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IN THE
COURT OF APPEALS OF INDIANA

ASTER WILSON, III,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A04-0903-PC-141
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0601-PC-10

September 2, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Aster Wilson, III appeals the denial of his petition for post-conviction relief. We affirm.

Issue

Wilson raises two issues, which we consolidate and restate as whether he received ineffective assistance of trial counsel.

Facts

On November 20, 2002, Wilson was convicted of Class B felony aiding robbery and being an habitual offender. On December 17, 2002, Wilson was sentenced to forty-five years in the Department of Correction. This court affirmed his conviction on direct appeal. See Aster Wilson, III v. State, No. 02-A03-0302-CR-48 (Ind. Ct. App. July 8, 2003). The facts surrounding Wilson's conviction were summarized by this court on direct appeal:

> On June 9, 2001, Wilson drove his friend Jennifer Dray to Scott's grocery store in Ft. Wayne. Wilson stayed in the car while Dray shopped. Another customer, Allissa Guenin, accompanied by her four-year-old daughter, exited Scott's and began walking towards her car when she had finished shopping. Guenin's purse was sitting in the empty child seat portion of her shopping cart as she pushed it through the parking lot, and her daughter was walking next to her.
>
> Suddenly, Dray came up from behind Guenin, reached over Guenin's daughter, and grabbed Guenin's purse from the shopping cart. Dray then ran towards Wilson's car, got in, and yelled at Wilson, "Go, go, just go." Wilson asked Dray, "What's up?" And Dray responded "Just go." But before Wilson drove away, Guenin had caught up to Dray, reached

> in the open passenger window of the car, and grabbed her purse, which was sitting on Dray's lap. Before Guenin could pull her arm out of the car with her purse, Wilson began to drive away, forcing Guenin to drop the purse back into Dray's lap. But Guenin's arm was caught on the door's locking mechanism, and Guenin screamed at Wilson to stop the car. When Wilson did not stop the car, Guenin tripped and fell trying to pull her arm out of the car window, and she hit her head on the pavement. While Guenin was on the ground, one of the back wheels of the car ran over her right leg. Wilson and Dray then left the scene.

Id.

At trial, Dray testified that Wilson did not know she had taken Guenin's purse. Detective Bender, however, testified that after being properly advised of his rights, Wilson stated that he told Dray to give Guenin back her purse before driving off.

On January 17, 2006, Wilson filed a pro se petition for post-conviction relief. The Indiana Public Defender entered an appearance on March 13, 2006, and filed a motion for leave to amend Wilson's pro se petition on May 19, 2008. An evidentiary hearing was held in September 2008, and on January 2, 2009, the post-conviction court denied Wilson's petition for relief. Wilson now appeals.

Analysis

Wilson appeals from the denial of post-conviction relief. Because post-conviction proceedings are civil proceedings, a petitioner must establish his claims by a preponderance of the evidence. Kien v State, 866 N.E.2d 377, 381 (Ind. Ct. App. 2007), trans. denied. When appealing the denial of post-conviction relief, a petitioner faces a rigorous standard of review. Id. To prevail, "the petitioner must establish that the

evidence is uncontradicted and leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Id. "The reviewing court may consider only the evidence and reasonable inferences supporting the judgment of the post-conviction court." Id. Although we show no deference to the post-conviction court's conclusions of law, we accept its factual findings unless they are clearly erroneous. Id.

Wilson argues he received ineffective assistance of counsel because trial counsel failed to tender an instruction on theft as a lesser-included offense of robbery. Claims of ineffective assistance of counsel are reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). To prevail, a claimant must first demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms. Taylor v. State, 882 N.E.2d 777, 781 (Ind. Ct. App. 2008). Second, the claimant must demonstrate that the deficient performance resulted in prejudice. Id. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. "The failure to establish either prong will cause the claim to fail." Vermillion v. State, 719 N.E.2d 1201, 1208 (Ind. 1999). Thus, an ineffective

assistance claim may be disposed of on the ground of lack of prejudice alone. Strickland, 466 U.S. at 670, 104 S. Ct. at 2069.

Wilson fails to establish he was prejudiced by counsel's performance in failing to tender a theft instruction. To prevail, Wilson must show that but for counsel's failure to tender the instruction, there is a reasonable probability that he would have been convicted of theft and not robbery. Wilson contends he was prejudiced because counsel's failure to tender the instruction deprived the jury the option of convicting him of the lesser-included offense. Here, however, there was no serious evidentiary dispute whereby the jury could have concluded that a theft, rather than a robbery, occurred. See Hauk v. State, 729 N.E.2d 994, 998 (Ind. 2000). As the post-conviction court noted, if Wilson knew Dray had taken Guenin's purse when she entered the car, the jury could not have found that he aided only in a theft because the evidence established that force was used to perfect the taking.[1] Conversely, had the jury accepted Dray's rendition of the event, i.e., that Wilson had no knowledge of the taking, it could not have found Wilson guilty of aiding either a theft or a robbery. See Ind. Code § 35-41-2-4. We cannot say, therefore, that there is a reasonable probability the result would have been different had the jury been instructed on theft, since it could not have found that Wilson aided in a theft but not a robbery. Thus, we conclude Wilson suffered no prejudice from the failure to tender a theft instruction.

[1] The force that occurred was Wilson's driving off while Guenin had her hand in the car, struggling with Dray for possession of the purse.

Wilson also argues that the post-conviction court erred in rejecting his ineffective assistance claim because trial counsel did not inform him of a plea offer. We disagree. The record reveals that during the post-conviction evidentiary hearing, trial counsel testified that he informed and discussed the plea offer with Wilson. Moreover, as Wilson acknowledges, "counsel's handwritten notation on [the plea agreement] supports counsel's testimony that counsel discussed the plea with his client and that the offer was refused." Appellant's Br. p. 13. Although Wilson testified otherwise, the record reflects that the post-conviction court made a factual and credibility judgment against Wilson, which we will neither reweigh nor reassess. See Willoughby v. State, 792 N.E.2d 560, 562 (Ind. Ct. App. 2003). Because there was evidence supporting the post-conviction court's conclusion, we cannot say that it erred in rejecting Wilson's claim. See Kien, 866 N.E.2d at 381.[2]

Conclusion

Wilson was not denied effective assistance of counsel by trial counsel's failure to tender a jury instruction on theft, and the post-conviction court did not err in concluding that trial counsel informed Wilson of the plea offer. We affirm.

Affirmed.

NAJAM, J., and KIRSCH, J., concur.

[2] We need not address the post-conviction court's alternative basis for rejecting Wilson's claim.