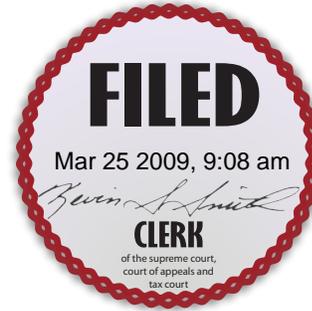


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JAMES G. ASCHERMAN,  
Appellant-Petitioner,

vs.

STATE OF INDIANA,  
Appellee-Respondent.

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No. 43A03-0803-PC-114

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APPEAL FROM THE KOSCIUSKO CIRCUIT COURT  
The Honorable Rex L. Reed, Judge  
Cause No. 43C01-8912-CF-94

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**March 25, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

In this *pro se* appeal, Appellant-Petitioner James Ascherman challenges the post-conviction court's partial denial of his petition for relief. Upon appeal, Ascherman points to several alleged errors at trial and claims he received ineffective assistance of trial and appellate counsel, all of which he claims warrant additional post-conviction relief. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

In a set-up drug deal in approximately June of 1989, confidential informant William Julian, in cooperation with authorities, attempted to buy drugs from Ascherman. Julian determined where Ascherman lived, went to his house wearing a body transmitter and tape recorder, and asked him if he had any cocaine and marijuana. Ascherman answered that he would have the drugs at a later date. At some subsequent point, Julian, who was again working in cooperation with authorities, returned with his wife to Ascherman's house, where Ascherman produced a bag of marijuana, which Julian purchased. On both August 29 and 30, 1989, Julian and his wife, while still working for authorities, purchased ecstasy pills from Ascherman.

Based upon the above and other facts, Ascherman was charged with two counts of Class B felony Dealing in a Schedule I Controlled Substance (Counts 1 and 3); two counts of Class D felony Possession of a Controlled Substance (Counts 2 and 4); Class D felony Dealing in Marijuana (Count 5); and Class D felony Possession of Marijuana (Count 6). Ascherman was also alleged to be a habitual offender.

Prior to trial, Ascherman's trial counsel wrote a letter to the prosecutor indicating his understanding that the State could respond to the defense's use of the entrapment

defense with predisposition evidence; that the defense strategy therefore was not to invoke the entrapment defense; and that, in exchange, the prosecutor would agree not to introduce evidence of Ascherman's predisposition. Also prior to trial, Ascherman's trial counsel filed a motion *in limine* seeking to exclude evidence relating to Ascherman's involvement in other controlled-substance-related offenses. The trial court granted this motion.

Following a jury trial, Ascherman was found guilty as charged and determined to be a habitual offender. *See Ascherman v. State*, 575 N.E.2d 277, 278 (Ind. Ct. App. 1991), *reh'g denied*, 580 N.E.2d 294 (Ind. Ct. App. 1991), *trans. denied*. The trial court sentenced Ascherman to fifty years for each of Counts I and III (consisting of a ten-year presumptive sentence, enhanced by ten years for aggravating circumstances and thirty years due to habitual offender status), and thirty-three years for each of Counts II, IV, V, and VI (consisting of a one-and-one-half-year presumptive sentence enhanced by one and one-half years for aggravating circumstances and thirty years due to habitual offender status). The trial court ordered that the sentences for Counts I and II be served concurrently with each other and consecutively with the concurrent sentences for each of Counts III and IV, and Counts V and VI. The trial court further ordered that Ascherman's sentence for Counts I and II be executed in the Department of Correction and that the balance of his sentence be suspended to probation.

On March 29, 1991, Ascherman filed a direct appeal challenging the trial court's admission of certain evidence, both during the trial and habitual offender phases, and the trial court's permitting the jury to possess a certain exhibit during deliberations. On July

24, 2001, this court rejected Ascherman's challenges and affirmed his convictions. *See id.*

Ascherman filed his initial *pro se* petition for post-conviction relief on October 20, 1994, amended it on July 20, 1995, and amended it by counsel on December 21, 2006.<sup>1</sup> In it, Ascherman apparently challenged his sentence on a number of grounds and alleged, *inter alia*, that he had received ineffective assistance of trial and appellate counsel. Following a September 5, 2007 hearing on the matter, the post-conviction court issued a February 6, 2008 order in which it vacated Ascherman's convictions, sentences, and fines in Counts II, III, IV, and VI, and reduced his sentence on Count V to three years by vacating the habitual offender enhancement. The post-conviction court denied all of Ascherman's additional claims. This appeal follows.

## **DISCUSSION AND DECISION**

### **I. Standard of Review**

In reviewing Ascherman's claims, we are mindful that the petitioner bears the burden to establish his grounds for post-conviction relief by a preponderance of the evidence. *Godby v. State*, 809 N.E.2d 480, 481-82 (Ind. Ct. App. 2004) (citing Ind. Post-Conviction Rule 1(5)), *trans. denied*. In challenging the post-conviction court's denial of relief on a number of grounds, Ascherman is appealing from a negative judgment and faces the rigorous burden of showing that the evidence as a whole "leads unerringly and unmistakably to a conclusion opposite to that reached by the [post-

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<sup>1</sup> Facts regarding the post-conviction proceedings are based upon the post-conviction court's order. Ascherman did not detail the post-conviction process leading to the instant appeal in his brief, nor did he include his petition for post-conviction relief or any of the amended petitions in his appendix.

conviction] court.”” *Id.* at 482 (quoting *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) (quotation omitted)). We will disturb a post-conviction court’s decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We accept the post-conviction court’s findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Id.*

Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). If an issue was known and available, but not raised on direct appeal, it is waived. *Id.* If it was raised on appeal, but decided adversely, it is res judicata. *Id.* A claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding if such claim is not raised on direct appeal. *Id.* A claim of ineffective assistance of appellate counsel is an appropriate issue for post-conviction review. *Id.*

## **II. Analysis**

### **A. Freestanding Claims of Trial Court Error**

Ascherman makes several claims of trial court error by challenging the trial court’s denial of a motion for a continuance, its admission of certain evidence, and its alleged use of the same criminal history to establish his habitual offender status and enhance his sentence. These challenges are freestanding claims of trial court error and are not available in post-conviction proceedings. *See Lambert v. State*, 743 N.E.2d 719,

726 (Ind. 2001). 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). Ascherman does not argue that any of these claims were demonstrably unavailable at the time of trial or direct appeal.<sup>2</sup> Accordingly, Asherman's freestanding claims of error are waived.

### **B. Ineffective Assistance of Counsel**

To establish a violation of the right to effective counsel as guaranteed by the Sixth Amendment, the petitioner must establish both prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wesley v. State*, 788 N.E.2d 1247, 1252 (Ind. 2003). First, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness—as measured by prevailing professional norms—and that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed to the defendant by the Sixth Amendment. *See id.* Second, a defendant must show that the deficient performance prejudiced the defense. *Id.* This requires a showing that counsel's errors were so serious as to deprive the defendant of a

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<sup>2</sup> Ascherman's sentencing claim is based upon alleged trial court error and does not reference Indiana Post-Conviction Rule 1(1)(a) as an avenue for relief. In any event, *Jones v. State*, 600 N.E.2d 544, 548 (Ind. 1992), cited in *Pedraza v. State*, 887 N.E.2d 77, 80 (Ind. 2008), stands for the proposition that under the presumptive sentencing scheme applicable to Ascherman, it was permissible for the trial court to consider the same prior offenses for both enhancement of the instant offense and to establish habitual offender status. Although *McVey v. State*, 531 N.E.2d 458, 461 (Ind. 1988) held that a history of criminal activity used as proof for a habitual offender finding could not also be the sole aggravating circumstance used to enhance a sentence, the sentencing order in the instant case suggests that the trial court considered a number of aggravating factors. Ascherman fails to point to any part of the record demonstrating that the trial court's sole aggravating circumstance in enhancing his sentence was the criminal history used to constitute his habitual offender enhancement.

fair trial, a trial whose result is reliable. *Id.* To establish prejudice, a defendant must show 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. *Id.* The two prongs of the *Strickland* test are independent inquiries, and failure to satisfy either prong will cause the claim to fail. *See Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), *trans. denied*. If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008). The same standard of review applies to claims of ineffective assistance of trial counsel and claims of ineffective assistance of appellate counsel. *Stephenson v. State*, 864 N.E.2d 1022, 1046 (Ind. 2007).

### **1. Investigation of Controlled Buy**

Ascherman argues that his trial counsel failed to adequately investigate the controlled nature of the drug buy to establish whether the proper procedures necessary for such buys were followed.

A controlled buy consists of searching the person who is to act as the buyer, removing all personal effects, giving him money with which to make the purchase, and then sending him into the residence in question. Upon his return he is again searched for contraband. Except for what actually transpires within the residence, the entire transaction takes place under the direct observation of the police.

*Methene v. State*, 720 N.E.2d 384, 387 (Ind. Ct. App. 1999) (quoting *Flaherty v. State*, 443 N.E.2d 340, 341 (Ind. Ct. App. 1982) (internal quotation and emphasis omitted).

According to Ascherman, the above procedures were not properly followed, which he claims was evidenced by testimony at the post-conviction hearing that the authorities could not actually see the controlled buy and that Julian's wife was not as thoroughly searched as he was. Ascherman fails to argue how the authorities' inability to view a transaction they were otherwise monitoring on audiotape or their failure to use certain particularly invasive search methods on Julian's wife demonstrate that the above procedures were not followed. Indeed, nothing from the above language specifies the exact search methods necessary, and the procedures specifically account for time during which authorities are unable to directly observe the transaction at issue. Even if the procedures were not followed, however, Ascherman fails to explain how the integrity of the controlled buy was so compromised that counsel's failure to investigate and object accordingly would have altered the outcome of the trial. Significantly, apart from pure speculation, Ascherman points to no evidence demonstrating that, contrary to Julian's testimony, another person sold Julian the drugs or that Julian's wife had undiscovered contraband on her person at the time of the buy. Ascherman's claim of ineffective assistance of trial counsel on this ground is without merit.

## **2. Entrapment Defense**

Ascherman additionally claims ineffective assistance of trial counsel on the grounds that trial counsel failed to investigate and advise him regarding the availability of the entrapment defense. Yet the record reveals that trial counsel and Ascherman were fully aware of the entrapment defense and the implications of using it, and that, in strategically attempting to avoid predisposition evidence in response to the entrapment

defense, they decided not to pursue it. As further evidence of this strategy, trial counsel filed a motion *in limine* seeking to bar evidence of Ascherman's other involvement in controlled-substance-related activities. Given the trial court's recognition during sentencing of Ascherman's "long and egregious involvement in controlled substances as a major distributor," Record p. 276, this appears to reflect sound strategy. Accordingly, we reject Ascherman's claim of ineffective assistance on this ground as well.

### **3. Objections at Trial**

Ascherman additionally alludes to trial counsel's alleged ineffective assistance on the grounds of "failing to object at trial to the State entering into evidence that were clearly outside the Court granted Motion in limine." Appellant's Br. p. 9. Ascherman develops this argument no further, and we deem it waived. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring argument be supported by cogent reasoning with citations to authority).

### **4. Failure to File "Davis" Petition**

Ascherman's final challenge is based upon an alleged failure to file a "Davis" petition. It is unclear whether this is a challenge to the effectiveness of trial or appellate counsel. Ascherman claims that trial counsel failed to file a "Davis Petition during his trial." Appellant's Br. p. 9. Ascherman also points, however, to testimony at the post-conviction hearing wherein appellate counsel, when asked about a "Davis petition where you can stop a direct appeal and go back down for further evidentiary hearing to put additional evidence in," responded that he did not recall whether he was aware of this procedure or not. Tr. p. 13. The State analyzes this claim as a challenge to appellate

counsel's failure to pursue a *Davis/Hatton* procedure, which involves the termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court. *Slusher v. State*, 823 N.E.2d 1219, 1222 (Ind. Ct. App. 2005).

Where it is necessary on appeal to develop an additional evidentiary record to evaluate the reasons for trial counsel's error, the proper procedure is to request that the appeal be suspended or terminated so that a more thorough record may be compiled through the pursuit of post-conviction proceedings. *Id.* This procedure for developing a record for appeal is more commonly known as the *Davis/Hatton* procedure. *Id.*

Apart from making references to testimony regarding "tapes," Ascherman fails to explain what part of the evidentiary record needed further development, how this would have affected the outcome of any of the lower proceedings, and how counsel was ineffective in failing to pursue a *Davis/Hatton* procedure, if indeed this is the procedure he is referring to. We deem this argument waived.

The judgment of the post-conviction court is affirmed.

MAY, J., and FRIEDLANDER, J., concur.

