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:

RANDY M. SWISHER
Westville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

FILED
Jul 19 2011, 9:48 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

RANDY M. SWISHER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 64A03-1004-PC-204
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause No. 64D02-0911-PC-11831

July 19, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Randy M. Swisher appeals the denial of his petition for post-conviction relief. More particularly, Swisher contends that the post-conviction court erred by concluding that the issues in Swisher's petition were known to him at the time of his direct appeal. Finding no error, we affirm.

FACTS

The underlying facts, as stated by a panel of this Court in Swisher's direct appeal are as follows:

> On January 1, 2008, Swisher was home alone while his son Josh, daughter-in-law Megan, their baby, and their friends, Chad and Amber, went to lunch. Earlier that day, Swisher overheard the group talking about him behind a closed door. The group was discussing Swisher's recent erratic behavior and considering obtaining mental help for him. Swisher was convinced they were hashing out a "plot to kill him." Appellant's Br. p. 4.
>
> As the group pulled into the driveway after lunch, Swisher came outside with a shotgun. He was yelling that they should call 911. Thinking that there had been a home invasion, Josh and Chad ran into the house. Chad grabbed a handgun from his glove compartment before entering the house. The women stayed behind with the baby and called 911.
>
> Once Josh got inside, Swisher asked for his cell phone and then told Josh to sit on the couch. When Josh refused, Swisher pointed the shotgun at him. Chad walked in, and Swisher asked him for his cell phone. Chad refused, and Swisher pointed the shotgun at him. Chad raised his own gun. Swisher fired, and hit Chad in the arm and shoulder. Chad fired back and hit Swisher in the midsection. Josh got down and went to get a gun from his bedroom. Josh returned to [the] room to find Chad crouched on the floor. Josh ordered Swisher to drop the shotgun. He refused, and Josh fired. Swisher went to his knees and dropped the shotgun, but was still holding a 9mm Glock handgun. Josh continued to yell for Swisher to drop the weapon. When Swisher did, Josh pinned Swisher against the stove in the kitchen. Josh noticed all the stove burners were on without flames and assumed the home was filling with gas.

> The State charged Swisher with Class B felony aggravated battery and Class C felony battery with a deadly weapon. Swisher represented himself at the four day trial. The jury found him guilty of both counts. The trial court sentenced him to twenty years for the aggravated battery and merged the other count. This appeal followed.

Swisher v. State, 64A03-0810-CR-514, memo op. at 2-3 (Ind. Ct. App. July 9, 2009), trans. denied.

On appeal, Swisher proceeded pro se and argued that the trial court had improperly instructed the jury and that he was denied due process because the trial court declined to order the Porter County Sheriff's Department to turn over a computer. Id. at 3-5. A panel of this Court rejected these arguments and affirmed Swisher's convictions. Id. at 5-9.

On November 19, 2009, Swisher filed a petition for post-conviction relief and a motion for a change of judge. On November 25, 2009, the post-conviction court denied Swisher's motion for a change of judge. On February 1, 2010, the State filed an answer to Swisher's petition and a motion to dismiss. On March 29, 2010, the post-petition court denied Swisher's petition without a hearing. Swisher now appeals.

DISCUSSION AND DECISION[1]

[1] As an initial matter, we note that on May 12, 2011, Swisher filed a pro se Motion for Summary Judgment with this Court and on June 7, 2011, he filed a pro se Motion and Request for Specific and Special Findings of Facts and Conclusions of Law on the Motion for Summary Judgment. Summary judgment is utilized by our trial courts under Indiana Trial Rule 56. Accordingly, Swisher's motions are not properly before this Court. Notwithstanding this conclusion, Swisher essentially argues that this Court erred by granting the court reporter an extension of time to prepare the transcript for this appeal. This Court did not grant the court reporter an extension of time. Rather, this Court noted in its October 25, 2010, Order that no hearing was conducted on Swisher's petition for post-conviction relief. Therefore, there were no transcripts to prepare. In any event, Swisher's motions are denied.

Swisher appeals from the denial of his petition for post-conviction relief. In post-conviction proceedings, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Helton v. State, 907 N.E.2d 1020, 1023 (Ind. 2009); see also Ind. Post-Conviction Rule 1(5). Because the post-conviction court denied relief, Swisher is appealing from a negative judgment and faces the rigorous burden of showing "that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the [post-conviction] court." Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993).

Post-conviction relief is not a substitute for a direct appeal. Holt v. State, 656 N.E.2d 495, 496 (Ind. Ct. App. 1995). Rather, post-conviction relief is reserved for those issues not known at the time of trial and direct appeal or for some reason not available to the defendant at that time. Id. A petitioner seeking post-conviction relief must show that the issues raised were unascertainable at the time of trial and direct appeal or the allegations arising therefrom are waived. Id. Furthermore, issues which have been raised and adjudicated on direct appeal are res judicata and not subject to consideration for post-conviction relief. Id.

Swisher raised seven issues in his petition for post-conviction relief, including insufficient and inaccurate transcripts, procedural due process violations, evidence tampering, jury tampering, judicial prejudice, actual innocence by law, and erroneous sentence. As the post-conviction court observed, "[e]ach and every of Petitioner's allegations within the Petition for Post-Conviction Relief were raised by the Petitioner in

his original Notice of Appeal and in his Motion to Correct Error." Appellee's App. p. 7. Consequently, they are waived. See Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001) (stating that "[i]f an issue was known and available, but not raised on direct appeal, it is waived").

Moreover, to the extent that Swisher chose not to avail himself of an issue on direct appeal, he has failed to sufficiently explain to this Court why he could not do so. Likewise, although Swisher vigorously contends that a hearing is necessary to prove the claims in his petition for post-conviction relief, he does not elaborate with any specificity the facts in which a hearing would bring to light. And a post-conviction court may summarily deny a petition for post-conviction relief when it can determine, after reading the petition and consulting the record, that there is no factual issue in dispute. Godby v. State, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004). Consequently, we affirm the decision of the post-conviction court.[2]

The judgment of the post-conviction court is affirmed.

MAY, J., and BRADFORD, J., concur.

---

[2] Swisher also accuses several individuals involved in the appellate process of improper and criminal conduct. Specifically, in his Reply Brief, Swisher accuses the Deputy Attorney General of misrepresenting facts. Similarly, Swisher accuses the Appellate Clerk, Chief Judge Robb, and myself, when I served as Chief Judge of this Court, of "obstruction of justice" and participants in a larger conspiracy. Reply Br. p. 7. This argument completely lacks cogency. See Ind. Appellate Rule 46(A)(8) (stating that the "argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning") (emphasis added). Even more compelling, Swisher's accusations are wholly unsupported by the record.