



**DARDEN, Judge**

STATEMENT OF THE CASE

Keyone Johnson appeals the denial of his petitions for post-conviction relief under cause number 49G03-0712-PC-261820 (“Cause No. 820”) and cause number 49G03-0308-PC-129037 (“Cause No. 037”).

We affirm.

ISSUE

Whether Johnson received ineffective assistance of trial counsel.

FACTS

1. Cause No. 820

The relevant facts are set forth in this court’s decision in *Johnson v. State*, No. 49A05-0807-CR-417, slip op. at 2-3 (Ind. Ct. App. Feb. 11, 2009), *trans. denied*, which reads as follows:

On November 18, 2007, Johnson was at 2308 Larnie Lane in Indianapolis with his then-six-year-old son, K.J. Johnson had three other children, including two with Erica Meredith (“Erica”). Erica had left K.J. and his siblings in Johnson’s care for the night. K.J. was in “Big Erica[ ]” and “daddy’s” bedroom, watching movies. At some point during the evening, he stood on the bed and discovered a handgun on top of the bed’s headboard. He pushed a button, which ejected the clip. He then pointed the gun at his left hand and shot himself through his hand.

After he shot himself, K.J. went into the living room to get Johnson. Johnson took K.J. to the home of K.J.’s mother and grandmother. K.J.’s mother then took him to the hospital.

Indianapolis Metropolitan Police Detective Genae Gehring was assigned to K.J.'s case on November 19, 2007. K.J.'s mother could not tell Detective Gehring the address of the home where K.J. had shot himself. K.J. also did not know the address or location of the house and could only tell Detective Gehring that the shooting had occurred "at Big Erica's and daddy's house . . . ." He was able to provide Detective Gehring with Erica's cell phone number. Erica, however, refused to give Detective Gehring her address or any identifying information, including her last name. Eventually, K.J.'s grandmother informed Detective Gehring of Erica's last name. Detective Gehring then contacted Child Protective Services, from which she obtained Erica's address. K.J. subsequently identified that residence as where the shooting had taken place. Detective Gehring executed a search warrant for the residence but did not locate a gun.

On December 11, 2007, the State charged Johnson with Count I, class B felony neglect of a dependent; and Count II, unlawful possession of a firearm by a serious violent felon, a class B felony. The trial court commenced a bifurcated jury trial on June 23, 2008.

During the first phase, Erica testified that she returned home in the early morning of November 19, 2007. When she went into the bedroom, she discovered "[t]he hole in the wall and the bed," as well as blood "[n]ext to the hole." According to her testimony, however, she did not find a gun. She also testified that she did not keep a gun in the house and that Johnson did not live at 2308 Larnie Lane.

Johnson testified that on November 18, 2007, he resided at 724 East 24th Street in Indianapolis. According to Johnson, he had lived with Erica at 2308 Larnie Lane, but they had "just been kind of separated for a minute." He further testified that he did not have a gun that weekend and did not go into the bedroom on the day of the shooting. During the second phase of the trial, Johnson stipulated that he had been convicted of robbery as a class C felony in 1996.

The jury found Johnson guilty of neglect of a dependent as a class B felony but not guilty of unlawful possession of a firearm by a serious violent felon. On July 11, 2008, the trial court sentenced Johnson to fifteen years with three years suspended.

(Internal citations omitted).

Johnson appealed, arguing that the evidence was insufficient to sustain his conviction for neglect of a dependent and that the jury's verdicts required reversal where the jury found that he knowingly allowed K.J. access to a loaded gun while finding that he did not possess the gun. Finding that the facts presented at trial supported a reasonable inference that Johnson was aware of a high probability that K.J. would have access to the loaded gun in the bedroom and that the jury's verdicts were not so extremely contradictory and irreconcilable as to require reversal, this court affirmed Johnson's conviction. *Id.* at 6, 8.

On August 27, 2009, Johnson filed a petition for post-conviction relief in which he asserted ineffective assistance of trial counsel from Patrick E. Chavis, III. Johnson argued that Chavis failed to present evidence and testimony that Quincy Montgomery had spent the night at Meredith's home and possibly had left the gun in the bedroom. Johnson also argued that Chavis "failed to establish [Johnson's] exact residency at the time of the incident." (PCR App. 95). Johnson further argued that Chavis had a conflict of interest because he had represented Meredith during an investigation into the shooting by the Department of Child Services ("DCS").

The post-conviction court held a hearing on Johnson's petition on August 3, 2010. Chavis testified that he had established an attorney-client relationship with Johnson prior to the shooting. He also testified that during his interviews with Montgomery and Meredith, neither informed him that Montgomery had spent the night at Meredith's house the night before the shooting. He also testified that neither Johnson nor Meredith told

him that the gun belonged to Montgomery. According to Chavis, it was not until after Montgomery's arrest on June 10, 2008, while at Johnson's house and in possession of a gun, that anyone claimed that the gun used in the shooting belonged to Montgomery. When Chavis interviewed Montgomery regarding the gun, he told Chavis that he "was prepared to tell [him] whatever [he] thought was necessary . . . ." (PCR Tr. 15). Based on his interviews with those involved, Chavis did not believe that the gun belonged to Montgomery.

Chavis further testified that he had interviewed K.J. several times, and while K.J. informed him that he had seen the gun before, he never claimed to have seen Montgomery, with whom K.J. was familiar, with the gun. Chavis believed that if he called Montgomery to testify or asked K.J. about Montgomery, it would open up "Pandora's box," possibly revealing that the gun was a "community gun," (PCR tr. 39), used by both Johnson and Montgomery, particularly since Montgomery was arrested at Johnson's residence, and Montgomery "was a sidekick of" Johnson's. (PCR Tr. 28). Ballistic tests neither eliminated nor identified the gun found on Montgomery as the one that had been fired by K.J.

As to Johnson's residence at the time of the shooting, Chavis testified that Johnson failed to inform Chavis that he did not live with Meredith when the shooting occurred. Furthermore, police officers found boots and documents belonging to Johnson in the Larnie Lane residence. The documents listed different addresses for Johnson. Chavis testified that Johnson had "several houses," which he "fixed up, flipped and s[old]."

(PCR Tr. 31). He also testified that he believed Johnson and Meredith moved from the Larnie Lane residence shortly after the incident to a residence on Sheldon Street, which is where Chavis often met with Johnson.

Regarding representing Meredith, Chavis testified that Johnson hired him to represent Meredith during the DCS investigation; the investigation was resolved “early on”; and it no longer was pending at the time of Johnson’s trial. (PCR Tr. 22). Chavis opined that DCS only became involved “to try to get [Meredith] to cooperate and give information with respect to the whereabouts of” Johnson. (PCR Tr. 11).

Johnson, Meredith and Montgomery also testified during the hearing. All three testified that they had told Chavis that the gun belonged to Montgomery. Meredith admitted that she never informed police officers that the gun belonged to Montgomery.

## 2. Cause No. 037

On August 2, 2003, the State had charged Johnson with Count 1, operating a vehicle while intoxicated, a class A misdemeanor; Count 2, operating a motor vehicle with a blood-alcohol content of .15% or greater, a class A misdemeanor; Count 3, operating a motor vehicle with a suspended license, a class A misdemeanor; and Count 4, public intoxication, a class B misdemeanor under cause number 49F09-0308-CM-129037.<sup>1</sup> On December 10, 2003, Johnson pleaded guilty to Count 1, and the State dismissed the remaining charges. The trial court sentenced Johnson to 365 days, with 363 days suspended to probation.

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<sup>1</sup> We shall refer to both the lower cause number and the post-conviction cause number as Cause No. 37.

On May 31, 2005, the trial court found Johnson to be in violation of his probation. The trial court therefore revoked Johnson's suspended sentence; sentenced him to 365 days of community corrections; credited Johnson for eight days; and ordered that he wear a Secure Continuous Remote Alcohol Monitor ("SCRAM") bracelet. The trial court further ordered that Johnson serve his sentence consecutive to the sentences imposed under cause numbers 49F09-0407-FD-131159 and 49F09-0408-FD-152197.<sup>2</sup> Johnson began his placement on June 30, 2005.

On January 31, 2007, the State filed a notice that Johnson had violated several conditions of his community corrections placement under Cause No. 037. According to the notice, Johnson had served 569 days of his 665-day placement.<sup>3</sup>

On July 11, 2008, the trial court held a sentencing hearing under Cause No. 820 and five other cases, including Cause No. 37 and cause numbers 49F09-0407-FD-131159 and 49F09-0408-FD-152197, which had been transferred from other courts.

Johnson, by his counsel, Chavis, and the State entered into an agreed entry, under which Johnson agreed to serve a total sentence of fourteen months under Cause No. 37 and cause numbers 49F09-0407-FD-131159 and 49F09-0408-FD-152197. The agreed

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<sup>2</sup> It is not clear from the record how much time the trial court imposed under these cause numbers or when the trial court imposed the sentences. During the sentencing hearing, however, the trial court, in reviewing the records, stated that, under cause number 49F09-0407-FD-131159, Johnson "received a sentence of 545 days, 180 executed. So 365 Community Corrections Scram"; then Johnson "was to do probation for 365 days"; and that "[p]robation [wa]s moving to revoke the probation, so there's 365 days there." (Tr. 320). As to cause number 49F09-0408-FD-152197, the trial court stated that Johnson had received "365 days suspended." (Tr. 320). Thus, it appears that the trial court could have imposed executed sentences of one year under each of these cause numbers due to Johnson's probation violations.

<sup>3</sup> It is not clear from the record whether this was an aggregate sentence.

entry, however, did not specify the sentence to be served under each cause number but left it to the trial court's discretion. During the hearing, Chavis recommended "[s]ix [months] on one, four [months] on the other two," to which the State agreed. (Tr. 387). Thus, under Cause No. 37, the trial court imposed a sentence of 180 days, to be served consecutive to Johnson's sentences under the other two cause numbers.

Johnson did not file a direct appeal of his sentence. Rather, on September 21, 2009, Johnson filed a petition for post-conviction relief, alleging, *inter alia*, ineffective assistance of trial counsel. Johnson argued that he completed his sentence to community corrections under Cause No. 37 on June 22, 2006, 357 days<sup>4</sup> after he began serving the SCRAM component on June 30, 2005. He therefore asserted that he received ineffective assistance of counsel because the six-month sentence imposed pursuant to the agreed entry "was unauthorized by Indiana [s]tatutes and laws." (PCR App. 105).

During the consolidated hearing on August 3, 2010, Chavis testified that he "thought [he had] recalculated" the time and credit but could not recall. (PCR Tr. 40). Regarding his request for relief, Johnson opined that the post-conviction court "could probably rule on that just by going back and getting all of the files and recalculating all of the time . . . ." (PCR Tr. 79).

### 3. Findings of Fact and Conclusions of Law

Following the post-conviction hearing, both Johnson and the State submitted proposed findings of fact and conclusions of law. On February 4, 2011, the post-

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<sup>4</sup> Again, the trial court credited Johnson with eight days.

conviction court entered its Findings of Fact and Conclusions of Law, denying Johnson's petitions for post-conviction relief.

### DECISION

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*. An appeal from the denial of post-conviction relief constitutes an appeal from a negative judgment. *Id.* Thus, to prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Id.* In the post-conviction setting, conclusions of law receive no deference on appeal. *Id.* As to factual matters, the reviewing court examines only the probative evidence and reasonable inferences that support the post-conviction court's determination and does not reweigh the evidence or judge the credibility of the witnesses. *Id.*

#### 1. Cause No. 820

Johnson asserts that Chavis rendered ineffective assistance of trial counsel by "failing to present the testimony of Quincy Montgomery and/or specifically question Erica Meredith about him," (Johnson's br. at 19); failing "to use available evidence to prove that Johnson did not live in [the Larnie Lane] house and was only there to babysit that afternoon," Johnson's br. at 21; and representing Meredith in a DCS matter. We cannot agree.

To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish before the post-conviction court the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a 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 counsel made errors so serious that counsel was not functioning as “counsel” guaranteed to the defendant by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. 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 one that is sufficient to undermine confidence in the outcome. Further, counsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.

*Overstreet v. State*, 877 N.E.2d 144, 151-52 (Ind. 2007) (citations omitted), *cert. denied*, 129 S. Ct. 458 (2008). “[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Strickland*, 466 U.S. at 697.

a. *Montgomery*

Johnson claims that Chavis rendered ineffective assistance of counsel by failing to present Montgomery’s testimony or question Meredith about Montgomery during cross-examination. Whether to call someone as a witness is a matter of trial strategy which this court will not second-guess. *Johnson v. State*, 832 N.E.2d 985, 1003 (Ind. Ct. App. 2005), *trans. denied*. “[A]lthough egregious errors may be grounds for reversal, we do

not second-guess strategic decisions requiring reasonable professional judgment even if the strategy or tactic, in hindsight, did not best serve the defendant's interests." *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997), *cert. denied*, 523 U.S. 1079 (1998). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002).

Here, it is clear that Chavis did not find Montgomery's claim regarding ownership of the gun to be credible; therefore, not calling Montgomery to testify constituted a reasonable professional judgment. As to the testimony of Johnson, Meredith, and Montgomery during the post-conviction hearing that the gun belonged to Montgomery and that they had informed Chavis of this, the post-conviction court clearly did not find their testimony credible. This court will not reweigh the evidence or judge the credibility of the witnesses.

Furthermore, Chavis did cross-examine Meredith regarding whether someone other than Johnson had stayed at her house prior to the shooting and left the gun there. Meredith admitted that she had an "overnight," (tr. 107), guest the night before the shooting and that it was "possible" that the guest had left the gun in the bedroom. (Tr. 108).

While Johnson may have wished to pursue the cross-examination in "more detail," Johnson's br. at 20, we will not second guess Chavis's trial strategy to not elicit testimony regarding Montgomery, particularly where Montgomery and Johnson were co-

workers and well-acquainted with each other; the gun used in the shooting disappeared shortly after the shooting; Montgomery was found in possession of a gun more than six months after the shooting and while Montgomery was at Johnson's residence. In addition, we find no prejudice as ballistic tests did not confirm that the gun found in Montgomery's possession was the same gun used in the shooting.

b. *Johnson's residence*

Johnson also argues that Chavis rendered ineffective assistance of counsel by failing "to use available evidence to prove that Johnson did not live in th[e] [Larnie] house . . . ." Johnson's Br. at 21. Specifically, Johnson seems to claim that Chavis should have "mentioned" the paperwork found in Meredith's residence. *Id.*

We need not "determine whether counsel performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

During trial, Johnson testified that he did not live in the house on Larnie Lane. During Chavis's cross-examination of Meredith, Meredith testified that Johnson did not live with her when the shooting took place. Chavis elicited additional testimony from Meredith that Johnson was at the residence the day of the shooting only to babysit and had not spent the night there.

Regarding the paperwork, officers found documents belonging to Johnson in the residence on Larnie Lane. While the documents do not list the Larnie Lane residence as Johnson's address, the documents established a connection between Johnson and the house on Larnie Lane.<sup>5</sup>

Johnson has failed to demonstrate that there is a reasonable probability that, but for trial counsel's failure to introduce the paperwork into evidence, the result of the trial would have been different. Accordingly, his claim of ineffective assistance of trial counsel fails in this regard.

*c. Conflict of interest*

Johnson maintains that Chavis rendered ineffective assistance of counsel because he also represented Meredith during a DCS investigation. According to Johnson, Chavis "was privy to information stemming from [DCS's] investigation [of the shooting] and had loyalty to Meredith which had to have affected his decisions regarding witnesses and questions to ask[.]" Johnson's Br. at 22-23.

A criminal defendant's Sixth Amendment right to effective assistance of counsel includes the right to conflict-free representation. To prevail on a claim of conflict of interest, the defendant must demonstrate to the post-conviction court that trial counsel had an actual conflict of interest and that the conflict adversely affected counsel's performance. Once a defendant has demonstrated an actual conflict and an adverse effect on his lawyer's performance, the prejudice prong of an ineffective assistance claim is presumed.

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<sup>5</sup> We note that Johnson testified during trial that he "remodel[s] homes and sell[s] real estate." (Tr. 210). Thus, the presence of documents listing different addresses for Johnson does not necessarily establish that he resided at those addresses.

*Shepherd v. State*, 924 N.E.2d 1274, 1287 (Ind. Ct. App. 2010) (internal citations omitted), *trans. denied*. An adverse effect requires a showing of “(1) a plausible strategy or tactic that was not followed but might have been pursued; and (2) an inconsistency between that strategy or tactic and counsel’s other loyalties, or that the alternate strategy or tactic was not undertaken due to the conflict.” *Id.*

During the post-conviction hearing, Meredith testified that DCS did not “formally open[]” a case but only interviewed her and her children regarding the shooting and that the interviews took place in Chavis’s presence. (PCR Tr. 64). Chavis testified that when DCS contacted her to obtain her address, Meredith informed DCS that Chavis represented her. Chavis, however, had not been retained by Meredith at this point. Chavis testified that Johnson later retained him on behalf of Meredith. Chavis believed that DCS only contacted Meredith to get “information with respect to the whereabouts of [Johnson].” (PCR Tr. 11). Chavis further testified that the DCS investigation “was over early on . . . and that was the end of that. There was no CHINS filed” or pending at the time of the trial. (PCR Tr. 22). According to Chavis, by the time Johnson surrendered himself to police on November 28, 2007, DCS had closed their investigation, and his representation of Meredith did not affect his ability to represent Johnson.

Johnson does not specify to what information Chavis was “privy” or how such information adversely affected Chavis’s representation of him. Johnson’s Br. at 22. As to Chavis’s “loyalty to Meredith,” Johnson’s br. at 22, Johnson has failed to demonstrate that Chavis’s representation of Meredith in an investigation in November of 2007, which

was closed early in the case, resulted in an adverse effect in his trial, which took place in June of 2008. In fact, Chavis insinuated during his closing argument that Meredith lied about the gun not belonging to her, stating “[s]he doesn’t want to lose her two children to [DCS]. So [Meredith has] got as much motive to lie about a gun as anybody in this courtroom.” (Tr. 271).

Johnson has demonstrated neither an actual conflict nor an adverse effect on Chavis’s performance. Thus, we cannot say that Chavis’s performance prejudiced Johnson.

d. *Cumulative errors*

Johnson argues that the cumulative effect of Chavis’s errors requires a new trial. Errors that are not individually sufficient to prove ineffective assistance of counsel may add up to ineffective assistance when viewed cumulatively. *French v. State*, 778 N.E.2d 816, 826 (Ind. 2002).

Given that any testimony or evidence regarding Montgomery’s possession of a gun could have connected the gun to Johnson; and that the documents found in the Larnie Lane residence could have connected Johnson to the residence, there is no reasonable probability that these alleged errors made by counsel deprived Johnson of a fair trial. Moreover, Chavis’s brief representation of Meredith during a DCS investigation did not affect his performance where he extensively cross-examined Meredith and raised doubts regarding whether Meredith truthfully testified that the gun did not belong to her.

## 2. Cause No. 037

Johnson asserts that Chavis also rendered ineffective assistance of counsel under Cause No. 037 by misleading him into entering into an agreement, part of which “require[d] him to serve more time than legally possible.” Johnson’s Br. at 26. Specifically, Johnson maintains that Chavis failed to recognize that he “had already served all but 96 days” in Cause No. 037.<sup>6</sup> Johnson’s Br. at 13. Therefore, the agreement that he serve a sentence of 180 days under Cause No. 037 resulted in a sentence of “84 (180-96) days more than legally possible for a [c]lass A misdemeanor on the SCRAM violation.” *Id.* at 25.

“Because it is community-based and serves as an ‘alternative to commitment to the department of correction,’ placement in a community corrections program is not a commitment to the Department of Correction.” *Million v. State*, 646 N.E.2d 998, 1000 (Ind. Ct. App. 1995) (quoting Ind. Code § 35-38-2.6-3(a)). Thus, a hearing on a petition to revoke a placement in a community corrections program is treated the same as a hearing on a petition to revoke probation. *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999), *reh’g denied*. As a result, the same due process requirements for probation revocations are required for community corrections program revocations. *Id.* Those requirements include entitlement to “representation by counsel, written notice of the claimed violations, disclosure of the opposing evidence, an opportunity to be heard and present

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<sup>6</sup> Again, according to the notice of violation, Johnson had completed 569 days of his 665-day sentence, leaving ninety-six days left to serve.

evidence, and the right to confront and cross-examine witnesses in a neutral hearing before the trial court.” *Id.* at 550.

Because a revocation is a civil proceeding, “we apply a less stringent standard of review in assessing counsel’s performance.” *Childers v. State*, N.E.2d 514, 517 (Ind. Ct. App. 1995), *trans. denied*. “If counsel appeared and represented the petitioner in a procedurally fair setting which resulted in judgment of the court, it is not necessary to judge his performance by rigorous standards.” *Id.*

Here, the record shows that Chavis represented Johnson during the hearing; conferred with Johnson regarding the agreed entry; and Johnson admitted to violating the terms of his placement in community corrections. Johnson fails to argue or show that the hearing was procedurally unfair. We therefore cannot say that he received ineffective assistance of counsel.<sup>7</sup>

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.

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<sup>7</sup> We note that Johnson states that “neither counsel nor the Court clearly understood the history of the cases[.]” Johnson’s Br. at 24. It seems, however, that Johnson’s post-conviction counsel also does not understand the history of the cases, stating that “Johnson was placed on Community Corrections SCRAM monitoring under three (3) cause numbers for a total of 665 days,” (Johnson’s br. at 24) (footnote omitted) (emphasis added), but later that “the maximum days left to serve under [Cause No. 037] was 96 (665 minus 569).” Johnson’s Br. at 25 (emphasis added). This confusion is understandable given “the record is not totally clear regarding the time that could have been imposed on the other two cases[.]” *Id.* at 26. Such confusion could have been abated by providing a complete record, including that of the two other cause numbers under which the trial court ordered Johnson to be placed on community corrections. Johnson’s counsel, however, failed to provide this record to either the post-conviction or this court. Given the inadequacy, we cannot say that Johnson has shown that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court.