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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL A. DAVIS,)
)
Appellant-Petitioner,)
)
vs.) No. 33A05-0812-PC-740
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE HENRY CIRCUIT COURT
The Honorable Jay L. Toney, Special Judge
Cause No. 33C01-0712-PC-1

July 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Michael A. Davis appeals from the post-conviction court's denial of his petition for post-conviction relief. Davis raises two issues for our review:

1. Whether the dismissal and subsequent re-filing of identical charges against Davis denied him his right to a speedy trial.
2. Whether he was denied the effective assistance of trial counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 25, 2006, the State charged Davis by information with Dealing in a Schedule II Controlled Substance, as a Class B felony, and Maintaining a Common Nuisance, as a Class D felony, in Cause No. 33C01-0604-FB-6 ("FB-6"). On May 1, Robert E. Roberts of the Henry County Public Defender office entered an appearance on behalf of Davis. Subsequently, the State requested enhanced sentencing of Davis as an habitual offender.

On May 22, counsel for Davis filed a motion for speedy trial. In response, the court advanced the trial date to June 26. But on June 21, the State filed a motion to dismiss the charging information without prejudice because the State did "not wish to pursue criminal charges at [that] time." Appellant's App. at 329. On the same date, the trial court granted that motion and dismissed the charges.

On August 10, 2006, the State again charged Davis by information with dealing in a Schedule II controlled substance, as a Class B felony, and maintaining a common nuisance, as a Class D felony, in Cause No. 33C01-0608-FB-13 ("FB-13"). On the same date, the State also filed a request for enhanced sentencing of Davis as an habitual

offender. But on August 15, the State moved to dismiss the habitual offender petition, which the court subsequently granted, and simultaneously filed an information alleging Davis to be an habitual controlled substance offender. And on August 23, Davis filed a pro se motion for a speedy trial. In response, the trial court advanced the jury trial to October 30.

On August 28, Roberts filed an appearance on behalf of Davis. On October 5, Roberts' appearance was withdrawn, and Chief Public Defender Mark Stamper entered a "temporary" appearance on behalf of Davis. Appellant's App. at 164. On October 20, the court granted a motion to withdraw Stamper's appearance and appointed deputy public defender Louis Denney to represent Davis. On October 25, the court set a pretrial evidentiary hearing for November 8, vacated the October 30 trial date, and released Davis from custody.

After several continuances, the court held a jury trial March 5, 2007. On that date, the State moved to dismiss the count charging Davis with maintaining a common nuisance, and the court proceeded with jury selection. The trial resumed on March 12 for further jury selection. But before the proceedings resumed, Davis pleaded guilty to dealing in a Schedule II controlled substance, as a Class B felony. The court took the guilty plea under advisement and set the matter for contested sentencing on March 26. When Davis failed to appear for sentencing, the court issued an arrest warrant and continued the sentencing hearing.

On April 9, when the sentencing hearing resumed, Davis orally moved to withdraw his guilty plea. The court granted Davis five days to reduce his motion to

writing. Davis failed to file a written motion, and on April 17 the court again set the matter for sentencing on April 23. On that date, Davis filed a written motion to withdraw his guilty plea. The court gave the State thirty days to respond to that motion, and the State filed its response on May 23. On May 25, the court denied Davis' motion to withdraw his plea. On June 25, the court sentenced Davis to ten years, with credit for time served in FB-6 and FB-13. The court also granted the State's oral motion to dismiss the habitual controlled substance offender charge.

On July 13, 2007, Davis initiated a direct appeal, and on September 25 he filed a pro se petition for post-conviction relief. On November 7, Davis filed a motion to dismiss his appeal. This court denied that motion. On November 29, Davis filed an amended motion to dismiss the appeal, which the court granted with prejudice.

On February 15, 2008, the State filed its motion for summary disposition of Davis' petition for post-conviction relief. On February 19, Davis filed his motion for demand of judgment. On August 25, the post-conviction court held an evidentiary hearing on Davis' petition. And on October 21, the post-conviction court entered its findings of fact and conclusions thereon, denying post-conviction relief. Davis now appeals.

DISCUSSION AND DECISION

Standard of Review

Davis appeals from the post-conviction court's denial of his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Saylor v. State, 765 N.E.2d 535, 547 (Ind. 2002). In reviewing the judgment

of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting the judgment. Conner v. State, 711 N.E.2d 1238, 1245 (Ind. 1999). The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Saylor, 765 N.E.2d at 547. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

Issue One: Dismissal of Charges

Davis first contends that the trial court committed “reversible error in holding that the [State’s] dismissal and re[-]filing of charges by information to circumvent Davis’s speedy trial right was proper[.]” Appellant’s Brief at 8. He further asserts that “[i]t was fundamental error for the State to deprive [him] of his successful procedural challenge” regarding the denial of his right to a speedy trial. Id. at 11. The State counters that Davis has waived this issue for our review by not raising it on direct appeal. It is undisputed that this issue was available to him for appeal.¹ We agree with the State that Davis has waived his claim for relief.

In Lindsey v. State, 888 N.E.2d 319 (Ind. Ct. App 2008), trans. denied, we addressed the applicability of a “free standing” claim of fundamental error in a post-conviction proceeding:

¹ Davis also alleges that he was denied the effective assistance of counsel with regard to the dismissal and re-filing of charges. We address below his claims regarding the effective assistance of counsel.

“The post-conviction relief process is also open to the ‘raising [of] issues not known at the time of the original trial and appeal or for some reason not available to the defendant at that time.’ Kimble v. State, (1983) Ind., 451 N.E.2d 302, 303-304. It is not, however, open to the raising of issues available to a petitioner upon his original appeal. Brown v. State, (1974) 261 Ind. 619, 308 N.E.2d 699. Errors not assigned at the trial level nor argued on direct appeal are deemed waived in the context of post-conviction relief. Frith v. State, (1983) Ind., 452 N.E.2d 930; Howland v. State, (1982) Ind., 442 N.E.2d 1081. ‘To unreservedly hold the door open for appellate review under the post conviction remedy rules, regardless of the circumstances which preceded, would perforce characterize post conviction relief as some sort of “super-appeal” contrary to its intended function.’ Langley v. State, (1971) 256 Ind. 199, 210, 267 N.E.2d 538, 544[, overruled on other grounds].

We recently stated, by way of dicta, that a claim of fundamental error can be raised in a post-conviction petition regardless of whether such issue was waived in the direct appeal process. This Court asserted ‘it is through a showing of fundamental error that the post conviction court can bypass an obstacle to reaching the merits of a free standing claim erected by a prior procedural default.’ Snider v. State, (1984) Ind., 468 N.E.2d 1037, 1039.

An error characterized as fundamental is one which is ‘blatant’ and which if not rectified would deny the petitioner ‘fundamental due process.’ Terry v. State, (1984) Ind., 465 N.E.2d 1085; Johnson v. State, (1979) 271 Ind. 145, 390 N.E.2d 1005. A claim characterized solely as fundamental error is available only on appeal and is raised when there has been a failure to assign an error which is so egregious that it must be decided by the appellate court because of its fundamental nature.

In clarification of the dicta in Snider, supra, any issue set forth in a post-conviction petition must be raised within the purview of the post-conviction rules, e.g., deprivation of the Sixth Amendment right to effective assistance of counsel, or be an issue demonstrably unavailable to the petitioner at the time of his trial and direct appeal. Therefore, in a post-conviction petition an allegation of the denial of the petitioner’s due process rights may not be raised in the ‘free standing’ form of an allegation of fundamental error.”

888 N.E.2d at 323 (quoting Bailey v. State, 472 N.E.2d 1260, 1262-63 (Ind. 1985)) (first alteration original).

In Canaan v. State, 683 N.E.2d 227 (Ind. 1997), cert. denied, 524 U.S. 906 (1998),

the court noted as follows:

Canaan seeks to avoid application of the waiver doctrine by arguing that it does not apply here because “these challenges . . . raise fundamental issues.” As such, he makes a bold assertion of the fundamental error doctrine. It is true that we have acknowledged an exception to the waiver rule in circumstances where the trial court committed “fundamental error.” But we view this exception as an extremely narrow one, available only “when the record reveals clearly blatant violations of basic and elementary principles [of due process], and the harm or potential for harm cannot be denied.” Warriner v. State, 435 N.E.2d 562, 563 (Ind. 1982). While concerns over due process do sometimes merit invocation of a fundamental error exception to the contemporaneous objection rule on direct appeal, we think its availability as an exception to the waiver rule in post-conviction proceedings is generally limited to those circumstances we set forth in Bailey v. State, 472 N.E.2d 1260, 1263 (Ind. 1985): “Deprivation of the Sixth Amendment right to effective assistance of counsel, or . . . an issue demonstrably unavailable to the petitioner at the time of his [or her] trial and direct appeal.” Here, as noted in the text, Canaan did not raise these issues before the trial, direct appeal, or post-conviction courts; he raises them for the first time on appeal from the denial of post-conviction relief. We are unable to conclude that these issues amount to fundamental error (which must be “blatant”) and when none of trial counsel, direct appeal counsel, or post-conviction counsel in this case identified them as such.

683 N.E.2d at 235 n.6 (alterations original, citations to the record omitted). Since Canaan, both our Supreme Court and this court have repeatedly recognized that “[t]he fundamental error doctrine is not applicable in post-conviction proceedings” absent the circumstances referenced in Bailey. Boesch v. State, 778 N.E.2d 1276, 1281 (Ind. 2002); see, e.g., Conner v. State, 829 N.E.2d 21, 25 (Ind. 2005); Edington v. State, 806 N.E.2d 310, 311 (Ind. 2004) (holding that the Court of Appeals “was wrong to grant relief on Edington’s fundamental error claim” in his post-conviction appeal); Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002); Carew v. State, 817 N.E.2d 281, 286 n.4 (Ind. Ct. App.

2004), trans. denied; Dawson v. State, 810 N.E.2d 1165, 1172 (Ind. Ct. App. 2004), trans. denied; Cowherd v. State, 791 N.E.2d 833, 837-38 (Ind. Ct. App. 2003), trans. denied.

Here, Davis argues that he was denied his constitutional right to a speedy trial because the State dismissed and then re-filed the charges against him. But Davis did not pursue that argument on direct appeal. Indeed, Davis did not pursue a direct appeal. Instead, he presents the issue in post-conviction proceedings for review, and, without support or explanation, refers to the issue as one of fundamental error. The trial court found that Davis' petition was "not barred by . . . waiver, and that the Petition should be decided upon the merits." Appellant's Brief at 22. To the extent the post-conviction court's conclusion refers to waiver by procedural default, the court erred.²

As discussed above, the relevant law on this issue was stated by our Supreme Court in Bailey and, more recently, in Canaan. A defendant in a post-conviction proceeding may allege a claim of fundamental error only when asserting either (1) "[d]eprivation of the Sixth Amendment right to effective assistance of counsel," or (2) "an issue demonstrably unavailable to the petitioner at the time of his [or her] trial and direct appeal." Canaan, 683 N.E.2d at 235 n.6 (quoting Bailey, 472 N.E.2d at 1263) (second alteration original). Davis has not shown that his claim regarding the dismissal

² We distinguish between waiver as an affirmative defense and a discretionary judicial doctrine that forecloses an issue on appeal. Waiver is an affirmative defense governed by Indiana Trial Rule 8(C), and it is only applicable in circumstances where the party asserting waiver has argued such defense before the lower court. Strong v. State, 820 N.E.2d 688, 691 n.1 (Ind. Ct. App. 2005), trans. denied. By contrast, the latter form of waiver, which is more appropriately described as "procedural default" or "forfeiture," is a doctrine of judicial administration whereby appellate courts may sua sponte find an issue foreclosed under a variety of circumstances in which a party has failed to take the necessary steps to preserve the issue. Id.

and re-filing of charges was unavailable to him for direct appeal, and we address the effectiveness of counsel below. Accordingly, Davis has forfeited this claim of error.

Issue Two: Ineffective Assistance of Counsel

Davis also contends that he was denied the effective assistance of counsel. There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption. Gibson v. State, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. To make a successful ineffective assistance claim, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the lack of reasonable representation prejudiced him. Mays v. State, 719 N.E.2d 1263, 1265 (Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), trans. denied. Even if a defendant establishes that his attorney's acts or omissions were outside the wide range of competent professional assistance, he must also establish that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. See Steele v. State, 536 N.E.2d 292, 293 (Ind. 1989). A defendant who pleads guilty must show a reasonable probability of acquittal in order to prevail in a post-conviction attack on the conviction based on a claim of ineffective assistance of counsel. Segura v. State, 749 N.E.2d 496, 503 (Ind. 2001).

Here, Davis alleges that his trial counsel did not "act in a professional manner to preserve his right to a fair trial and his right to a speedy trial, or object to a hearing for

which he never had been notified, or object to the improper dismissal and re[-]filing of informations solely to evade his right to a speedy trial.” Appellant’s Brief at 11. He also maintains that his various trial counsels’ “failure to properly investigate Davis’s defense and know basic information about the State’s witness whose testimony was bought and promised to be paid for the prosecution effectively deprived Davis of any defense whatever.” Id. at 13. He states in summary that he was “compelled to plead guilty in a hearing that he does not even remember having participated in before a biased judge against whom he had obtained removal previously[.]”³ Id. at 18.

Davis lists numerous ways in which his trial counsels’ performances were allegedly deficient.⁴ But Davis in no way demonstrates a reasonable probability that, but for counsels’ unprofessional errors, Davis would have been acquitted. See Segura, 749 N.E.2d 496, 503; Steele, 536 N.E.2d at 293. Because Davis has failed to demonstrate the second or prejudice prong of the Strickland test, his claim of ineffective assistance must fail. We conclude that the trial court did not err when it denied Davis’ petition for post-conviction relief.

Conclusion

Davis contends that he is entitled to post-conviction relief because the State dismissed and subsequently re-filed charges against him for the sole purpose of

³ Davis also contends that Ind. Criminal Rule 13 barred the trial judge from having acted as judge in his case. But, aside from the single reference to Indiana Criminal Rule 13, Davis does not support that argument with citation to supporting authority or cogent analysis. As such, the argument is waived. See Ind. Appellate Rule 46(A)(8)(a).

⁴ Davis also contends that his trial counsels’ performances were “per se ineffective.” Appellant’s Brief at 11. But, again, Davis has not supported that contention with citation to supporting authority or cogent analysis. Therefore, again, the argument is waived. App. R. 46(A)(8)(a).

circumventing Davis' right to a speedy trial. That claim was available to him on direct appeal, but he did not pursue an appeal. As a result, that claim is not properly before us, and the post-conviction court erred when it concluded that the claim should be decided on the merits. Davis also contends that he was denied the effective assistance of trial counsel. But, Davis has not shown that, but for the alleged unprofessional representation, he would have been acquitted. Therefore, Davis' ineffective assistance claim must fail. Davis is not entitled to post-conviction relief.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.