

James E. Wilhelm, Jr. pleaded guilty to burglary and robbery as class A felonies, criminal confinement as a class B felony, and admitted being a habitual offender. Upon petition for post-conviction relief (PCR), Wilhelm, pro se, sought to set aside his guilty plea. He appeals the denial of his PCR petition, presenting the following restated issues for review:

1. Did the trial court improperly enhance Wilhelm's sentence?
2. Did the State err in failing to respond to Wilhelm's discovery motion?
3. Did the officer who prepared the probable cause affidavit commit perjury therein?
4. Did the State improperly charge, convict, and sentence Wilhelm of burglary as a class A felony?
5. Was Wilhelm denied due process?
6. Did Wilhelm receive ineffective assistance of counsel in advising Wilhelm to plead guilty?

We affirm.

On December 16, 1994, Wilhelm pleaded guilty to burglary as a class A felony, robbery as a class A felony, criminal confinement as a class B felony, and admitted to being a habitual offender. The trial court sentenced Wilhelm to concurrent sentences of forty-five years for burglary, twenty years for robbery, and ten years for criminal confinement and enhanced the sentence for burglary by twenty-five years for being a habitual offender. Further facts will be supplied where relevant.

On November 10, 2006, Wilhelm filed a PCR petition seeking to set aside his guilty plea. He submitted affidavits in support of the petition and the matter ultimately proceeded

to a March 18, 2010 telephonic hearing based upon Wilhelm's affidavits. The post-conviction court denied Wilhelm's PCR petition, entering the following relevant findings of fact and conclusions of law:

Findings of Fact

* * * * *

9. The facts underlying the convictions in this case were set out in the Information, Probable Cause Affidavit, guilty plea hearing and sentencing hearing. The sentencing judge was well aware that the petitioner "was not armed nor was the victim present during the commission of the Burglary phase."

10. The crimes of burglary and robbery happened distinctly in this case. The burglary was complete when the Petitioner broke into the house with the intent to commit theft therein. Not until the victim and her child arrived home sometime later was the Petitioner given the opportunity to commit, and did commit, the offense of robbery.

Conclusions of Law

11. Defense Counsel was not ineffective for failing to specifically argue certain facts that were well known to the trial judge. The sentence would not have been different had defense counsel simply reminded the judge of some of the less heinous aspects of the crimes.

12. The single larceny rule does not apply in this case.

13. Blakely v. Washington, 542 U.S. 296 (2004) does not apply in this case. In Smiley v. State, 823 N.E.2d 679 (Ind. [] 2005), the Indiana Supreme Court found that this rule was not applicable to cases that were not currently on direct appeal at the time the Blakely case was decided in 2005. Because the present case was resolved in 1995, Blakely is not applicable.

14. The Petitioner makes passing reference to other alleged errors in his case (e.g. "Investigating officer committed perury (sic) in Affidavit of Probable Cause" (Motion to Amend Post-Conviction), "State failed to respond to Defendant's Discovery Motion" (Motion to Amend Post-Conviction)). As to these allegations there is an absolute lack of proof or coherent argument.

15. To the extent these arguments were available when the Defendant first appealed this matter in 1995, by foregoing the arguments at that time, the Defendant forever waived them.

16. To the extent that the Petitioner's arguments overlap those made in his Appeal in 1995, those arguments have already been rejected, and are unavailable to him pursuant to the doctrine of res judicata.

Appellant's Brief at 26-27.

In a post-conviction proceeding, the petitioner bears the burden of establishing his claims for relief by a preponderance of the evidence. *Overstreet v. State*, 877 N.E.2d 144 (Ind. 2007), *cert. denied*, 129 S.Ct. 458 (2008). When appealing from the denial of a PCR petition, the petitioner stands in the position of one appealing from a negative judgment and therefore must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* We further observe that the post-conviction court is the sole judge of the weight of the evidence and credibility of witnesses. *J.J. v. State*, 858 N.E.2d 244 (Ind. Ct. App. 2006).

1.

Wilhelm contends the trial court improperly enhanced his sentence in contravention of *Blakely*. In *Smylie v. State*, 823 N.E.2d 679, 690-91 (Ind. 2005), *cert. denied*, 546 U.S. 976, our Supreme Court determined that *Blakely* would apply “retroactively to all cases on direct review at the time *Blakely* was announced.” *Blakely* was decided in 2004. Wilhelm's direct appeal was decided on December 29, 1995 (*see Wilhelm v. State*, No. 92A05-9505-CR-170 (Ind. Ct. App. December 29, 1995)) – long before *Blakely*. Therefore, the rule announced in *Blakely* does not apply to Wilhelm's case.

2. & 3.

The second and third claims presented by Wilhelm are that the State erred in failing to respond to his pretrial discovery motion and that the officer who prepared the probable cause affidavit committed perjury therein. Freestanding claims of error that were available at the time but not raised upon direct appeal are waived for purposes of post-conviction relief. *Sanders v. State*, 765 N.E.2d 591 (Ind. 2002). Because these claims were available at the time of Wilhelm's direct appeal but not presented, they are waived.

4.

Wilhelm contends he received ineffective assistance of trial counsel when counsel failed to "investigate the charge of Burglary and present the affirmative defense that defendant was not armed nor was the victim present during the commission of the burglary phase." *Appellant's Brief* at 6. As a result, according to Wilhelm, the State improperly charged and convicted him of burglary as a class A felony. He contends that the burglary was completed when he broke and entered the home and ended when the victim and her baby arrived home while he was still in the house. Wilhelm contends that the burglary ended at that point and the robbery commenced. Thus, inasmuch as the victim was injured after the burglary ended, it could not be charged as a class A felony. In considering this argument, we review the facts of the occurrence.

According to the evidence that was presented to establish probable cause at the guilty plea hearing, Wilhelm hid in the victim's barn on the morning of the crimes while the victim, her husband, and their baby were inside preparing to leave. The victim and her husband left at the same time but separately, traveling to different destinations. After they left and the house was empty, Wilhelm cut a screen, entered the house, retrieved a rifle owned by the

husband, and waited for the victim to return in order to rob her. This court set out the remainder of the fact as follows in deciding Wilhelm's direct appeal:

The [victim] arrived with the baby and saw Wilhelm holding a .22 caliber rifle. Wilhelm immediately ordered [the victim] to put the baby down. After [the victim] complied, Wilhelm told her to remove her clothes. [The victim] refused, and Wilhelm fired a shot, again repeating his order for [the victim] to undress. When [the victim] continued to refuse Wilhelm's commands, he shot her in the thigh and struck her on the cheek with the butt end of the rifle. [The victim] struggled with Wilhelm and grabbed the barrel of the gun. Wilhelm then choked [the victim], causing her to release her grip on the weapon. He then pointed the gun at the baby's head, and [the victim] agreed to "do anything" Wilhelm wanted as long as he did not harm the child.

When Wilhelm and [the victim] entered the living room, Wilhelm again struck her with the butt of the gun and a second struggle ensued. Wilhelm then choked [the victim] until she nearly lost consciousness. When [the victim] regained her senses, she was lying on her stomach. Wilhelm was sitting on [the victim] back tying her hands. Wilhelm then wrapped the remainder of the rope around [the victim]'s neck.

Wilhelm then undressed [the victim] and ejaculated on her back. Wilhelm proceeded to place duct tape around [the victim]'s head, covering her eyes and mouth. He then turned [the victim] over, ripped open her bra, and grabbed her breasts. Moments later, one of [the victim]'s neighbors appeared at the door. Wilhelm confronted her with the gun, and the neighbor began screaming that her husband was coming to the house. Wilhelm grabbed [the victim]'s purse and ran from the residence.

Wilhelm v. State, No. 92A05-9505-CR-170, slip op. at 2-3.

The foregoing facts reveal that Wilhelm entered the residence, laid in wait for the victim, assaulted her, and left with some of the property of the victim and her husband. "Burglary occurs when a person 'breaks and enters the building or structure of another person, with intent to commit a felony in it.'" *Davis v. State*, 770 N.E.2d 319, 322 (Ind. 2002) (quoting Ind. Code Ann. § 35-43-2-1). Thus, in this case, the burglary offense was completed when Wilhelm entered the home with the intent to commit theft. We use

“completed” here in the sense that all of the elements of the offense had, at that point, been established. We do not use “completed” in the sense that the offense was, at that point, at an end. Rather, the offense continued until Wilhelm left the victim’s house. This means that until Wilhelm left the house, the crime was ongoing. Thus, if either or both of the factors that serve to elevate a burglary offense were present before he departed from the residence, then the offense may be elevated thereby. *See* I.C. § 35-43-2-1(1)(A) (elevating burglary to a class B felony if it is committed while armed with a deadly weapon) and I.C. § 35-43-2-1(2)(A) & (B) (elevating burglary to a class A felony if it results in bodily injury or serious bodily injury).

As recited above, Wilhelm shot the victim with a firearm, thus satisfying the “while armed with a deadly weapon” element set out in I.C. § 35-43-2-1(1)(A). Therefore, counsel did not render ineffective assistance in failing to make the meritless argument that Wilhelm was not armed during the burglary. *See Stephenson v. State*, 864 N.E.2d 1022 (Ind. 2007) (the failure to make a meritless objection cannot form the basis of a claim of ineffective assistance of counsel), *cert. denied*, 552 U.S. 1314 (2008).

5.

Wilhelm contends he was denied due process. Specifically, he contends:

Petitioner raised his 14th U.S.C.A. was violated to due process of law caused (Loss of Liberty).

Respondent did “not” object to said above raised, as well as no proof of venue to sustain conviction raised with “no” object by the respondent. Petitioner raises, the wrongdoer shall not derive any benefit from his own wrong (Legal Maxim). This error, if not rectified, by charges vacated, would cause a Fundamental due process. **See Roberts v. State, 492 N.E.2d 310, 313 and Warriner v. State, 435 N.E.2d 562[.]**

Appellant's Brief at 17-18 (emphasis in original). The foregoing argument, accurately transcribed, comprises Wilhelm's entire argument on this point. It is entirely lacking in cogency and therefore is waived. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring the argument section to be supported by cogent reasoning with citations to relevant authorities).

6.

Wilhelm contends trial counsel rendered ineffective assistance in advising Wilhelm to plead guilty. Wilhelm contends that trial counsel failed to investigate and discover facts that would have justified "the affirmative defense that defendant was not armed nor was the victim present during the commission of the burglary phase." *Appellant's Brief* at 6. Thus, according to Wilhelm, counsel rendered ineffective assistance in advising him to plead guilty to burglary as a class A felony when the facts supported only the lesser offense of burglary as a class B felony. We have rejected the argument upon which this claim is premised, i.e., that the burglary offense ended the moment Wilhelm entered the victim's home with the intent to commit a felony. Instead, we held that, for purposes of the presence or occurrence of elements that would increase the classification of the offense, the burglary offense was ongoing at least until Wilhelm departed from the premises. We have also held that the evidence recited above supported a conviction of burglary as a class A felony. Therefore, counsel's advice to plead guilty was not premised upon an error, i.e., that Wilhelm could not have committed burglary as a class A felony. Wilhelm did not receive ineffective assistance of trial counsel.

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.