

STATEMENT OF THE CASE

Petitioner-Appellant Edward Murrell appeals the denial of his petition for post-conviction relief. We affirm.

ISSUES

Murrell raises three issues, which we consolidate and restate as:

- I. Whether Murrell received ineffective assistance of trial counsel; and
- II. Whether Murrell received ineffective assistance of direct appeal counsel.

FACTS AND PROCEDURAL HISTORY

On February 5, 2003, an Indianapolis police officer sought a search warrant for a residence at 1350 Burdsal Parkway, Indianapolis, Indiana. In his probable cause affidavit, the officer asserted that a confidential informant had told him that Murrell was selling cocaine at that address. The court issued a search warrant for the residence. During the execution of the warrant, officers found cocaine and marijuana. The State charged Murrell with dealing in cocaine, a Class A felony; possession of cocaine, a Class C felony; dealing in marijuana or hash, a Class D felony; and possession of marijuana or hash, a Class D felony. Murrell filed a motion to suppress evidence and a request to reveal the identity of the confidential informant, and the trial court denied both requests. A jury found Murrell guilty as charged. Murrell appealed, arguing that the elected judge should have presided over his trial instead of a master commissioner. This Court affirmed the trial court's judgment in an unpublished Memorandum Decision. *See Murrell v. State*, Cause No. 49A04-0403-CR-155 (Ind. Ct. App. Dec. 23, 2004), *trans. denied*.

In 2006, Murrell filed a petition for post-conviction relief. The court denied Murrell's petition without holding an evidentiary hearing, and Murrell appealed. In an unpublished Memorandum Decision, this Court reversed the post-conviction court's decision and remanded for an evidentiary hearing. *See Murrell v. State*, Cause No. 49A02-0807-PC-657 (Ind. Ct. App. Mar. 19, 2009).

On remand, the post-conviction court held a hearing on Murrell's claims. The court denied Murrell's petition, and he now appeals.

DISCUSSION AND DECISION

In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. *Hall v. State*, 849 N.E.2d 466, 468 (Ind. 2006). To prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Id.* at 469. Where, as here, the post-conviction court enters findings and conclusions in accordance with Indiana Post-Conviction Rule (1)(6), we will reverse upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. *Id.* (quotation omitted).

I. EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel performed deficiently and the deficiency resulted in prejudice. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). To satisfy the first prong,

the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the “counsel” guaranteed by the Sixth Amendment. *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008). To satisfy the second prong, the defendant must show prejudice: a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel’s errors, the result of the proceeding would have been different. *Id.* Counsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption. *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007).

In this case, Murrell first contends that his trial counsel, Marcel Pratt, rendered ineffective assistance by failing to argue effectively that the evidence against Murrell should have been suppressed.¹ Prior to Murrell’s trial, Pratt filed a motion to suppress all evidence obtained through the search warrant, arguing that the evidence in the probable cause affidavit was stale. Murrell contends that Pratt should have instead argued that the confidential informant’s assertions were uncorroborated and unreliable.²

In the probable cause affidavit, the officer asserted that he knew the informant to be a past user of cocaine and could therefore identify cocaine and the manner in which it is packaged for sale. The officer further asserted that he believed that the informant was

¹ The State contends that Murrell waived this issue by failing to present it to the post-conviction court. Based on our review of the record, we disagree and address this issue on the merits.

² Murrell also presents this issue as a freestanding claim of error. This issue was available to Murrell on direct appeal. Therefore, it is waived as a freestanding issue. *See Bunch v. State*, 778 N.E.2d 1285, 1289 (Ind. 2002) (noting, “claims available on direct appeal but not presented are not available for post-conviction review”). Nevertheless, we consider his claim in the context of effective assistance of counsel.

reliable because on three prior occasions the informant had provided information that led to the seizure of controlled substances and to criminal convictions. The officer's sworn statements in the affidavit were sufficient to establish the reliability of the informant. *See Teague v. State*, 891 N.E.2d 1121, 1129 (Ind. Ct. App. 2008) (determining that the State established an informant's reliability by testifying as to the informant's history of providing truthful information in criminal investigations). Consequently, it was not objectively unreasonable for Murrell's trial counsel to decline to challenge the informant's reliability in the motion to suppress.

Murrell also argues that his counsel should have argued in the motion to suppress that the police illegally filed two affidavits of probable cause, the second one dated February 11, 2003, four (4) days after the search, which contained additional observations about Murrell. We disagree. The first affidavit, Murrell's post-conviction exhibit A, was the probable cause affidavit for the search warrant. The second affidavit, Murrell's post-conviction exhibit B, was the probable cause affidavit for Murrell's arrest and was filed after the execution of the search warrant. The Chronological Case Summary (CCS) supports this. According to the CCS, on February 11, 2003, the State filed a probable cause affidavit, the trial court found probable cause, and it ordered the issuance of an arrest warrant for Murrell. Murrell points to no authority that bars the State from filing a probable cause affidavit for an arrest warrant after executing a search warrant. Therefore, it was not objectively unreasonable for Murrell's trial counsel to decline to challenge the two probable cause affidavits in the motion to suppress.

Next, Murrell argues that his trial counsel was ineffective because he was unsuccessful in obtaining the disclosure of the identity of the confidential informant. Prior to Murrell's trial, Pratt asked the trial court to order the State to disclose the informant's identity. Pratt informed the court that he wanted to question the informant regarding the informant's statement that Murrell was at the Burdsal Parkway residence with cocaine prior to the execution of the search warrant. Murrell contends that Pratt should have more explicitly argued that being denied the opportunity to question the informant would violate Murrell's right to confront witnesses against him under the Sixth Amendment to the United States Constitution. We disagree. Pratt clearly conveyed to the court an intention to confront the confidential informant, and the court denied his request. Murrell does not demonstrate that Pratt could have obtained a different result by citing the Sixth Amendment.³ We cannot say that Pratt's performance on this point was objectively unreasonable. *See Perry v. State*, 904 N.E.2d 302, 309 (Ind. Ct. App. 2009), *trans. denied* (determining that counsel had presented the defendant's mental illness as a mitigating factor during sentencing, despite the defendant's claim to the contrary, and that the Court "cannot and will not find . . . trial counsel ineffective for failing to do something that he did, in fact, do").

Finally, Murrell contends that his trial counsel was ineffective for failing to pursue an interlocutory appeal of the denial of his motion to suppress. Murrell did not present this issue to the post-conviction court. Therefore, it is waived on appeal. *See Allen v.*

³ For the purposes of this opinion, we assume without deciding that the informant's statement to the police was testimonial in nature, thereby triggering Murrell's Sixth Amendment protections.

State, 749 N.E.2d 1158, 1171 (Ind. 2001) (determining that claims raised for the first time in a post-conviction appeal are waived).

For these reasons, with respect to the trial court's conclusion that Murrell received effective assistance of trial counsel, we are not left with a definite and firm conviction that a mistake has been made.

II. EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show that appellate counsel was deficient in his or her performance and that the deficiency resulted in prejudice. *Henley*, 881 N.E.2d at 644. Ineffective assistance of appellate counsel claims fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Carter v. State*, 929 N.E.2d 1276, 1278 (Ind. 2010). Ineffectiveness is rarely found when the issue is failure to raise a claim on direct appeal. *Taylor v. State*, 717 N.E.2d 90, 94 (Ind. 1999)

Murrell contends that his counsel on direct appeal, Katherine Cornelius, rendered ineffective assistance because she waived two issues. Specifically, he contends that Cornelius: (1) should have challenged the sufficiency of the evidence supporting his convictions; and (2) should have claimed that Murrell received ineffective assistance of trial counsel because trial counsel should have filed an interlocutory appeal of the denial of Murrell's motion to suppress evidence.

Regarding the sufficiency of the evidence, Cornelius testified at the post-conviction hearing that it is her practice to challenge the sufficiency of the evidence when

she thinks that an element of a charge has not been proven. In this case, she concluded that there was not a viable sufficiency of the evidence argument and raised a different argument instead. Thus, Cornelius considered a sufficiency of the evidence claim and made a strategic decision not to present it in Murrell's appeal. Considering Cornelius' performance in its totality, her performance on this issue did not fall below an objective standard of reasonableness under prevailing professional norms. *See Taylor*, 717 N.E.2d at 94 (rejecting a claim of ineffective assistance of appellate counsel for failure to raise an issue where counsel raised several other issues).

Next, as to whether Cornelius should have claimed that Murrell received ineffective assistance of trial counsel because trial counsel should have filed an interlocutory appeal, Murrell did not present this claim to the post-conviction court. Consequently, it is waived on appeal. *See Allen*, 749 N.E.2d at 1171. Thus, with respect to the trial court's conclusion that Murrell received effective assistance of direct appeal counsel, we are not left with a definite and firm conviction that a mistake has been made.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

BAKER, J., and BAILEY, J., concur.