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APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

RICHARD BECK
Michigan City, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD BECK,)
)
 Appellant-Petitioner,)
)
 vs.) No. 49A05-0807-PC-412
)
 STATE OF INDIANA,)
)
 Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus Stinson, Judge
The Honorable Jeffrey Marchal, Commissioner
Cause No. 49G06-0405-FB-73587

May 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Richard Beck challenges the denial of his petition for post-conviction relief.

We affirm.

ISSUES

1. Whether Beck's challenges to the sufficiency of the evidence; his trial in absentia; and, the amendment of the charging information are barred *res judicata*.
2. Whether Beck's claims regarding waiver of his right to trial by jury; alleged procedural error regarding the filing of the habitual offender charge; violation of his Sixth Amendment rights; and, prosecutorial misconduct are barred by waiver.
3. Whether Beck failed to meet his burden of proof on his claim of ineffective assistance of trial and appellate counsel.

FACTS

We have previously found the facts of this case to be as follows:

At approximately 11:00 a.m. on April 28, 2004, employees at a business on South Singleton Street in Indianapolis observed Beck using a crowbar to open the back door to the south unit of a duplex residence at 2103 South Singleton Street. Beck was wearing a hooded sweatshirt with the hood pulled around his face even though it was warm outside. The employees telephoned the police, and shortly thereafter, Indianapolis police officers arrived on the scene. While they were waiting for the police to arrive, the employees observed Beck take a television set into the house.

The exterior of 2103 South Singleton showed damage from pry marks and the residence sustained over \$600 in damage as a result of the break-in. Inside 2103 South Singleton, the police found a stereo, speakers, and a television set, all of which belonged to residents of 2109 South Singleton. The exterior of 2109 South Singleton showed damage from pry marks and the interior revealed that items had been moved.

On May 3, 2004, the State charged Beck with Count I, class B felony Burglary, Count II, class D felony Theft, Count III, class D felony Residential Entry, and Count IV, class A misdemeanor Criminal Mischief. On June 4, 2004, the State filed a Habitual Offender count. After waiving

his right to be tried by a jury on the first four counts against him, Beck's bench trial was scheduled for July 6, 2004. * * * After resting, the [S]tate moved to amend the information to change the address where the residential entry and criminal mischief alleged in Counts III and IV occurred. The trial court overruled Beck's objection to the amendment. The trial court found Beck guilty on all counts.

* * *

Beck waived his right to be tried by a jury on the habitual offender count and on December 15, 2004, the trial court found Beck to be a[n] habitual offender. On January 14, 2005, the trial court merged the theft count into the burglary count and merged the criminal mischief count into the residential entry count because of double jeopardy concerns. It sentenced Beck to thirteen years of incarceration on the burglary count, enhancing the sentence by ten years because of the habitual offender finding, and two years of imprisonment on the residential entry count, to be served consecutively.

Beck v. State, No. 49A02-0502-CR-116 *2-4 (Ind. Ct. App. October 31, 2005).

In Beck's direct appeal, he argued that "(1) the evidence was insufficient to support his conviction; (2) the trial court erred when it tried him in absentia without conducting a competency hearing; and (3) the trial court erred when it permitted the State to amend two of the counts against him after the State had rested." *Id.* On October 31, 2005, we affirmed Beck's conviction on counts I and III, but remanded the matter to the trial court with instructions to vacate the judgment of convictions on counts II and IV.

On June 12, 2006, Beck filed a petition for post-conviction relief, wherein he alleged "1) improper trial in absentia; 2) improper denial of competency hearing; 3) insufficient evidence; 4) error in granting counsel's motion to withdraw; 5) improper suppression of evidence; 6) prosecutorial misconduct; 7) denial of right to jury trial; 8) improper habitual offender charge; 9) ineffective assistance of trial counsel; and 10) ineffective assistance of appellate counsel." (Findings of Fact, Conclusions of Law 2).

On February 7, 2008, the post-conviction court conducted an evidentiary hearing on Beck's petition for post-conviction relief. Chester Vanover -- leaseholder of the 2109 South Singleton Street residence -- and Beck testified at the hearing. Beck did not subpoena his trial counsel or appellate counsel to testify; nor did he introduce affidavits from counsel in support of his claim. On May 5, 2008, the post-conviction court denied Beck's petition for post-conviction relief. Beck now appeals.

DECISION

Beck raises seven issues for our review. He argues that (1) the evidence is not sufficient to support his conviction for class B felony burglary; (2) the trial court erred when it refused to set aside his waiver of trial by jury; (3) the trial court erred by trying him in absentia before conducting a competency hearing; (4) the trial court erred when it failed to follow the proper procedures for filing the habitual offender charge; (5) the trial court erred in allowing the State to amend the charging information after it had rested its case; (6) the trial court and the post-conviction court violated his Sixth Amendment right to counsel; and (7) there was prosecutorial misconduct.

The State counters that Beck's "claims concerning the sufficiency of the evidence to support his Burglary conviction, the holding of his trial *in absentia*, and the amending of the charging information" are barred *res judicata*. State's Br. at 6. The State also asserts that Beck's "remaining claims, with the exception of his ineffective assistance of counsel claim" are barred by waiver or procedural default. State's Br. at 6. The State asserts further that Beck has not met his burden of proof with regard to his claim of ineffective assistance of trial counsel.

Our supreme court has held that

[p]ost-conviction proceedings do not afford an opportunity for a ‘super-appeal.’ Rather, post-conviction proceedings provide defendants the opportunity to raise issues that were not known at the time of the original trial or that were not available on direct appeal. *Lowery v. State*, 640 N.E.2d 1031, 1036 (Ind. 1994) (‘Post-conviction actions are special, quasi-civil remedies whereby a party can present an error which, for various reasons, was not available or known at the time of the original trial or appeal.’), cert. denied, 516 U.S. 992, 116 S.Ct. 525, 133 L.Ed.2d 432 (1995). These proceedings do not substitute for direct appeals but provide a narrow remedy for subsequent collateral challenges to convictions. The petitioner for post-conviction relief has the burden of establishing his grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000), reh’g denied, cert. denied, 534 U.S. 1164, 122 S.Ct. 1178 (2002) (internal citation omitted).

1. Res Judicata

First, Beck’s contentions that the evidence is insufficient to support his conviction; that the trial court erred in conducting his trial in absentia; and that the trial court erred in permitting the State to amend the charging information are barred by *res judicata*.

As a general rule, when this Court decides an issue on direct appeal, the doctrine of *res judicata* applies, thereby precluding its review in post-conviction proceedings. The doctrine of *res judicata* prevents the repetitious litigation of that which is essentially the same dispute. A petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error.

Id. As the State notes in its brief, these claims “were all raised, argued, and decided adversely to [Beck] in his direct appeal.” State’s Br. at 8. Accordingly, to the extent that Beck is again advancing these same claims, they are barred by *res judicata*.

2. Barred Claims

Next, Beck's assertions that the trial court erred when it refused to set aside his waiver of trial by jury; that the trial court permitted the State to improperly file the habitual offender charge; and that the prosecutor committed misconduct are barred from consideration due to waiver or procedural default. *See Spranger v. State*, 650 N.E.2d 1117, 1121 (Ind. 1995) (Issues available, but not presented, on direct appeal forfeited on post-conviction review). *But cf. Woods v. State*, 701 N.E.2d 1208 (Ind. 1998) (regarding claims of ineffective assistance of trial counsel).

Beck has failed to present any evidence to show how the trial court erred or that he was prejudiced by the trial court's actions. Thus, his claims as to the trial court's refusal to set aside his waiver of jury trial, the improper filing of the habitual offender charge, and alleged prosecutorial misconduct are waived.

3. Ineffective Assistance of Counsel

Beck argues that he was entitled to post-conviction relief on his claim of ineffective assistance of trial and appellate counsel. Before reviewing whether Beck received ineffective assistance of counsel, we note the following:

Effectiveness of counsel is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in *Strickland*. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. Deficient performance is that which falls below an objective standard of reasonableness. Prejudice exists when a claimant 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 is a probability sufficient to undermine confidence in the outcome.' The two prongs of the *Strickland* test are separate and independent inquiries. Thus, '[i]f it is easier to

dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.’

Zachary v. State, 888 N.E.2d 343, 346 (Ind. Ct. App. 2008) (some internal citations omitted).

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The *Strickland* Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. The two prongs of the *Strickland* test are separate and independent inquiries. Thus, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice that course should be followed.

Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001) (citing *Strickland*, 466 U.S. at 689-90).

Beck asserted that his counsel rendered ineffective assistance because counsel recommended that Beck waive his right to trial by jury; however, the post-conviction court found, as supported by the record, that Beck failed to introduce the testimony of his trial counsel at the hearing on his petition for post-conviction relief, thereby raising the reasonable inference “that counsel would not have supported [Beck’s] allegations.” (Findings of Fact, Conclusions of Law 11). The post-conviction court noted further that Beck’s claim that trial counsel was ineffective because counsel “accept[ed] the State’s version of facts and subsequent[ly] fail[ed] to make motions,” constituted trial strategy, which is not subject to attack through an ineffectiveness claim, unless it is so

unreasonable or lacking as to fall outside the objective standard of reasonableness. (Findings of Fact, Conclusions of Law 11).

Moreover, the post-conviction court ruled that Beck was required to demonstrate that trial counsel's failure to object "was unreasonable and resulted in sufficient prejudice such that there exist[ed] a reasonable probability [that] the outcome would have been different" had there been a proper objection. (Findings of Fact, Conclusions of Law 12). Because Beck advanced "only general allegations that counsel failed to interview witnesses, failed to properly prepare for trial, and that counsel thought the case would be dismissed," the post-conviction court reasonably "infer[red] that counsel would not have supported [Beck]'s claims" and found that Beck had failed to meet his evidentiary burden. (Findings of Fact, Conclusions of Law 12).

Next, regarding Beck's claim that trial counsel was ineffective for failing to investigate his mental condition, the trial court found that the burden was on Beck to "present evidence that was available to counsel – had they conducted the type of investigation [Beck] now claims they should have – that would have resulted in the imposition of a different sentence." (Findings of Fact, Conclusions of Law 12). The post-conviction court concluded, and we agree, that Beck has failed to produce any such evidence to support his claim.

With respect to alleged ineffectiveness of appellate counsel, Beck argued that counsel failed to raise a hearsay issue pertaining to the content of doctor statements. Under his evidentiary burden, Beck was required to show that appellate counsel's performance was deficient and further, that he was prejudiced as a result. The post-

conviction court found that Beck “d[id] not point to any prejudice that he may have suffered, and . . . presented no such evidence at the evidentiary hearing.” (Findings of Fact, Conclusions of Law 14). Thus, the post-conviction court concluded, and we agree, that Beck was not entitled to relief from his claim of ineffectiveness of appellate counsel.

Our review leads us to conclude that Beck has failed to meet his evidentiary burden. Beck did not subpoena trial counsel, Angela Dow-Davis, or appellate counsel, Todd Woodmansee, to testify at the hearing on his petition for post-conviction relief; nor did he introduce affidavits from counsel in support of his claim. In addition, he failed to introduce the trial record and/or transcript into evidence at the evidentiary hearing on his petition for post-conviction relief; consequently, they cannot be considered part of the post-conviction record or considered on appeal. *See State v. Hicks*, 525 N.E.2d 316, 317 (Ind. 1998) (“[A] post-conviction court may not take judicial notice of the transcript of the evidence from the original proceedings unless exceptional circumstances exist. The transcript must be admitted into evidence just like any other exhibit. Because the record was not submitted to the post-conviction court, it was not part of the evidence the post-conviction court considered when denying [petitioner’s] petition, and it is not in the record before us on appeal.”).

Given the lack of evidence on Beck’s claims of ineffective assistance of trial and appellate counsel, we are unable to assess the performance of counsel and, hereby, affirm the post-conviction court’s findings that Beck was not entitled to relief with respect to his claims of ineffective assistance of trial and appellate counsel.

Affirmed.

BAILEY, J., and ROBB, J., concur.