

Leroy Burke, pro se, appeals from the denial of post-conviction relief, by which he sought to challenge his 2000 conviction and sentence for class A felony conspiracy to deal in cocaine. Burke presents two issues for our review:

1. Did the post-conviction court properly reject Burke's freestanding *Blakely* challenge?
2. Did the post-conviction court err in concluding that Burke received the effective assistance of appellate counsel?

We affirm.

The facts as set forth in this court's opinion on Burke's direct appeal follow:

In March of 2000, an undercover police officer in Kokomo bought cocaine from Brian Matthews. As the officer attempted to arrest Matthews, he fled into a house owned by Phillip DeVault. The officer followed Matthews into the house, where the officer saw marijuana and drug paraphernalia. Police obtained a warrant, searched the house, found cocaine and equipment used to cook and package it, and arrested DeVault.

Later in March of 2000, police purchased drugs from Oscar Rivera. Police searched Rivera's apartment and found \$1,600. After Rivera was arrested, Burke contacted Rivera's girlfriend, Barbara Butler, and asked her to get the money back from the police. Burke instructed Butler to tell the police the money was her tax refund. Butler notified a police officer who, posing as Butler's cousin, arranged to meet Burke. The officer gave Burke the money and then arrested him.

Matthews, DeVault, and Rivera entered into plea agreements that provided they would testify against Burke. Matthews testified he had been selling cocaine for Burke. DeVault testified that he drove Burke to Chicago to obtain cocaine and that Burke had cooked and packaged it at DeVault's house. Rivera testified he sold cocaine for Burke and had wired money to Burke as payment.

Burke v. State, No. 34A02-0101-CR-28, slip op. at 2-3 (Ind. Ct. App. Sept. 26, 2001).

The State charged Burke with class A felony conspiracy to commit dealing in cocaine, and following a jury trial, Burke was convicted as charged. On January 18, 2001, the trial

court sentenced Burke to fifty years imprisonment. On direct appeal, this court rejected Burke's challenge to the sufficiency of the evidence and therefore affirmed his conviction. On June 11, 2007, Burke filed a petition for post-conviction relief. The post-conviction court held a hearing on July 31, 2008, and issued its written findings of fact and conclusions of law denying relief on October 27, 2008.

In a post-conviction proceeding, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Wesley v. State*, 788 N.E.2d 1247 (Ind. 2003). When challenging the denial of post-conviction relief, the petitioner appeals a negative judgment, and in doing so faces a rigorous standard of review. *Wesley v. State*, 788 N.E.2d 1247. To prevail, the petitioner must convince this court that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.* We will disturb the post-conviction court's decision only where the evidence is without conflict and leads to but one conclusion and the post-conviction court reached the opposite conclusion. *Id.*

1.

Burke challenges the validity of his sentence pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), as a free-standing claim. It is well-established that *Blakely* does not apply retroactively. See *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005); *Fulkrod v. State*, 855 N.E.2d 1064 (Ind. Ct. App. 2006). Burke's case was final long before *Blakely* was decided, therefore, *Blakely* is inapplicable. The post-conviction court did not err in rejecting Burke's claim in this regard.

Burke argues that he received ineffective assistance of appellate counsel. We have set out the standard for reviewing claims of ineffective assistance of counsel as follows:

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. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. To meet the appropriate 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. Failure to satisfy either prong will cause the claim to fail.

Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)) (internal citations omitted), *trans. denied*.

In his petition for post-conviction relief, Burke argued that his appellate counsel was ineffective for failing to challenge the conspiracy elements instruction as an erroneous statement of the law. The instruction given to the jury, to which Burke's trial counsel objected, states:

To convict the Defendant of conspiracy to Commit Dealing in cocaine as a class B felony, the State must have proved each of the following elements beyond a reasonable doubt: That the defendant Leroy Burke, Jr., (1) agreed with William T. Graham, Brian Matthews, Dan Younger, Phillip De Vault, Oscar Rivera, and Barbara Butler to commit the crime of Dealing in Cocaine, to-wit: knowingly or intentionally delivering cocaine, pure or adulterated; (2) with the intent to commit the crime, and (3) defendant or William T. Graham, Brian Matthews, Dan Younger, Phillip De Vault, Oscar Rivera and Barbara Butler, performed one of the following overt acts in furtherance of the agreement: (a) Brian Matthews delivered cocaine to Detective Tom Hudson of the Kokomo Police Department; (b) Oscar Rivera delivered cocaine to Lt. Tom Kelley of the Kokomo Police Department; (c) Leroy Burke delivered cocaine in an amount exceeding three grams to Oscar Rivera, Phillip De Vault, and Brian Matthews for the purpose of resale; (d) Oscar Rivera and Barbara Butler

held U.S. currency, a portion of which was paid by Lt. Tom Kelley of the Kokomo Police Department to Oscar Rivera for cocaine for Leroy Burke; (e) William T. Graham went to 3820 Alamedia Boulevard in Kokomo, Howard County, Indiana, to retrieve the U.S. currency held by Oscar Rivera and Barbara Butler for Leroy Burke; (f) Leroy Burke made arrangement [sic] with Captain Michael Holsapple of the Kokomo Police Department, to accept delivery of the U.S. currency held by Oscar Rivera and Barbara Butler for Leroy Burke; (g) Leroy Burke accepted delivery from Captain Michael Holsapple of the Kokomo Police Department, of the U.S. currency which had been held for him by Oscar Rivera and Barbara Butler; and (h) Leroy Burke delivered said U.S. currency to William T. Graham.

Appendix at 45-46. Burke's sole challenge to this instruction is a claim related to the last two charged overt acts (i.e., (g) and (h)), which Burke contends are insufficient to prove a conspiracy. Specifically, Burke maintains that the jury could not convict him of conspiracy solely on the fact that he accepted or delivered U.S. currency without any indication in the instruction that the money was related to the sale of cocaine.

Burke misreads the instruction. The instruction read as a whole informed the jury that it had to find that Burke agreed with the identified co-conspirators to commit the crime of dealing in cocaine and that in furtherance of such agreement, "Burke [or one of the listed co-conspirators] performed one of the [listed] overt acts in furtherance of the agreement." *Id.* Thus, contrary to Burke's claim, the instruction does explicitly provide that the overt acts, including the ones Burke challenges regarding delivery and acceptance of U.S. currency, must have been performed in furtherance of the agreement to deal cocaine. The jury instruction properly set forth the findings the jury was required to make in order to find Burke guilty of conspiracy to commit dealing in cocaine. The State was not relieved of its burden of proof in any way. Having concluded that the jury instruction was proper, appellate

counsel was not ineffective for failing to raise a meritless challenge. The post-conviction court properly denied Burke relief.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.