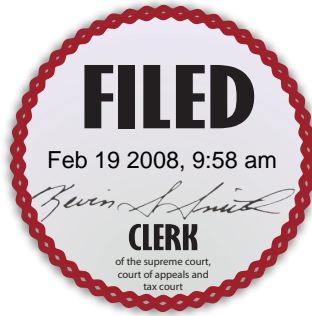


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

PAUL F. HOLCOMB,
Appellant-Petitioner,

vs.

STATE OF INDIANA,
Appellee-Respondent.

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No. 38A02-0708-PC-650

APPEAL FROM THE JAY CIRCUIT COURT
The Honorable Brian D. Hutchison, Judge
Cause No. 38C01-0104-CF-11

February 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Paul Holcomb appeals the post-conviction court’s denial of his petition for post-conviction relief. Holcomb raises one issue, which we revise and restate as whether Holcomb was denied the effective assistance of appellate counsel. We affirm.

The relevant facts follow. On April 12, 2001, the State charged Holcomb with three counts of dealing in cocaine as class A felonies.¹ On June 14, 2002, Holcomb filed a motion for discharge pursuant to Ind. Criminal Rule 4(C), which the trial court denied. After a jury trial, Holcomb was convicted as charged. The trial court found the following aggravators: (1) “both the Pre-Sentence Investigation Report and testimony of [Holcomb] indicate that [Holcomb] had a history of using and dealing drugs;” (2) Holcomb “has three (3) prior criminal convictions with probation time;” (3) Holcomb “needs rehabilitative services best served by incarceration;” and (4) “that imposition of anything less than an enhanced sentence would decrease the seriousness of the offense.” Appellant’s Direct Appeal Appendix at 149. The trial court found the following mitigating factor: that “the only evidence was from a confidential informant thereby making the State the victim of the offense; and that to an extent the victim of the offense induced or facilitated the offense.” Id. The trial court found that the aggravators

¹ Ind. Code § 35-48-4-1 (1998) (subsequently amended by Pub. L. No. 17-2001, § 19 (eff. July 1, 2001) and Pub. L. No. 151-2006, § 22 (eff. July 1, 2006)).

outweighed the mitigators and sentenced Holcomb to forty years for each count and suspended five years.² The trial court ordered that the sentences be served concurrently.

Holcomb appealed and argued that the trial court erred by denying his motion for discharge under Ind. Criminal Rule 4(C). We affirmed Holcomb's convictions. Holcomb v. State, No. 38A02-0209-CR-799, slip op. at 5 (Ind. Ct. App. April 4, 2003).

Holcomb filed a petition for post-conviction relief, which was later amended and alleged that he was denied the effective assistance of appellate counsel because his appellate counsel failed to argue that certain aggravators were improper.³ Specifically, Holcomb argued that the trial court: (1) failed to provide a specific statement regarding the need for correctional or rehabilitative treatment; and (2) could only use the "depreciate the seriousness of the crime" aggravator if the trial court considered a sentence less than the presumptive. Holcomb also noted that the current offenses were his first felony convictions. After a hearing, the post-conviction court entered findings of fact and conclusions thereon and denied Holcomb's claims. Specifically, the post-conviction court's order stated:

* * * * *

FINDINGS OF FACT:

* * * * *

² The trial court sentenced Holcomb on August 22, 2002.

³ Holcomb also argued that the trial court lacked the authority to assess a fee greater than \$1,000 and failed to inquire into Holcomb's ability to pay more than the mandatory fee of \$200. Holcomb does not make this argument on appeal.

5. As the basis for imposing a sentence beyond what was then a “presumptive sentence” of thirty (30) years, the Court found:
 - a. Both the Pre-Sentence Investigation Report and the testimony of [Holcomb] at the sentencing hearing indicated that [Holcomb] had been engaged in drug use and drug dealing for an extended period of time.
 - b. [Holcomb] had three prior misdemeanor convictions wherein he had been placed under probation supervision, and yet the probation supervision had proven insufficient to deter him from subsequent criminal activity.
 - c. [Holcomb] was in need of correctional or rehabilitative treatment that could best be provided by his commitment to a penal facility.
 - d. Illicit drug use and dealing ruins lives, takes a terrible toll on peoples [sic] relationships, and takes a terrible toll on their ability to support themselves, so imposition of a less than an enhanced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime.

6. The Court found that the weight of the aggravating circumstances exceeded that of the mitigating circumstances.

* * * * *

11. In a memorandum decision issued by the Court of Appeals on January 28, 2003, the decision of the trial court was affirmed as [Holcomb] had caused a portion of the delay in bringing the matter to trial and that he had failed to enter a timely objection to the trial date when it was established.

12. On June 5, 2007, an evidentiary hearing was held, wherein the Court admitted the following Exhibits in evidence:
 - a. Exhibit 1: The record of proceedings from [Holcomb]’s trial;
 - b. Exhibit 2: The Appellant Brief in the ensuing appeal;
 - c. Exhibit 3: The Brief of Appellee in the ensuing appeal;
 - d. Exhibit 4: The decision of the Court of Appeals in 38A02-0209-CR-799;

- e. Exhibit 5: A transcript of the sentencing hearing in [Holcomb]'s trial; and
 - f. Exhibit 6: The Affidavit of Attorney Jill Gonzalez.
13. No additional evidence was presented at the hearing and the Court heard argument of counsel.
 14. [Holcomb] asserts two distinct errors which he claims warrant post-conviction relief.
 15. First, [Holcomb] asserts that the Court improperly imposed an aggravated sentence after relying on aggravating factors that were not supported by the evidence or law.
 16. Second, [Holcomb] asserts that the Court's order of restitution to the Tri-County Drug Task Force was actually an additional imposition of a Drug Abuse, Prosecution, Interdiction and Correction Fee which exceeded the amounts allowable under statute.
 17. [Holcomb] acknowledges that each of these contentions were able to be addressed on direct appeal, but further asserts that ineffective assistance of appellate counsel resulted in the failure to bring those claims.

CONCLUSIONS OF LAW:

* * * * *

5. While a judge should not impose an aggravated sentence solely on the existence of a prior criminal conviction, remote in time or unrelated in nature, it has often been said that the existence of a single aggravating circumstance may be enough to support an enhanced sentence. In the instant case, not only did [Holcomb] have three prior (albeit unrelated) criminal convictions, but he also admitted that he had been involved in drug dealing for at least sixteen years.
6. Despite [Holcomb]'s claims that he had temporarily curtailed his dealing activities for approximately three years immediate prior to

the instant offenses, imposition of an enhanced sentence was justified by [Holcomb]'s extensive criminal history.

7. Counsel for [Holcomb] correctly points out that the Court, beyond reciting the fact [Holcomb] had received community supervision three times only to later re-offend, failed to enumerate additional reasons it believed [Holcomb] needed treatment or rehabilitation that could best be provided by commitment to a penal facility.
8. Counsel is also correct that the Court failed to give any indication that it was considering imposition of less than a presumptive sentence when it found that a reduced sentence or suspended sentence would depreciate the seriousness of the crime.
9. However, inasmuch as the enhanced sentence was justifiable on the basis of criminal history alone, it was not erroneous. Therefore, it did not fall below an objective standard of reasonableness for appellate counsel to forego that particular claim on appeal.

* * * * *

12. [Holcomb]'s claim of ineffective assistance of appellate counsel does not survive the *Strickland* test in that he has failed to establish by a preponderance of the evidence that appellate counsel failed to meet an objective standard of reasonableness in her representation, or that any such alleged shortcoming would have resulted in a different outcome upon appellate review.

Appellant's Appendix at 73-77.

Before discussing Holcomb's allegations of error, we note the general standard under which we review a post-conviction court's denial of a 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. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a

negative judgment. 810 N.E.2d at 679. 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. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

The sole issue is whether Holcomb was denied the effective assistance of appellate counsel. Holcomb argues that his appellate counsel was ineffective when he failed to argue that the trial court abused its discretion when it imposed a sentence based upon improper aggravators.⁴

We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel.

⁴ Holcomb also appears to argue that his appellate counsel was ineffective for failing to challenge Holcomb’s sentence as inappropriate under Ind. Appellate Rule 7(B). To the extent that Holcomb challenges his sentence under Ind. Appellate Rule 7(B), Holcomb has waived this argument because he did not raise this argument before the post-conviction court. See Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (holding that issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal), reh’g denied, trans. denied.

Williams v. State, 724 N.E.2d 1070, 1078 (Ind. 2000), reh'g denied, cert. denied, 531 U.S. 1128, 121 S. Ct. 886 (2001). 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. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). 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. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Perez v. State, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. French, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

When we analyze claims based upon appellant counsel's failure to raise issues on appeal, we must be especially deferential to counsel's decision because the strategic decision regarding which issues to raise on appeal "is one of the most important strategic decisions to be made by appellate counsel." Bieghler v. State, 690 N.E.2d 188, 192 (Ind. 1997), reh'g denied, cert. denied, 525 U.S. 1021, 119 S. Ct. 550 (1998). Ineffectiveness is very rarely found in cases where a defendant asserts that appellate counsel failed to

raise an issue on direct appeal. Id. at 193. The Indiana Supreme Court has adopted a two-part test to evaluate the deficiency prong of these claims: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are “clearly stronger” than the raised issues. Id. at 194. If this analysis demonstrates deficient performance by counsel, the court then examines whether the issues that appellate counsel failed to raise “would have been clearly more likely to result in reversal or an order for a new trial.” Id.

To determine whether Holcomb’s appellate counsel’s performance was deficient, we first review the propriety of the trial court’s sentencing of Holcomb. Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances.” Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998).

The trial court found the following aggravators: (1) “both the Pre-Sentence Investigation Report and testimony of [Holcomb] indicate that [Holcomb] had a history of using and dealing drugs;” (2) Holcomb “has three (3) prior criminal convictions with probation time;” (3) Holcomb “needs rehabilitative services best served by incarceration;” and (4) “that imposition of anything less than an enhanced sentence would decrease the seriousness of the offense.” Appellant’s Direct Appeal Appendix at 149.

The post-conviction court found that the third and fourth aggravators were improper, but that the sentence could be sustained based upon the first and second

aggravators. On appeal, the State makes no claim that the post-conviction court erred by determining that the third and fourth aggravators were improper. However, Holcomb argues that the first and second aggravators do not support the enhanced sentence.

1. History of Using and Dealing Drugs

The trial court found that “both the Pre-Sentence Investigation Report and testimony of [Holcomb] indicate that [Holcomb] had a history of using and dealing drugs” as an aggravator and Holcomb did not challenge this aggravator in his petition.⁵ Appellant’s Direct Appeal Appendix at 149. We cannot say that this aggravator is improper. See Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004) (holding that the defendant’s substance abuse was a proper aggravating factor), trans. denied; Bennett v. State, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003) (holding that a defendant’s alcoholism could properly have been considered as an aggravating circumstance); see also Hines v. State, 856 N.E.2d 1275, 1281 (Ind. Ct. App. 2006) (holding that the trial court did not err by considering the defendant’s admission that he had molested his own daughter as an aggravating factor), trans. denied.

⁵ On appeal, Holcomb argues that his “past includes no drug-related convictions . . . and it is not possible to describe with certainty any past drug-related activities in which he may have been involved.” Appellant’s Brief at 14. Holcomb also appears to argue that the trial court “incorrectly construes [his] gratuitous statements that he had in the indeterminate past made an unknown number of unspecified drug transactions as an admission ‘that he had been involved in drug dealing for at least sixteen years.’” Id. (internal citations omitted). However, Holcomb did not challenge this aggravator before the post-conviction court. A party may not raise an argument for the first time on appeal. See Walker, 843 N.E.2d at 57 (holding that an issue not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal). Thus, this argument is waived.

2. Criminal History

Holcomb appeared to argue that his appellate counsel was ineffective for failing to challenge the weight of the aggravator of Holcomb's criminal history.⁶ The significance of a criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999), reh'g denied. "[A] criminal history comprised of a single, nonviolent misdemeanor is not a significant aggravator in the context of a sentence for murder." Id. at 929 (footnotes omitted). Holcomb has convictions for battery as a class A misdemeanor, operating while intoxicated as a class A misdemeanor, and operating a vehicle after being adjudged an habitual traffic offender as a class A misdemeanor. Although Holcomb's criminal history might not be entitled to significant weight, we cannot say that the trial court abused its discretion by giving his criminal history some aggravating weight. See Hines, 856 N.E.2d at 1281 (holding that "[a]lthough his criminal history is not significant, neither is it irrelevant").

Even assuming that the trial court improperly considered the third and fourth aggravators, we cannot say that it affected Holcomb's sentence because two other aggravators exist and the trial court imposed a relatively modest enhancement.⁷ See

⁶ At the hearing, Holcomb's attorney argued that Holcomb "does have a criminal history and . . . based on that aggravator that the sentence . . . is excessive." Post-Conviction Hearing Transcript at 9-10.

⁷ Ind. Code § 35-50-2-4 (1998) provided that "[a] person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances"

generally Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002) (“Even when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist.”). We cannot conclude that this issue was “clearly stronger” than the issue appellate counsel raised on appeal: whether the trial court erred by denying his motion for discharge under Ind. Criminal Rule 4(C). See, e.g., Timberlake v. State, 753 N.E.2d 591, 608 (Ind. 2001) (holding that the issue appellate counsel failed to raise was not clearly stronger than the issues that were raised). Moreover, we cannot say that this issue would have been clearly more likely to result in reversal. Thus, Holcomb has failed to demonstrate any prejudice, his claim of ineffective assistance of appellate counsel fails, and the post-conviction court’s denial of the petition for post-conviction relief is not clearly erroneous.

For the foregoing reasons, we affirm the post-conviction court’s denial of Holcomb’s petition for post-conviction relief.

Affirmed.

BARNES, J. and VAIDIK, J. concur

Subsequently amended by Pub. L. No. 71-2005, § 7 (eff. April 25, 2005). Here, the trial court enhanced Holcomb’s sentence for each count by ten years for a forty-year sentence, suspended five years for each count, and ordered that the sentences be served concurrently.