



John Barkdull appeals the denial of his petition for post-conviction relief (PCR), by which he sought to challenge his conviction of three counts of non-support of a dependent, all class D felonies. Those convictions were entered upon Barkdull's guilty pleas. Barkdull presents the following restated issues for review:

1. Must Barkdull's convictions be reversed because he received ineffective assistance of trial counsel?
2. Was Barkdull's guilty plea voluntary?

We affirm.

The facts are that on July 16, 1997, Barkdull was charged with three counts of neglect of a dependent under separate cause numbers. Each case involved child support arrearage and each case involved a different mother and a different child. Under two of the cause numbers, neglect was charged as a class C felony; the other charged neglect as a class D felony. The same lawyer, R.C. Dixon, represented Barkdull in each case. Barkdull pled guilty to all three charges as class D felonies and received a nine-year suspended sentence.

On November 21, 2000, Barkdull filed a PCR petition, seeking to set aside his convictions and sentence. He filed an amended PCR petition on July 18, 2006. The PCR court denied that petition on May 17, 2007, issuing findings of fact and conclusions of law. Because they assist in further illuminating the facts and issues presented in this appeal, we reproduce them here:

## FINDINGS OF FACT<sup>1</sup>

1. Petitioner plead guilty to three (3) counts of Non-support of a Dependent, all class D felonies and on June 3, 1998, the Court sentenced the Petitioner to an aggregate sentence of nine (9) years.
2. Petitioner was represented by R.C. Dixon in all three causes.
3. At the time the Petitioner was sentenced, he alleges that counsel failed to determine that some of the mothers of some of the children did not want him prosecuted.
4. Petitioner has alleged that counsel failed to conduct pretrial discovery.
5. As of May 14, 1998, the Petitioner was in open court in a case entitled Debra Simmons vs. the Petitioner where the court found that his arrearage was \$1346.50 in case no. P-76-45 .... That finding relates to 48C01-9707-DF-142. The original charging information indicates that when the second amended information was filed in 48C01-9707-DF-142 on August 15, 1997, the amount owed was \$1346.50.
6. As of May 14, 1998, the Petitioner was in open court in a case entitled Patricia Kellams vs. the Petitioner where the court found that his arrearage was \$26,650.00 in case no. P-86-322 .... That finding relates to 48C01-9707-DF-142 [sic]. The original charging information indicates that when the second amended information was filed in 48C01-9707-DF-143 on August 15, 1997, the amount owed was \$20,420.00. That amount was above the C felony level and the Petitioner was still allowed to plead guilty to a Class D felony.
7. As of May 14, 1998, the Petitioner was in open court in a case entitled Deborah Merrill vs. the Petitioner where the court found that his

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<sup>1</sup> The findings refer to the three underlying cases against Barkdull alternately by case number, cause number, and the name of the mother. It appears that in places the findings attribute the incorrect cause numbers to the cases, resulting in some confusion. The materials submitted in conjunction with this appeal are not sufficient to allow us to entirely clear up the confusion. We are able to ascertain: (1) case number P-76-45 pertains to Simmons, the amount owed in that case was \$1346.50, and the cause number was 48C01-9707-DF-142; (2) case number P-81-284 pertains to Merrill and the amount of the arrearage was \$5865.00, but it is not clear from the appellate materials whether the cause number was 48C01-9707-DF-143 or 48C01-9707-DF-144; and (3) case number P-86-322 pertains to Kellams and the amount of the arrearage was \$26,650.00, but it is not clear from the appellate materials whether the cause number was 48C01-9707-DF-143 or 48C01-9707-DF-144. Adding to the confusion is the fact that in paragraphs 6 and 7 of the findings, the court obviously attributes two separate cause numbers to the same case within a single paragraph. For our purposes, it is enough to know that the leniency noted in paragraph 6 of the findings and paragraph 4 of the conclusions of law pertains to Kellams's case, in which the arrearage exceeded \$20,000.00.

arrearage was \$5865.00 in case no. P-81-284 .... That finding relates to 48C01-9707-DF-144. The original charging information indicates that when the second amended information was filed in 48C01-9707-DF-142 [sic] on August 15, 1997, the amount owed was \$4415.00.

8. At the time the threshold for a Class C felony non-support case was \$10,000.00,

### **CONCLUSIONS OF LAW**

1. The law is with the State of Indiana and against the Petitioner.  
2. No issue raised rises to the level of fundamental error.  
3. To establish ineffective assistance of counsel, a defendant is required to show that: (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The two prongs of *Strickland* are separate and independent inquiries; hence if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice that course should be followed. Landis v. State, 749 N.E.2d 1130 (Ind. 2001).

4. The Petitioner could not establish that the amounts that he owed, even if they varied from the findings of the IV-D Court, were insufficient to establish a factual basis for the pleas of guilty as to each count on each case. The Court further finds that as such, there was no evidence supporting prejudice. With respect to the case ending in 48C01-9707-DF-142, the State was generous in allowing a plea to the lesser included D felony.

5. Even if the victims did not wish to pursue the cases, in some instances, it is not the victim's call, rather the State is the Plaintiff in a criminal case.

6. The Petitioner could not establish either prong of the *Strickland* standard.

7. Accordingly, the Petitioner's Petition For Post-Conviction relief is DENIED.

*Appellant's Appendix* at 15-17. Barkdull appeals the denial of his amended PCR petition.

1.

We have set out the standard for reviewing claims of ineffective assistance of counsel as follows:

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. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. 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. Failure to satisfy either prong will cause the claim to fail.

*Walker v. State*, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)) (internal citations omitted), *trans. denied*.

Barkdull's specific claims of ineffective assistance are as follows: (1) Counsel failed to conduct adequate pretrial investigation, (2) counsel failed to "fully advise" Barkdull concerning the guilty plea, thus "misleading" Barkdull and "forcing" him to accept the plea, *Appellant's Brief* at 10, and (3) counsel failed to prepare for or call witnesses at the sentencing hearing.

Barkdull first contends that counsel rendered ineffective assistance in failing to conduct adequate pretrial discovery. Barkdull does not identify what witnesses could or should have been interviewed, or what information or evidence helpful to his cause would have been discovered. Representative of Barkdull's efforts to identify the prejudice allegedly flowing from counsel's lack of investigation is this statement: "Trial counsel failed ... to conduct an investigation of the facts of the case so as to provide an

adequate defense for leverage in negotiation [sic] a plea agreement.” *Id.* at 4. At best, Barkdull’s argument begs the question as to the existence of the prejudice. The foregoing statement simply assumes *something* helpful to his cause would have been uncovered, but it is left to our imagination as to what that “something” would be. This does not satisfy the requisite showing of prejudice.

Barkdull’s argument on this point also may be understood to include the claim that the amounts of the arrearages he was deemed to owe were not correct. This argument is similarly flawed in that the claim is supported only by what appears to be Barkdull’s suggestion that it might be so. This is simply not enough. The nearest he comes to identifying prejudice is to assert, “had counsel (deposed or interviewed witnesses relating to this case) he would have found that many of these woman/children [sic] did not want Barkdull prosecuted on their behalf.” *Id.* Even assuming that is true, Barkdull has not shown prejudice, because the decision whether to prosecute a criminal action is made by the State, not the victim or a complaining witness. *See Glass v. Trump Indiana, Inc.*, 802 N.E.2d 461 (Ind. Ct. App. 2004). Thus, if Barkdull was guilty of nonsupport of a dependent, the State could prosecute regardless of whether the mother or child wished to do so.

Barkdull next contends counsel failed to fully advise him concerning the guilty plea, thereby misleading Barkdull and forcing him to accept the plea. As was true with respect to the allegation above, Barkdull has not identified what advice counsel could have offered that would have changed the equation concerning whether accepting the

plea agreement was in Barkdull's best interest. On the question of whether defense counsel induced Barkdull to enter into the plea agreement by misleading him, we note that, as best we can tell, Barkdull agreed to accept a plea agreement without first consulting counsel. According to Barkdull, he attended a pretrial conference from which Dixon was absent. With the trial court's permission, Barkdull and three prosecutors met in a conference room adjacent to the courtroom and discussed Barkdull's cases. Apparently, it was during this meeting that Barkdull decided to accept a plea bargain. At a subsequent hearing, Barkdull informed Dixon about his conversations with the prosecutors "cause [Dixon] was not aware that [Barkdull] agreed to take a plea bargain." *Transcript* at 24.

Barkdull also seems to assert on this point that counsel misadvised him regarding the sentence he might or would receive. Barkdull describes the alleged misadvice as follows: "Notwithstanding the plea agreement being unconstitutional, trial counsel misrepresented the truth regarding the sentencing procedures, that is, that he could be sentenced to more time than the terms set forth in the plea agreement." *Appellant's Brief* at 6. This suggests that the plea agreement called for a different, lesser sentence than the one imposed by the trial court. Unfortunately, the plea agreement is not included in the appellate materials. We are informed on that matter only by comments made by the trial court at the post-conviction hearing. Said comments consist of the judge reading portions of what appears to have been a transcript of the guilty plea hearing. According to the quoted material, while discussing Barkdull's sentence at the guilty plea hearing, attorney

Dixon summarized a portion of the agreement as follows: “Your Honor, if his support arrearage is caught up, the charges are to be amended so he pleads guilty to an A misdemeanor.” *Transcript* at 34. The prosecuting attorney corrected Dixon as follows:

That is not actually ... that is actually not quite correct. Mr. Dixon is being a little harder on his client than we were. The misdemeanor treatment was if he made regular support payments including payments on his arrearage. I mean he has dug himself too big of a hole to get caught up thirty thousand dollars (\$30,000.00) in nine (9) years. I mean that is probably too much to ask, but if he stays current and he makes the payments, then the State would have no objection to reducing the sentence [to misdemeanors].

*Id.* If this is indeed the basis of Barkdull’s claim of misadvice, we are at a loss to understand how Dixon’s comparatively minor misunderstanding of the agreed-to sentence prejudiced Barkdull, especially in light of the fact that it was corrected almost immediately. If this is not the basis of Barkdull’s claim in this regard, we cannot discern what is. Again, Barkdull has failed to establish prejudice.

The final discernible claim of ineffective assistance is that counsel failed to prepare for or call witnesses at the sentencing hearing. Barkdull explains:

Trial counsel failed to prepare for Barkdull’s sentencing hearing, which resulted in a complete denial of counsel during that phase of the proceeding. Trial counsel did absolutely nothing to prepare for the sentencing. Further Mr. Dixon did nothing to bring in any of the woman [sic] and children who could have argued on Barkdull’s behalf. In fact, he allowed the Prosecutor to do all of the work for him as far as money amounts and time that a negotiation was not evident [sic].

*Appellant’s Brief* at 9. As is the case with allegations of ineffective assistance discussed above, Barkdull does not fully explain which witnesses counsel could have called or what

they would have said that might have affected the outcome. Barkdull has again failed to prove the prejudice element of his claim.

We have determined that, with respect to each instance of alleged ineffective assistance, Barkdull has failed to prove the prejudice element of his claim. Barkdull seeks to avoid the consequences of this lack of a showing of prejudice by invoking the fundamental error doctrine and alleging a *Cronic* error. With respect to the former claim, in order to rise to the level of fundamental error, an error must be so prejudicial to the rights of the defendant that a fair trial is impossible. *Caron v. State*, 824 N.E.2d 745 (Ind. Ct. App. 2005), *trans. denied*. This doctrine permits reversal only when there has been a blatant violation of basic principles that denies a defendant fundamental due process. *Id.* The defendant bears the burden of proving that such a fundamental error occurred that rendered the trial unfair. *Id.* “In determining whether an alleged error rendered a trial unfair, we must consider whether the resulting harm or potential for harm is substantial. We look to the totality of the circumstances and decide whether the error had a substantial influence upon the outcome.” *Id.* at 751 (internal citation to authority omitted). Our Supreme Court has consistently held that the doctrine of fundamental error is available only in egregious circumstances. *See, e.g., Brown v. State*, 799 N.E.2d 1064 (Ind. 2003). The fundamental error rule may not be invoked merely on the basis that an error occurred that was prejudicial to the defendant. *See Absher v. State*, 866 N.E.2d 350 (Ind. Ct. App. 2007). Neither is it enough to urge that a constitutional right is implicated. *Id.* To qualify as fundamental error, “an error must be so prejudicial to the rights of the

defendant as to make a fair trial impossible” and must “constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.” *Id.* at 355 (quoting *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002) (internal quotations and citations omitted)).

Barkdull’s claim of fundamental error is not separately explained; it is instead subsumed under the general discussion of ineffective assistance of counsel regarding failure to investigate. In effect, the argument for fundamental error consists only of invoking the term. Simply asserting the legal conclusions that his guilty plea was unfairly entered and that he received ineffective assistance of counsel, without any cogent argument or citation to authority addressed to the specific claim of fundamental error, is not enough to prove fundamental error. *See, c.f., Canaan v. State*, 683 N.E.2d 227, 232 (Ind. 1997) (concluding that defendant waived appellate review of his claim of ineffective assistance of trial counsel where defendant made only a “conclusory statement” as to the effect of trial counsel’s failure to object without providing supporting argument or authority), *cert. denied; see also* Ind. Appellate Rule 46(A)(8)(a) & (b) (providing that appellant’s contentions regarding the issues presented on appeal must be supported by cogent reasoning and by citations to authorities and statutes). Barkdull has failed to prove that counsel’s alleged failure to investigate and call witnesses constituted fundamental error.

Arguably, Barkdull also seeks to avoid the consequences of failing to prove prejudice by invoking *United States v. Cronin*, 466 U.S. 648 (1984). That case

established what amounts to a narrow exception to the two-part *Strickland* test. In *Cronic*, the U.S. Supreme Court suggested that in limited circumstances of extreme magnitude, “a presumption of ineffectiveness” may be justified and that such circumstances are, in and of themselves, “sufficient [to establish a claim of ineffective assistance] without inquiry into counsel’s actual performance at trial.” *Id.* at 662. Our Supreme Court has explained *Cronic* set out three situations that justify this presumption:

(1) when counsel is completely denied; (2) when counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing; and (3) when surrounding circumstances are such that, “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.”

*Conner v. State*, 711 N.E.2d 1238, 1248 (Ind. 1999) (quoting *United States v. Cronic*, 466 U.S. at 659-60), *cert. denied*.

Barkdull does not identify the category into which his *Cronic* claim fits. Indeed, he mentions *Cronic* only in passing while discussing the holding in *Patrasso v. Nelson*, 121 F.3d 297 (7<sup>th</sup> Cir. 1997), i.e.:

Court [in *Patrasso*] used *Cronic* standard of complete denial of counsel and presumed prejudice. There was much confusion as to when kids were born, establishment of paternity and further the money amount. Barkdull was left in many cases to the mercy of the Prosecutor and finally the court because of Mr. Dixon’s lack of assistance during and prior to the hearing.

*Appellant’s Brief* at 9. This argument is not sufficient to overcome, under *Cronic*, his failure to show prejudice in seeking to establish a *Strickland* violation.

2.

Barkdull challenges the voluntariness of his plea agreement. He argues:

Barkdull did not enter into his guilty plea, intelligently, or voluntarily because he was forced and misled by his trial counsel into accepting the terms of the plea agreement; he was taken advantage of because he lacked the legal knowledge comprehend [sic] the contents of the sentencing portions of the plea agreement. Further he was pushed by not only the State but also by the Court. Additionally, Barkdull concedes that the court advised him of his *Boykin* rights (*Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)); however, this plea agreement that the court accepted contained information as the money amount owed that Barkdull was not fully advised about prior to the sentencing hearing.

*Appellant's Brief* at 10.

In order to evaluate Barkdull's claim on this issue, we must consider the plea agreement itself, especially the portion of the agreement setting forth the sentencing terms. Unfortunately, it appears that Barkdull has failed to include the plea agreement in the appellate materials. Therefore, we are unable to review "the contents of the sentencing portions of the plea agreement", *id.*, and thus are unable to evaluate his claim that counsel misled him in that regard. We note, however, the material that is before us belies Barkdull's claim that counsel did not discuss with him the penal consequences of his plea. When questioned by the court, Barkdull acknowledged that he could read and write English, that he had the opportunity to discuss the plea agreement with counsel, and that he was pleased with counsel's representation. Thus, Barkdull has not proven that his guilty plea was not knowingly, voluntarily, or intelligently entered and it may not be set aside on that basis.

Judgment affirmed.

MATHIAS, J., and ROBB, J., concur.