

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.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

TROY A. WRIGHT
Pendleton, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TROY ANTHONY WRIGHT,)

Appellant-Defendant,)

vs.)

No. 45A04-0812-PC-745

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Judge
Cause No. 45G04-0610-PC-14

June 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Troy Anthony Wright, pro se, appeals the denial of his petition for post-conviction relief (PCR), by which he challenged his conviction for murder.

We affirm.

The underlying facts were set out as follows in an unpublished opinion affirming Wright's conviction upon direct appeal to this court:

In the afternoon of October 2, 2003, Toby Combs (Combs) and his Uncle Chris Fenderson (Fenderson) were selling compact discs (CD's) at a CITGO gas station (CITGO) located on the corner of Clark Road and 15th Avenue in Gary, Indiana. During this time, Martin Dix (Dix), with Wright as his passenger, parked his car on the street in front of the CITGO. As Wright got out of Dix's car, Combs walked across the street from the CITGO and entered a liquor store. After purchasing liquor, Combs was confronted by Wright at the doorway of the liquor store. Wright shot Combs approximately six times, then ran to Dix's car and they drove away. As a result of the shooting, Combs died at the scene. Fenderson witnessed the shooting, and notified a police officer driving by that the shooter drove away in a grey Monte Carlo. Shortly thereafter, Wright was apprehended.

On October 3, 2003, the State filed an information, charging Wright with murder, I.C. § 35-42-1-1. On January 10 through January 13, 2005, a jury trial was held. After the close of the evidence, the jury found Wright guilty as charged. On April 1, 2005, following a sentencing hearing, the trial court ordered Wright to serve an executed sentence of sixty-three years.

Wright v. State, No. 45A03-0505-CR-204, *slip op.* at 2-3 (Ind. Ct. App. 2006).

On October 6, 2006, Wright, pro se, filed a PCR petition challenging his conviction on grounds that he received ineffective assistance of trial and PCR counsel. On June 30, 2008, the post-conviction court denied the petition following a hearing, issuing findings of fact and conclusions of law. We reproduce the relevant findings and conclusions here:

6. On October 25, 2007, the petitioner returned to this court with a petition for post-conviction relief which alleges that he was denied effective assistance of counsel on his direct appeal; and denied a fair trial by an impartial jury, due to the following:

- A. Trial counsel was deficient for failing to conduct an adequate pretrial investigation in [sic] the facts and circumstances of his defense;
 - B. Trial counsel was deficient for failing to call a known and available witness for the defense, Benitta Thornton, who would have testified that the victim in this case had told her that he intended to shoot the respondent [sic], Troy Wright, at his first opportunity;
 - C. Trial counsel was deficient for failing to advise respondent [sic], Troy Wright, that the State had offered the respondent [sic] a plea agreement, but that trial counsel had rejected this offer without communicating the plea offer;
 - D. Appellate counsel's performance was deficient because he failed to advise the respondent [sic], Troy Wright, when the Indiana Court of Appeals issued a decision in the respondent's [sic] direct appeal; and
 - E. Trial counsel was deficient for failing to investigate allegations of foul play and juror misconduct during deliberations by alternate juror, Robert Bugs.
7. At the hearing on the petition for post-conviction relief, the court took judicial notice of its file in cause number 45G04-0310-MR-00009. The petitioner testified on his own behalf and also presented the testimony of his trial counsel, Paul Stacci. Trial counsel testified that he had fully interviewed Benitta Thornton and he discussed with the respondent [sic] whether she would testify. However, trial counsel was uncertain whether Ms. Thornton actually testified at trial. The petitioner testified that he remembered his trial counsel discussing with him whether the defense would call Benitta Thornton as a witness. The Record of Proceedings from the direct appeal was not offered into evidence. Benitta Thornton and attorneys Nick Thiros and Jeffrey Schlesinger were not called to testify.
8. The only evidence regarding the expected substance of Benitta Thornton's testimony came from petitioner himself. He testified that Ms. Thornton would have testified that the victim in this case, Toby Combs, had stated, "when I see him (the petitioner), I'm going to shoot him again." However, he testified that Ms. Thornton heard the victim make this statement in 1995, eight years prior to the shooting in this case.

9. A letter purportedly from Alternate Juror Robert Buggs, dated January 19, 2005, was offered into evidence, but was not accepted on the basis of lack of foundation and hearsay. The exhibit was accepted only as an offer to prove. Mr. Stacci testified, however, that he and co-counsel Nick Thiros met with Mr. Buggs and discussed this letter with him after they had received it. As Mr. Stacci testified, they thereafter declined to file a motion to set aside the verdict because there was no basis to file such a motion.

Conclusions of law:

* * * * *

4. Counsel's decision to not call Benitta Thornton to testify does not constitute ineffective assistance of counsel. Counsel interviewed the witness, discussed the testimony with the petitioner, and thereafter elected not to call her. While counsel could not recall the reason for that decision, it is clear that the statement was hearsay, and admissible in a self-defense case only if the petitioner first testified that he was aware of the victim's comment. Further, the victim's comment was stale, at best, having occurred eight years prior to the commission of the offense in this case and Benitta Thornton herself did not find the victim's comment to be credible. The decision not to call Ms. Thornton was a strategic decision, and the effect of her testimony would have been negligible. The decision not to call this witness did not effect [sic] the outcome of the trial.

* * * * *

7. The alternate juror was not called to testify, and the hearsay statements contained in the letter purportedly from this juror do not fall within the areas of inquiry allowed by the rules. Counsel correctly determined that there was no basis for filing a motion to set aside the verdict.

* * * * *

9. The letter allegedly from the alternate juror was known to the petitioner at the time of his direct appeal, but was not included in the appeal. As indicated above, there was no basis for including the issue in the appeal, and this court will find that appellate counsel made the correct strategic decision not to include it, despite the petitioner's

failure to question appellate counsel at the post-conviction relief hearing about his decision.

Appellant's Appendix at 34-36. Wright appeals the denial of his PCR petition.

We note at the outset that in a post-conviction proceeding, the petitioner bears the burden of establishing his claims for relief by a preponderance of the evidence. *Overstreet v. State*, 877 N.E.2d 144 (Ind. 2007), *cert. denied*, 129 S.Ct. 458 (2008). When appealing from the denial of a PCR petition, the petitioner stands in the position of one appealing from a negative judgment and therefore must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* We further observe that the post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *J.J. v. State*, 858 N.E.2d 244 (Ind. Ct. App. 2006).

Wright's allegations of error consist of claims that his counsel at various stages of this case rendered ineffective assistance. In order to prevail, Wright must demonstrate the existence of the two components of that claim, as established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Creekmore v. State*, 853 N.E.2d 523 (Ind. Ct. App. 2006), *clarified on reh'g*, 858 N.E.2d 230. He must first establish that counsel's performance was deficient, i.e., fell below an objective standard of reasonableness and that the errors in representation were so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment. *Id.*

A showing of deficient performance alone is not enough, however, to prevail on a claim of ineffective assistance of counsel. The petitioner must also show that the deficient performance prejudiced the defense. *Id.* Because a petitioner must prove both elements, the

failure to prove either element defeats the claim. *See Young v. State*, 746 N.E.2d 920 (Ind. 2001) (holding that because the two elements of *Strickland* are separate and independent inquiries, the court may dispose of the claim on the ground of lack of sufficient prejudice if it is easier).

Wright's specific claims of ineffective assistance are as follows: (1) Trial counsel failed to call a witness who would have purportedly supported his claim of self-defense; (2) trial counsel failed to "explore allegations of foul play and juror misconduct . . . by seeking a hearing regarding same", *Appellant's Brief* at 8; (3) at the PCR hearing, counsel failed to call Thornton, the alleged self-defense witness and Buggs, source of the juror misconduct claim, thus denying Wright a fair hearing.

We begin with Wright's claim that trial counsel rendered ineffective assistance in failing to call Thornton, who allegedly overheard the victim say that he would kill Wright when he saw Wright again. We first note that Wright's argument on this point does not include a claim that counsel's failure to call Thornton was inadvertent or the product of a lack of diligence, nor could it. Wright's appellate appendix reveals that trial counsel interviewed Thornton several times, including as late as the day before trial. Trial counsel testified at the PCR hearing that he could not recall why he chose not to call Thornton, or indeed whether he actually did or did not call her at trial. It appears, then, that even assuming counsel did not call Thornton, it was a deliberate, strategic decision.

A defendant faces a daunting task in challenging matters of strategy or tactics. "Counsel is afforded 'considerable discretion' in choosing strategy and tactics." *State v.*

Miller, 771 N.E.2d 1284, 1288 (Ind. Ct. App. 2002) (quoting *Martin v. State*, 760 N.E.2d 597, 600 (Ind. 2002)), *trans. denied*. When evaluating claims of defective strategy rising to the level of ineffective assistance, we “strongly presume” counsel provided adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *State v. Miller*, 771 N.E.2d at 1288. Moreover, we have indicated that, generally, “deliberate choices made by attorneys for tactical or strategic reasons do not establish ineffective assistance of counsel, even where such choices are subject to criticism or ultimately proved to be detrimental to the defendant.” *Id.* We have adopted this view upon our recognition that the best and most experienced criminal defense attorneys may disagree on matters of strategy. *See Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2003). Nevertheless, strategic and tactical decisions are not beyond review. “A strategic decision may be deemed ineffective assistance of counsel if it ‘is so deficient or unreasonable as to fall outside of the objective standard of reasonableness.’” *State v. Miller*, 771 N.E.2d at 1288 (quoting *Potter v. State*, 684 N.E.2d 1127, 1133 (Ind. 1997)). We have determined that reversal on this basis “is reserved only for performance that may be characterized as ‘egregious’”. *Id.* (quoting *Conrad v. State*, 747 N.E.2d 575, 586 (Ind. Ct. App. 2001), *trans. denied*). The appellate materials provide no basis upon which to support this determination.

We find no indication that Thornton confirmed Wright’s claim that she overheard the victim say he would kill Wright. Moreover, even if she appeared and testified that she had heard such an utterance, that statement was allegedly made approximately eight *years* before

the victim was murdered. In addition, we are presented with no means by which to evaluate the prejudice Wright allegedly suffered thereby because we have not been provided with a transcript of the trial. As our Supreme Court has previously observed, “[i]t is practically impossible to gauge the performance of trial counsel without the trial record....” *Tapia v. State*, 753 N.E.2d 581, 588 n. 10 (Ind. 2001); *see also Bahm v. State*, 789 N.E.2d 50 (Ind. Ct. App. 2003), *clarified on reh’g on other grounds*, 794 N.E.2d 444, *trans. denied*. Whether a defendant received ineffective assistance of counsel is a highly fact-sensitive determination. Without a record to evaluate the prejudice element of Wright’s claim of ineffective assistance of counsel, we are forced to conclude that he has not met his burden of proving that he was prejudiced by his trial counsel’s alleged failure to call Thornton as a witness. Wright therefore failed to prove that he received ineffective assistance of trial counsel.

Wright’s second claim of ineffective assistance of counsel is that trial counsel failed to act upon allegations of what Wright characterizes as “foul play and juror misconduct”. *Appellant’s Appendix* at 8. As was true with respect to the decision not to call Thornton as a witness, trial counsel was aware of this matter and questioned the alternate juror about it before deciding not to act upon the information. As a matter of deliberate choice, this decision provides grounds for a finding of ineffective assistance of counsel only if it can be characterized as egregious. *State v. Miller*, 771 N.E.2d 1284.

The handwritten summary of alleged juror misconduct and irregularities submitted by Buggs consists of a laundry list of Buggs’s criticisms of the jury during deliberation. It begins with the complaint that “there was not one Black male juror” on the panel, *Exhibit*

Binder, Defendant’s Exhibit 1, page 1 of 6, and ends with the observation, “All the testimony & evidence presented during the trial was mute [sic] – Troy admitted he killed Toby. How and where he was shot did not disprove self defense.” *Id.* at 6 of 6. In-between, Buggs cited with disapproval certain comments made by other jurors and set forth his analysis of the evidence, supporting his (Buggs’s) conclusion that the jury’s guilty verdict was incorrect. We have reviewed Buggs’s list of complaints and find in it nothing that would render trial counsel’s decision not to pursue the matter “so deficient or unreasonable as to fall outside of the objective standard of reasonableness”, *State v. Miller*, 771 N.E.2d at 1288 (quoting *Potter v. State*, 684 N.E.2d at 1133) or egregious. *Id.* Wright has failed to demonstrate that he received ineffective assistance of trial counsel in this regard.

Finally, Wright claims PCR counsel rendered ineffective assistance of counsel by failing to call Thornton and Buggs to substantiate Wright’s claims of error, and by failing to introduce the trial record at the PCR hearing, thereby depriving him of a procedurally fair post-conviction hearing.

Our Supreme Court has discussed at length the standard by which post-conviction counsel’s performance is measured. We reproduce that discussion *in toto* for Wright’s benefit:

This Court declared its approach to claims about performance by a post-conviction lawyer in *Baum v. State*, 533 N.E.2d 1200 (Ind. 1989). We observed that neither the Sixth Amendment of the U.S. Constitution nor article 1, section 13 of the Indiana Constitution guarantee the right to counsel in post-conviction proceedings, and explicitly declined to apply the well-known standard for trial and appellate counsel of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Baum* Court noted that post-conviction pleadings are not regarded as criminal actions and need not be

conducted under the standards followed in them. *Id.* We held unanimously that a claim of defective performance “poses no cognizable grounds for post-conviction relief” and that to recognize such a claim would sanction avoidance of legitimate defenses and constitute an abuse of the post-conviction remedy. [*Baum v. State*, 553 N.E.2d] at 1200-01.

We therefore adopted a standard based on principles inherent in protecting due course of law--one that inquires “if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court.” *Id.* at 1201. As Justice DeBruler explained later, speaking for a majority of us, it is “not a ground for post-conviction relief that petitioner’s counsel in a prior post-conviction proceeding did not provide adequate legal assistance,” but such a contention could provide a prisoner with a basis for replying to a state claim of prior adjudication or abuse of process. *Hendrix v. State*, 557 N.E.2d 1012, 1014 (Ind. 1990) (DeBruler, J., concurring).

The *Baum* approach bears resemblance to that followed in the federal system. The habeas provisions of the U.S. Code applicable to federal prisoners recognize the availability of successive collateral proceedings but authorize the courts of appeal to permit successive proceedings only in instances of newly discovered evidence of innocence or new rules of constitutional law declared retroactive by the U.S. Supreme Court. 28 U.S.C. § 2255 (2000). Thus, the Second Circuit has held that a petitioner may obtain relief from the adjudication of his habeas petition only in the “extraordinary circumstances” that “his lawyer abandoned the case and prevented the client from being heard, either through counsel or pro se.” *Harris v. United States*, 367 F.3d 74, 77 (2nd Cir. 2004).

Graves v. State, 823 N.E.2d 1193, 1196 (Ind. 2005) (footnotes and some citations omitted).

Applying the standard enunciated above in *Graves*, we observe that Wright and his post-conviction counsel appeared at the PCR hearing and presented two witnesses and argument in support of Wright’s claims for relief. Thus, counsel certainly did not abandon Wright or prevent him from being heard. *See Graves v. State*, 823 N.E.2d 1193. Wright has failed to demonstrate that post-conviction counsel rendered ineffective assistance of counsel.

Judgment affirmed.

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