



Appellant/Petitioner Anthony E. Frink appeals the denial of his petition for post-conviction relief (“PCR”), claiming ineffective assistance of both trial and appellate counsel. Specifically, Frink argues that his trial counsel was ineffective because counsel failed to request a directed verdict following the presentation of the State’s evidence relating to whether he is a habitual offender. Frink additionally argues that his appellate counsel was ineffective because counsel failed to challenge the sufficiency of the evidence to support the habitual offender finding on direct appeal. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

Our opinion in Stitts’s direct appeal instructs us as to the underlying facts leading to this post-conviction appeal:

On September 1, 2002, Robert Roberts discovered the body of an acquaintance, Don Robertson, in his backyard. An investigation revealed that Robertson had been killed by blunt force trauma to the head. His pants and shoes were gone, and a bag that he habitually carried was missing. Robertson, who was homeless and sold crack cocaine, spent some time during the evening preceding his death at a neighborhood convenience store. A security tape of the store premises showed that Robertson was last seen walking away with Frink. Subsequent police investigation revealed that Robertson sold crack to Frink earlier in the day and the pair had smoked it together, but eventually argued about whether Robertson would give Frink more cocaine after he was gone.

Laboratory tests revealed that Frink’s pants had Robertson’s blood on them. Police arrested Frink and charged him with numerous crimes related to Robertson’s robbery and death. After a jury trial at which he was found guilty of seven counts, the trial court entered convictions on murder, dealing in cocaine, and robbery.

*Frink v. State*, No. 79A02-0404-CR-338 slip op. p. 2 (Ind. Ct. App. April 20, 2005). In bifurcated trial proceedings, Frink was also found to be a habitual offender.

In Frink's direct appeal, this court affirmed the judgment of the trial court in part, vacated the trial court's judgment in part, and remanded the matter to the trial court with instructions after concluding that the evidence was sufficient to support Frink's convictions, but that the convictions for both murder and Class A felony robbery, *i.e.*, robbery resulting in serious bodily injury, violated the principles of double jeopardy because there was no evidence of a serious bodily injury apart from the wounds that resulted in Robertson's death. *Id.* at 3-9. Thus, this court vacated Frink's Class A felony robbery conviction and remanded the matter to the trial court with instructions for the trial court to enter a conviction for Class C felony robbery and impose the presumptive four year sentence for the Class C felony robbery conviction. *Id.* at 9. Frink filed a petition for transfer, which was unanimously denied by the Indiana Supreme Court.

On April 27, 2006, Frink filed a *pro se* PCR petition. On July 2, 2009, Frink, by counsel, filed an amended PCR petition. The post-conviction court conducted an evidentiary hearing on Frink's amended PCR petition on October 19, 2009. During this hearing, Frink, by counsel, presented evidence in support of his amended PCR petition. On January 14, 2010, the post-conviction court issued an order denying Frink's request for PCR. Frink now appeals.

### **DISCUSSION AND DECISION**

Post-conviction procedures do not afford the petitioner with a super-appeal. *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds

enumerated in the post-conviction rules. *Id.* A petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on appeal. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001); *Collier v. State*, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999), *trans. denied*.

Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from a denial of a PCR petition, a petitioner must convince this court that the evidence, taken as a whole, “leads unmistakably to a conclusion opposite that reached by the post-conviction court.” *Stevens*, 770 N.E.2d at 745. “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 its decision will be disturbed as contrary to law.” *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We therefore accept the post-conviction court’s findings of fact unless they are clearly erroneous but give no deference to its conclusions of law. *Id.*

### **Ineffective Assistance of Counsel**

Initially, we note that in raising his claims of ineffective assistance of counsel in the instant appeal, Frink questions the validity of his 1978 felony conviction for committing a crime while armed with a handgun following his guilty plea to the same. Frink asserts that

his 1978 felony conviction was invalid because the commission of a crime while armed with a handgun did not constitute an independent felony in 1978, and, as a result, it was error for the finder of fact in the instant matter to base its habitual offender finding on this felony conviction. However, to the extent that Frink challenges the validity of his 1978 felony conviction, we observe that the validity of this prior felony conviction is not properly before this court in the instant appeal. Frink's amended petition for post-conviction relief did not include a challenge to the validity of his 1978 felony conviction, and the facts relating to the 1978 felony conviction are unrelated to the charges levied by the State in the instant matter. In fact, it does not appear that Frink has ever challenged the validity of the 1978 felony conviction in any court. Again, post-conviction procedures do not afford the petitioner with a super-appeal and challenges must be based on the grounds enumerated in the post-conviction rules. *Williams*, 706 N.E.2d at 153. Frink's instant PCR petition cannot be interpreted as properly raising the validity of his 1978 conviction because Frink has failed to show that any such claim has been filed in accordance with the post-conviction rules. Therefore, we will not address the propriety of Frink's 1978 felony conviction.

#### **A. Standard of Review**

The right to effective counsel is rooted in the Sixth Amendment to the United States Constitution. *Taylor v. State*, 840 N.E.2d 324, 331 (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.* (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). “The benchmark for judging any claim

of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel's performance was deficient by demonstrating that counsel's representation "fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Id.* We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or most effective way to represent a client and therefore under this prong, we will assume that counsel performed adequately, and will defer to counsel's strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.* Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. *Reed*, 866 N.E.2d at 769. A petitioner may show prejudice by demonstrating that there is "a reasonable probability (*i.e.* a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id.*

A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams*, 706 N.E.2d at 154. Therefore, if we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the

adequacy of counsel's performance. *See Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002). Further, the same standard applies to claims of ineffective assistance of trial counsel and claims of ineffective assistance of appellate counsel. *Burnside v. State*, 858 N.E.2d 232, 238 (Ind. Ct. App. 2006).

### **B. Trial Counsel**

Frink challenges the post-conviction court's determination that his trial counsel was not ineffective for failing to request a directed verdict following the presentation of the State's evidence relating to the habitual offender finding. Specifically, Frink asserts that trial counsel's failure to request a directed verdict resulted in ineffective assistance because his 1978 felony conviction was arguably invalid. Frink, however, has failed to provide a cogent argument in support of this assertion, merely baldly asserting that his trial counsel was ineffective in this regard. "A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record." *Wingate v. State*, 900 N.E.2d 468, 475 (Ind. Ct. App. 2009) (quoting *Davis v. State*, 835 N.E.2d, 1113 (Ind. Ct. App. 2005), *trans. denied*); *see also* Ind. Appellate Rule 46(A)(8) (requiring that contentions in appellant's briefs be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal). Therefore, in light of Frink's failure to provide a cogent argument in support of his claim of ineffective assistance of trial counsel, Frink has waived this claim on appeal.

Waiver notwithstanding, Frink's claim fails. A directed verdict is appropriate only if there is a total absence of evidence as to the guilt of the accused or where there is no conflict

in the evidence and it is susceptible only to an inference in favor of the accused. *State v. Casada*, 825 N.E.2d 936, 938-39 (Ind. Ct. App. 2005). A defense motion for a directed verdict will not be granted if the State presents a prima facie case. *Id.* at 939 (emphasis omitted). The State presents a prima facie case that a defendant is a habitual offender by introducing exhibits and testimony evidencing prior felony convictions to the finder-of-fact. *See Ferguson v. State*, 273 Ind. 468, 477, 405 N.E.2d 902, 907-08 (1980) (providing that the State made a prima facie case that defendant was a habitual offender by introducing exhibits evidencing his prior felony convictions to the jury).

Here, the State presented a prima facie case that Frink is a habitual offender. Indiana Code section 35-50-2-1 (2002) provides that the term “‘felony conviction’ means a conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year.” The State presented exhibits and testimony during the second phase of Frink’s bifurcated trial that demonstrated that Frink has at least two prior unrelated felony convictions. This evidence specifically demonstrated that Frink received a six-year sentence for his 1978 felony conviction and that he received a six-year sentence for a 1990 felony conviction in North Carolina. Thus, in light of the evidence of Frink’s prior felony convictions presented by the State at trial, a directed verdict could not have properly been granted in Frink’s favor even if his trial counsel would have requested one. *See Casada*, 825 N.E.2d at 939 (defense motion for directed verdict will not be granted if State presents a prima facie case). Having determined that a directed verdict could not have properly been granted in Frink’s favor, we conclude that Frink has failed to show that

he was prejudiced by trial counsel's allegedly deficient failure to request a direct verdict.

### **C. Appellate Counsel**

Frink next claims that the post-conviction court erred in determining that his appellate counsel was not ineffective for failing to challenge the sufficiency of the evidence supporting the habitual offender finding on direct appeal. In support of this claim, Frink asserts that the State failed to prove one of the relied-upon prior felony convictions during the habitual offender phase at trial. Specifically, Frink asserts that the evidence presented by the State was insufficient to support the habitual offender finding because of the questions surrounding the validity of his 1978 felony conviction.

Again, Indiana Code section 35-50-2-1 provides that the term "felony conviction" means a conviction to which the convicted person might have been imprisoned for more than one year. Here, it is undisputed that the State proved that Frink was sentenced to six years for the 1978 conviction. It is also undisputed that Frink was sentenced to six years for his 1990 felony conviction in North Carolina. In light of this undisputed evidence, we conclude that the evidence presented by the State was indeed sufficient to prove that Frink's prior convictions constituted felony convictions. Therefore, appellate counsel could not have raised a successful challenge to the sufficiency of the evidence supporting the habitual offender finding on direct appeal. Having concluded that appellate counsel could not raise a successful challenge to the sufficiency the evidence on direct appeal, we conclude that Frink has failed to prove that he was prejudiced by appellate counsel's failure to raise said claim.

The judgment of the post-conviction court is affirmed.

DARDEN, J., and BROWN, J., concur.