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**IN THE  
COURT OF APPEALS OF INDIANA**

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JOSEPH T. WILLIAMS-BEY, )

Appellant-Petitioner, )

vs. )

STATE OF INDIANA, )

Appellee-Respondent. )

No. 45A03-0611-PC-527

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Clarence D. Murray, Judge  
Cause No. 45G02-0412-PC-18

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**July 23, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Joseph Williams-Bey (Williams-Bey), appeals the post-conviction court's denial of his Petition for Post-Conviction Relief.

We affirm.

## ISSUES

Williams-Bey raises two issues on appeal, which we restate as follows:

- (1) Whether Williams-Bey received ineffective assistance of his trial counsel; and
- (2) Whether the trial court violated Williams-Bey's right to appeal.

## FACTS AND PROCEDURAL HISTORY

On January 9, 1991, Williams-Bey was seen by police in possession of a television set, which was later determined to belong to Lisa Marie Williams (Williams). Williams-Bey admitted to police that he entered Williams' apartment and removed her television. On January 10, 1991, the State filed an Information charging Williams-Bey with Count I, burglary, a Class B felony, Ind. Code § 35-43-2-1. On February 20, 1991, the State filed an amended Information, amending Count I, burglary, a Class B felony, to theft, a Class D felony, I.C. § 35-43-4-2. That same day, Williams-Bey pled guilty to theft and the burglary Count was dismissed. On March 13, 1991, Williams-Bey was sentenced to one year.

On December 21, 2004, Williams-Bey filed a Petition for Post-Conviction Relief, but later amended his Petition on December 16, 2005, claiming (1) ineffective assistance of trial counsel for failure to conduct an adequate investigation, and failing to argue his innocence, and (2) that the trial court deprived him of his right to appeal. On March 1,

2006, a post-conviction hearing was held. The post-conviction court took the matter under advisement and on October 12, 2006, issued the following Findings of Fact and Conclusions of Law:

#### Findings of Fact

1. On January 10, 1991, [Williams-Bey] was charged with [b]urglary, a [C]lass B felony.
2. An initial hearing was conducted on January 11, 1991, and [counsel] of the Lake County Public Defender's Office was appointed to represent [Williams-Bey].
3. The facts as stated in the affidavit for probable cause indicate the following:

Affiant, a police officer for the Hammond, Indiana, Police Department, was assigned the duty of investigating a reported burglary occurring January 9, 1991, in Hammond, Lake County, Indiana. During the course of my investigation I spoke with [Williams], who I believe to be truthful and credible because she spoke of facts within her own personal knowledge, and she stated that she resides in an apartment located . . . in Hammond and that at approximately 11:05 p.m. on January 8, 1991, she left her apartment to go to work, at which time she locked and secured [the door to her apartment]. She further stated that she returned home at approximately 7:30 p.m. on January 9, 1991, and found that the door frame had been broken and that her door was open and that a television set was missing from inside the apartment. She further stated that she had [not] given [anyone] permission to enter the apartment or take [her] television set. After being advised of his civil and constitutional rights and waiving said rights, [Williams-Bey] made a written statement in which he stated that on January 9, 1991, in the early morning hours, he entered the apartment of [Williams] and took a television set therefrom.

4. On February 20, 1991, pursuant to a written plea, [Williams-Bey] plead guilty to the reduced charge of [t]heft, a [C]lass D felony. The plea further contemplated that the parties would freely argue their respective positions as to the sentence to be imposed by the court. In

return for [Williams-Bey's] plea, the State agreed to dismiss the burglary charge.

5. At the guilty plea hearing, the court advised [Williams-Bey] of the constitutional and statutory rights he was waiving by pleading guilty. Furthermore, [Williams-Bey] acknowledged, under oath, and swore that the facts recited by himself to establish a factual basis for the offense were true. Finally, [Williams-Bey] acknowledged, under oath, that he understood that he was admitting that he committed the criminal acts described in the factual basis. The court did not advise [Williams-Bey] of his right to take a direct appeal.

\* \* \*

8. [Williams-Bey] has returned to this court with a [P]etition for [P]ost-[C]onviction [R]elief which, as ultimately amended, alleges that [Williams-Bey] was denied the effective assistance of counsel because his attorney [] failed to adequately investigate his case and that he was inadequately prepared to represent [Williams-Bey].
9. At the hearing on the petition for post-conviction relief on March 1, 2006, [Williams-Bey] presented the testimony of trial counsel. . . .
10. [Counsel] testified that he did not remember [Williams-Bey] nor did he recall his case, but that it was his common practice to interview his clients and investigate their cases. He further testified that if the witnesses had given statements to the police, and had indicated at the conclusion of the police statement that they did not have anything to add, [Counsel's] practice was to not depose those witnesses.
11. On June 9, 2006, [Williams-Bey] offered an affidavit, to which the State was given an opportunity to object. On June 22, 2006, the State did object, but the affidavit was accepted, and the State was given the opportunity to file responsive affidavits or exhibits. In his affidavit, [Williams-Bey] asserted that [his counsel] failed to file pre-trial motions that [Williams-Bey] had requested, [that Counsel] failed to interview and depose numerous witnesses, and that [Williams-Bey] did not want to sign the plea agreement, but wanted a fair trial.

#### Conclusions of Law

\* \* \*

1. Petitions for post-conviction relief are quasi-civil in nature and the petitioner bears the burden of proving the claims raised therein by a preponderance of the evidence.
2. A court of review judges the effectiveness of trial counsel by the standard expressed in *Strickland v. Washington*, 466 U.S. 668 . . . (1984). The question is whether counsel's performance fell below prevailing professional norms and if so, whether the substandard performance prejudiced the petitioner. To prove the prejudice prong of this analysis, the petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lambert v. State*, 743 N.E.2d 719, 730-31 (Ind. 2001) . . . .
3. As a general matter, if a post-conviction petitioner has claimed ineffective assistance of counsel in the context of a guilty plea, he must show a reasonable probability that he would have been acquitted at trial to prove the prejudice prong of *Strickland*. . . . Furthermore, and more specifically, if a petitioner was convicted pursuant to a guilty plea, and later claims that his [or her] attorney rendered ineffective assistance because s/he overlooked or impaired a defense, the petitioner must show that a defense was indeed overlooked or impaired *and* that the defense would likely have changed the outcome of the proceeding in order to prove the prejudice prong of *Strickland*.
4. Counsel [is] presumed competent, and this presumption must be overcome by strong and convincing evidence.
5. There are numerous factual allegations in [Williams-Bey's] proposed findings of fact and conclusions of law, including that [Williams-Bey] lived with a roommate at the scene in question, that the complaining witness did not live there, that [Williams-Bey] had been at a party on the night in question, and that [Williams-Bey] was intoxicated at the time the offense was alleged to have occurred. However, [Williams-Bey's] proposed findings are not evidence in [this] case. Further, [Williams-Bey] did not present this evidence either as testimony at the post-conviction relief hearing, or in his affidavit. Therefore, this "evidence" is not before the court.
6. There is insufficient evidence from which the court can conclude that [Williams-Bey's] attorney overlooked or impaired a defense, and that any such oversight was prejudicial and would have likely changed the outcome of the proceeding.

7. There was no evidence from which the court [could] conclude that [Williams-Bey's] sharing [] an apartment with another individual in the same building in which the crime occurred, or that the victim did not reside there held any significance as a defense to the crime. Furthermore, the court notes that [Williams-Bey] swore under oath that he took the television belonging to the victim.
8. Finally, [Williams-Bey's] exposure in terms of a sentence was reduced from six (6) to twenty (20) years on the Class B felony, to a possible sentence of six (6) months to three years for the [Class] D felony. In fact, [Williams-Bey] received a sentence for one (1) year. The court finds [Williams-Bey's] assertion that he would not have pled guilty but for counsel's omissions to be incredible.
9. Based on the evidence presented, we conclude that counsel's performance did not fall below prevailing professional norms.
10. Based on the evidence presented, we conclude that [Williams-Bey] was not prejudiced by counsel's representation.
11. [Williams-Bey] was not denied [] effective assistance of counsel.
12. Additionally, [Williams-Bey] argues that the trial court erred in not advising him of his right to an appeal. The court assumes that [Williams-Bey] is referring to his right to take a direct appeal of his sentence, which was imposed pursuant to an "open plea." While the court, in fact, did not advise [Williams-Bey] that he had [the right to file] a direct appeal of his sentence, [Williams-Bey] has never attempted to file a Notice of Appeal or Petition to File a Belated Appeal. The court cannot be said to have violated [Williams-Bey's] constitutional right to appeal when [Williams-Bey] has never attempted to pursue his appellate rights.

(Appellee's App. pp. 7-11) (some internal citations omitted).

Williams-Bey now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

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

Williams-Bey claims the post-conviction court erred in denying his Petition for Post-Conviction Relief. Specifically, Williams-Bey argues his trial counsel was ineffective for failing to (1) conduct an adequate investigation, and (2) argue his innocence.

Post-conviction hearings do not afford defendants the opportunity for a “super appeal.” *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. Williams-Bey has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *see also id.* Because Williams-Bey is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh’g denied, cert. denied*, 540 U.S. 830 (2003); *see also Moffitt*, 817 N.E.2d at 248. It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that a decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution. *Taylor v. State*, 840 N.E.2d 324 (Ind. 2006). “The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” *Id.* at 331 (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984),

*reh'g denied*). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. When called upon to find whether there was ineffective assistance of trial counsel, we use the analysis outlined by the Supreme Court in *Strickland*:

A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the 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, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

*Id.* at 687. A petitioner’s failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999), *reh'g denied, cert. denied*, 529 U.S. 1113 (2000).

Trial counsel is given wide discretion in determining strategy and tactics, and therefore appellate courts will accord those decisions deference. *McCann v. State*, 854 N.E.2d 905, 909 (Ind. Ct. App. 2006). Additionally, we note that counsel’s conduct is assessed based on facts known at the time and not through hindsight; and rather than focusing on isolated instances of poor tactics or strategy in the management of a case, the effectiveness of representation is determined based on the whole course of attorney conduct. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997), *reh'g denied, cert. denied*, 523 U.S. 1079 (1998).



Williams-Bey first argues his trial counsel rendered ineffective assistance by failing to conduct an adequate investigation. In this case, Williams-Bey's attorney explained at the post-conviction hearing that "it [is] his common practice to interview his clients and investigate their cases. He further testified that if the witnesses had given statements to the police, and had indicated at the conclusion of the police statement that they did not have anything to add, [Counsel's] practice was to not depose those witnesses." (Appellee's App. p. 9). "Tactical choices by trial counsel do not establish ineffective assistance of counsel even though such choices may be subject to criticism . . . ." *Smith v. State*, 689 N.E.2d 1238, 1244 (Ind. 1997). Thus, Williams-Bey has failed to establish his trial counsel was deficient for failing to conduct an adequate investigation.

With respect to Williams-Bey's argument that his trial counsel provided ineffective assistance for failing to argue his innocence, we cannot agree. Williams-Bey made a signed written statement to police that he entered Williams' apartment and took a television set. He also acknowledged, under oath, and swore that the facts he recited establishing a factual basis for the offense were true. Furthermore, Williams-Bey acknowledged, under oath, that he understood that he was admitting that he committed the criminal acts described in the factual basis. Thus, Williams-Bey's counsel was left with no time or place to argue his innocence.

## II. *Right to Direct Appeal*

Williams-Bey also argues the trial court violated his right to a direct appeal. Specifically, he claims the trial court never advised him of his right to appeal his plea of guilty. However, [a] person who pleads guilty is not permitted to challenge the propriety

of that conviction on direct appeal.” *Collins v. State*, 817 N.E. 2d 230, 231 (Ind. 2004). Thus, because Williams-Bey could not have appealed his guilty plea, there was error in not informing him he could do so.

### CONCLUSION

Based on the foregoing, we find that (1) Williams-Bey did not meet his burden of establishing he received ineffective assistance of trial counsel, and (2) his argument that the trial court violated his right to appeal is without merit. Thus, the post-conviction court properly denied Williams-Bey’s Petition for Post-Conviction Relief.

Affirmed.

NAJAM, J., and BARNES, J., concur.