

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Shaheen Zamani,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Plaintiff.

July 27, 2022

Court of Appeals Case No.
22A-PC-263

Appeal from the Marion Superior
Court

The Honorable Charnette D.
Garner, Judge

The Honorable Ronnie Huerta,
Magistrate

Trial Court Cause No.
49D35-2001-PC-4347

Najam, Judge.

Statement of the Case

[1] Shaheen Zamani appeals from the post-conviction court's denial of his petition for post-conviction relief. Zamani raises four issues for our review, which we consolidate and restate as the following three issues:

1. Whether three of the post-conviction court's findings of fact are clearly erroneous.
2. Whether he was denied the effective assistance of trial counsel.
3. Whether the trial court denied him his right to due process when it did not sua sponte order a competency evaluation prior to his guilty plea.

[2] We affirm.

Facts and Procedural History

[3] On January 26, 2006, David Kinsey, a police officer for the MCSD/Decatur Township Schools, observed a man later identified as Zamani pacing outside of an entrance to Decatur Central High School during the middle of the school day. Officer Kinsey saw Zamani light a cigarette and, thinking that he was a high school student smoking on school grounds, he approached him and asked him what he was doing. Zamani told Officer Kinsey that he was there to see a teacher, and Officer Kinsey asked Zamani for photo identification, which he could not produce.

[4] Officer Kinsey told Zamani several times to leave the school grounds, but he did not comply. Zamani was on his cell phone and screaming at someone about a “limo” he was expecting. Ex. at 18. Officer Kinsey later described Zamani as behaving “totally irrational[ly].” *Id.* at 19. Officer Kinsey finally arrested Zamani for trespassing, but he resisted being placed in handcuffs. Two officers with the Indianapolis Metropolitan Police Department (“IMPD”) who had arrived at the scene assisted Officer Kinsey in placing Zamani in handcuffs, but Zamani continued to physically resist the officers. A third IMPD officer arrived and placed Zamani in “leg cuffs.” *Id.* Zamani continued to physically resist officers even after he was transported to the jail, where he was placed in a ward reserved for mentally ill inmates.

[5] The State charged Zamani with intimidation, as a Class D felony; trespass, as a Class D felony; resisting law enforcement, as a Class A misdemeanor; battery on an officer, as a Class A misdemeanor; and disorderly conduct, as a Class B misdemeanor. Zamani’s appointed counsel (“defense counsel”) recognized that Zamani “was mentally ill,” and Zamani was referred to a “special mental health court” known as “P.A.I.R.” Tr. at 14. Indeed, Zamani had been diagnosed with schizophrenia a few years prior, at age seventeen. However, “because he was not stabilized in some of his behavior issues, [the prosecutor determined] that he wouldn’t be an appropriate candidate for P.A.I.R.” *Id.* at 15.

[6] In March, defense counsel negotiated a plea agreement with the State whereby Zamani would plead guilty to intimidation, resisting law enforcement, and

battery against a police officer, and the State would dismiss the other charges. The terms of the agreement provided that Zamani would complete mental health treatment as part of his probation. However, during the plea hearing, when the trial court asked Zamani if the charges against him were true, Zamani disputed that he had injured any of the officers. The State then withdrew the plea agreement.

[7] On April 26, the trial court held another plea hearing. The parties had negotiated a new plea agreement with the only difference being that the battery against a police officer charge was omitted. The trial court asked Zamani whether he understood the charges and each of his rights, and Zamani acknowledged that he understood everything. And when the trial court asked whether the charges against Zamani were true, he replied, “Yes sir. Yes, Your Honor.” Ex. at 39. Defense counsel then asked the trial court to consider Zamani’s indigence and mental illness in sentencing him. The trial court then asked Zamani, “Okay, Mr. Zamani, anything you want to say?” *Id.* at 42. Zamani replied, “Guilty.” *Id.* The trial court then said, “Okay, but is there anything you want to say about the sentencing?” *Id.* Zamani replied, “No.” *Id.* The trial court accepted the plea agreement and sentenced Zamani to 545 days with 182 days executed and 363 days suspended to probation, which included mental health treatment. Zamani did not appeal his convictions or sentence.

[8] In March 2021, Zamani filed an amended petition for post-conviction relief in which he alleged that he was incompetent to plead guilty in 2006 and that he

was denied the effective assistance of trial counsel when defense counsel allowed him to plead guilty. Zamani also alleged that the trial court denied him his right to due process when it did not sua sponte order a competency evaluation prior to accepting his guilty plea.

[9] During the hearing on Zamani’s petition, defense counsel stated that she was generally aware of Zamani’s mental illness “from the very beginning[.]” Tr. at 14. Defense counsel testified that, during her representation of Zamani, she conferred with Mike Trent, who “help[ed] guide” public defenders with respect to representing mentally ill defendants, and Marianne Halbert, who had experience with mentally ill people through her work on civil commitments. *Id.* at 12. Defense counsel also testified that she frequently communicated with Zamani’s mother about his case and his mental illness.

[10] Zamani presented testimony by Dr. George Parker, who testified that, while Zamani was in jail in 2006, his behavior was “not necessarily psychotic,” but was “certainly difficult and challenging” due to his mental illness. *Id.* at 66. Dr. Parker concluded that he could not form a “definitive opinion” regarding whether Zamani was competent to plead guilty in April 2006, but he thought it was “clear that he had a serious mental illness at that time.” *Id.* at 69. And Dr. Parker stated that there was “an array of suggestions that there [we]re mental health issues that might [have] affect[ed] Mr. Zamani’s understanding of the proceedings.” *Id.* In the end, Dr. Parker testified that his “hypothesis” was that Zamani “might not have been competent,” but that he could not “prove that.” *Id.* at 70.

[11] Zamani also presented evidence that, at the time of his arrest in this case, he was on probation for a case in Johnson County (“the Johnson County case”). After his guilty plea in this case, he was “taken into custody by Johnson County” for violation of his probation. *Id.* at 23. On May 31, 2006, Zamani was placed with a mental health unit of the New Castle Correctional Facility, and he was prescribed anti-psychotic and antidepressant medications. On June 19, the trial court in Johnson County ordered a competency evaluation, and Zamani was found to be “competent to stand trial.” *Id.* at 58.

[12] At the post-conviction hearing in this case, Defense counsel testified that, on April 25, 2006, one day before his guilty plea, Zamani was “very emotional” and “wasn’t responsive.” *Id.* at 19. Trent emailed defense counsel and stated that Zamani “seemed suicidal and hopeless” and was “confused in his thinking.” *Id.* at 20. But defense counsel also stated that, while she and Trent were concerned about Zamani’s mental illness, she did not recall that they questioned his competency to plead guilty. Defense counsel believed that Zamani was competent to plead guilty on April 26, and, after talking to Zamani that day, Halbert agreed. The post-conviction court denied Zamani’s petition following a hearing. This appeal ensued.¹

¹ We note that, in 2014, Zamani was convicted of aggravated battery, battery, and attempted murder following a jury trial, and he is currently serving an aggregate sixty-five year executed sentence. *See Zamani v. State*, 33 N.E.3d 1130 (Ind. Ct. App. 2015), *trans. denied*.

Discussion and Decision

Overview

[13] As we stated in *Barber v. State*, 141 N.E.3d 35, 42-43 (Ind. Ct. App. 2020), *trans. denied*,

[a] defendant is not competent to stand trial when he is unable to understand the proceedings and assist in the preparation of his defense. *Mast v. State*, 914 N.E.2d 851, 856 (Ind. Ct. App. 2009), *trans. denied*; *see also* Ind. Code § 35-36-3-1(a). Due process precludes convicting and sentencing an incompetent defendant. *Gross v. State*, 41 N.E.3d 1043, 1047 (Ind. Ct. App. 2015). Indiana statutes “control the appropriate way to determine a defendant’s competency and, if necessary, to commit the defendant and provide restoration services.” *Curtis v. State*, 948 N.E.2d 1143, 1153 (Ind. 2011); Ind. Code ch. 35-36-3. When there is reason to believe a criminal defendant lacks the ability to understand court proceedings and assist his attorney, the trial court should set a hearing and appoint two or three disinterested professionals to evaluate his competency. *Gross*, 41 N.E.3d at 1047; *see also* Ind. Code § 35-36-3-1(a). . . . But the right to a competency hearing is not absolute. *Campbell v. State*, 732 N.E.2d 197, 202 (Ind. Ct. App. 2000). Such a hearing is required only when the trial court is confronted with evidence creating a bona fide doubt as to a defendant’s competency. *Mast*, 914 N.E.2d at 856. The presence of indicators that would require the court to conduct a hearing under Indiana Code section 35-36-3-1 are determined on the facts of each case. *Id.*

Standard of Review

[14] In appealing from the denial of post-conviction relief, Zamani proceeds from a negative judgment. *See, e.g., McDowell v. State*, 102 N.E.3d 924, 929 (Ind. Ct. App. 2018) (quoting *Manzano v. State*, 12 N.E.3d 321, 325 (Ind. Ct. App. 2014),

trans. denied), *trans. denied*. As such, he must convince us that the evidence unmistakably and unerringly leads to a conclusion opposite the one reached by the post-conviction court. *Id.* In making this determination, we consider only the evidence and reasonable inferences supporting the court’s judgment. *Id.* If Zamani fails to meet this “rigorous standard of review,” we will affirm. *Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010), *trans. denied*.

[15] The post-conviction court entered findings of fact and conclusions of law in accordance with Post-Conviction Rule 1(6). Though we do not defer to the court’s legal conclusions, we review the factual findings for clear error—that which leaves us with a definite and firm conviction that a mistake has been made. *State v. Cozart*, 897 N.E.2d 478, 482 (Ind. 2008).

Issue One: Findings of Fact

[16] Zamani first contends that three of the post-conviction court’s findings are clearly erroneous. Zamani first asserts that the court erroneously found that the Johnson County competency evaluations occurred “within a few weeks” of Zamani’s April 26, 2006, guilty plea in this case. Appellant’s App. Vol. 2 at 125. Zamani suggests that, because the evaluations occurred on July 17 and 18, they did not occur “within a few weeks” of April 26, and the post-conviction court erroneously “relied on them to conclude Zamani did not prove he was not competent at the time of his [April 26] plea.” Appellant’s Br. at 21.

[17] However, a “few” is defined in relevant part as “a small number of units.” Few, Merriam-Webster Online Dictionary, <https://www.merriam->

webster.com/dictionary/describe (last visited July 5, 2022). In other words, “a few weeks” does not have a precise meaning as Zamani suggests. And we cannot say that the post-conviction court clearly erred when it found that Zamani’s Johnson County competency evaluations occurred a few weeks after his April 26, 2006, guilty plea. In any event, even assuming the court erred when it characterized the elapsed time as a “few” weeks, we cannot say that the court erred when it found that the July 2006 competency evaluations were relevant to the question of his competency at the time he pleaded guilty that preceding April.² In addition, the post-conviction court made several other findings to support its conclusion on Zamani’s competency, including that Dr. Parker was “unable to offer a definite opinion as to whether Zamani was legally incompetent when he pled guilty in this case,” which Zamani does not challenge. Appellant’s App. Vol. 2 at 125.

[18] Zamani also challenges excerpts from the post-conviction court’s finding No. 7, which states as follows:

[Defense] counsel testified that she was aware that Zamani suffered from mental health issues. This awareness came from observations and conversation with Zamani, as well as extensive conversations with Zamani’s mother who was very involved in the handling of the case. Counsel also indicated that she discussed the case multiple times with people within the Marion

² Zamani suggests that the Johnson County evaluation occurred after he had received weeks of treatment, including new medications. But Zamani was receiving treatment while in jail in Marion County. And Dr. Parker testified that the records do not show whether Zamani’s medication regimen changed between April 26, 2006, and the competency evaluations in Johnson County.

County Public Defender Agency who dealt [with] cases involving mental health issues, also [sic] she spoke several times with Michael Trent who was identified as the liaison between the Marion County Jail and Midtown (now Eskanazi) Mental Health. Also, she indicated that she was aware of Zamani's diagnoses, and [she] had reviewed at least some of the associated paperwork.

Id. at 124.

[19] Zamani contends that the post-conviction court erroneously found that defense counsel “had ‘extensive conversations with Zamani’s mother[,]’ implying [defense counsel had] received information about his mental illness from the mother.” Appellant’s Br. at 21 (quoting post-conviction court’s order). Zamani points out that Dr. Parker testified that Zamani’s mother was not “the most reliable informant” with respect to Zamani’s mental health history and that, “to a certain extent, [defense counsel and Trent] were working blind.” Tr. at 50-51. However, defense counsel testified that Zamani’s mother was “very involved” in the case and “wanted certain treatment” for Zamani. *Id.* at 16. That testimony supports the trial court’s finding.

[20] Finally, Zamani contends that the post-conviction court erroneously found that defense counsel “knew of ‘Zamani’s diagnoses and had reviewed at least some of the associated paperwork.’” *Id.* at 22. Zamani asserts that defense counsel “did not understand the severity of [his] mental illness” and he points out that defense counsel testified that she did not “personally” have access to his mental health records. Appellant’s Br. at 21; Tr. at 23-24. But defense counsel testified

that she “knew what [Zamani’s] diagnoses were” based on “information [she was] provided.” Tr. at 22. To the extent the evidence does not show that defense counsel reviewed any “paperwork” regarding Zamani’s mental illness, Zamani does not explain how that error is significant here in light of the other evidence that defense counsel was aware of his diagnoses based on information she was provided. We cannot say that the post-conviction court’s finding is clearly erroneous.

Issue Two: Effective Assistance of Trial Counsel

[21] Zamani next contends that he was denied the effective assistance of trial counsel. As we explained in *Barber*, 141 N.E.3d at 42,

[t]he Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel and mandates “that the right to counsel is the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) (quotation omitted).

Generally, 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. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (citing *Strickland*, 466 U.S. at 687, 694, 104 S. Ct. 2052). A counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* To meet the 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. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001).

Failure to satisfy either prong will cause the claim to fail. *French*, 778 N.E.2d at 824. When we consider a claim of ineffective assistance of counsel, we apply a “strong presumption . . . that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Morgan v. State*, 755 N.E.2d 1070, 1073 (Ind. 2001). “[C]ounsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002).

[22] Zamani maintains that defense counsel’s performance was deficient when she did not request a competency evaluation and when she “allowed him to plead guilty while he was not competent to do so.” Appellant’s Br. at 32. And Zamani maintains that he was prejudiced because, “‘but for counsel’s error, the result of the proceeding would have been different.’” *Id.* at 35-36 (quoting *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019)). In support, Zamani states that

[his] competency was in question based on the factors identified by Dr. Parker. Had counsel sought a competency evaluation, there is a reasonable probability he would have been found incompetent. Therefore, Zamani would not have plead[ed] guilty because it would have been a violation of due process.

Appellant’s Br. at 36.

[23] Initially, we note that much of Zamani’s argument on appeal focuses on the evidence that he contends shows that he was not legally competent to plead guilty in this case. But a claim of ineffective assistance of trial counsel looks only to whether defense counsel’s performance fell “below an objective

standard of reasonableness based on prevailing professional norms.” *Barber*, 141 N.E.3d at 42. In other words, the question here is not whether he was competent but only whether the evidence shows that it was reasonable for his defense counsel to not request a competency evaluation and to allow him to plead guilty.

[24] The post-conviction court found in relevant part that: defense counsel was aware of Zamani’s mental illness and specific diagnoses; defense counsel believed that Zamani “understood everything” about the guilty plea, and defense counsel obtained a second opinion from Halbert before the plea; Dr. Parker confirmed that defense counsel “was aware of and discussed Zamani’s mental health competency issues with various professionals in the criminal justice system”; “Dr. Parker also noted that within a few weeks of his Marion County guilty plea, Zamani was evaluated for competency at the order of a Johnson County Judge” and he was found to “exhibit[] symptoms of mental illness” but “legally competent”; and Dr. Parker could not give a “definite opinion as to whether Zamani was legally incompetent when he pled guilty in this case.” Tr. at 21; Appellant’s App. Vol. 2 at 125. Accordingly, the post-conviction court concluded that Zamani had not met his burden to show that defense counsel’s performance was deficient.

[25] The evidence supports the post-conviction court’s findings and conclusion. Significantly, Dr. Parker testified that the guilty plea hearing was “straightforward” and, while “it wasn’t clear that [Zamani] was fully tracking what was happening[,]” neither was it “obvious” that Zamani misunderstood

the proceedings. Tr. at 65. Dr. Parker testified that, while it is “clear that [Zamani] had a serious mental illness” when he pleaded guilty in April 2006, he could not give a “clear opinion whether [Zamani] was or was not competent at that time.” *Id.* at 68-69. In the end, Dr. Parker expressed “concerns” about Zamani’s competence at the time of his guilty plea in this case, but he could only “hypothesi[ze] . . . that he might not have been competent[.]” *Id.* at 69-70.

[26] The evidence shows that defense counsel was aware of Zamani’s mental illness “from the very beginning” and, as the post-conviction court found, she consulted with both Trent and Halbert regarding his mental illness. *Id.* at 14. Still, Zamani asserts that defense counsel should have done more to gain insight into his mental illness. And he maintains that defense counsel should have requested a competency evaluation after Trent reported that Zamani “seemed suicidal and hopeless” the day before his guilty plea hearing. *Id.* at 20.

[27] However, as the State points out, even Dr. Parker acknowledged that defense counsel made “reasonable efforts” to obtain Zamani’s medical records. Appellee’s Br. at 25. Dr. Parker testified that defense counsel tried to find records “at Midtown or Wishard,” which is “usually a good guess” because it is where “most of the folks that have mental health issues” get treatment. Tr. at 48. But neither Zamani nor his mother had told defense counsel that he had previously been treated at Community North and Logansport.

[28] Dr. Parker further acknowledged the statutory requirements for determining a defendant’s competency, namely, whether a defendant has the “current ability

to understand the legal proceedings against him and [the] current ability to assist his attorney in his defense.” *Id.* at 34. Defense counsel testified that, on the day of his guilty plea hearing, Zamani “understood everything,” including the charges against him and the implication of his probation violation. *Id.* at 21. And defense counsel got a second opinion from Halbert, who agreed that Zamani “could go through with the plea agreement[.]” *Id.* at 22. Finally, during the guilty plea hearing, Zamani answered the trial court’s questions appropriately. The trial court was able to observe Zamani and found that he “underst[ood] the nature of the charges to which he [pleaded] and the possible sentence for his crimes. H[is] plea is freely, voluntarily and knowingly made.” *Ex.* at 41. We agree with the post-conviction court that Zamani has not shown that defense counsel’s performance was deficient. Therefore, Zamani was not denied the effective assistance of trial counsel.

Issue Three: Due Process

[29] Zamani next contends that, because he was not legally competent, his right to due process was violated when he pleaded guilty. Again, due process precludes convicting and sentencing an incompetent defendant. *Gross v. State*, 41 N.E.3d 1043, 1047 (Ind. Ct. App. 2015). Zamani maintains that the trial court should have sua sponte ordered a competency evaluation. We cannot agree.

[30] As this Court explained in *Armour v. State*, 948 N.E.2d 810, 813 (Ind. Ct. App. 2011),

Ind. Code § 35-36-3-1 provides in relevant part:

If at any time before the final submission of any criminal case to the court or the jury trying the case, the court has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of a defense, the court shall immediately fix a time for a hearing to determine whether the defendant has that ability.

“A court is required to hold a hearing to determine the defendant’s competency to stand trial *only when it is confronted with evidence creating a reasonable doubt about the defendant’s competency.*” *Haviland v. State*, 677 N.E.2d 509, 516 (Ind. 1997).

(Emphasis added).

[31] Zamani asserts that the trial court had ample evidence of his legal incompetence. Zamani points out that, during his initial hearing, the trial court stated as follows:

I am gonna put the Defendant on Community Corrections mental health component, I want Community Corrections to evaluate him. And he’s to undergo monthly urine testing, because, his behavior in Court, ‘course the record can’t pick it up, but I think it’s a little unusual, and um, so, I want him evaluated. Okay? [And] . . . if you wanna make sure that Mike Trent at the jail sees him too, if you could?

Ex. at 51. Then, when his initial guilty plea was withdrawn in March 2006, the trial court stated:

if we do any kind of plea, it needs to incorporate some kind of mental health counselling, okay? I mean, that’s something that I think would benefit him, it’s something that I would’ve imposed.

It's something that I would've imposed for the, um, his time on probation, anyway. I think it would've been helpful.

Id. at 82. During his guilty plea hearing on April 26, after the trial court had accepted Zamani's guilty plea, defense counsel stated that Zamani "does have a lot of mental health issues that he needs to work through and we want to make sure he gets that treatment." *Id.* at 42. The trial court responded by asking Zamani whether he had anything he wanted to say, and Zamani responded, "Guilty." *Id.* The following colloquy ensued:

THE COURT: Okay but is there anything you want to say about the sentencing?

DEFENDANT ZAMANI: No.

THE COURT: And you understand what is going on here today? Do you have any questions about anything?

DEFENDANT ZAMANI: No.

THE COURT: You have no questions, right?

DEFENDANT ZAMANI: No.

THE COURT: And you understand everything?

DEFENDANT ZAMANI: Yeah.

Id.

[32] Zamani contends that, "[b]ased on [his] behavior in court, there was a bona fide doubt as to his competence." Appellant's Br. at 31 (citing *Pate v. Robinson*, 383

U.S. 375 (1966); I.C. § 35-36-3-1). However, we agree with the State that Zamani is improperly conflating mental illness and competency, which are sometimes, but not always, concomitant. Again, defense counsel and Halbert both determined that Zamani was able to understand the guilty plea proceeding, and the trial court engaged with Zamani during the hearing and determined that he understood everything. At the post-conviction hearing, Dr. Parker testified that the guilty plea hearing was “straightforward,” and nothing indicated that Zamani misunderstood the proceedings. Tr. at 65. We cannot say that the post-conviction court clearly erred when it concluded that Zamani was not denied his right to due process.

[33] Finally, Zamani claims that his guilty plea was not made knowingly, intentionally, and voluntarily because he was legally incompetent. To prove a substantive competency claim, a post-conviction petitioner must present clear and convincing evidence “creating a ‘real, substantial, and legitimate doubt’ as to his competence[.]” *Barber*, 141 N.E.3d at 44 (quoting *Medina v. Singletary*, 59 F.3d 1095, 1106 (11th Cir. 1995)). Zamani maintains that Dr. Parker’s testimony satisfies this burden. However, Dr. Parker testified only that there was “an array of *suggestions* that there [we]re mental health issues *that might [have affected]* Zamani’s understanding of the proceedings.” Tr. at 69 (emphases added). And Dr. Parker could not give a definitive opinion whether Zamani was legally incompetent to plead guilty. Given Dr. Parker’s equivocal testimony, and given that Zamani appeals from a negative judgment, we cannot

say that the post-conviction court clearly erred when it concluded that Zamani's guilty plea was knowing, intentional, and voluntary.

Conclusion

[34] Zamani has not shown that he was denied the effective assistance of trial counsel, and he has not shown that he was denied his right to due process. While Zamani clearly suffered from mental illness in April 2006, and while Dr. Parker testified to "concerns" about whether Zamani was competent to plead guilty, the evidence shows that Zamani understood the proceedings. Tr. at 68. The post-conviction court did not clearly err when it denied Zamani's petition for post-conviction relief.

[35] Affirmed.

Bradford, C.J., and Bailey, J., concur.