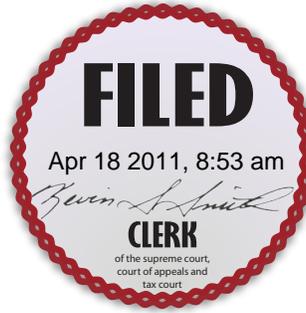


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

**MARLAN BONDS**  
Michigan City, Indiana

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

**MICHAEL GENE WORDEN**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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MARLAN BONDS, )  
 )  
 Appellant-Petitioner, )  
 )  
 vs. ) No. 20A04-1005-PC-315  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Respondent. )

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable George W. Biddlecome, Judge  
Cause No. 20D03-0803-PC-8

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**April 18, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Marlan Bonds appeals the post-conviction court's denial of his petition for post-conviction relief ("PCR"), raising the following consolidated issue: whether Bonds received ineffective assistance of trial and appellate counsel.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

In October 2003, Bonds was living with his wife and her four-year-old daughter. On the morning of October 11, 2003, Bonds was babysitting the girl while her mother went to work. The facts most favorable to the convictions are that, sometime that morning, Bonds held the child by her feet and her neck and dipped her in a bathtub of scalding water, causing her to suffer third degree burns on her buttocks, vaginal area, and surrounding portions of her body. The child's mother telephoned home to check on the status of things and heard her daughter moaning, so she rushed home and discovered the burns. On October 29, 2003, the State charged Bonds with Class B felony neglect of a dependent and Class D felony battery on a child and later added an habitual offender enhancement charge. Attorney Thomas Wilson entered his appearance for Bonds in January 2004.

Prior to trial, Wilson conducted pretrial discovery, including discussing the case with Bonds, taking witness depositions, and investigating the case. His investigation and trial preparation included speaking with the doctor/psychiatrist that treated Bonds, who explained that while Bonds was on medication at the time of the incident, he would still have been capable of understanding what he was doing. *Tr.* at 134. Accordingly, Wilson did not pursue an insanity defense. Bonds's theory of defense was that the child ingested some of his

medications and burned herself in scalding water in the bathtub, and that he was in another room and did not know it was happening. Wilson advised Bonds not to waive his right to a jury trial but, ultimately, Bonds chose to waive a jury trial and proceed with a bench trial, which began on August 9, 2004.

During the second day of trial, Bonds sought to dismiss Wilson as his attorney. The trial court recessed the trial and ordered a competency evaluation. Two doctors submitted reports that Bonds was competent; therefore, at the August 18 status conference, the trial court ruled that Bonds was competent to stand trial, and Bonds agreed with the trial court's determination. *Appellant's App.* at 560-64. The trial court next addressed the outstanding issue of whether Wilson would continue to represent Bonds. Initially, Bonds insisted that he desired to represent himself; however, he eventually acknowledged "the seriousness of [the] charges" and agreed to Wilson's continued representation of him. *Id.* at 569-70.

The trial resumed on August 25, and that day, Bonds dismissed Wilson as his counsel and elected to proceed *pro se*. The trial court appointed Wilson as standby counsel. The trial court found Bonds guilty of both charged offenses, adjudged Bonds an habitual offender, and sentenced him to consecutive sentences totaling fifty-three years. Bonds appealed and was represented by attorney Eugene C. Hollander.

Bonds's claims on direct appeal were: (1) whether Bonds was competent such that he could knowingly waive his right to a jury trial; (2) whether the trial court abused its discretion when the trial court denied Bonds's request to assert an insanity defense; and (3) whether the trial court abused its discretion in sentencing Bonds. *Appellee's Br.* at 4;

*Appellant's App.* at 395-96. This court affirmed Bonds's convictions and sentence by unpublished decision. *Bonds v. State*, Cause No. 20A03-0412-CR-582 (Ind. Ct. App. Apr. 13, 2006).<sup>1</sup>

Bonds filed a *pro se* petition for PCR in May 2008, and the State filed an answer; however, Bonds filed an amended *pro se* PCR petition and memorandum in support in November 2008. *Appellant's App.* at 50-52. The Indiana Public Defender's office declined representation, issuing a memorandum of no merit.

During the evidentiary hearing on the amended PCR petition, Bonds asked the trial court to admit as an exhibit the record of his direct appeal and the trial record. While the trial court granted his request, the record before us suggests that Bonds never presented a copy of either the appellate or trial court records to be marked and admitted.<sup>2</sup> *See Appellee's Br.* at 5 n.2. At the hearing, Bonds presented the testimony of attorney Wilson, who stated that he investigated Bonds's case, which included interviewing witnesses, doctors, and Bonds on innumerable occasions. *Tr.* at 160-61. Wilson also reviewed medical and psychiatric records relative to the issue of Bonds's competency. With regard to Bonds's mental state at the time of the offense, Wilson noted that Bonds's explanation both to Wilson and at trial for the child's burn injuries was that he was not present when she burned herself, *i.e.*, he "didn't do it." *Tr.* at 161. Therefore, issues related to Bonds's mental competency at the time of the offense were irrelevant at trial, and an insanity defense was inapplicable. Furthermore,

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<sup>1</sup> A copy of the memorandum decision is not included in the record before us.

<sup>2</sup> Neither the trial record nor the appellate record are included in the record before us.

Wilson opined that an intoxication defense would not have been successful at trial because, based on the information he learned during his investigation, Bonds was competent at the time of the crime. *Appellant's App.* at 253-54, 267-74, 278-79, 295; *Tr.* at 153. Wilson also testified that despite his advice to Bonds that he should not waive a jury trial, Bonds did so anyway. Bonds did not present any other witnesses at his PCR hearing.

After taking the matter under advisement, the trial court denied Bonds's PCR petition by written order, and Bonds now appeals.

### **DISCUSSION AND DECISION**

At the outset, we note that *pro se* litigants, such as Bonds, are held to the same standard as trained counsel and are required to follow procedural rules. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. “[T]he courts of this State have never held a trial court is required to guide *pro se* litigants through the judicial system.” *Id.*

The petitioner for post-conviction relief bears the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert. denied* 537 U.S. 839 (2002). Bonds is appealing from a negative judgment, and he must convince us that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite the one reached by the post-conviction court. *Timberlake*, 753 N.E.2d at 597; *Jervis v. State*, 916 N.E.2d 969, 972 (Ind. Ct. App. 2009), *trans. denied* (2010), *cert. denied* 131 S. Ct. 472 (2010). The reviewing court will not reverse the judgment unless the petitioner shows that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-

conviction court. *Jervis*, 916 N.E.2d at 972. Further, the post-conviction court in this case made findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which leaves us with a definite and firm conviction that a mistake has been made. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). Findings of fact are accepted unless clearly erroneous, but no deference is accorded to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Id.*

## I. Trial Counsel

Bonds contends that his trial counsel rendered ineffective assistance to him. We have set out the standard for reviewing ineffective assistance claims:

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) (internal citations omitted), *trans. denied* (2006), *cert. denied* 549 U.S. 1130 (2007). There is a strong presumption that counsel rendered adequate assistance. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002), *cert. denied* 540 U.S. 830 (2003).

To establish the prejudice prong of the test, Bonds must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* "Prejudice exists when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result of the proceeding fundamentally unfair or unreliable." *Jervis*, 916 N.E.2d at 972.

Initially, we note a couple of matters. First, the record before us does not include a copy of the trial transcript. Although Bonds asked for and was granted permission at the PCR hearing to admit the trial transcript as an exhibit, it appears that he did not provide a copy to the post-conviction court to be marked and admitted. As the State observes, "It is practically impossible to gauge the performance of trial counsel without the trial record[.]" *Appellee's Br.* at 9 (quoting *Tapia v. State*, 753 N.E.2d 581, 587 n.10 (Ind. 2001)). Second, Bonds chose to represent himself during trial, despite the trial court's efforts to encourage him to retain attorney Wilson. Because he represented himself, he cannot bring a Sixth Amendment claim of ineffective assistance of trial counsel. *See Carter v. State*, 512 N.E.2d 158, 162-164 (Ind. 1987); *Wright v. State*, 663 N.E.2d 210, 212 (Ind. Ct. App. 1996) (by agreeing to proceed *pro se*, defendant waived any ineffective assistance claim). Nevertheless, we address the merits of Bonds's claims.

In large part, Bonds's assertions stem from claims that attorney Wilson failed to properly investigate his case. "When deciding a claim of ineffective assistance of counsel for

failure to investigate, we apply a great deal of deference to counsel’s judgments.” *Parish v. State*, 838 N.E.2d 495, 500 (Ind. Ct. App. 2005). Bonds maintains that Wilson failed to talk to witnesses, failed to seek a third competency evaluation, failed to review medical records, and failed to speak to doctors concerning his mental capacity and mental health issues. The gist of Bonds’s position is that he was incompetent at the time of the offense and incompetent at the time of trial, and that his attorney failed, by lack of investigation, to determine either. Contrary to Bonds’s assertions, Wilson testified at the PCR evidentiary hearing that he spoke with members of Bonds’s family and obtained medical records from Oaklawn Hospital, where Bonds was treated. He interviewed doctors to discuss and assess Bonds’s mental condition and the effect of medications on him. Wilson learned that the medication Bonds was taking would not have prevented Bonds from understanding circumstances of his conduct and recognizing danger posed by his actions. Accordingly, Wilson found that doctor’s testimony would not have been helpful to Bonds’s defense, and Wilson did not pursue an insanity defense. Here, Bonds has failed to reveal what any further investigation would have uncovered, to establish precisely what Wilson should have found, and how not finding it prejudiced him. His claim that Wilson was ineffective for failure to sufficiently investigate his case therefore fails.

Bonds also asserts that Wilson was ineffective for “failing to motion the Court for a competency evaluation by an independent psychiatrist[.]” *Appellant’s Br.* at 41. During trial, the trial court recessed the case to have Bonds undergo a competency evaluation; two psychiatrists determined he was competent to stand trial. At the PCR hearing, Wilson

testified that he had no basis to request a third competency evaluation. Bonds has failed to demonstrate why Wilson should have ordered a third competency evaluation, and his claim that Wilson was ineffective for failure to request or obtain another competency evaluation at trial is without merit.

Bonds next claims that Wilson should have filed an insanity defense and failed to present an involuntary intoxication defense. As Wilson explained at the PCR hearing, Bonds maintained that he did not commit the offense (did not place the child in scalding water) and was not present in the bathroom when it happened; thus, an insanity defense, which admits to having committed the offense, was not appropriate or applicable and was not pursued at trial. Furthermore, the decision of whether to pursue an insanity defense is a matter of trial strategy, and an appellate court will not substitute its judgment for trial counsel's on matters of trial strategy and tactics. *See Field v. State*, 426 N.E.2d 671, 673 (Ind. 1981).

With regard to Bonds's claim that Wilson should have pursued an involuntary intoxication defense, Bonds failed to present any evidence in support of that claim at the PCR hearing. While Bonds argued that Wilson should have presented evidence that he was "forced" to take medication and that those medications had "allergenic side effects," *Tr.* at 168, he presented no admissible evidence on the matter at the PCR hearing. Furthermore, Wilson testified that he spoke with Bonds's treating physician, who told him that the medications Bonds was taking would not have prevented him from understanding his actions. Accordingly, Wilson did not have information suggesting an intoxication defense would have

been successful, and we are not persuaded that Wilson was ineffective for not presenting an intoxication defense at trial.

Bonds also asserts that Wilson was ineffective because “he failed to advocate Bonds[’s] constitutional rights when counsel waived the fundamental right to a jury trial[.]” *Appellant’s Br.* at 5. We reject this claim of error. First, Bonds personally waived the right to a jury trial, not Wilson, and he did so against Wilson’s advice; Wilson testified at the PCR hearing that he adamantly advised against waiving a jury trial. *Tr.* at 269-70. Second, as the State notes, Bonds’s claim that his waiver was not made knowingly, intelligently, or voluntarily is a “freestanding claim” that is unavailable in a post-conviction proceeding. *Appellee’s Br.* at 16. Third, the post-conviction court determined that Bonds’s claimed error regarding waiver of a jury trial was considered and rejected in Bonds’s direct appeal. *Appellant’s App.* at 395-96. Bonds presented no evidence to the contrary at the PCR hearing. To the extent that Bonds suggests Wilson knew or should have known that Bonds was being “forced” to take medications, there was no evidence presented of that fact at the PCR hearing, and in fact, Wilson testified that he had no basis, after consultation and investigation, to believe Bonds was not competent to waive his right to a jury trial. Bonds has failed to establish prejudice and his ineffective assistance of counsel claim fails.

Wilson testified at the PCR hearing about deposing witnesses, interviewing others, and objecting and cross-examining witnesses at trial. Bonds presented no credible evidence at the PCR hearing that Wilson’s performance fell below an objective standard of reasonableness and, moreover, nothing to establish that Bonds was prejudiced by Wilson’s

representation of him at trial. Bonds's claim that his trial counsel was ineffective therefore fails.

## II. Appellate Counsel

Bonds also contends that his appellate counsel rendered ineffective assistance for failing to assert that he did not have the capacity to waive jury trial and failing to raise the “meritorious issue[]” that Bonds was under the influence of “forced psychotropic medications” before and during trial. *Appellant's Br.* at 46-47; *Tr.* at 186. We review claims of ineffective assistance of appellate counsel using the same standard applicable to claims of trial counsel ineffectiveness. *Fisher*, 810 N.E.2d at 676 (citing *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)). The defendant must show that appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Id.* Ineffective assistance claims at the appellate level of proceedings generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Id.* The Indiana Supreme Court has recognized the need for a reviewing court to be deferential to appellate counsel on a “waiver of issues” type of claim:

[T]he reviewing court should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

*Fisher*, 810 N.E.2d at 677 (citing *Timberlake*, 753 N.E.2d at 605).

Here, Bonds claims that his appellate counsel, Hollander, was ineffective because Hollander raised the jury trial waiver issue for the first time in Bonds's reply brief, and

therefore, Bonds was prejudiced. We are not persuaded. In addition to the fact that Bonds fails to provide us with cogent argument or authority on the matter, we also reject his ineffectiveness claim because Bonds failed to present any evidence supporting this claim to the post-conviction court. Specifically, from the record before us, it appears that Bonds sought permission at the PCR hearing to admit the trial and appellate records, which presumably would include his Appellant's Brief and Reply Brief from his direct appeal, but he did not provide a copy to the PCR court to be marked and admitted. Nor did attorney Hollander testify at the PCR hearing. Based on the record before us, there is no evidence that the trial record included evidence supporting his claim that he was forcibly medicated with something that caused him to be unable to knowingly and intelligently waive his right to a jury trial. In fact, Bonds has failed to illustrate that Hollander even knew about the alleged "forced" medication issue. Accordingly, Bonds has failed to establish that he was prejudiced by appellate counsel's performance, and his claims of ineffective assistance of appellate counsel fail.

Affirmed.

CRONE, J., and BRADFORD, J., concur.