found on his person a .357 handgun and 3.69 grams of cocaine, which was packaged into thirty-seven individual packets.

After waiving his Miranda rights, White spoke with the police. He admitted that the handgun found in his possession was the same gun he had on the night of the shooting

and that he did not have a handgun permit. He also admitted that he had fired the gun in the direction of a group of people, but claimed not to have intended to shoot any particular person. White further admitted that he intended to sell the cocaine he had in his possession when arrested. Forensic testing later determined that the handgun found on White fired the bullet that killed Wilburn.

On September 18, 2000, the State charged White as follows: Count I, murder; Count II, Class A misdemeanor carrying a handgun without a license; Count III, Class A felony dealing in cocaine; Count IV, Class C felony possession of cocaine and a firearm; Count V, Class C felony possession of cocaine; Count VI, Class A misdemeanor carrying a handgun without a license; and Count VII, Class A misdemeanor resisting law enforcement.

A jury trial began on August 14, 2001, but in the middle of the trial, White agreed to accept the State's plea offer. White agreed to plead guilty to an amended Count I, reduced to Class C felony reckless homicide, and also pleaded guilty to Counts II–IV. During the plea colloquy, White admitted that he had discussed the plea agreement with his trial counsel and stated that he was satisfied with his counsel's performance. The trial court informed White of the rights he was giving up by pleading guilty and informed him of his possible sentence. White acknowledged his rights, but still indicated that he was pleading guilty of his own volition. White further admitted that he recklessly shot at Wilburn, that he did not have a license to carry a handgun, and that he possessed over three grams of cocaine, which he intended to distribute, when arrested. The trial court accepted the plea, entered judgment of conviction thereon, and set a date for sentencing.

During a hearing held on December 5, 2001, White's counsel informed the judge that there was an "issue with the plea," but the hearing was continued so that the judge who had accepted the plea could hear the matter. Appellant's App. p. 106. On January 2, 2002, White filed a *pro se* motion to dismiss counsel. The trial court held a hearing on this motion on January 9, 2002. At this hearing, White's counsel made a motion to withdraw the guilty plea. White explained to the trial court that he pleaded guilty because he was "emotionally distressed," and denied that he ever intended to deal in cocaine. The trial court denied White's motion.

At a hearing held on February 6, 2002, White admitted that his earlier request to withdraw his guilty plea was motivated by fear and the advice of fellow jail inmates. White again admitted to shooting the gun. White's counsel argued that, although White had admitted to intending to sell the cocaine found in his possession, he had not previously sold cocaine, and emphasized his client's lack of a serious criminal history. The trial court then sentenced White as follows: Count I, five years; Count II, one year; and Count III, thirty years, with ten years suspended.[1] The trial court ordered all sentences to be served consecutively.

White did not file a direct appeal, but did file a *pro se* petition for post-conviction relief on February 23, 2005. On April 20, 2005, the State Public Defender entered an appearance on White's behalf, and the State filed its answer to White's petition. The

[1] The trial court "merged" Count IV into Count I and did not impose sentence on this count.

State Public Defender withdrew her appearance on June 31, 2008,[2] and White proceeded *pro se* yet again. White filed an amended petition on May 29, 2009, claiming that he had been denied the effective assistance of trial counsel and that his guilty plea had not been knowingly and intelligently made.

The post-conviction court held hearings on White's amended petition on August 20, 2009, September 24, 2009, and March 18, 2010. During the first hearing, the post-conviction court explained to White that there was no record from a direct appeal because he had not taken a direct appeal. White then attempted to introduce into evidence documents he had obtained from the internet, but the post-conviction court sustained the State's objections to these exhibits. Realizing that White was unprepared to proceed, the post-conviction court continued the hearing. During the second hearing, the transcripts of the guilty plea hearing and the hearing where White moved to withdraw his guilty plea were admitted into evidence. White called only one witness, his trial counsel, who testified that he advised White to accept the State's guilty plea offer because it was, in his opinion, in White's best interests not to continue with the trial. Specifically, White's trial counsel explained that White had admitted to him that he had committed the crimes and that the State had strong evidence of White's guilt. White's trial counsel adamantly denied White's claims that he had coerced White into pleading guilty. To the contrary, trial counsel testified that he had investigated the case and worked diligently on White's

[2] See Indiana Post-Conviction Rule 1(9)(c) (providing that if State Public Defender determines the proceeding is not meritorious, she shall file with the post-conviction court a withdrawal of appearance).

behalf. On August 20, 2010, the court issued findings of fact and conclusions of law denying White's petition for post-conviction relief.[3] White now appeals.

Post-Conviction Standard of Review

A post-conviction petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Henley v. State, 881 N.E.2d 639, 643 (Ind. 2008). On appeal from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. To prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Id. at 643-44. When the post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to the court's legal conclusions, but the "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. at 644.

I. Ineffective Assistance of Counsel

As explained by our supreme court in Timberlake v. State:

> A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. Second, the

[3] White has not included in his brief or his appendix a copy of the post-conviction court's findings of fact and conclusions of law. See Ind. Appellate Rule 46(A)(10); Ind. Appellate Rule 50(A)(2)(b). The State claims that it was also unable to obtain the findings.

> defendant must show that the deficient performance prejudiced the defense. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The Strickland Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. The two prongs of the Strickland test are separate and independent inquiries. Thus, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.

753 N.E.2d 591, 603 (Ind. 2001) (citations and quotations omitted).

In Segura v. State, 749 N.E.2d 496, 507 (Ind. 2001), our supreme court created two categories of ineffective assistance of counsel claims relating to guilty pleas and applied different treatments to each category depending on whether the ineffective assistance allegation related to: (1) an omitted defense or failure to mitigate a penalty, or (2) an improper advisement of penal consequences. See Willoughby v. State, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003), trans. denied.

White's post-conviction claims fall within this first category. For such claims, the prejudice from the omitted defense or failure to mitigate a penalty must be measured by evaluating the probability of success of the omitted defense or determining whether using the opportunity to mitigate a penalty would have produced a better result for the petitioner. Id. (citing Segura, 749 N.E.2d at 499). This means that the petitioner must

establish a reasonable probability that a more favorable result would have obtained in a competently run trial, i.e., that the petitioner would not have been convicted but for counsel's alleged errors. Id. at 564 (citing Segura, 749 N.E.2d at 499).[4]

White argues that, instead of applying the Strickland analysis, we should presume prejudice because his trial counsel failed to subject the prosecution to a meaningful adversarial test. In support of this claim, White refers to United States v. Cronic, 466 U.S. 648 (1984), in which the United States Supreme Court recognized a narrow exception to the Strickland requirement that a defendant who asserts ineffective assistance of counsel must demonstrate that the deficiency prejudiced the defense. See Florida v. Nixon, 543 U.S. 175, 190 (2004). Cronic established that "a presumption of prejudice" was appropriate in "'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" Nixon, 543 U.S. at 190 (quoting Cronic, 466 U.S. at 658). As our supreme court explained in Conner v. State, 711 N.E.2d 1238, 1254-55 (Ind. 1999):

> The Cronic Court identified three situations that would 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."

[4] When the petitioner's claim involves trial counsel's improper advisement of penal consequences, the petitioner must establish by objective facts circumstances that support the conclusion that counsel's errors in advice were material to the decision to plead guilty. Id. (citing Segura, 749 N.E.2d at 507). In addition to the petitioner's conclusory allegations, there must be specific facts establishing an objectively reasonable probability that competent representation would have caused the petitioner not to enter a plea. Id. None of White's claims of ineffective assistance of trial counsel appear to fall within the category of the improper advisement of penal consequences.

In the present case it is readily apparent that White's trial counsel did not entirely fail to subject the State's case to meaningful adversarial testing. We first note that White did not proceed through trial, as did the defendant in Cronic. Moreover, White's counsel was able to negotiate a plea bargain with the State whereby the State agreed to accept White's plea of guilt to reckless homicide instead of the charged crime of murder, significantly reducing White's possible sentence. White's counsel also presented witnesses at White's sentencing hearing and argued that White's guilty plea should be considered as a significant mitigating factor even though White had attempted to withdraw his plea. White's trial counsel's testimony at the post-conviction hearing, which the post-conviction court obviously found credible, indicated that he had investigated the case and worked diligently on White's behalf. Put simply, White's counsel did not entirely fail to subject the State's case to meaningful adversarial testing, and the Cronic presumption of prejudice is inapplicable.

A. *Ineffective Assistance of Trial Counsel*

White claims that his trial counsel was ineffective in several respects, and we address each claim, as best we can discern them, in turn.[5]

[5] Many of White's arguments are not well developed, but we have endeavored to address them on the merits. White's status as a *pro se* appellant does not mean that he will receive any special leeway, as *pro se* litigants are held to the same standard regarding rule compliance as are licensed attorneys and must comply with the appellate rules to have their appeal determined on the merits. See Smith v. State, 822 N.E.2d 193, 203 (Ind. Ct. App. 2005).

1. *The Bullet*

One of White's first claims of ineffective assistance of trial counsel involves his trial counsel's alleged failure to notice or take advantage of the fact that a laboratory report indicated that Wilburn was killed by a .38 caliber or a 9 mm bullet, whereas White was apprehended with a .357 magnum handgun. This, White claims, would have supported a claim of "factual innocence." We initially note that a .38 caliber bullet can be fired from a .357 handgun. See Baker v. State, 483 N.E.2d 736, 739 (Ind. 1985); Cox v. State, 475 N.E.2d 664, 672 (Ind. 1985) (both relying on evidence that .38 bullet can be fired from either a .38 or .357 revolver). Thus, White's argument that this would have somehow proved his factual innocence is unconvincing.

More importantly, White admitted to the police that he fired his handgun into the group of people which included Wilburn, and several witnesses identified him as the shooter. White refers us to no evidence suggesting that anyone else shot Wilburn. We therefore cannot say that trial counsel's performance fell below an objective standard of reasonableness for not trying to argue that White was not the individual who shot and killed Wilburn, or even if it did, that White has demonstrated any resulting prejudice.

2. *Statement to Police*

This leads us to one of White's other arguments: that his trial counsel was ineffective for failing to suppress his statement to the police wherein he admitted to being the shooter and further admitted that he intended to sell the cocaine in his possession. White, however, fails to explain precisely how his trial counsel could have suppressed the statement. Indeed, the record indicates that White was arrested pursuant to an arrest

warrant, was advised of his Miranda rights, and confessed to the police. Under these facts and circumstances, we cannot say that White's trial counsel's decision not to attempt to suppress White's statement constituted ineffective assistance of trial counsel.

3. *Advice to Plead Guilty*

White also claims that his trial counsel was ineffective for informing him that he was unlikely to prevail at trial and was facing a sentence as high as 115 years, which he claims was done to induce him to plead guilty. In light of the rather overwhelming evidence against White, including the cocaine and handgun found in his possession and his statement to the police in which he admitted to the shooting and intending to sell the cocaine, we cannot say that this advice was unreasonable.

4. *Severance and Joinder of Charges*

White also complains that his counsel moved to sever the charges against him as a ploy to gain his trust, only to rejoin the charges for trial. This argument overlooks the fact that White pleaded guilty and did not proceed through trial. Further, White's trial counsel was able to get the State to agree to a plea which reduced the murder charge to reckless homicide, significantly reducing White's potential sentence. Moreover, White makes no argument that the joinder of the charges was legally improper. And at the post-conviction hearing, White's trial counsel denied White's claims that he had coerced him into pleading guilty. Thus, White's accusations against his counsel are without legal or factual basis.

5. *Misrepresentation of Facts*

White similarly claims that his trial counsel misrepresented material facts and lied to him to induce him into pleading guilty. White's trial counsel, who testified at the post-conviction hearing, obviously did not corroborate White's claims. Thus, White's claim is simply one that we should reweigh the evidence and judge the credibility of witnesses, which we will not do.

6. *Failure to File Written Motion to Withdraw Plea*

White also finds fault in his trial counsel's failure to file a written motion to withdraw his guilty plea. White is correct that a written motion to withdraw is required after the trial court has accepted a guilty plea. See Ind. Code § 35-35-1-4(b) (2004). Nevertheless, the trial court overlooked this requirement and held a hearing on White's motion at which White was represented by his trial counsel. White has entirely failed to show how the trial court's ruling on his motion to withdraw would have been different had his trial counsel filed a written motion. Thus, he has demonstrated no prejudice by his trial counsel's actions.

7. *Denial of Motion to Withdraw Guilty Plea*

White also claims that the trial court abused its discretion in denying his motion to withdraw his guilty plea. We first note that this issue could have been presented in a direct appeal, because the trial court's ruling on White's motion was a final appealable order. See Ind. Code § 35-35-1-4(e) (2004). White therefore may not present this issue as a free-standing claim in a petition for post-conviction relief. See Collins v. State, 817 N.E.2d 230, 232 (Ind. 2004) (an issue known and available but not raised on direct appeal

may not be raised in post-conviction proceedings). However, to the extent that White claims that his counsel was somehow ineffective for failing to convince the trial court to grant his motion to withdraw his plea, we address this claim on the merits.

The decision to allow a defendant to withdraw a guilty plea is within the sound discretion of the trial court and is reviewed only for an abuse of that discretion. Hollingsworth v. State, 717 N.E.2d 610, 612 (Ind. Ct. App. 1999). The trial court may properly refuse to allow a defendant to withdraw a guilty plea if the defendant fails to show it would result in manifest injustice. Id. (citing Ind. Code § 35-35-1-4(b)). Moreover, there is a presumption in favor of the trial court's ruling. Id.

White cannot demonstrate that the failure to permit him to withdraw his guilty plea resulted in a manifest injustice. As noted before, the evidence of White's guilt was exceptionally strong: witnesses saw him shoot at the group that included Wilburn; when arrested, White possessed the handgun which was used to shoot the bullet that killed Wilburn and had a large amount of cocaine packaged for resale; and White admitted to the police that he shot the gun and intended to sell the cocaine.

Furthermore, before the trial court accepted White's guilty plea, it explained to White the rights he was giving up and the sentence he was facing by pleading guilty. White acknowledged his rights and indicated that he was pleading guilty of his own volition. White then admitted that he recklessly shot at Wilburn, that he did not have a license to carry a handgun, and that he possessed over three grams of cocaine he intended to sell. At the hearing on White's motion to withdraw the plea, White claimed only that he was "emotionally distressed" at the guilty plea hearing and insisted that he was

innocent of the dealing charge. Under these facts and circumstances, we cannot say that White's trial counsel was ineffective based upon the trial court's denial of White's motion to withdraw his plea.

8. *Trial Court Bias*

White briefly claims that the trial court was biased against him.[6] In support of this argument, White relies on the fact that the trial court denied his motion to withdraw his guilty plea. White's argument is not well taken. First, we presume that a judge is not biased against a party. Lambert v. State, 743 N.E.2d 719, 728 (Ind. 2001). And a trial court's adverse rulings on judicial matters do not indicate a personal bias against a defendant that calls the trial court's impartiality into question. Id. (citing Harrison v. State, 707 N.E.2d 767, 790 (Ind. 1999)). Other than the adverse rulings, White refers to no evidence suggesting that the trial court had a personal bias against him.

B. *Ineffective Assistance of Appellate Counsel*

White also claims that he was denied the effective assistance of trial counsel. However, neither his original nor his amended petition for post-conviction relief included a claim of ineffective assistance of appellate counsel. And he did not present this argument at the post-conviction hearing. In fact, he informed the trial court that he was proceeding solely on grounds that his guilty plea was not voluntary and that he received ineffective assistance of trial counsel. Accordingly, this issue is waived. See Allen v. State, 749 N.E.2d 1158, 1171 (Ind. 2001) ("Issues not raised in the petition for post-

[6] Again, we address this claim only to the extent that it is relevant to White's claims of ineffective assistance of counsel.

conviction relief may not be raised for the first time on post-conviction appeal."); see also Ind. Post-Conviction Rule 1(8) ("All grounds for relief available to a petitioner under this rule must be raised in his original petition.").[7]

II. Voluntariness of Plea

White also seems to argue that his guilty plea was not knowingly, voluntarily, and intelligently made. Although this is related to his claim that the trial court erred in denying his motion to withdraw his guilty plea, it is not precisely the same, and we address it separately.[8] A trial court may not accept a plea of guilty unless it has determined that the plea is voluntary. Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003) (citing Ind. Code § 35-35-1-3). Before accepting a guilty plea, the trial court must take steps to insure that the defendant's plea is voluntary. Id. (citing Ind. Code §§ 35-35-1-2, 35-35-1-3). "Generally speaking, if a trial court undertakes these steps, a post-conviction petitioner will have a difficult time overturning his guilty plea on collateral attack." Id. (citing State v. Moore, 678 N.E.2d 1258, 1265 (Ind. 1997)).

Here, the record of the guilty plea hearing clearly shows that the trial court advised White of the charges against him, of the rights he was giving up by pleading guilty, and

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[7] Even if this issue was properly preserved, White does not explain what issues should have been brought on direct appeal. Although White baldly claims that his appellate counsel told him that the trial court relied on improper aggravators, he does not identify what these aggravators were, why they were improper, or how they affected his sentence. To the extent that White's argument is directed toward the State Public Defender, who withdrew her representation of White, it is waived for failure to present a cogent argument. See Ind. Appellate Rule 46(A)(8)(a).

[8] Even though this issue is presented as a free-standing claim of error and not as part of White's claim of ineffective assistance of trial counsel, this issue is reviewable only by means of a petition for post-conviction relief. See Stringer v. State, 899 N.E.2d 748, 750 (Ind. Ct. App. 2009) (defendant's claim on direct appeal that his plea was not knowing and voluntary could not be undertaken on direct appeal and had to be presented in a petition for post-conviction relief); Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996) ("post-conviction relief is exactly the vehicle for pursuing claims for validity of guilty pleas.").

the penalty he faced by pleading guilty. Upon the trial court's inquiry, White also indicated that the decision to plead guilty was his own and was not a product of threats or coercion. White readily admitted to the factual basis for the plea. After unsuccessfully attempting to withdraw his guilty plea, White admitted at the sentencing hearing that he had done so because he had taken the advice of fellow jail inmates and was frightened. He then acknowledged that selling drugs to provide for his family was unwise. He also again admitted to shooting the gun, but claimed that he did not know that he had shot anyone.

At the post-conviction hearing, White's only witness was his trial counsel, who testified that he did not coerce White into pleading guilty, that he thought the guilty plea was in White's best interests given the strength of the evidence against him, and that the decision to plead guilty was White's. Under these facts and circumstances, the post-conviction court properly concluded that White's guilty plea was knowingly and voluntarily made.

III. Post-Conviction Court's Rulings

White also claims that the post-conviction court erred when it denied his requests for various documents. Specifically, he claims that the post-conviction court should have provided him with access to a ballistic test and the transcript of his incomplete trial. Yet White fails to explain why he needed access to these items, how he attempted to obtain these items himself, or how he was prejudiced by their absence. In fact, most of White's claims regarding ineffective assistance of trial counsel involve his counsel's actions in

failing to successfully move to set aside White's guilty plea. White does not explain how the transcript of the incomplete trial was relevant to this claim.

Similarly, White does not explain which ballistic test he is referring to, but we presume he means the test that matched his handgun with the bullet that killed Wilburn. Still, we do not see how not having access to this test prejudiced White's presentation of his post-conviction claims. As noted above, White refers to an alleged discrepancy between the .38 bullet that killed Wilburn and his .357 handgun, but multiple people witnessed White shooting the gun, he admitting the shooting to the police, and he again admitted his role in the shooting during the plea hearing and at sentencing. Under these facts and circumstances, we cannot say that White has demonstrated any error in the post-conviction court's rulings or any resulting prejudice.

Conclusion

In conclusion, the trial court did not err in concluding that White had not met his burden of establishing that he was entitled to post-conviction relief.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.