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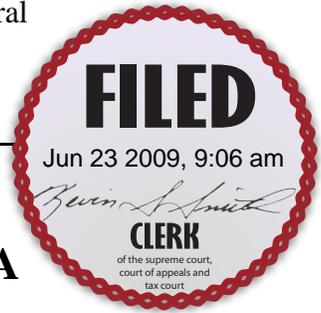
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**IN THE  
COURT OF APPEALS OF INDIANA**

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FRANK JENKINS, IV,  
Appellant-Petitioner,

vs.

STATE OF INDIANA,  
Appellee-Respondent.

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No. 84A04-0812-PC-727

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APPEAL FROM THE VIGO SUPERIOR COURT  
The Honorable David R. Bolk, Judge  
Cause No. 84D01-0303-MR-665

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**June 23, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Frank Jenkins, IV, appeals the post-conviction court's denial of his petition for relief.

We affirm.

### **Facts and Procedural History**

On February 9, 2002, Jenkins knowingly shot and killed Antonio A. Jackson. He also knowingly possessed a firearm after having been convicted in 2000 of a serious violent felony. On February 27, 2002, the State charged Jenkins with felony murder and class B felony possession of a firearm by a serious violent felon. On November 26, 2003, the parties entered into a plea agreement, in which Jenkins agreed to plead guilty to both charges in exchange for the State's recommendation of concurrent sentences of forty-five years for murder and ten years for the firearm conviction. On December 23, 2003, the trial court sentenced Jenkins pursuant to the plea agreement.

On March 5, 2008, Jenkins filed a petition for post-conviction relief. He argued that he had been denied effective assistance of trial counsel for several reasons: (1) counsel had not advised him of his right of allocution at his sentencing hearing; (2) counsel failed to ensure that he had been properly advised of the nature of the offenses; (3) counsel failed to advise him of double jeopardy concerns regarding the charges; and (4) counsel failed to properly investigate and prepare the case for trial. On August 21, 2008, the State filed its response. On October 6, 2008, the post-conviction court held a hearing on the petition. On November 21, 2008, the post-conviction court denied Jenkins's petition for relief. This appeal ensued.

## Discussion and Decision

In reviewing the judgment of a post-conviction court, we consider only the evidence and reasonable inferences supporting the judgment. *Hall v. State*, 849 N.E.2d 466, 468 (Ind. 2006). The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. *Id.* at 468-69. When the post-conviction court has denied relief, the petitioner appeals from a negative judgment and must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

Jenkins bore the burden of establishing his grounds for relief by a preponderance of the evidence. *Id.* Evaluating a claim of ineffective assistance of counsel requires application of a two-part test articulated by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and more recently summarized by another panel of this court as follows:

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Second, the defendant must show that the deficient performance resulted in prejudice. To establish prejudice, a defendant must show 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.

*Sial v. State*, 862 N.E.2d 702, 704 (Ind. Ct. App. 2007) (citations omitted).

### ***A. Statement of Allocution***

Jenkins contends that his trial counsel was ineffective in failing to advise him of his right to make a statement of allocution at sentencing. In support of his claim, he cites

*Biddinger v. State*, 868 N.E.2d 407 (Ind. 2007). In *Biddinger*, our supreme court held that although the trial court need not advise a guilty plea defendant of his right to make a statement of allocution, if a guilty plea defendant asks to make such a statement, then the trial court must grant that request. *Id.* at 412. Prior to *Biddinger*, Indiana courts had consistently held that a defendant who pled guilty simply did not have a right to allocution at sentencing. See, e.g., *Devore v. State*, 658 N.E.2d 657 (Ind. Ct. App. 1995); *Fuller v. State*, 485 N.E.2d 117 (Ind. 1985); *Minton v. State*, 400 N.E.2d 1177 (Ind. Ct. App. 1980).

*Biddinger* was issued more than three years after Jenkins's sentencing hearing. For purposes of ineffective assistance claims, the law requires consideration of legal precedent available to counsel at the time of his representation of the accused. *Sweeney v. State*, 886 N.E.2d 1, 8 (Ind. Ct. App. 2008), *trans. denied, cert. denied*; *Gann v. State*, 550 N.E.2d 73, 75 (Ind. 1990). Counsel will not be deemed ineffective for not anticipating or initiating changes in the law. *Id.* At the time of Jenkins's sentencing, he was not entitled to make a statement of allocution pursuant to Indiana law. Therefore, his argument must fail.<sup>1</sup>

### ***B. Advisement of Nature of Charges***

Next, Jenkins claims that his attorney was ineffective in failing to advise him prior to his guilty plea that both his killing of Jackson and his possession of the firearm involved a

“knowing” mens rea. Before accepting a guilty plea, the trial court must determine that the defendant understands the elements of the charge to which he pleads guilty. *Howse v. State*, 672 N.E.2d 441 (Ind. Ct. App. 1996) (citing *State v. Sanders*, 596 N.E.2d 225, 228 (Ind. 1992), *cert. denied*), *trans. denied* (1997); *see also* Ind. Code § 35-35-1-2(a)(1) (“The court shall not accept a plea of guilty ... without first determining that the defendant ... understands the nature of the charge against him”). Jenkins says that “the guilty plea hearing in this case contains no explanation of the charge by the trial judge, or any representation by trial counsel that the nature of the offense was explained to the Defendant[.]” Appellant’s Br. at 10. Our review of the transcript indicates otherwise.

At the guilty plea hearing, the trial court asked Jenkins if he understood the nature of the charges against him, and he answered affirmatively. The trial court specifically recited the charges and explained the sentencing ranges for each, after which the following exchange took place:

COURT:                   And, knowing all of these things I have just explained to you how do you plead to this charge of Murder, a Felony?

DEFENDANT:           Guilty.

COURT:                   What is the factual basis?

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<sup>1</sup> Jenkins cites Indiana Code Section 35-38-1-5, which states in pertinent part,

When the defendant appears for sentencing, the court shall inform the defendant of the verdict of the jury or the finding of the court.... The defendant may also make a statement personally in the defendant’s own behalf and, before pronouncing sentence, the court shall ask the defendant whether the defendant wishes to make such a statement.

We note that Article 38, of which this statute is a section, deals with “Proceedings Following Dismissal, Verdict, or Finding[.]” This statute is not applicable to guilty plea hearings.

[PROSECUTOR]: With respect to the charge of Murder, on or about February 9, 2002, in Vigo County, Indiana, Frank Jenkins, IV did then and there *knowingly* kill Antonio A. Jackson by shooting the said Antonio A. Jackson with a firearm, in violation of the statute.

COURT: Is that what happened?

DEFENDANT: Yes.

[PROSECUTOR]: With respect to Count 2...

COURT: How do you plead to Count 2, Unlawful Possession of a Firearm by a Serious Violent Felon?

DEFENDANT: Guilty.

[PROSECUTOR]: With respect to Count 2, on or about February 9th, 2002 in Vigo County, Indiana, the Defendant, Frank Jenkins, IV did then and there *knowingly* possess a firearm, and prior thereto, on or about April 17<sup>th</sup>, 2000 in Clay County, in the Clay Circuit Court, Clay County, Indiana, the said Frank Jenkins, IV was convicted of a serious violent felony, to-wit: Burglary, a Class B Felony in violation of the statute.

COURT: Is that also all true?

DEFENDANT: Yes.

COURT: Do you understand that by pleading guilty you are admitting the truth of the facts alleged against you by the State?

DEFENDANT: Yes, sir.

Appellant's Exhibit 2 at 6-7 (emphases added).

Jenkins claims that "had [he] been advised by the Court or trial Counsel that he had to have knowingly committed the offense of murder, [he] would have maintained his innocence

of any intent to commit murder or to the knowing possession of a firearm.” Appellant’s Br. at 13. In our view, the transcript reveals that Jenkins was advised of the nature of the charges to which he was pleading guilty, and that he expressed as much through his answers to the court’s questions. As shown above, Jenkins admitted to the court that the prosecutor’s descriptions of his crimes—which both included the word “knowingly”—were accurate. Thus, Jenkins’s claim must fail.

### ***C. Double Jeopardy***

Jenkins alleges that his trial counsel was ineffective in failing to advise him that if he were to exercise his right to a trial, any conviction and sentence on the firearm charge would merge into the conviction and sentence on the murder charge based on double jeopardy principles. First, we note that Jenkins has waived this issue by failing to include an argument in his appellant’s brief. Pursuant to Indiana Appellate Rule 46(A)(8)(a), “[t]he argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on....” On this issue, Jenkins included only one paragraph in the “Summary of the Arguments” section of his brief, and he failed to provide any supporting citations. Thus, his argument is waived. *See, e.g., Cooper v. State*, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (finding argument waived where it was “supported neither by cogent argument nor citation to authority”).

Waiver notwithstanding, Jenkins’s claim fails. The extent of his argument is that if his counsel had advised him of the double jeopardy issue, he “would have maintained his

innocence and chosen to proceed to trial by jury.” Appellant’s Br. at 5. Such a self-serving conclusory statement is insufficient to carry his burden, however. *Sial*, 862 N.E.2d at 705-06. When a petitioner alleges that his attorney was ineffective in failing to advise him of the possible penal consequences of a guilty plea, he must establish special circumstances or specific facts showing that if the attorney had properly advised him, there is a reasonable probability that he would have chosen to proceed to trial. *See id.* at 707-08 (concluding that defendant received ineffective assistance of counsel where counsel failed to advise him that deportation was a possible consequence of a guilty plea, and where there were special circumstances, namely that he had wife and daughter living in U.S. and that he had lived in U.S. for over twenty years). Jenkins has failed to do so here.

***D. Trial Counsel’s Lack of Preparedness for Trial***

Finally, Jenkins claims that his counsel was unprepared for trial, which motivated him to advise Jenkins to accept the plea agreement. At the post-conviction hearing, trial counsel testified that he had talked with Jenkins on numerous occasions, that he had investigated the case, and that he was prepared to go to trial. As mentioned above, the post-conviction court is the sole judge as to the credibility of the witnesses. *Hall*, 849 N.E.2d at 468. Moreover, we will consider only the evidence supporting the post-conviction court’s decision. *Id.* The post-conviction court was free to believe the testimony of Jenkins’s trial counsel and to disbelieve Jenkins’s testimony. Accordingly, we affirm the judgment of the post-conviction court.

Affirmed.

BRADFORD, J., and BROWN, J., concur.