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IN THE COURT OF APPEALS OF INDIANA

Robert Deshon Coleman,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent.

October 7, 2022

Court of Appeals Case No. 21A-PC-1260

Appeal from the Clay Superior Court

The Honorable Christopher A. Newton, Special Judge

Trial Court Cause No. 11D01-1810-PC-797

Pyle, Judge.

Statement of the Case

[1] Robert Deshon Coleman ("Coleman") appeals the post-conviction court's denial of his petition for post-conviction relief, in which he alleged that he had received ineffective assistance of trial and appellate counsel. Concluding that

Coleman has failed to meet his burden of showing that the post-conviction court erred by denying relief on his allegations of ineffective assistance of trial and appellate counsel, we affirm the post-conviction court's judgment.[1]

[2] We affirm and remand.

Issue

Whether the post-conviction court erred by denying post-conviction relief to Coleman.

Facts

[3] The relevant facts of Coleman's underlying offenses, as set forth by this Court in Coleman's direct appeal, are as follows:

> In 2016, several Indianapolis-area Kroger stores ("Kroger") were victims of pharmacy robberies perpetrated by a pair of African-

[1] Coleman also contends that the post-conviction court's order should be reversed because the post-conviction court failed to rule on the merits of his post-conviction claims. Coleman's argument challenging the post-conviction court's order is premised on the post-conviction court's use of the word "dismisses" instead of the word "denies" at the conclusion of its order. Coleman's argument is without merit. Here, after the post-conviction court held a post-conviction hearing in which Coleman presented and questioned witnesses, the court entered a six-page order in which it addressed Coleman's claims of ineffective assistance of trial and appellate counsel and concluded that Coleman had failed to meet his burden on these claims. At the end of its order, the post-conviction court wrote as follows: "The Court FINDS that [Coleman] has not met [his] burden in this cause and DISMISSES the Petition for Post-Conviction Relief." (App. Vol. 2 at 157). Based on the record before us, it is apparent that the post-conviction court inadvertently used the word "dismisses" instead of "denies" at the conclusion of its order when it denied Coleman's petition for post-conviction relief. Accordingly, we reject Coleman's contention that the post-conviction court's typographical error equates to a failure to address the merits of his claims or that it requires reversal of the order. *See McBride v. Monroe Cnty. Off. of Fam. & Child.*, 798 N.E.2d 185, 199-200 (Ind. Ct. App. 2003) (explaining that the trial court's use of word "possible" instead of "probable" in termination order was typographical error that did not warrant reversal in light of court's statements made during hearing and court's findings and conclusions read as a whole). We do, however, remand to the post-conviction court for the sole purpose of correcting the typographical error in its post-conviction order. *See Littrell v. State*, 15 N.E.3d 646, 653 (Ind. Ct. App. 2014) (remanding to the trial court to correct a typographical error in its guilty plea and sentencing orders), *trans. denied*.

American males who typically wore hats and cased the pharmacy area of each store before approaching the counter and demanding controlled substances. In May 2016, Kroger notified the management of its stores in Indianapolis and surrounding counties concerning the robberies and reminded employees about the pharmacy robbery protocols.

On the afternoon of May 13, 2016, Brandi Schutter, a certified pharmacy technician at Kroger's Brazil, Indiana store, observed two African-American males lingering near the pharmacy area. Both were wearing hats, and one of them, later identified as Coleman, was peering around the end of an aisle toward the pharmacy. Finding the men's behavior to be suspicious, Schutter notified her supervisor, and the two implemented pharmacy robbery protocols. Per the protocols, a group of Kroger employees congregated by the pharmacy area, and another employee called 911 to report a robbery in progress. Immediately thereafter, Coleman and his companion, Stacey Griffin, left the store without making a purchase.

Within minutes, Clay County Sheriff's deputies arrived and apprehended the two suspects in the parking lot. When asked his identity, Coleman provided a false name. An eyewitness reported that she had seen a man fitting Coleman's description remove a handgun from his clothing and throw it in a trash can on the sidewalk outside the tanning salon by Kroger. Deputies recovered the handgun from the trash can and found it to contain a full magazine and a round in the chamber. The deputies conducted patdowns before transporting Coleman and Griffin. During the patdown of Griffin, a piece of paper fell from his pocket onto the pavement. The paper appeared to be a robbery demand note.

The State charged Coleman with [L]evel 3 felony attempted armed robbery, [L]evel 3 felony conspiracy to commit armed robbery, [L]evel 4 felony unlawful possession of a firearm by an SVF, [C]lass A misdemeanor carrying a handgun without a license, and [C]lass A misdemeanor false identity statement.

> Coleman waived jury trial on the SVF count, and a jury convicted him as charged on the remaining counts.

Coleman v. State, 11A01-1705-CR-934 at *1 (Ind. Ct. App. Feb. 15, 2018).

[4] Coleman was represented at trial by Amie Martens ("Trial Counsel Martens") and Denise Turner ("Trial Counsel Turner"). During the bifurcated SVF bench trial, Coleman's trial counsel informed the trial court that counsel had discussed the issue with Coleman and had advised him to waive his jury trial on the SVF charge. The parties agreed to incorporate the evidence from the first phase of trial. Coleman stipulated to the fact that he was the same Robert Coleman listed in the SVF charge as the Robert Coleman who was listed in the certified copies of the chronological case summary and abstract of judgment that the State admitted to show that Coleman had been convicted of Class C felony robbery in Marion County in 2011.

> The trial court subsequently convicted [Coleman] on the SVF count. Per the State's request, the trial court did not enter judgment on the [L]evel 3 felony attempt count due to double jeopardy concerns.
>
> The trial court sentenced Coleman to an aggregate twenty-five-year term, with sixteen years for the conspiracy count, a consecutive nine-year term for the SVF count, and concurrent one-year terms for his two class A misdemeanor convictions.

Coleman, 11A01-1705-CR-934 at *1-2.

[5] Coleman filed a direct appeal and was represented by attorney Heather Barton ("Appellate Counsel Barton"). Coleman challenged some of the trial court's

rulings on the admission of evidence and asserted that his aggregate sentence was inappropriate. In regard to the admission of evidence, Coleman argued that the trial court had abused its discretion by admitting: (1) the surveillance video, asserting that the State had failed to lay a proper foundation to authenticate the video; and (2) the robbery demand note that had fallen from Griffin's pocket during the patdown, arguing that it was inadmissible hearsay.

[6] First, this Court held that the trial court's evidentiary rulings were not erroneous. *Id.* at *2-3. Specifically, we determined that admission of the surveillance video, which showed that Coleman had discarded a gun into a trash can on the Kroger sidewalk, was merely cumulative of an eyewitness' testimony regarding Coleman's actions depicted in the video. *Id.* at *2. We also determined that the trial court had not erred by admitting the handwritten robbery note, which read as follows: "This is a robbery. Corporate (sic) or I will kill you. I need Tussinex[,] Percocet 10 mg[,] Roxicodonie (sic) 10 mg 30 mg." *Id.* at *3 (internal quotation marks omitted; brackets and parentheticals in original). Specifically, we determined that the note was not hearsay under the hearsay exception in Indiana Evidence Rule 801(d)(2)(E) where there was sufficient independent evidence of a conspiracy. *Id.* Lastly, this Court held that Coleman had failed to demonstrate this his sentence was inappropriate. *Id.* at *5. Accordingly, we affirmed Coleman's convictions and sentence. Coleman did not file a petition to transfer.

[7] Subsequently, in October 2018, Coleman filed a pro se petition for post-conviction relief and later filed, by counsel, amended petitions in September

2019 and October 2020. In his final amended petition, Coleman raised post-conviction claims of ineffective assistance of trial and appellate counsel. Specifically, he alleged that his trial counsel had rendered ineffective assistance by failing to: (1) file a motion in limine to prohibit any evidence about the Indianapolis robberies or evidence that Coleman had been incarcerated pending trial; (2) tender a lesser-included offense jury instruction for Level 5 felony robbery or Level 4 felony robbery of a pharmacy as lesser included offenses to his Level 3 felony attempted armed robbery charge;[2] and (3) "challenge the SVF charge in light of insufficient evidence[.]" (App. Vol. 2 at 124). Coleman also argued that his trial counsel had rendered ineffective assistance of counsel based on the cumulative effect of three alleged errors. In regard to Coleman's ineffective assistance of appellate counsel claim, he alleged that his counsel had rendered ineffective assistance by failing to: (1) raise an appellate evidentiary issue to challenge the admission of Coleman's second police statement based on hearsay; and (2) file a petition to transfer.

[8] In March 2021, the post-conviction court held a hearing on Coleman's final amended post-conviction petition. Coleman called Trial Counsel Martens, Trial Counsel Turner, and Appellate Counsel Barton as witnesses and questioned them about his ineffective assistance of counsel claims.

[2] In his post-conviction petition, Coleman incorrectly stated that his Level 3 felony was for armed robbery instead of attempted armed robbery.

[9] Thereafter, in March 2021, the post-conviction court issued an order denying Coleman's petition for post-conviction relief. Specifically, the post-conviction court concluded that Coleman had failed to meet his burden of proving his claims of ineffective assistance of trial and appellate counsel.

[10] Coleman now appeals.

Decision

[11] Coleman argues that the post-conviction court erred by denying him post-conviction relief on his claims of ineffective assistance of trial and appellate counsel. Our standard of review in post-conviction proceedings is well settled.

> We observe that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court.

Shepherd v. State, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010) (internal case citations omitted), *trans. denied.* "We review the post-conviction court's factual

findings under a 'clearly erroneous' standard but do not defer to the post-conviction court's legal conclusions." *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007), *reh'g denied*, *cert. denied*. Additionally, "[w]e will not reweigh the evidence or judge the credibility of the witnesses; we examine only the probative evidence and reasonable inferences that support the decision of the post-conviction court." *Id.*

[12] We turn first to Coleman's argument regarding ineffective assistance of trial counsel. On appeal, Coleman contends that his trial counsel rendered ineffective assistance by failing to: (1) file a motion in limine regarding evidence about the Indianapolis robberies or evidence that Coleman had been incarcerated pending trial;[3] (2) tender a lesser-included offense jury instruction; and (3) challenge the sufficiency of the evidence for the SVF charge.

[13] A claim of ineffective assistance of counsel requires a petitioner to show that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Davidson v. State*, 763 N.E.2d 441, 444

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[3] Coleman also asserts that his trial counsel rendered ineffective assistance of counsel by failing to object to this same evidence. Coleman has waived this argument because he did not raise such a claim in his post-conviction petition. *See Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001) ("Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal."), *reh'g denied*, *cert. denied*. *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.").

(Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh'g denied*), *reh'g denied*, *cert. denied*. "A reasonable probability arises when there is a 'probability sufficient to undermine confidence in the outcome.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). "Failure to satisfy either of the two prongs will cause the claim to fail." *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). "Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *Id.* Therefore, if we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). Moreover, isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Because counsel is afforded considerable discretion in choosing strategy and tactics, a strong presumption arises that counsel rendered adequate assistance. *Id.*

[14] Turning to Coleman's argument that trial counsel rendered ineffective assistance by failing to file a motion in limine regarding evidence about the Indianapolis robberies or evidence that Coleman had been incarcerated pending trial, we note that we need not address the deficient performance prong of this claim. *See Henley*, 881 N.E.2d at 645 (explaining that if we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient). Here, Coleman merely asserts that he was prejudiced by his trial counsels' failure to file a motion in limine,

but he fails to allege and show that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Accordingly, we affirm the trial court's denial of post-conviction relief on this claim of ineffective assistance of trial counsel. *See French*, 778 N.E.2d at 824 (explaining that a petitioner's failure to satisfy either of the two prongs for an ineffective assistance of counsel claim will cause the claim to fail).

[15] We also reject Coleman's claim that his trial counsel rendered ineffective assistance by failing to tender a lesser-included offense jury instruction for Level 5 felony robbery or Level 4 felony robbery of a pharmacy as lesser included offenses to his Level 3 felony attempted armed robbery charge.[4] When reviewing this claim, the post-conviction court concluded that Coleman had failed to prove the prejudice prong of his claim because there had been testimony during the post-conviction hearing that indicated that Coleman's "trial counsel believed it was an all or nothing approach" and that counsel had not tendered a lesser-included instruction because it could have been seen as a concession that a robbery had occurred. (App. Vol. 2 at 156). Because trial counsel's decision not to tender a lesser-included offense jury instruction was consistent with a reasonable trial strategy, we affirm the trial court's denial of post-conviction relief to Coleman on this claim. *See Reed*, 866 N.E.2d at 769 (explaining that counsel is afforded considerable discretion in choosing strategy

[4] In his appellate brief, Coleman again incorrectly states that his Level 3 felony was for armed robbery instead of attempted armed robbery.

and tactics and that a strong presumption arises that counsel rendered adequate assistance).

[16] Coleman also failed to meet his post-conviction burden on his final ineffective assistance of trial counsel claim in which he asserts that his trial counsel rendered ineffective assistance of counsel by failing to "challenge the SVF charge[.]" (Coleman's Br. 21). After the jury had found Coleman guilty in the initial phase of his trial, Coleman waived his jury trial on the SVF charge. During the bifurcated SVF bench trial, Coleman stipulated to his identity. Specifically, he stipulated to the fact that he was the same Robert Coleman who was listed in the certified copies of the chronological case summary and abstract of judgment that the State admitted to show that Coleman had been convicted of Class C felony robbery in Marion County in 2011. On appeal, Coleman asserts that his trial counsel should have challenged the sufficiency of the SVF evidence and suggests that the State would not have had sufficient evidence to convict him of the SVF charge. Coleman, however, does not show that any such challenge to the evidence would have been successful if made. Furthermore, Coleman merely asserts that he was prejudiced by his trial counsels' failure to challenge the sufficiency of the SVF evidence, but he fails to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Accordingly, we affirm the trial court's denial of post-conviction relief on this claim of ineffective assistance of trial counsel. *See French*, 778 N.E.2d at 824 (explaining that a

petitioner's failure to satisfy either of the two prongs for an ineffective assistance of counsel claim will cause the claim to fail).

[17] Next, we turn to Coleman's post-conviction claims regarding ineffective assistance of appellate counsel. Coleman argues that his appellate counsel rendered ineffective assistance by failing to: (1) challenge the admission of Coleman's second police statement based on hearsay; and (2) file a petition to transfer.

[18] We apply the same standard of review to a claim of ineffective assistance of appellate counsel as we do to an ineffective assistance of trial counsel claim. *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013). Thus, a petitioner alleging a claim of ineffective assistance of appellate counsel is required to show that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Davidson*, 763 N.E.2d at 444 (quoting *Strickland*, 466 U.S. at 687). "Failure to satisfy either of the two prongs will cause the claim to fail." *French*, 778 N.E.2d at 824.

[19] Ineffective assistance of appellate counsel claims "'generally fall into three basic categories: (1) denial of access to an appeal[;] (2) waiver of issues[;] and (3) failure to present issues well.'" *Garrett*, 992 N.E.2d at 724 (quoting *Reed*, 856 N.E.2d at 1195). Coleman's first ineffective assistance of appellate counsel

claims is based upon category (2), waiver of issues. To evaluate the performance prong in a waiver-of-issues appellate counsel claim, our Court applies the following test: "(1) whether the unraised issues are significant and obvious from the face of the record[;] and (2) whether the unraised issues are 'clearly stronger' than the raised issues." *Garrett*, 992 N.E.2d at 724 (quoting *Timberlake v. State*, 753 N.E.2d 591, 605-06 (Ind. 2001), *reh'g denied*, *cert. denied*). The prejudice prong for the waiver-of-issues category of an ineffective assistance of appellate counsel claim requires an examination of whether the issues that appellate counsel failed to raise "'would have been clearly more likely to result in reversal or an order for a new trial.'" *Garrett*, 992 N.E.2d at 724 (quoting *Bieghler v. State,* 690 N.E.2d 188, 193 (Ind. 1997), *reh'g denied*, *cert. denied*).

[20] "Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on . . . appeal" because "the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Reed*, 856 N.E.2d at 1196. "'Accordingly, when assessing these types of ineffectiveness claims, reviewing courts should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable.'" *Conner v. State*, 711 N.E.2d 1238, 1252 (Ind. 1999) (quoting *Bieghler,* 690 N.E.2d at 194), *reh'g denied*, *cert. denied*. To show that appellate counsel was ineffective for failing to raise an issue on appeal, a petitioner "'must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly

deferential.'" *Garrett*, 992 N.E.2d at 724 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260-61 (Ind. 2000), *reh'g denied*, *cert. denied*).

[21] Coleman contends that his appellate counsel rendered ineffective assistance of counsel by failing to raise an appellate evidentiary issue to challenge the admission of Coleman's second police statement based on hearsay. During the post-conviction hearing, Coleman's appellate counsel testified that she chose not to challenge the admission of Coleman's second police statement on appeal because she did not believe that the statements made during that interview "were that egregious in comparison" to the admission of the note and the surveillance video that she had challenged on appeal. (Tr. Vol. 2 at 27). Appellate counsel also testified that her belief was that the issue "was not so obvious or . . . significant" to raise as an appellate issue. (Tr. Vol. 2 at 27).

[22] The post-conviction court concluded that Coleman, who had not specified what the alleged inadmissible hearsay had been, had failed to show deficient performance and that he had also failed to show prejudice because there had been "ample evidence to still convict" Coleman even without the police statement. (App. Vol. 2 at 156). We agree with the post-conviction court that Coleman has failed to meet his burden of showing his waiver-of-issues appellate counsel claim. Coleman has not shown that the issue that appellate counsel failed to raise was "clearly stronger" than the evidentiary issues raised on direct appeal or that the issue "would have been clearly more likely to result in reversal or an order for a new trial." *See Garrett*, 992 N.E.2d at 724.

[23] Lastly, we address Coleman's argument that his appellate counsel rendered ineffective assistance by failing to file a petition to transfer. Specifically, he asserts that appellate counsel's failure to file a petition to transfer of his direct appeal will result in a procedural default of any federal habeas corpus petition. The State responds, in relevant part, that Coleman's claim is "meritless" because he has "fail[ed] to identify any specific federal issue or claim that has been procedurally defaulted" and because his direct appeal issues were state law claims only. (State's Br. 35). We agree with the State.

[24] We recognize that under the "exhaustion doctrine, codified at 28 U.S.C. § 2254[,]" a habeas petitioner "must exhaust all state court remedies, including a request for discretionary review by a state court of last resort, in order to preserve his right to request federal habeas corpus relief." *Clemons v. State*, 967 N.E.2d 514, 521 (Ind. Ct. App. 2012), *trans. denied*, *cert. denied*. However, federal habeas corpus review is available only for violations of federal law. *See Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (holding that "only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts") (emphasis in original). The Supreme Court has explained that "federal habeas corpus relief does not lie for errors of state law." *Id.* (cleaned up). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991).

[25] Coleman does not argue that he has a specific federal claim or issue that has been procedurally defaulted. Indeed, he cannot show a federal claim where his

direct appeal involved state law claims (admission of evidence claims based on improper foundation and hearsay and a claim of inappropriate sentence under Indiana Appellate Rule 7(B)). Thus, Coleman has failed to show that he was prejudiced by appellate counsel's failure to file a transfer petition on his state law claims. *See Wilson*, 562 U.S. at 5 (explaining that federal habeas corpus relief does not lie for errors of state law). Accordingly, we affirm the post-conviction court's denial of post-conviction relief on this claim, but we also remand this case to the post-conviction court to correct its typographical error.

[26] Affirmed and remanded.

May, J., and Brown, J., concur.