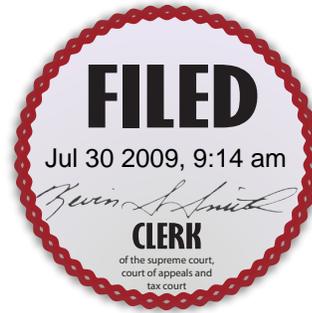


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MONDRE D. BROWN,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 49A05-0806-PC-381

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Sheila A. Carlisle, Judge  
The Honorable William T. Robinette, Master Commissioner  
Cause No. 49G03-0410-PC-196476

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**July 30, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Mondre Brown (“Brown”) was convicted in Marion Superior Court of Class A felony attempted murder and Class C felony assisting a criminal. He was ordered to serve a forty-five-year aggregate sentence. Brown filed a direct appeal, but later moved to dismiss the appeal and requested permission to file a petition for post-conviction relief. After a post-conviction hearing was held, his petition was denied. Brown appeals and raises several issues, which we restate as:

- I. Whether Brown was denied the effective assistance of trial counsel;
- II. Whether Brown was denied the effective assistance of post-conviction counsel; and,
- III. Whether Brown’s consecutive sentences run afoul of Indiana Code section 35-50-1-2(c).

We affirm.

### **Facts and Procedural History**

On or about May 25, 2003, Brown and several acquaintances were at Club Holla in Indianapolis. While at the club, Brown was involved in an altercation with George Saffold (“Saffold”), Clarence Sanders (“Sanders”), and Cortez Smith (“Smith”). Saffold and Sanders later left the club with four other individuals in a black Pontiac Grand Prix. They were traveling in the area of 34<sup>th</sup> and Keystone when a brown Chevrolet Caprice driven by Brown pulled in front of the Grand Prix. When the Grand Prix attempted to turn onto Keystone, the Caprice moved to cut it off. Smith, who was a passenger in the Caprice, jumped out of the car, and the driver of the Grand Prix drove into an alley.

At that point, Brown also stepped out of the Caprice. Both Brown and Smith were carrying firearms. Brown and Smith pursued the Grand Prix down the alley and multiple gunshots were fired at the vehicle. Brown and Smith then ran back to the Caprice and drove away. Saffold, who was a passenger in the back seat of the Grand Prix, died shortly thereafter as a result of a gunshot wound to his head. Sanders also suffered a non-fatal gunshot wound to the head.

During the investigation of the shooting, one of the passengers in the Grand Prix identified Brown from a photo array. Brown agreed to speak to Detective Jerry Pullings (“Detective Pullings”), and Brown admitted that he owned the Caprice. He stated he was present at the shooting but not involved.

In 2004, Brown was charged with murder and Class A felony attempted murder. A jury trial commenced on July 18, 2005. The jury hung as to the murder charge, but found Brown guilty of attempted murder. Brown was retried on the murder charge and was convicted of Class C felony assisting a criminal. On June 14, 2006, the trial court ordered Brown to serve consecutive terms of forty years, with five years suspended, for Class A felony attempted murder and five years for Class C felony assisting a criminal, for an aggregate forty-five-year sentence.

Brown filed a direct appeal of his conviction, but later filed a motion to dismiss the appeal without prejudice and requested permission to file a petition for post-conviction relief. In his petition for post-conviction relief, Brown alleged that trial counsel was ineffective for 1) failing to object to testimony regarding a firearm not used in the commission of the offense, 2) failing to advise Brown not to contact one of the

victims, 3) advising Brown not to testify at trial; and, 4) having a conflict of interest with one of the victims.

On May 22, 2008, the post-conviction court entered the following pertinent findings of fact:

9. . . . Ms. Maxwell provided the following testimony regarding her preparation for Brown's trial:

I drove to the location of the crime to get a physical layout of it. I talked to some of the neighbors that were down there looking for witnesses. I traveled to different jails to interview . . . people. I spent a lot of time with his family trying to get some background on that evening and his relationship with the party. Took a look at and examined statements and police reports and paperwork. Went to a rehab facility to interview another witness who claimed to have seen the events of that night. Did some comparisons of how many different Chevy Caprice's of that year were around in the neighborhood had listed with the bureau, tried to determine how many would match that description.

In addition, Ms. Maxwell testified that she met with Petitioner 12-14 times leading up to his trial.

Ms. Maxwell testified that prior to trial she had discussed with deputy prosecutor Mark Busby the firearm that was found in the search of defendant's car, that the ballistics tests did not match the murder weapon, and that Mr. Busby had told her that the gun would not be coming into evidence. Ms. Maxwell testified that she relied upon this representation, that she was absolutely in shock when the State offered the firearm, and that she should have reacted more quickly and objected. Ms. Maxwell also testified that, during her cross-examination of the detective, the fact was brought out that said gun was found during a probation sweep.

Ms. Maxwell testified that she had discussions with her client about whether or not he should testify, and that one of her concerns was that his prior criminal history might come out –not as Ashton offenses but that his prior acts might come in mistakenly based upon his testimony. . . . Ms. Maxwell further testified that her opinion at the time was that it would be a mistake for the defendant to testify, and she wrote such a note to him in response to his note that he wanted to testify.

Appellant's App. pp. 66-68.

The trial court concluded that Brown failed to establish that his trial counsel was ineffective because Brown could not demonstrate that he was prejudiced by counsel's alleged errors. Consequently, the court denied Brown's petition for post-conviction relief. Brown now appeals. Additional facts will be provided as necessary.

### **Standard of Review**

As explained by our supreme court in Henley v. State, 881 N.E.2d 639 (Ind. 2008):

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, [a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.

Id. at 643-44 (citations and internal quotation omitted).

### **I. Effective Assistance of Trial Counsel**

Our supreme court has summarized our review of claims of ineffective assistance of trial counsel as follows:

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668 (1984). Thus, a claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Strickland, 466 U.S. at 687-88. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome." Id.

\* \* \*

Although the two parts of the Strickland test are separate inquir[ies], a claim may be disposed of on either prong. See Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). Strickland declared that the "object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." 466 U.S. at 697.

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006).

When considering the deficient performance prong of the Strickland test, the question is not whether the attorney could, or even should, have done something more. Reed v. State, 866 N.E.2d 767, 769 (Ind. 2007). "Rather, the question is whether the attorney's performance amounted to a reasonably competent defense or did not." Id. As a result, the inquiry must focus on what the attorney actually did. Id. "[I]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Id. (quoting Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001)). Moreover, because counsel is afforded considerable discretion in choosing strategy and tactics, "[a] strong presumption arises that counsel rendered adequate assistance." Id. (quoting Timberlake, 753 N.E.2d at 603).

First, we address Brown's arguments with regard to the firearm found in his vehicle. Brown claims that after Detective Pullings received a tip from his "baby mama" that Brown was involved in the shooting, Detective Pullings arranged for the probation department to execute a "probation sweep" of Brown's residence and vehicle. As a result of the search, the detective found a submachine gun in the trunk of Brown's vehicle.

Brown alleges his trial counsel was ineffective for failing to object to the admission of evidence concerning the search and submachine gun at trial. In support of this argument, Brown cites cases holding that “[t]he State must demonstrate that a warrantless search of a probationer was a true probationary search and not an investigatory search.” See e.g. Allen v. State, 743 N.E.2d 1222, 1228 (Ind. Ct. App. 2001), trans. denied (citing Purdy v. State, 708 N.E.2d 20, 23 (Ind. Ct. App. 1999) (“A probation search cannot be a mere subterfuge enabling the police to avoid obtaining a search warrant.”)).

In his petition for post-conviction relief, Brown did not argue that trial counsel should have challenged the search and submachine gun on Fourth Amendment grounds. Therefore, this issue is waived. See Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006), trans. denied.

Brown also argues that trial counsel should have made an Evidence Rule 404(b) objection to the testimony regarding the submachine gun found in his vehicle. However, this claim is also waived because Brown failed to raise this issue in his petition for post-conviction relief.<sup>1</sup> Moreover, possession of a weapon is not necessarily a “prior bad act” as that term is used in Rule 404(b). See Pickens v. State, 764 N.E.2d 295, 299 (Ind. Ct. App. 2002), trans. denied.

Waiver notwithstanding, and assuming for the sake of argument that counsel erred by failing to raise these arguments at trial, Brown cannot establish any prejudice. As the trial court found:

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<sup>1</sup> In his petition for post-conviction relief, Brown alleged that his trial counsel was ineffective for failing to object to the evidence concerning the submachine gun because the gun was found one year after the shooting and was not connected to the shooting by any “ballistics or identification evidence[.]” Appellant’s App. p. 61.

Neither has Petitioner proven prejudice as to counsel's non-objection. As soon as the firearm was mentioned, the detective's testimony immediately thereafter conveyed that this 9mm [submachine gun] was not the gun that fired the bullets used in the crime. And Ms. Maxwell's cross-examination clarified that the crime lab tested this weapon and it was determined to have nothing to do with the evidence of 5-25-03. Moreover, the State placed negligible focus on this evidence in its case in chief and only mentioned this firearm briefly in its rebuttal closing. This issue comprised a few moments worth of a two-day trial.

Appellant's App. p. 77.

Brown also argues that counsel was ineffective for referring to the search as a "probation search." Again, Brown cannot establish prejudice. The statement was merely a single reference inferring that Brown was on probation, and trial counsel's "mistake of mentioning the word probation was [nothing] more than a minor slip with minimal effect." See Appellant's App. p. 79. Cf. Holtz v. State, 858 N.E.2d 1059, 1063 (Ind. Ct. App. 2006), trans. denied ("In our view, testimony regarding one prior conviction—with no further information about the date or the nature of the conviction—would not suggest to the jury that Holtz was a career criminal. Thus, we cannot conclude that there was a reasonable probability that the jury's verdict would have been different, but for the admission of testimony regarding one prior conviction.").

Brown's final ineffective assistance of trial counsel claim is that counsel was ineffective for failing to raise a hearsay objection to Detective Pullings' testimony regarding statements Brown made to the detective. Brown's claim fails because his statements were admissible under Indiana Evidence Rule 801(d)(2) as statements by a party opponent. See Banks v. State, 761 N.E.2d 403, 405 (Ind. 2002) (citing Evid. R. 801(d)(2) ("A party's own statement offered against that party is not hearsay.")).

For all of these reasons, we conclude that Brown has not established that he was denied effective assistance of trial counsel.

## II. Post-Conviction Counsel

Next, Brown claims he was denied effective assistance of post-conviction counsel because “[t]he evidence in this case, clearly shows that there were more meritorious issues that [post-conviction counsel] could have raised on Post-Conviction than those that were raised.” Appellant’s Br. at 26.

“The right to counsel in post-conviction proceedings is guaranteed by neither the Sixth Amendment of the United States Constitution nor [Article] 1, [Section] 13 of the Constitution of Indiana. A petition for post-conviction relief is not generally regarded as a criminal proceeding and does not call for a public trial within the meaning of these constitutional provisions. It thus is not required that the constitutional standards be employed when judging the performance of counsel when prosecuting a post-conviction petition at the trial level or at the appellate level.

We therefore apply a lesser standard responsive more to the due course of law or due process of law principles which are at the heart of the civil post-conviction remedy. We adopt the standard that if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court, it is not necessary to judge his performance by the rigorous standard set forth in Strickland. . . .”

Taylor v. State, 882 N.E.2d 777, 783 (Ind. Ct. App. 2008) (quoting Baum v. State, 533 N.E.2d 1200, 1201 (Ind. 1989)).

Brown’s argument that post-conviction counsel could have raised “more meritorious issues” is not a cognizable claim for relief. See Matheney v. State, 834 N.E.2d 658, 663 (Ind. 2005) (“That counsel chose the claims counsel believed likely to prevail is not ‘abandonment’ and did not deprive Matheney of a procedurally fair post-conviction proceeding.”).

### **III. Single Episode of Criminal Conduct**

Finally, we address Brown's argument that his aggregate forty-five year sentence is illegal because his convictions arose from a single episode of criminal conduct. On the date Brown committed these offenses, Indiana Code section 35-50-1-2(c) limited the total sentence for acts arising out of a single episode of criminal conduct to the presumptive sentence for a felony one class higher than the highest felony charged, unless the convictions were classified as crimes of violence. Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003).

Brown's claim fails for two reasons. In 2001, our General Assembly amended section 35-50-1-2(a) and added attempted murder to the list of crimes of violence. Although assisting a criminal is not listed as a crime of violence, "limitations on consecutive sentencing do not apply between crimes of violence and those that are not crimes of violence." See Williams v. State, 741 N.E.2d 1209, 1214 (Ind. 2001). Moreover, in 2003, the presumptive sentence for murder, the next class of felony above a Class A felony, was fifty-five years. Therefore, Brown's aggregate forty-five year sentence did not exceed the presumptive sentence for the felony one class higher than the highest felony charged.

### **Conclusion**

Brown failed to establish that he was denied effective assistance of trial counsel. His claim of ineffective assistance of post-conviction counsel fails to state a cognizable basis for relief. Finally, Brown's forty-five year aggregate sentence does not run afoul of Indiana Code section 35-50-1-2(c).

Affirmed.

RILEY, J., and KIRSCH, J., concur.