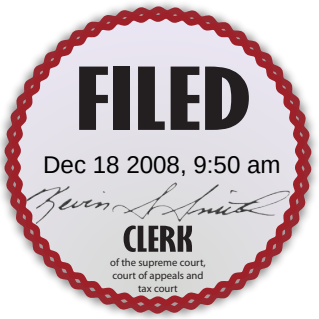

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT E. MONEY,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 22A01-0805-PC-241
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable Susan L. Orth, Judge
Cause No. 22D01-0603-PC-1

December 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Robert Money appeals the denial of his petition for post-conviction relief ("PCR"). We affirm.

Issue

The sole restated issue is whether the post-conviction court properly concluded that Money received effective assistance of counsel when he pled guilty to Class A felony dealing in cocaine and to being an habitual offender.

Facts

The facts most favorable to the post-conviction court's judgment are that on July 16, 2003, the State charged Money with Class A felony dealing in cocaine. On December 8, 2003, the State filed a separate information charging Money with two counts of Class B felony dealing in cocaine; on December 11, 2003, it added an allegation that Money was an habitual offender. On December 15, 2003, the State also moved to amend the information in the Class A felony case to add an allegation that Money was an habitual offender. Money's trial counsel objected to this amendment on the basis that it was untimely, but the trial court overruled the objection and allowed the amendment.

On January 5, 2004, Money pled guilty to the Class A felony charge and the habitual offender allegation, with sentencing left to the trial court. In exchange, the State dismissed the Class B felony charges. The trial court accepted the plea and sentenced Money to forty years for the Class A felony conviction, enhanced by thirty years for the

habitual offender finding, for a total sentence of seventy years. Money directly appealed to this court, contending that his sentence was inappropriate. We rejected this argument and affirmed. See Money v. State, No. 22A01-0406-CR-282 (Ind. Ct. App. Jan. 18, 2005), trans. denied.

On March 18, 2006, Money filed a PCR petition, which later was amended by counsel. The petition alleged that Money had received ineffective assistance of counsel because counsel failed to advise Money that the habitual offender enhancement of his sentence was not permitted by statute and, thus, illegal. On March 31, 2008, the post-conviction court denied the petition. Money now appeals.

Analysis

Post-conviction proceedings provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007). If an issue was known and available but not raised on direct appeal, the issue is procedurally foreclosed. Id. "If an issue was raised and decided on direct appeal, it is res judicata." Id. "In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002).

"In post-conviction proceedings, the defendant bears the burden of proof by a preponderance of the evidence." Stephenson, 864 N.E.2d at 1028. We review factual findings of a post-conviction court under a "clearly erroneous" standard but do not defer

to any legal conclusions. Id. We will not reweigh the evidence or judge the credibility of the witnesses and will examine only the probative evidence and reasonable inferences therefrom that support the decision of the post-conviction court. Id.

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). Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). A defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and 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." Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

The State concedes that the habitual offender enhancement of Money's sentence for Class A felony dealing in cocaine, which falls under Indiana Code Section 35-48-4-1, was statutorily impermissible. Habitual offender enhancements are not permitted if:

> (3) all of the following apply:
>
> > (A) The offense is an offense under IC 16-42-19 or IC 35-48-4.
> >
> > (B) The offense is not listed in section 2(b)(4) of this chapter.
> >
> > (C) The total number of unrelated convictions that the person has for:
> >
> > > (i) dealing in or selling a legend drug under IC 16-42-19-27;

> (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);
>
> (iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
>
> (iv) dealing in a schedule IV controlled substance (IC 35-48-4-3); and
>
> (v) dealing in a schedule V controlled substance (IC 35-48-4-4);
>
> does not exceed one (1).

Ind. Code § 35-50-2-8(b). Money meets all of these qualifications, and thus it was illegal to enhance his sentence for Class A felony dealing in cocaine under the habitual offender statute. If trial counsel was unaware of this statutory limitation, or failed to advise Money of it, his performance may have fallen below an objective standard of reasonableness.

It is well-settled, however, that "[a] defendant 'may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence.'" Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004) (quoting Collins v. State, 509 N.E.2d 827, 833 (Ind. 1987)). Whether a defendant has benefitted from a plea agreement with an illegal sentencing provision generally is measured by whether the plea reduced the defendant's penal exposure. See id. at 39-40. Additionally, our supreme court has not permitted attempts to avoid the Lee rule merely by stating that the plea was the result of ineffective assistance of counsel. See Stites v. State, 829 N.E.2d 527, 529

(Ind. 2005) (holding that ineffective assistance claim was "merely a subset of Stites' claim that her plea agreement was void because it called for consecutive sentences"). Another way of saying this might be that a defendant who, on advice of counsel, enters a plea agreement calling for an illegal sentence is not prejudiced if he or she nonetheless benefited from that sentence.

In exchange for Money's guilty plea to Class A felony dealing in cocaine and an habitual offender enhancement, the State dismissed two Class B felony dealing in cocaine charges. Money's total penal exposure under the plea agreement was eighty years: the maximum fifty years for a Class A felony and the maximum possible thirty years habitual offender enhancement. See I.C. §§ 35-50-2-4, 35-50-2-8(h). The maximum legal sentence Money faced for one Class A felony and two Class B felonies, if all sentences were served consecutively, was ninety years: fifty for the Class A felony and the maximum twenty years for each Class B felony. See I.C. § 35-50-2-5. Money reduced his total penal exposure ten years by pleading guilty, and in fact ended up receiving a sentence twenty years less than the maximum he faced if he did not plead guilty.

Money contends the State failed to prove the State dismissed two, as opposed to only one, Class B felony charge. However, this being a post-conviction proceeding it was Money's burden to prove he was entitled to relief. See Stephenson, 864 N.E.2d at 1028. This means Money was required to prove that he was charged with only one Class B felony; the State was not required to prove he was charged with two. In any event, the available chronological case summary for the Class B felony case, while not initially

specifying how many charges were filed against Money, does later indicate that the State sought to amend the information to add a "Ct III," an habitual offender allegation. App. p. 57. Additionally, at the PCR hearing counsel for the State asked Money whether he disputed that there were two Class B felonies that the State charged him with and dismissed in exchange for the plea; Money did not dispute this, and instead argued that he was "coerced" into entering the plea. Tr. p. 13. Obviously, it would have been preferable if the State had introduced the actual charging information from the Class B felony case into evidence at the PCR hearing, but that was not done.

Money also argues that the State failed to establish that it would have been permissible for the sentences for the Class A felony and two Class B felonies all to run consecutively for a total of ninety years, and that it is possible the sentences would have to have been served concurrently. He directs us to a limitation on consecutive sentencing that applies in certain cases where there are multiple drug dealing convictions, first stated by our supreme court in Beno v. State, 581 N.E.2d 922 (Ind. 1991). Again, however, it was Money's burden to prove that Beno would have required concurrent sentences; the State was not required to prove otherwise.

Money failed to establish that he did not receive a benefit from his plea agreement, despite the illegal habitual offender enhancement. The evidence most favorable to the post-conviction court's ruling is that the plea reduced his sentencing exposure by ten years. Therefore, Money cannot attack the illegal sentence, whether by a claim of ineffective assistance of counsel or otherwise.

Conclusion

The post-conviction court properly denied Money's PCR petition. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.