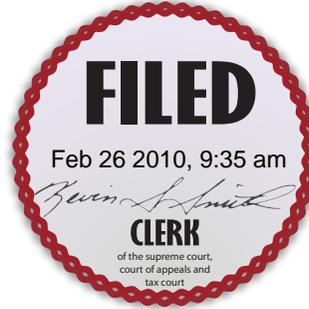


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

GREGORY A. WILSON,
Appellant-Petitioner,

vs.

STATE OF INDIANA,
Appellee-Respondent.

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No. 71A03-0905-PC-197

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R.W. Chamblee, Judge
Cause No. 71D01-0211-PC-39

February 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Wilson was convicted in 1997 of four felonies. On direct appeal he claimed trial counsel was ineffective for not objecting to certain hearsay testimony. We affirmed, and Wilson sought post-conviction relief on the ground his appellate counsel addressed only one available ground for challenging testimony and should have argued a statement was not within a hearsay exception established by Ind. Evidence Rule 803(4).¹ The post-conviction court denied relief, and we affirm.

DISCUSSION AND DECISION

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *McElroy v. State*, 864 N.E.2d 392, 395 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 204 (Ind. 2007). A petitioner appealing the denial of post-conviction relief stands in the position of one appealing from a negative judgment. *Id.* 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.*

Counsel's performance is presumed effective. *Stephenson v. State*, 864 N.E.2d 1022, 1031 (Ind. 2007), *reh'g denied, cert. denied sub nom. Stephenson v. Indiana*, ___ U.S. ___, 128 S.Ct. 1871 (2008). A defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Id.* There is a strong presumption

¹ "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source

counsel made all significant decisions in the exercise of reasonable professional judgment. *Id.* Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. *Id.* Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.*

Wilson asserts his appellate counsel was ineffective because he did not raise trial counsel's failure to challenge certain testimony on hearsay grounds. As Wilson did not meet his burden of establishing grounds for relief by a preponderance of the evidence, we must affirm.

At the post-conviction hearing, Wilson did not present testimony or an affidavit from either his trial or appellate counsel. In *Culvahouse v. State*, 819 N.E.2d 857, 863 (Ind. Ct. App. 2004), *trans. denied* 831 N.E.2d 738 (Ind. 2005), Culvahouse contended his appellate counsel was ineffective for failing to raise the issue whether his sentence was manifestly unreasonable. We noted Culvahouse's appellate counsel did not testify at the post conviction hearing:

When counsel is not called as a witness to testify in support of a petitioner's arguments, the post-conviction court may infer that counsel would not have corroborated the petitioner's allegations. *See Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989). Given that Culvahouse has the burden of demonstrating ineffectiveness of counsel, Culvahouse failed to meet his burden by presenting no evidence to the post-conviction court concerning his appellate representation.

thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded by the hearsay rule, even though the declarant is available. Ind. Rule of Evidence 803(4).

Id.

Wilson did not offer testimony, affidavits, or any other evidence from either trial or appellate counsel.² He therefore did not meet his burden to show appellate counsel's strategic decision not to argue the Rule 803(4) issue amounted to ineffective assistance. We accordingly affirm.

Affirmed.

KIRSCH, J., and DARDEN, J., concur.

² Wilson did not provide the post-conviction court, or this court, with the trial transcript. We have held that failure to enter into evidence a transcript of the underlying trial may amount to failure to prove ineffective assistance of counsel. *E.g., Taylor v. State*, 882 N.E.2d 777, 782 (Ind. Ct. App. 2008). Wilson did not have the transcript admitted into evidence at his post-conviction hearing, but at the hearing he read from what he indicated was the transcript. The trial court permitted him to do so: "I'm going to suggest to you that your testimony requires you to have your paperwork with you Grab your stuff." (Tr. at 9.) Wilson then testified, in large part reading from or referring to his materials, and the State did not object. Nor does the transcript reflect the State questioned Wilson or otherwise actively participated in the hearing.

We are concerned that the State acquiesced to Wilson's presentation of evidence in that manner, yet on appeal now points to that same presentation of evidence, which the trial court permitted and the State did not challenge, as demonstrating Wilson should be denied relief. We accordingly decline to affirm on that ground.