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IN THE
COURT OF APPEALS OF INDIANA

ROBERT CARL JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0907-PC-609
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
The Honorable Steven Rubick, Magistrate
Cause No. 49G04-0306-PC-104459

December 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Robert Carl Johnson appeals the denial of his petition for post-conviction relief. Johnson presents three issues for our review:

1. Did the post-conviction court properly determine that his trial counsel was not ineffective?

2. Did the post-conviction court properly determine that his appellate counsel was not ineffective?

3. Did the admission of State's Exhibits 35 through 40 constitute fundamental error?

We affirm.

The facts as set out by this court on Johnson's direct appeal follow:

> On June 25, 2003, Johnson and David Halbert robbed a restaurant. Halbert acted as lookout while Johnson, who had a .38 caliber handgun, demanded money from the store manager. After taking the money, they robbed the patrons and a waitress.
>
> On June 30, 2003, the State charged Johnson with four counts of robbery as a Class B felony, and with single counts of confinement as a Class B felony, SVF as a Class B felony, possession of a handgun without a license as a Class A misdemeanor, resisting law enforcement as a Class A misdemeanor, and with being an habitual offender. After a jury trial, the trial court directed a verdict for Johnson on resisting law enforcement and one of the robbery counts. The jury found Johnson guilty of two counts of robbery, criminal confinement, and carrying a handgun without a license.
>
> Johnson waived his right to a jury trial for the SVF charge and habitual offender enhancement, and a bench trial commenced on April 5, 2005. To prove both charges, the State offered two prior Class C felony convictions: a battery conviction dated July 20, 1994, and a conviction of carrying a handgun without a license dated July 24, 1998. To establish the battery conviction the State introduced a certified copy of an officer's arrest report for "Carl Johnson."[1] (App. at 294.) Johnson stipulated to the admissibility and authenticity of the exhibit and that the fingerprints included in the report were his. *Id*. The State also introduced the certified court record of the charging information for and conviction of battery as a Class C felony against "Carl

[1] At an initial hearing in this cause Johnson told the court his true name was Carl F. Johnson.

> Johnson." (Tr. at 295.) Also included was a plea agreement signed by "Carl Johnson." *Id*. Both contain the same cause number. *Id*.
>
> To establish the 1998 handgun conviction the State introduced an arrest report the parties stipulated was correct and authentic. It contained a thumbprint the parties stipulated was Johnson's. The State also offered the certified court records of the charging information for and conviction of carrying a handgun without a license as a Class C felony, with the same cause number.
>
> The trial court found Johnson guilty of SVF and attached the habitual offender enhancement to the first count of robbery. It sentenced Johnson to twenty years for each count of robbery, twenty years for criminal confinement, twenty years for SVF, and one year for carrying a handgun without a license, which sentences were to run concurrently. It imposed an habitual offender penalty of thirty years, for a total sentence of fifty years.

Johnson v. State, No. 49A04-0505-CR-282, slip op. at 2-4 (June 16, 2006) (some footnotes omitted).

On December 27, 2006, Johnson filed a pro se petition for post-conviction relief. The post-conviction court held a hearing on Johnson's petition on December 10, 2008. At the start of the hearing, the post-conviction court administered the oath to Johnson and gave him the "floor." *Transcript* at 2. Johnson did not present any witnesses or evidence. Rather, Johnson told the court that he "wanted to come here today to talk about, you know, the problems I've been having with identity and them finding—the State finding me guilty on the habitual criminal serious violent felon." *Id*. On April 14, 2009, the post-conviction court issued its order denying Johnson his requested relief, specifically noting that Johnson had provided no evidence to establish that his trial and appellate counsel were ineffective. This appeal ensued.

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentence by filing a post-conviction petition. Ind. Post-

Conviction Rule 1(1). Post-conviction proceedings, however, do not afford a petitioner with a super-appeal. *Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002). In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective assistance of counsel or issues demonstrably unavailable at the time of trial or direct appeal. *Sanders v. State*, 765 N.E.2d 591 (Ind. 2002).

The petitioner in a post-conviction proceeding must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Fisher v. State*, 810 N.E.2d 674 (Ind. 2004). "When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Fisher v. State*, 810 N.E.2d at 679. To succeed on appeal from the denial of relief, the petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite to the one reached by the post-conviction court. *Johnson v. State*, 832 N.E.2d 985 (Ind. Ct. App. 2005), *trans. denied*.

1.

Johnson argues that the post-conviction court erred in concluding that his trial counsel was not ineffective. Johnson's complete argument in this regard is that his "[t]rial counsel (Jose Salinas) stipulated to inadmissible evidence . . . concerning birthdates used to convict Johnson of Habitual and SVF . . . ." *Appellant's Brief* at 5. Johnson's single paragraph on this issue concludes that "it is clear that counsel's performance was deficient and prejudiced Johnson's substantial rights." *Id.*

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. *Walker v. State*, 843 N.E.2d 50 (Ind. Ct. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)), *trans. denied*. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id*. 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. *Id*. Failure to satisfy either prong will cause the claim to fail. *Id*.

Initially, we note that Johnson has waived his right to appellate review by failing to present cogent argument. Ind. Appellate Rule 46(A)(8)(a) (stating that appellant's brief must contain contentions presented and that each contention must be supported by cogent reasoning and citations to authorities and statutes relied upon). Johnson's two-sentence argument (as reproduced above) is based on the assumption that trial counsel stipulated to inadmissible evidence and that such constituted ineffective assistance. Johnson offered no further analysis other than his unsupported assertion.

Waiver notwithstanding, Johnson has not met his burden of establishing that his counsel was ineffective. Although Johnson provides citations to documents in the trial record, Johnson did not offer those documents or any other evidence at his post-conviction hearing. It is well established that a post-conviction court may not take judicial notice of the transcript of the evidence from the original proceedings unless exceptional circumstances

exist. *Bahm v. State*, 789 N.E.2d 50 (Ind. Ct. App. 2003), *trans. denied*. The transcript must be admitted into evidence just like any other exhibit. *Id*. Without the trial record or the documents referred to by Johnson, the post-conviction court could not evaluate Johnson's claim. It was incumbent upon Johnson to demonstrate trial counsel's deficiency and that he was prejudiced. Johnson wholly failed to meet his burden in this regard. The post-conviction court properly denied Johnson's requested relief.

2.

Johnson argues that the post-conviction court erred in concluding that his appellate counsel was not ineffective. Johnson's complete argument is that "[a]ppellate counsel failed to argue extent of habitual offender and serious violent felon errors in State's evidence. Counsel failed to sufficiently argue issues . . . . Counsel failed to raise 'obvious and significant issues on appeal[.]' Mason vs. Hanks, 97 f3d. (7th Cir.96)." *Appellant's Brief* at 5.

Claims of ineffective assistance of appellate counsel are reviewed under the same standard applicable to claims of ineffective assistance of trial counsel. *Walker v. State*, 843 N.E.2d 50. 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. *Id*. Claims of ineffective assistance of appellate counsel generally fall into one of three categories: (1) denying access to appeal; (2) failing to raise issues; and (3) failing to present issues competently. *Bieghler v. State*, 690 N.E.2d 188 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998).

Johnson attempts to challenge his appellate representation under the second and third categories. As with his claim of ineffective assistance of trial counsel, however, Johnson has waived his right to appellate review by failing to present cogent reasoning. *See* App. R 46(A)(8)(a). Johnson's argument is wholly unsupported by any evidence. Further, Johnson does not even suggest what other obvious and significant issues his appellate counsel should have pursued. Johnson has failed to sufficiently argue his claim of ineffective assistance of appellate counsel.

Waiver aside, Johnson has not met his burden of establishing his claim of ineffective assistance of appellate counsel for the same reason as set forth above. Johnson did not admit any documents or materials from the trial record or call any witnesses regarding the underlying case. Johnson has not established that his appellate counsel rendered deficient performance or prejudice resulting therefrom. The post-conviction court did not err in denying Johnson's request for relief.

3.

Johnson argues that errors in State's Exhibits 35 through 40, which were supposedly admitted to support the habitual offender finding and serious violent felon determination, were fundamental. Free-standing claims of fundamental error are not available on post-conviction review. *Sanders v. State*, 765 N.E.2d 591. This argument is waived for appellate review.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.