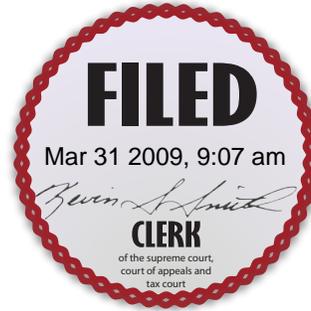


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

**SCOT DEAN SILVERS**  
Albion, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**IAN McLEAN**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

SCOT DEAN SILVERS,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

No. 02A03-0809-PC-474

---

APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Frances C. Gull, Judge  
Cause No. 02D04-0804-PC-40

---

**March 31, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Scot D. Silvers (“Silvers”) was convicted in Allen Superior Court of Class B felony robbery, Class D felony resisting law enforcement, and Class B felony unlawful possession of a firearm by a serious violent felon (“SVF”). The trial court sentenced Silvers to an aggregate term of twenty-three years. Following an unsuccessful appeal, Silvers seeks post-conviction relief, arguing the following:

- I. That the trial court abused its discretion in dismissing his petition for post-conviction relief;
- II. That his trial counsel was ineffective for failing to raise the issue of Indiana Rule of Criminal Procedure 4(B), failing to communicate State’s plea offer, and failing to bifurcate the trial; and,
- III. That appellate counsel was ineffective for failing to raise the issues requested by Silvers.

Affirmed.

### **Facts and Procedural History**

On direct appeal, the facts were set forth as follows:

[O]n September 10, 2001, Silvers and his sixteen-year-old son, Brandon, were staying with Joel Baker and Kimberly Kaufman. Baker gave Silvers permission to drive his blue Taurus. Driving the Taurus, Silvers and Brandon went to a gas station and parked behind the store. Silvers put on a black wig, pulled up the hood on his sweatshirt, put on sunglasses, grabbed a gun from the seat, and exited the car. Silvers left the car running and told Brandon he would be back shortly.

After robbing the store, Silvers ran to the car and told Brandon to drive away. Susan Kuhn saw him run from the store and reported the license plate number to the police. A few blocks away, Silvers and his son switched seats, and Silvers drove away. On their way home, a police car pulled behind them and activated its lights. Silvers accelerated, and a high-speed chase ensued. Silvers instructed Brandon to throw the wig, gun, and clip out the window, which he did. After running the car into a cornfield and attempting to escape on foot, Silvers and Brandon were apprehended. Police recovered the wig and gun clip.

The State initially charged Silvers with robbery as a Class B felony and resisting law enforcement as a Class D felony. The State later charged

him with Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony. After a jury trial, Silvers was found guilty as charged, and he now appeals.

Silvers v. State, No. 02A03-0204-CR-120, slip op. (Ind. Ct. App. Oct. 9, 2002).

On direct appeal, we affirmed Silvers's convictions. On August 21, 2003, Silvers filed a pro se petition for post-conviction relief. An attorney at the State Public Defender's office entered his appearance on October 20, 2003. Following a review of Silvers's claims, the attorney filed a report with the merit review committee at the State Public Defender's office. On January 16, 2007, the State Public Defender's office withdrew from the case. On February 1, 2007, the post-conviction court granted Silvers's motion to withdraw his petition.

On February 16, 2008, Silvers filed a second pro se petition for post-conviction relief. On April 25, 2008, the State answered and moved for consideration of Silvers's petition on affidavit pursuant to Indiana Post-Conviction Rule 1(9)(b). The post-conviction court granted the motion. Following briefing by the parties, the post-conviction court denied his petition on August 27, 2008. Silvers appeals.

### **Standard of Review**

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. McCary v. State, 761 N.E.2d 389, 391 (Ind. 2002). Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Davidson v. State, 763 N.E.2d 441, 443 (Ind. 2002). The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a

preponderance of the evidence. Ind. Post-Conviction Rule 1(5) (2006); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, 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.

The post-conviction court entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6) (2006). “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error – ‘that which leaves us with a definite and firm conviction that a mistake has been made.’” Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (quoting State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997)). Although we accept findings of fact unless they are clearly erroneous, we give conclusions of law no deference. Fisher, 810 N.E.2d at 679.

### **I. Ineffective Assistance of Trial Counsel**

Silvers claims that he was denied effective assistance of trial counsel.

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, a claimant must demonstrate that counsel’s performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. 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.” A reasonable probability arises when there is a “probability sufficient to undermine confidence in the outcome.”

Appellate review of the post-conviction court’s decision is narrow. We give great deference to the post-conviction court and reverse that court’s decision only when “the evidence as a whole leads unerringly and

unmistakably to a decision opposite that reached by the postconviction court.”

Although the two parts of the Strickland test are separate inquires, a claim may be disposed of on either prong. Strickland declared that the “object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.”

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (internal citations omitted).

Moreover, we presume that counsel provided adequate assistance, and we give deference to counsel’s choice of strategy and tactics. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). “Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.” Id.

A. *Indiana Rule of Criminal Procedure 4(B)*

Silvers first argues that trial counsel provided ineffective assistance by failing to file a motion to dismiss and discharge when the trial court failed to bring him to trial within seventy days of his request for a speedy trial under Indiana Rule of Criminal Procedure 4(B). Criminal Rule 4(B)(1)(2003) provides, in pertinent part:

If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar.

At Silvers’s initial hearing on October 11, 2001, he requested a speedy trial. Appellant’s App. p. 59. During a hearing on October 25, 2001, where Silvers and counsel were present, the trial court attempted to set the trial date for December 5, 2001 but could not due to the unavailability of the State. Direct Appeal App. p. 28. The trial

court then tried to set the trial for December 6, 2001 but Silvers's counsel was unavailable on that date. *Id.* The trial court then set the trial for January 3, 2002 which was outside the seventy days timeframe required by Silvers's speedy trial request. *Id.*

During a bond review hearing on November 8, 2001, Silvers's counsel notified the trial court that a one-day trial would be insufficient considering the numerous witnesses. Bond Hrg. Tr. p. 3. At this hearing, the trial court asked Silvers whether he agreed to the delay in the trial date. Silvers stated that he didn't know if he was in agreement with the new trial date and wished to "reserv[e] my right to appeal it." *Id.* at 4. The trial court then reset the trial to January 9-10, 2002.

Even if we were to assume that trial counsel provided ineffective assistance by failing to object to the setting of the trial date, Silvers has not shown that he was prejudiced. Had trial counsel filed a motion to discharge Silvers and the trial court granted the motion, the State could have refiled the charges and proceeded to trial albeit at a later date. Silvers has not shown that but for trial counsel's error, the result of the proceeding would have been different. Because Silvers has failed to show prejudice, his claim of ineffective assistance of counsel for failure to object to the setting of the trial date outside of seventy days allowed cannot succeed.

#### *B. Communication of Guilty Plea*

Silvers next argues that trial counsel provided ineffective assistance by failing to communicate a plea offer. Silvers alleges that trial counsel had a plea offer from the State but failed to present that offer to him. In his affidavit, Silvers refers to a report compiled for the State Public Defender Merit Review Committee regarding Silvers's first

petition for post-conviction relief. The report indicates that trial counsel did receive a plea offer from the State but there were no notes in trial counsel's file that indicated he had discussed the offer with Silvers. Appellant's App. p. 66. However, when asked about the plea offer, trial counsel stated that he "would have communicated the offer" and that he "thought a plea bargain was better because of the evidence against Silver[.]" but "recalled that Silvers was adamant that he was innocent and would not accept a deal." Id.

Silvers claims that he did not receive the plea offer, yet his designated evidence supports the position that trial counsel did in fact relay the offer to Silvers but that Silvers rejected the offer and maintained his innocence. Silvers has not demonstrated that trial counsel's performance was deficient.

### *C. Bifurcation of Counts I and III*

Silvers finally argues that trial counsel provided ineffective assistance by failing to seek bifurcation of the proceedings for the determination of his status as a serious violent felon. Prior to the start of trial, trial counsel stated that he would not be seeking bifurcation of the proceedings. Tr. p. 5. He reasoned that based on how he anticipated the defense case-in-chief proceeding, the prior conviction that makes Silvers a serious violent felon would come out during Silver's testimony. Id.

As noted above, we give deference to counsel's choice of strategy and tactics. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). The decision to forego a bifurcated trial and have Silvers testify to his prior robbery conviction is strategic and does not support a finding that trial counsel's actions were not reasonable. Additionally, Silvers has failed

to show how he was prejudiced by the failure of trial counsel to seek bifurcation of the proceedings.

## **II. Ineffective Assistance of Appellate Counsel**

Silvers argues that appellate counsel provided ineffective assistance by failing to raise the issues as Silvers had requested. A petitioner arguing ineffective assistance of appellate counsel based upon appellate counsel's failure to properly raise and support a claim of ineffective assistance of trial counsel faces a compound burden. Dawson v. State, 810 N.E.2d 1165, 1177 (Ind. Ct. App. 2004), trans. denied. A petitioner making such a claim must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. Id. The petitioner must establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. Id.

Silvers believed that appellate counsel should have raised the issues of ineffectiveness of trial counsel as noted above. Having determined that trial counsel did not provide ineffective assistance to Silvers, it necessarily follows that appellate counsel could not have been ineffective for failing to raise these issues.

## **Conclusion**

Silvers's trial counsel did not provide ineffective assistance for failing to file a motion to discharge pursuant to Criminal Rule 4(B)(1), by communicating a plea offer to Silvers, and choosing to forego bifurcation of the proceedings. Also, Silvers's appellate counsel did not provide ineffective assistance for choosing not to raise non-meritorious

issues of ineffective assistance of trial counsel. Therefore, the post-conviction court did not err when it denied Silvers's petition for post-conviction relief.

Affirmed.

BAILEY, J., and BARNES, J., concur.