

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.

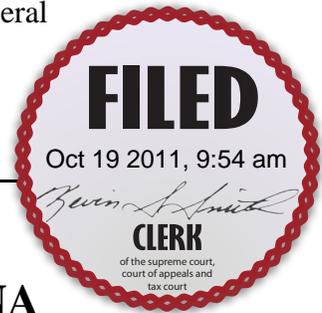
ATTORNEY FOR APPELLANT:

CHARLES W. LAHEY
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

DANNY L. SLAVEN,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 18A02-1101-PC-116

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Thomas G. Wright, Senior Judge
Cause No. 18C02-0102-CF-4

October 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Danny Slaven appeals the denial of his petition for post-conviction relief. He raises several issues not raised on direct appeal, including that he was subjected to double jeopardy and that his trial counsel rendered ineffective assistance. Because his double jeopardy claim was raised for the first time before the post-conviction court, it constitutes a freestanding claim of fundamental error, a claim not available in post-conviction proceedings. Regarding his claims of ineffective assistance of trial counsel, Slaven failed to meet his burden to establish that he suffered prejudice as a result of his counsel's performance. Slaven makes one claim of ineffective assistance of appellate counsel, namely that his appellate counsel should have challenged the sentence imposed by the trial court. Concluding that counsel's failure to do so indeed prejudiced Slaven, we reverse in part and remand for resentencing. Accordingly, we affirm in part, reverse in part, and remand for resentencing.

Facts and Procedural History

The facts recited by this Court in Slaven's direct appeal are as follows:

On December 7, 2000, Charles Rice ("Rice") became a confidential informant for the Muncie Police Department. Rice and Slaven were friends, and the police planned to use Rice to gather evidence against Slaven. That same day, the police provided Rice with \$550 so that he could pay off an existing debt to Slaven during a monitored transaction at Slaven's home. On December 8, 2000, in a visit not coordinated or monitored by the police, Rice returned to Slaven's home to repair the furnace.

At approximately 5:00 p.m. on December 9, 2000, Officer Scott O'Dell ("O'Dell") sent Rice to Slaven's home with \$500 of recorded currency with which to buy drugs from Slaven in a monitored transaction. Rice entered Slaven's home and purchased 28.48 grams of cocaine from Slaven for \$500. Rice then rendezvoused with the police and gave them the cocaine.

At approximately 5:45 p.m., Officer Richard Bradshaw (“Bradshaw”) saw Slaven, his girlfriend, and her three children leave the home and depart in an SUV. Bradshaw and several other officers in marked police cars followed Slaven. The police verified Slaven’s identity, pulled the SUV over, took Slaven into custody, and transported him to Muncie City Hall for questioning. Bradshaw then searched Slaven and discovered an envelope containing \$460 of the \$500 that Rice had used to purchase the cocaine. O’Dell then obtained a search warrant for Slaven’s home, from which police seized 3.69 grams of cocaine, 0.52 grams of marijuana, and a bag containing a small amount of cocaine.

On December 12, 2000, the State charged Slaven with Class A felony dealing in cocaine; Class A felony possession of cocaine; maintaining a common nuisance, a Class D felony; and Class D felony possession of marijuana. On September 10, 2001, Slaven filed a motion, seeking to exclude certain statements made by him and his wife; testimony concerning hearsay statements made by Rice; the tape recordings made of the transactions of December 7 and 9, 2000; the money seized from Slaven; and the cocaine and marijuana seized from Slaven’s home. That same day, the trial court denied Slaven’s motion in full, and a jury trial commenced. On September 13, 2001, the jury acquitted Slaven of the marijuana possession charge and convicted him on all other counts.

Slaven v. State, No. 18A02-0112-CR-841, slip op. at 2-4 (Ind. Ct. App. December 12, 2002).

On direct appeal, Slaven raised four issues including: (1) whether the trial court abused its discretion in admitting evidence seized from his home; (2) whether the trial court abused its discretion in admitting evidence seized after his traffic stop; (3) whether the trial court abused its discretion in admitting certain hearsay testimony; and (4) whether the trial court abused its discretion in excluding a defense witness. Finding no abuse of discretion, we affirmed Slaven’s convictions. *See id.*, slip op. at 6. Slaven filed his pro-se petition for post-conviction relief on February 6, 2004. Following several amendments to the petition and other pleadings, an evidentiary hearing was held on October 28, 2010. Thereafter, on

December 30, 2010, the post-conviction court entered its findings of fact and conclusions of law denying Slaven's petition. This appeal followed.

Discussion and Decision

Post-conviction proceedings are not “super appeals” through which convicted persons can raise issues they failed to raise at trial or on direct appeal. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002). Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002). A post-conviction petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009). On appeal from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). 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.

I. Double Jeopardy Claim

Slaven first asserts that the post-conviction court erred when it denied his claim that he had been subjected to double jeopardy. Specifically, Slaven claimed to the post-conviction court that because he forfeited \$11,984.56 in drug money to federal authorities pursuant to the Federal Controlled Substances Act, 21 U.S.C. § 801, his subsequent state court conviction for dealing in cocaine constituted double jeopardy. Slaven also claimed

that his convictions of dealing in cocaine, possession of cocaine, and maintaining a common nuisance all constituted double jeopardy violations.

Slaven did not raise a double jeopardy claim on direct appeal. Claims available, but not presented, on direct appeal are not available for post-conviction review. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002). Acknowledging that his failure to raise the double jeopardy issue on direct appeal could operate as waiver here, Slaven attempts to couch the double jeopardy issue in terms of fundamental error. We note that a freestanding claim of fundamental error is not available in post-conviction proceedings. *Taylor v. State*, 922 N.E.2d 710, 715 (Ind. Ct. App. 2010), *trans. denied*. However, “[a] defendant in a post-conviction proceeding may allege a claim of fundamental error . . . when asserting . . . deprivation of the Sixth Amendment right to effective assistance of counsel.” *Id.* at 716 (quotation marks and citation omitted).

In his brief, Slaven refers to the fact that he believes that his counsel’s failure to raise the double jeopardy issue constituted ineffective assistance of counsel and then states that “[t]he issue of ineffective assistance of counsel will be dealt with in a subsequent section.” Appellant’s Br. at 12. Although, Slaven goes on to assert several instances of ineffective assistance of trial counsel in the next section of his brief, he fails to again mention double jeopardy in the context of ineffective assistance, much less develop a cogent ineffective assistance argument regarding appellate counsel’s decision not to raise the double jeopardy issue. Consequently, Slaven’s double jeopardy claim amounts to a free-standing claim of

fundamental error, which is not available in post-conviction proceedings. Thus, we decline to address the issue.

II. Ineffective Assistance of Trial Counsel

Slaven also contends that he received ineffective assistance of trial counsel. When assessing a claim of ineffective assistance of counsel, we apply a two-part test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail, a claimant must first show that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms. *Taylor v. State*, 882 N.E.2d 777, 781 (Ind. Ct. App. 2008). The claimant must then show that the deficient performance resulted in prejudice. *Id.* Prejudice occurs when the claimant demonstrates that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006).

Counsel is afforded considerable discretion in choosing strategy and tactics and we will accord those decisions deference. *Timberlake*, 753 N.E.2d at 603. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.* Because an inability to satisfy either the performance or the prejudice prong of the *Strickland* test is fatal to an ineffective assistance claim, we need not even evaluate counsel's performance if the petitioner suffered no prejudice from that performance. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999).

Slaven's first allegation of deficient performance involves his counsel's failure to object to alleged prosecutorial misconduct that occurred during closing argument. The second day of Slaven's trial was September 11, 2001, the tragic day of the worst terrorist attacks this nation has endured. During closing arguments, which occurred a few days later, the prosecutor made the following statement:

This case is about trust ladies and gentlemen. Cause somebody is lying. There's absolutely no question that somebody's lying. Is it the Muncie Police Department? Jesse Neal? In particular, Scott Odell? Rich Bradshaw? Or is it Danny Slaven and another codefendant his wife? I want you to ask yourself something when you deliberate. Cause this is about trust. About common sense and it's about reason. If you're in trouble at home, are you going to call the Muncie Police Department or are you going to call Danny Slaven? You better resolve that issue.

Trial Tr. at 629-630. Slaven assumes and argues that the events of 9/11 caused the jurors to be preoccupied, distrustful, and pro-prosecution. He contends that the prosecutor's comments about trust played on the jury's fear and placed him in a position of grave peril. Thus, he argues, his counsel should have objected to the prosecutor's comments.

When an ineffective assistance of counsel claim is based upon failure to object, the defendant must prove that an objection would have been sustained by the trial court had counsel objected at trial and also that he was prejudiced by the failure. *Mays v. State*, 719 N.E.2d 1263, 1265-66 (Ind. Ct. App. 1999), *trans. denied* (2000). Slaven can do neither here. Slaven's trial counsel testified during the post-conviction proceedings that, as a tactical matter, he almost never objects during closing arguments because jurors often find it to be rude and hold it against a defendant. PCR Tr. at 17. Slaven's counsel stated that he would object to an "out-of-line" closing argument but he did not view the specific comments here as

“out-of-line.” *Id.* We agree with trial counsel. Slaven cannot show that an objection on prosecutorial misconduct grounds would have been sustained by the trial court. The prosecutor was merely asking the jury to weigh the credibility of the witnesses in favor of the State, and the events of 9/11 did not alter the jury’s entitlement to do so. Counsel’s failure to object to the State’s closing argument did not constitute deficient performance, much less prejudice Slaven.

Slaven next asserts that his trial counsel was ineffective for failing to preserve an objection to evidence obtained during the search of his residence. Prior to trial, counsel moved to suppress evidence of 3.69 grams of cocaine seized from Slaven’s residence, arguing that the evidence was obtained pursuant to an invalid search warrant. That motion was denied by the trial court. Thereafter, when the State offered the evidence at trial, Slaven’s counsel objected to the admission of the evidence, but this time on other grounds. The objection was overruled and the evidence was admitted. On direct appeal, we concluded that Slaven’s challenge to the validity of the search warrant was waived because a defendant may not argue one ground for objection at trial and then raise new grounds on appeal. *See Slaven*, slip op. at 4. Slaven now claims error in trial counsel’s strategy to object to the admission of the evidence on different grounds during trial, which consequently waived his ability to challenge the validity of the search warrant on direct appeal.

It is well settled that we need not address counsel’s alleged deficient performance when the post-conviction petitioner cannot show that he was prejudiced by that performance. *Vermillion*, 719 N.E.2d at 1208. In his post-conviction brief, Slaven devotes merely a short

paragraph to this issue and fails to direct us to evidence or to develop any argument explaining how the result of his direct appeal would have been different had trial counsel properly preserved an objection to the validity of the search warrant. Accordingly, Slaven has failed to meet his burden to establish how he was prejudiced by counsel's alleged deficient performance. Under the circumstances, we cannot say that trial counsel provided ineffective assistance.

Slaven also contends that trial counsel was ineffective for "failing to force the State to prove the elements of the [dealing in cocaine] offense in that the evidence at trial did not prove that Slaven delivered cocaine within 1000 [feet] of a park." Appellant's Br. at 15. Muncie Police Officer Michael Mueller testified at trial that he personally measured the distance from Slaven's residence to the public park at issue and that the distance was 675 feet. Trial Tr. at 491. Slaven argues that this evidence was insufficient and that trial counsel should have required the State to establish that Officer Mueller measured "in a straight line" and that his measuring device "had been calibrated." Appellant's Br. at 15-16. As noted by the State, this is essentially a sufficiency of the evidence claim piggy-backed onto an ineffective assistance of counsel claim. Slaven merely invites this Court to reweigh the evidence presented at trial, which we will not do. Slaven has not established that he received ineffective assistance of trial counsel on this issue.

III. Ineffective Assistance of Appellate Counsel

Slaven's final contention is that he received ineffective assistance of appellate counsel due to appellate counsel's failure to challenge the sentence imposed by the trial court.¹ The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006).

The trial court sentenced Slaven as follows:

Count 1, Dealing in Cocaine, Class A Felony, I.C. 35-48-1-(a)(1), [t]he Court now sentences the Defendant, Danny L. Slaven to the Indiana Department of Corrections for a period of **Fifty (50) years**. Defendant given jail time credit of 45 days served.

Count 2, Possession of Cocaine, Class A Felony, I.C. 35-48-4-6(a), the Court now sentences the Defendant, Danny L. Slaven to the Indiana Department of Corrections for a period of **Fifty (50) years, to be served concurrently with Count 1, and an additional Five (5) years to be served consecutively with Count 1**.

Count 4, Maintaining a Common Nuisance, Class D Felony, 35-48-4-13(b)(2), the Court now sentences the Defendant, Danny L. Slaven to the Indiana Department of Corrections for a period of **Three (3) years**, to be served concurrently with Count 1.

Appellant's App. at 83-84 (emphases in original). Indiana Code Section 35-50-2-4 provides that the maximum sentence for a class A felony is fifty years. However, the trial court here

¹ Because we choose to remand for resentencing on grounds of ineffective assistance of appellate counsel, we need not address Slaven's contention that trial counsel was also ineffective for failing to object to the sentencing order.

erroneously imposed a fifty-five-year sentence for Slaven's possession of cocaine conviction. The State concedes this point.²

Our review of the sentencing hearing and resulting order indicates that the trial court considered Slaven's crimes to be part of a single episode of criminal conduct. Accordingly, it appears that the trial court was trying to impose a total consecutive executed sentence of fifty-five years, which it is permitted to do by statute,³ but erroneously imposed too lengthy of a sentence with regard to one of the class A felonies. Because the single sentence imposed on Count 2 exceeded the maximum sentence allowable for a class A felony, the sentence is erroneous on its face. Accordingly, appellate counsel should have raised this claim on direct appeal. Consequently, appellate counsel was ineffective. Although we affirm the post-conviction court on all other grounds, Slaven is entitled to post-conviction relief solely on this basis. Therefore, we reverse in part and remand for resentencing.

Upon remand for resentencing, the trial court may do any of the following: (1) issue a new sentencing order without taking further action; (2) order additional briefing on the

² Although conceding that the trial court likely erred, the State argues that the trial court transcript, including the sentencing order, was never admitted into evidence before the post-conviction court, and thus neither the post-conviction court nor this Court can adequately review Slaven's sentence. This argument is disingenuous, as the post-conviction record clearly indicates that, upon Slaven's motion, the trial court admitted the trial transcript into evidence. PCR Tr. at 1.

³ Indeed, Indiana Code Section 35-50-1-2 provides that "except for crimes of violence, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class higher than the most serious felonies for which the person has been convicted." Ind. Code § 35-50-1-2(c). The most serious felony for which Slaven was convicted was a class A felony. At the time of his offenses, the advisory sentence for murder, the next higher class of felony, was fifty-five years. Ind. Code § 35-50-2-3. The trial court here imposed a total executed sentence of fifty-five years. This sentence does not exceed the maximum sentence allowed by our consecutive sentencing statute. *Hardister v. State*, 849 N.E.2d 563, 577-78 (Ind. 2006).

sentencing issue and then issue a new order without holding a new sentencing hearing; or (3) order a new sentencing hearing at which additional factual submissions are either allowed or disallowed and then issue a new order based on the presentations of the parties. *Mauricio v. State*, 941 N.E.2d 497, 498 (Ind. 2011). In light of the trial court's obvious intention to impose a fifty-five-year total executed sentence, we presume that the trial court will choose the first avenue and merely issue a new sentencing order without taking further action. We affirm in part, reverse in part, and remand to the trial court for resentencing.

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and MATHIAS, J., concur.