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IN THE
COURT OF APPEALS OF INDIANA

MATTHEW HEPLER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 87A01-0901-PC-3
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No. 87D01-0805-PC-069

August 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Matthew Hepler appeals the denial of his petition for post-conviction relief. Specifically, Hepler argues that the six-year sentence that was imposed following his conviction for Dealing in a Schedule I Controlled Substance,[1] a class C felony, was illegal and that his right to a speedy trial was violated. Hepler also argues that his trial counsel was ineffective for failing to move for a dismissal of the charge under Indiana Criminal Rule 4(C). Finding no error, we affirm the judgment of the post-conviction court.

FACTS

On November 9, 1993, Hepler was charged with Dealing in a Controlled Substance Within 1000 Feet of School Property, a class A felony. On July 18, 1997, Hepler pleaded guilty to dealing in a schedule I controlled substance as a class C felony pursuant to a written plea agreement. The trial court sentenced Hepler to six years of incarceration pursuant to the plea agreement, which provided that "[T]he Court sentences the defendant to the Indiana Department of Correction for a period of six years. Defendant is to receive credit for time served and for any time he spent as an informant. . . . Parties indicate that defendant has 889 days of credit toward his jail sentence. Defendant advises he has bond money." State's Ex. B. The sentence was ordered to run concurrently with the sentences that were imposed on two unrelated charges for dealing in marijuana, a class A misdemeanor.

Thereafter, on May 9, 2008, Hepler filed a petition for post-conviction relief, claiming that

[1] Ind. Code § 35-48-4-2(a)(1)(c).

> Petitioner was charged on November 9, 1993, and that he made his first Court appearance on or about December 21, 1993.[2] Further, the Defendant was not sentenced until July 18, 1997, in violation of his Criminal Rule 4 Rights and due process rights under the Fifth Amendment of the United States Constitution.
>
> Indiana law does not provide for credit for time served as an informant; and therefore, said sentence of the Petitioner was erroneous.
>
> The Petitioner was never advised by either the Court or his counsel of his rights under Criminal Rule 4, never waived said rights according to the chronological case summary, and he was never advised [of] the possibility of an enhanced sentence in State or Federal Court for his Felony Drug conviction.

Appellant's App. p. 2.

At the post-conviction hearing that commenced on July 21, 2008, the following exchange occurred:

> THE COURT: I want to make sure I understand this confidential informant thing. Do I understand that the sentencing Judge gave him credit for time served for being a confidential informant?
>
> [HEPLER'S COUNSEL]: Yes.
>
> THE COURT: And did he get good time credit for that same actual time served?
>
> [HEPLER'S COUNSEL]: It just says that the Defendant is to receive credit for time served and for any time he spent as an informant.
>
> THE COURT: So that—that actually helps the Defendant in terms of his sentence in this case, right? I mean, there's not an actual harm to him in terms

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[2] It is not clear when Hepler was arrested on this charge. However, the Chronological Case Summary (CCS) shows that the trial court set a bond at Hepler's initial hearing and granted Hepler's motion for a bond reduction on March 18, 1994. Ex. 1. We assume that Hepler posted bond at some point, as he appeared with trial counsel at several subsequent hearings. Moreover, while Hepler failed to appear at a March 17, 1995, hearing, the record shows that he was present at subsequent hearings. Id.

> of the sentence. Now, there may be a harm in a theoretical sense because it wasn't authorized by law.
>
> [HEPLER'S COUNSEL]: Yes, that's—I guess if you get credit for being a confidential informant, it's less time you have to spend in jail, so—
>
> [THE COURT]: That's interesting. I've never seen a confidential informant get credit time for being a C-I, but okay.

Tr. p. 14-15.

Following the presentation of the evidence, the post-conviction court denied Hepler's request for relief. In the findings of fact and conclusions of law that were entered on December 6, 2008, the post-conviction court determined that 252 days had elapsed from the date of the charging information until the trial court conducted the guilty plea hearing. The post-conviction court noted that Hepler's trial counsel did not testify at the hearing. Thus, it concluded that Hepler failed to show that his trial counsel was ineffective for failing to move to dismiss the case pursuant to Criminal Rule 4. The post-conviction court also found that Hepler did not address his alleged improper sentence in his proposed findings. As a result, the post-conviction court concluded that the sentence was clear on its face and denied Hepler's petition. Hepler now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Shanabarger v. State, 846 N.E.2d 702, 707 (Ind. Ct. App. 2006). When appealing from the

denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. 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. Post-conviction procedures do not afford petitioners with a "super appeal." Id. Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1). A court that hears a post-conviction claim must make findings of fact and conclusions of law on all issues presented in the petition. Ind. Post-Conviction Rule 1(6). The findings must be supported by facts and the conclusions must be supported by the law. Allen v. State, 749 N.E.2d 1158, 1163 (Ind. 2001). Our review on appeal is limited to these findings and conclusions. Pruitt v. State, 903 N.E.2d 899, 905 (Ind. 2009).

Finally, we note that the scope of relief available on post-conviction relief is limited to issues that were not known at the time of the original trial or that were not available on direct appeal. Id. Issues available but not raised on direct appeal are waived, while issues litigated adversely to the defendant are res judicata. Id.

II. Hepler's Claims

A. Erroneous Sentence and Violation of Speedy Trial

Hepler first contends that his petition for post-conviction relief should have been granted because the trial court erroneously awarded him credit for the time that he served as a confidential informant rather than for the time that he was incarcerated. Hepler also maintains that he was denied his right to a speedy trial.

Notwithstanding these contentions, we note that freestanding claims of error are not available in a post-conviction proceeding in light of the doctrines of waiver and res judicata. Shanabarger, 846 N.E.2d at 707. If an issue is known and available on direct appeal, but not raised, the issue is waived by procedural default. Id. A petitioner is not permitted to present freestanding claims of error, as those issues are available only on direct appeal. Lambert v. State, 743 N.E.2d 719, 726 (Ind. 2001).

In this case, Hepler did not directly appeal his conviction. As a result, Hepler waived his sentencing claim regarding the amount of credit time that was awarded by failing to challenge his sentence on direct appeal. Taylor v. State, 780 N.E.2d 430, 435 (Ind. Ct. App. 2002).

Waiver notwithstanding, the record shows that Hepler pleaded guilty to dealing in a controlled substance, a class C felony, and was sentenced to six years of incarceration. As noted above, the trial court awarded Hepler a total of 889 days of credit time. When Hepler was sentenced, the penalty range for this offense ranged from two to eight years with a presumptive sentence of four years. Ind. Code § 35-50-2-6.[3] Nothing about the sentence that Hepler received rendered it illegal, as the six-year term of incarceration was well within the penalty range for a class C felony. Although Hepler correctly observes that there is no statutory provision permitting a trial court to award credit time to a defendant who has served

[3] Although the penalty range remains the same, the current statute provides for an "advisory" sentence of four years for a class C felony.

as a confidential informant,[4] Hepler has failed to present any evidence in support of his claim, other than the CCS entry that referenced 889 days of credit time that were to be awarded. Appellant's App. p. 35. Because the evidence produced at the post-conviction hearing does not confirm that the trial court actually included time while serving as a confidential informant, Hepler failed to satisfy his burden of proof.[5]

Moreover, as the trial court observed at the post-conviction hearing, Hepler actually benefited from the trial court's agreement to award him "credit" for the 889 days. Hepler also makes no argument as to the amount of credit time that the trial court allegedly should have awarded. Indeed, the effect of the trial court's order was to impose a sentence of less than six years, which was actually a benefit to Hepler.[6] As a result, Hepler cannot prevail on this claim.

As for Hepler's claim that he was denied the right to a speedy trial, our Supreme Court has determined that "the right to have a trial expeditiously cannot exist or be enforced apart from the right to a trial and any claim of a denial thereof is waived upon a plea of guilty." Lawson v. State, 498 N.E.2d 1212, 1213 (Ind. 1986). In short, a guilty plea acts as a waiver

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[4] Pursuant to Indiana Code section 35-50-6-3(a), an inmate of Class I status is awarded one day of jail time credit for each day imprisoned or confined awaiting trial or sentencing for a crime.

[5] As an aside, we also note that allegation of inaccurate applied jail time credit is equivalent to a motion to correct erroneous sentence. Brattain v. State, 777 N.E .2d 774, 776 (Ind. Ct. App. 2002). A defendant who believes that he has been erroneously sentenced may file a motion to correct the sentence pursuant to Indiana Code section 35-38-1-15. Such a motion may only be filed to correct a sentence that is "erroneous on its face." Robinson v. State, 805 N.E.2d 783, 786 (Ind.2004). Hepler failed to file such a motion.

[6] The State also points out that Hepler appears to be asking for "more executed time" in light of his contention. Appellee's Br. p. 6.

of the right to a speedy trial. Id.

In sum, because Hepler improperly raised the freestanding claims of error discussed above in his petition for post-conviction relief, we conclude that the post-conviction court properly denied Hepler's request relief with regard to these claims.

B. Ineffective Assistance of Counsel

Hepler argues that his petition for post-conviction relief should have been granted because his trial counsel was ineffective. Specifically, Hepler maintains that he is entitled to relief because trial counsel should have filed a motion to dismiss the charge pursuant to Criminal Rule 4(C).

To establish ineffective assistance of counsel, Hepler 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 unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.'" Lambert, 743 N.E.2d at 726 (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)).

As for the performance component of an ineffective assistance claim based on counsel's performance, we have observed that "[c]ounsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Lambert, 743 N.E.2d at 730 (quoting State v. Holmes, 728 N.E.2d 164, 172 (Ind. 2000)).

As for the second prong, the United States Supreme Court has held that in most circumstances deficient performance of counsel will only be prejudicial when "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Rompilla v. Beard, 545 U.S. 374, 390 (2005) (quoting Strickland, 466 U.S. at 694). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Wiggins v. Smith, 539 U.S. 510, 534 (2003) (quoting Strickland, 466 U.S. at 694).

In this case, because Hepler presents his claim of ineffective assistance of counsel following a guilty plea, we analyze his claims in accordance with our Supreme Court's opinion in Segura v. State, 749 N.E.2d 496, 499 (Ind. 2001). Segura observed that there are two types of ineffective assistance claims in this context: (1) failure to advise a defendant regarding an issue that impairs or overlooks a defense; and (2) incorrect advisement regarding the penal consequences of a plea. Maloney v. State, 872 N.E.2d 647, 650 (Ind. Ct. App. 2007). Also, in the guilty plea context, a defendant who claims that he was incorrectly advised by counsel regarding a possible defense must show that but for that advice he would not have pleaded guilty, that the defense likely would have succeeded, and that that the defendant would have received a favorable outcome. Segura, 749 N.E.2d at 499, 502-04. If the claimed ineffectiveness relates to incorrect advice regarding penal consequences, it is not enough for the defendant simply to assert that he would not have pleaded guilty. In other words, his conclusory testimony to that effect is insufficient to prove prejudice. Id. at 505-07. The defendant must present "special circumstances" or objective facts to show that the

decision to plead guilty was "driven by the erroneous advice." Id. at 507.

In this case, it is apparent that Hepler is presenting a claim that amounts to trial counsel's alleged failure to advise him regarding an issue that had been overlooked. Criminal Rule 4(C) provides in part that "[n]o person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date of his arrest on such charge, whichever is later." In light of this argument, Hepler is required to show that the charges would have been dismissed if his trial counsel had moved to dismiss the charges pursuant to Criminal Rule 4. Segura, 749 N.E.2d at 502-04.

The record supports the post-conviction court's determination that only 252 days elapsed between the filing of the information and the guilty plea that were chargeable against the Criminal Rule 4(C) period. Indeed, upon reviewing the post-conviction court's detailed findings, we agree that nearly all of the delays were chargeable to Hepler. Appellant's App. p. 24-27. Moreover, the only evidence in the record that Hepler directs us to in support of his claim is a single entry that the trial court made in the CCS on October 6, 1995, which notes that the trial date was outside the one-year limitation. However, the entry states that the date was "set by agreement with defendant." Id. at 79. The post-conviction court noted this entry when calculating the days that were chargeable to the parties in accordance with Criminal Rule 4. Id. at 25. The record shows that Hepler requested numerous continuances that were chargeable to him. Moreover, his trial counsel did not testify at the post-conviction hearing. Appellant's App. p. 29-30. Thus, the post-conviction court could properly infer that counsel would not have corroborated Hepler's claims. Dickson v. State, 533 N.E.2d 586, 589 (Ind.

1989).

Finally, we note that the record supports several reasonable explanations for the delay. For instance, Hepler claims that he was working as a confidential informant for 889 days during this time period, which would explain much of the delay. Tr. p. 7, 14. Thus, counsel could have made a strategic decision to agree to the delay to allow Hepler to operate as an informant. Moreover, Hepler may have expressly agreed to the delay in an attempt to work off the charges, or for a plea to the reduced charge as a class C felony.

In any event, there was no evidence—other than a paper record—to support Hepler's claims. Thus, Hepler has failed to show that he would have been entitled to a dismissal of the charges had his trial counsel filed a motion under Criminal Rule 4. As a result, Hepler has failed to carry his burden to overcome the presumptions that his trial counsel rendered effective assistance. For all these reasons, we conclude that the post-conviction court properly denied Hepler's request for relief.

The judgment of the post-conviction court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.