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ATTORNEY FOR APPELLANT:

HILARY BOWE RICKS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

TERRY A. HODGE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 45A03-1003-PC-146
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
CIVIL DIVISION, ROOM III
The Honorable T. Edward Page, Temporary Judge
The Honorable Diane Ross Boswell, Special Judge
Cause No. 45G03-0509-FC-120

December 15, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Terry A. Hodge, appeals the denial of his successive petition for post-conviction relief.

We affirm.

ISSUE

Hodge raises one issue for our review, which we restate as: Whether the post-conviction court erred in denying Hodge's claim in his successive petition for post-conviction relief that he was denied effective assistance of counsel and that he was prejudiced by improper jury instructions.

FACTS AND PROCEDURAL HISTORY

On April 26, 1993, the State charged Hodge by Information with attempted murder, a Class A felony, and carrying a handgun without a license, a Class D felony. On July 21, 1993, the State amended the information to include a habitual offender count. On November 9, 1993, the State filed an amended Information charging Hodge with felony murder; murder; attempted robbery, a Class A felony; attempted murder, a Class A felony; carrying a handgun without a license, a Class D felony; and a habitual offender count.

On September 16, 1994, a jury found Hodge guilty, as an accomplice, of murder and attempted murder. The jury also determined that Hodge was a habitual offender. The trial court sentenced Hodge to forty years imprisonment on the murder conviction, thirty years imprisonment on the attempted murder conviction, with the attempted murder conviction

enhanced by twenty-five years imprisonment for the habitual offender determination. The trial court ordered the sentences to be served consecutively.

Hodge filed a direct appeal to the supreme court, which affirmed the convictions and sentences. *See Hodge v. State*, 688 N.E.2d 1246 (Ind. 1997), *overruled on an unrelated issue in Beattie v. State*, 924 N.E.2d 643 (Ind. 2010). In its opinion, the supreme court stated the facts as follows:

> [T]he defendant met [Kevin] Miller outside of a liquor store a few weeks prior to the shooting. After the two men briefly renewed each other's acquaintance from high school days, the defendant agreed to purchase a video cassette recorder (VCR) from a woman standing outside the store. The woman had previously talked to Miller about the VCR. After purchasing the equipment, the defendant discovered that it did not have a remote control. A few weeks later the defendant asked [Andrew] Ford for a ride and the two men rode off with a third person who was driving the car. As they approached an intersection, they honked at the car Miller was driving with [Patrick] Carter in the passenger's side front seat. Miller stopped and the defendant got out of his car and engaged Miller in an argument about the remote control. The defendant stated that he ought to take Miller's car and then reached inside the car to take the keys. A struggle ensued, during which the car occupied by Ford pulled in front of Miller's car. The defendant spoke to Ford, who then approached and, after the defendant stepped back, fired into the car, killing Carter and paralyzing Miller.
>
> A nearby police officer heard the gunfire and approached the scene of the shooting. As he noticed the victim's car at the intersection, he saw the defendant standing on the driver's side and Ford standing on the passenger side. When the officer neared the car, both men ran.

Id. at 1248.

On October 27, 1998, Hodge filed a pro se petition for post-conviction relief, which was amended by counsel on December 1, 2000. After an evidentiary hearing, the post-conviction court denied the petition, and Hodge appealed. This court affirmed the post-

conviction court's determination in a memorandum decision, holding that Hodge was not denied effective assistance of trial counsel when counsel decided not to call a particular witness or to request that the witness's deposition be admitted in lieu of his live testimony. *See Hodge v. State*, No. 49A03-0106-PC-189 (Ind. Ct. App. November 14, 2001).

On February 20, 2002, Hodge filed a pro se request to file a successive post-conviction relief petition, and on March 8, 2002, we granted permission to file the petition. In his petition, which was twice amended, Hodge alleged ineffective assistance of trial counsel, direct appellate counsel, and his first post-conviction counsel for not objecting to or raising the issue of the efficacy of the trial court's attempted murder and accomplice liability instructions. He also alleged fundamental error. After a hearing and a further amendment to the petition, the post-conviction court entered its findings denying the petition.

Hodge now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Hodge contends that (1) trial counsel was ineffective in failing to object to the attempted murder and accomplice liability instructions and in failing to tender alternative instructions; (2) appellate counsel was ineffective in failing to raise the improper instructions as fundamental error; and (3) prior post-conviction counsel was ineffective in failing to be aware of recent decisions that would have led him to include ineffective assistance of trial and appellate counsel in the amended petition for post-conviction relief. Hodge further contends that the post-conviction court erred in finding that the attempted murder and accomplice liability instructions properly informed the jury regarding specific intent to kill

Miller as the non-shooter aiding the shooter on the attempted murder charge. The latter contention is a freestanding claim based on fundamental error.

Post-conviction proceedings are civil in nature, and the petitioner bears the burden of establishing his claim for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A post-conviction proceeding is not a super-appeal; rather, issues raised in such a proceeding must fall within the grounds enumerated in P-C.R. 1. That is, post-conviction proceedings are only available for issues that were not known at the time of the original trial or were not available on direct appeal. *Pruitt v. State*, 903 N.E.2d 899, 905 (Ind. 2009). Freestanding claims of error are generally not available in post-conviction proceedings because of the doctrines of waiver and *res judicata*. *Williams v. State*, 808 N.E.2d 652, 659 (Ind. 2004).

The State asserts that Hodge's issues pertaining to ineffective assistance of trial and direct appellate counsel are barred by the doctrine of *res judicata* because the issues of ineffectiveness of both counsel were raised in his petition for post-conviction relief and the issue of trial counsel's effectiveness was raised and rejected on appeal of the denial of the petition. The State cites *Ben-Yisrayl v. State*, 738 N.E.2d 253, 259 (Ind. 2000), *cert. denied*, 534 U.S. 1164 (2002), for the proposition that an accused "having once litigated his Sixth Amendment claim concerning ineffective assistance of [trial] counsel, is not entitled to litigate it again, by alleging different grounds" (quoting *Sawyer v. State*, 679 N.E.2d 1328, 1329 (Ind. 1997)). The State argues that the *Ben-Yisrayl* holding should apply both to claims of ineffectiveness of trial counsel and to ineffectiveness of direct appellate counsel.

In his reply brief, Hodge responds to the State's contention by citing *State v. Huffman*, 643 N.E.2d 899, 901 (Ind. 1994) for the proposition that in extraordinary circumstances, where fairness must win over finality, a court is justified in revisiting previously litigated issues. We note that in *Huffman* the court explained that it had held in an unrelated case that a voluntary intoxication jury instruction was erroneous after it had held on Huffman's direct appeal that the same instruction did not constitute error. *Id*. After a post-conviction court found in favor of Huffman, our supreme court affirmed on the basis that a court "has the power to revisit prior decisions of its own or of a coordinate court in any circumstances." *Id*.

Hodge reasons that we should apply *Huffman* in recognition of the extraordinary circumstances of his appeal. However, the procedural and factual bases in the present case differ from those in *Huffman*, and we must conclude that *Huffman* is inapposite. Furthermore, Hodge does not show how his case differs from other cases where waiver has been applied.

The State also asserts that freestanding claims of fundamental error are not cognizable in a post-conviction proceeding. *See Stephenson v. State*, 864 N.E.2d 1022, 1029-30 (Ind. 2007), *cert. denied*, 552 U.S. 1314, 128 S.Ct. 1871 (2008) (holding that freestanding claims of trial error, fundamental or otherwise, are not available in post-conviction proceedings); *Hooker v. State*, 799 N.E.2d 561, 577 (Ind. Ct. App. 2003), *trans. denied* (rejecting petitioner's fundamental error argument and holding that an accomplice liability jury instruction, as it related to attempted murder, was not available for post-conviction review because it was known but not raised on direct appeal).

Hodge cites *Woodson v. State*, 767 N.E.2d 1022 (Ind. Ct. App. 2002), for the proposition that we have found fundamental error based on "erroneous attempted murder accomplice instructions virtually identical to those in Hodge's case . . . ." (Appellant's Reply Br. 2). On rehearing of *Woodson*, however, we clarified that such fundamental error must be raised, in a post-conviction petition, within the rules of post-conviction procedure. *Woodson v. State*, 778 N.E.2d 475, 478 (Ind. Ct. App. 2002). In short, the error must show a "deprivation of the Sixth Amendment right to effective assistance of counsel, or be an issue demonstrably unavailable to the petitioner at the time of his trial and direct appeal." *Id*. at 478. Because Hodge has already exhausted his ineffective assistance claim and does not assert that the instruction issue was demonstrably unavailable at the time of his prior appeals, we conclude that *Woodson* is inapplicable.

CONCLUSION

Hodge waives the issues of effectiveness of counsel and of the validity of the trial court's attempted murder and accomplice liability instructions.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.