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IN THE
COURT OF APPEALS OF INDIANA

ALVIN CHRISTMAS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 20A03-0903-PC-102
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0404-PC-4

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Alvin Christmas was convicted of Murder and Robbery Resulting in Serious Bodily Injury following a jury trial. On direct appeal, this court affirmed his convictions. See Christmas v. State, No. 20A03-0304-CR-116 (Ind. Ct. App. December 8, 2003) ("Christmas I"). Christmas subsequently petitioned for post-conviction relief, which the post-conviction court denied. He now appeals, challenging the post-conviction court's judgment, and he raises the following restated issues for our review:

1. Whether the post-conviction court abused its discretion when it denied his discovery requests.

2. Whether he was denied the effective assistance of trial counsel.

3. Whether he was denied the effective assistance of appellate counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

In Christmas I, we set out the facts and procedural history as follows:

> On the night of August 24, to August 25, 2001, Cassie Gibson (Gibson) contacted Christmas to buy some crack cocaine from him. They agreed to meet in the parking lot of the Elkhart General Hospital emergency room where she planned to take her friend, Autumn Attkisson (Attkisson), who needed emergency care. When Gibson arrived at the parking lot, Christmas was already there, waiting with his girlfriend, Regina McCain (McCain). Gibson got into the back seat of Christmas' maroon-colored Chrysler and asked him for some crack cocaine on credit. Since she already owed Christmas $60, he refused. Gibson then asked Christmas to drive her to Valente Ramirez' (Valente), who was living on Washington Street, in Elkhart, Indiana, with his brother. Valente regularly paid her as a prostitute, and she was hoping to get some money from him to pay her debt to Christmas and to purchase more crack cocaine.
>
> On the way to Valente's, Gibson informed Christmas that she would just enter the house, take his wallet, and leave again. Before arriving at the apartment, Christmas let Gibson smoke some crack cocaine. Upon their

arrival at Valente's residence, Christmas parked in the parking lot, and Gibson went up to the apartment. After knocking on the door, Valente let her in. Valente's brother, Jorge Ramirez (Jorge) was asleep on the living room floor. When Valente went into the bathroom, Gibson took the wallet and left the apartment. After returning to Christmas' car, Gibson saw that Valente's wallet only contained $20; nevertheless, she told Christmas that the wallet was empty. Christmas became angry, so Gibson informed him that Jorge's wallet probably contained a lot of money if he was interested in making money. Gibson offered to return to the apartment, and after having sex with Valente, she would call Christmas to let him in.

After Gibson went back to the apartment, Christmas drove to his home. McCain remained in the car while Christmas went into his apartment. When he returned to the car, he put something in the trunk, and told McCain to drive back to Valente's house on Washington Street. In the meanwhile, Gibson had sex with Valente on the dining room floor. After they finished, Valente woke up Jorge and retrieved twenty dollars from him, which Valente handed to Gibson. After she received the money, Gibson phoned Christmas to tell him that she would let him in. As soon as she saw Christmas on the front porch, Gibson exited and Christmas entered Valente's apartment. Christmas closed the front door.

Inside the apartment, Christmas ordered Valente to lay on the ground while he walked towards the area where Jorge was sleeping. After ordering Jorge to get up, Christmas shot him in the head. Jorge moaned and fell on his side; he later died of his injuries. Christmas waved the gun while walking. After Christmas approached Valente, Valente got up from the floor and lunged at Christmas, who shot Valente in the hand and forehead. Valente then fled the house.

Upon hearing gunshots, Gibson ran back to the car. When Christmas returned to the car, he was carrying a brown wallet and a gun in his right hand. Getting in the passenger's side of the car, Christmas divided up the money found in the wallet and gave Gibson $120. Gibson paid off her debt to Christmas and purchased another twenty dollars worth of crack cocaine. McCain drove Gibson to a friend's house where she threw away the wallet.

On January 25, 2002, the State charged Christmas with Count I, murder, a Class A felony, I.C. § 35-42-1-1; and Count II, robbery resulting in serious bodily injury, a Class A felony, I.C. § 35-42-5-1. Based on two prior felony convictions, the State charged him as a habitual offender pursuant to I.C. § 35-50-2-8.

> On December 2, through December 6, 2002, a jury trial was held in Elkhart Circuit Court. At the conclusion of the jury trial, the jury found Christmas guilty on Counts I and II, and during a bifurcated proceeding on the same day, adjudicated him to be a habitual offender. On December 26, 2002, the trial court conducted a sentencing hearing. At the sentencing hearing, the trial court sentenced Christmas to sixty[-]five years on Count I, murder; fifty years on Count II, robbery resulting in serious bodily injury, and enhanced this sentence by thirty years for his habitual offender status, with all sentences to run consecutively. The trial court ordered Christmas to serve his sentence at the Indiana Department of Correction.

This court affirmed Christmas' convictions on direct appeal. In his direct appeal, Christmas raised six issues: (1) whether sufficient evidence supported his convictions; (2) whether the State's examinations of two witnesses constituted evidentiary harpoons placing Christmas in grave peril; (3) whether the court properly admitted a letter written by Christmas into evidence; (4) whether the court properly admitted photographs of the victim; (5) whether the court properly limited Christmas' cross examination of one witness; and (6) whether the court properly instructed the jury during the habitual offender phase of the trial. Christmas' subsequent petition for transfer to our Supreme Court was denied. And the post-conviction court denied Christmas' petition for post-conviction relief following a hearing. This appeal ensued.

DISCUSSION AND DECISION

The petitioner bears the burden of establishing his grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Harrison v. State, 707 N.E.2d 767, 773 (Ind. 1999), cert. denied, 529 U.S. 1088 (2000). To the extent the post-conviction court denied relief in the instant case, Christmas appeals from a negative judgment and faces the rigorous burden of showing that the evidence as a whole "'leads unerringly and unmistakably to a conclusion opposite to that reached by the []

court.'" See Williams v. State, 706 N.E.2d 149, 153 (Ind. 1999) (quoting Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993)), cert. denied, 529 U.S. 1113 (2000). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. Bivins v. State, 735 N.E.2d 1116, 1121 (Ind. 2000).

Issue One: Discovery Requests

Christmas first contends that the post-conviction court erred when it denied his request for discovery in January 2007. Brief of Appellant at 7. The trial court explained its reasons for denying the request as follows:

> The Court notes that discovery has previously occurred in this action prior to the trial of this cause before the Court. The Court notes that at the trial of this action the Court believed there was an inquiry as to whether or not discovery was complete [and] counsel for the parties advised the Court that discovery was complete. Accordingly, the Court declines to order duplicate discovery to [Christmas] at this time. The Court also notes that a number of items requested by [Christmas] may not be in the presence or control of the State of Indiana. The Court also notes that a number of the other items requested by [Christmas] are available by an inspection of public records. The Court also notes that a number of items requested by [Christmas] in this action are confidential pursuant to Adm. Rule 9. For all of these reasons the Court declines to grant the blanket and overly broad discovery requested by [Christmas] in this action [and] refers [Christmas] to his trial counsel with respect to the items previously produced by the State of Indiana.

Appellant's App. at 115.

A trial court has broad discretion to control discovery. Bahm v. State, 789 N.E.2d 50, 55 (Ind. Ct. App. 2003). Accordingly, we will not reverse the trial court for a discovery decision absent an abuse of discretion. Id. An abuse of discretion has occurred

if the trial court's decision was against the logic and effect of the facts and circumstances before the court. Id.

Here, Christmas does not explain how the trial court's decision was against the logic and effect of the facts and circumstances underlying his discovery requests. For instance, Christmas does not attempt to counter any of the reasons the trial court set out in its order. Indeed, we would not characterize Christmas' argument on this issue as cogent.[1] Christmas has not demonstrated that the trial court abused its discretion when it denied his discovery requests.[2]

Issue Two: Trial Counsel

Christmas also contends that he was denied the effective assistance of trial 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

[1] We remind Christmas that pro se litigants are held to the same standard as are licensed lawyers. Goossens v. Goossens, 829 N.E.2d 36, 43 (Ind. Ct. App. 2005).

[2] To the extent Christmas asserts freestanding claims alleging prosecutorial misconduct on appeal from his petition for post-conviction relief, those issues are not available for review because they were known and available on direct appeal. See Randolph v. State, 802 N.E.2d 1008, 1012 (Ind. Ct. App. 2004) ("Issues available, but not raised, at trial or on direct appeal are waived for post-conviction proceedings.")

1263, 1265 (Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans. denied.

Deficient performance is representation that fell below an objective standard of reasonableness by the commission of errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Roberts v. State, 894 N.E.2d 1018, 1030 (Ind. Ct. App. 2008), trans. denied. Consequently, our inquiry focuses on counsel's actions while mindful that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render counsel's representation ineffective. Id. 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).

On appeal, Christmas asserts that his trial counsel was ineffective for the following reasons: failure to investigate and challenge his unlawful search and seizure; failure to challenge the delay between his arrest and the probable cause hearing; and failure to call several alleged alibi witnesses at trial. We address each allegation in turn.

Christmas first contends that his trial counsel did not adequately investigate or challenge the allegedly unlawful search and seizure that led to Christmas' arrest. He maintains that he was arrested without probable cause or reasonable suspicion and that the police did not have either an arrest warrant or search warrant at the time of his arrest. But police arrested Christmas after three witnesses identified him as the perpetrator. Thus, Christmas cannot show that any challenge to the legality of his arrest would have

been successful. And to the extent Christmas argues that the duration of his pretrial detention was unlawful, he likewise cannot prevail. Christmas has not demonstrated how the outcome of his trial would have been different had his trial counsel raised this issue to the trial court.

Finally, Christmas contends that his trial counsel was ineffective for failure to investigate and call certain alibi witnesses. During the post-conviction hearing, however, Christmas' trial counsel testified that he made a strategic decision to forego an alibi defense. In particular, Christmas' trial counsel testified as follows:

> None of the [] witnesses that I interviewed, and I can't remember specifically everybody that I talked to, but it was apparent to me that your understanding of what their testimony would be and what, in fact, their testimony was, was different.
>
> And strategically it appeared to me that if we put on an alibi defense and the witnesses testified differently than we informed the [S]tate that they would testify that it would be devastating to the case. So I—I didn't feel an alibi—an alibi notice and/or interposing an alibi defense was appropriate, and I told you that.

Post-Conviction Transcript at 158. On appeal, Christmas has not demonstrated that his trial counsel's strategy on the alibi issue constituted deficient performance.

In sum, Christmas has not shown either that his trial counsel's performance was deficient or that the outcome of his trial would have been different had his trial counsel conducted his defense in a different manner.[3] The post-conviction court did not err when it concluded that Christmas was not denied the effective assistance of trial counsel.

[3] Christmas raised additional issues under the rubric of ineffective assistance of trial counsel to the post-conviction court, but does not raise them on appeal. As such, those issues are waived.

Issue Three: Appellate Counsel

Christmas also contends that he was denied the effective assistance of appellate counsel. The standard of review for a claim of ineffective assistance of appellate counsel is essentially the same as for trial counsel in that the defendant must show that appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. Hooker v. State, 799 N.E.2d 561, 570 (Ind. Ct. App. 2003), trans. denied.

Here, Christmas' sole contention on appeal appears to be that his appellate counsel was deficient in not raising on direct appeal the issue of trial counsel's ineffectiveness regarding the issue of DNA evidence. Christmas did not raise this issue in the context of ineffective appellate counsel to the post-conviction court. Accordingly, the issue is not properly before us and is waived. See Koons v. State, 771 N.E.2d 685, 691 (Ind. Ct. App. 2002) (holding issues not raised in petition for post-conviction relief may not be raised for the first time on appeal from denial of post-conviction relief), trans. denied.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.