APPELLANT PRO SE:

GEORGE A. STATEN
Pendleton, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

GEORGE A. STATEN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A04-0608-PC-454
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
The Honorable Amy J. Barbar, Magistrate
Cause No. 49G02-0007-PC-120577

September 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner George Staten ("Staten") appeals the denial of his petition for post-conviction relief, which challenged his conviction for Murder, a felony.[1] We affirm.

Issue

Staten presents six issues for review. We address the issue that is not waived, res judicata, or procedurally defaulted: whether he was denied the effective assistance of trial and appellate counsel.[2]

Facts and Procedural History

On July 10, 2001, Staten was convicted of the murder of his live-in girlfriend, Tina Sparks. On August 15, 2001, he was sentenced to sixty-five years imprisonment. Staten appealed, and on May 30, 2002, this Court affirmed his conviction and sentence. Staten v. State, No. 49A02-0108-CR-583 (Ind. Ct. App. May 30, 2002).

On March 24, 2003, Staten filed a petition for post-conviction relief. The post-conviction court conducted a hearing on February 15, 2006, at which Staten proceeded pro-se. Staten testified and attempted to present newly discovered evidence in the form of a letter from Stephanie Perrine that Staten claimed "was received after the trial and could not have been presented to this Court during the trial." (P-C. Tr. 5.) The letter was excluded as hearsay. Staten also argued that he was denied the effective assistance of trial and appellate

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[1] Ind. Code § 35-42-1-1.

[2] We do not address Staten's freestanding claims of illegal interrogation, destruction of evidence, judicial misconduct, and sentencing error. When an issue is available at the time of direct appeal, but is not raised, it is precluded from review in a subsequent post-conviction proceeding. Taylor v. State, 840 N.E.2d 324, 330-31 (Ind. 2006).

counsel. On June 13, 2006, the petition for post-conviction relief was denied. Staten now appeals.

Discussion and Decision

Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief faces a rigorous standard of review. Benefiel v. State, 716 N.E.2d 906, 911-12 (Ind. 1999). To prevail on appeal, the petitioner must demonstrate that the evidence as a whole "leads unerringly and unmistakably to a decision opposite that reached by the trial court." Prowell v. State, 741 N.E.2d 704, 708 (Ind. 2001). Stated differently, we will disturb a post-conviction court's decision only where the evidence is uncontradicted and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. Miller v. State, 702 N.E.2d 1053, 1058 (Ind. 1998). Upon reviewing a petition for post-conviction relief, we may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court, i.e., the sole judge of the evidence and the credibility of the witnesses. Blunt-Keene v. State, 708 N.E.2d 17, 19 (Ind. Ct. App. 1999).

Staten contends he was denied the effective assistance of both trial and appellate counsel. Effectiveness of counsel is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in Strickland. Id. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and

resulting prejudice. Dobbins v. State, 721 N.E.2d 867, 873 (Ind. 1999) (citing Strickland, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687; see also Douglas v. State, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant demonstrates 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 a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see also Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the Strickland test are separate and independent inquiries. Strickland, 466 U.S. at 697. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Id.

Moreover, under the Strickland test, counsel's performance is presumed effective. Douglas, 663 N.E.2d at 1154. A petitioner must present convincing evidence to overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690; Broome v. State, 694 N.E.2d 280, 281 (Ind. 1998).

On appeal, Staten's sole specific allegation with respect to the deficient performance of trial counsel is as follows:

> Upon receipt of this letter [from Stephanie Perrine] Staten immediately notified trial counsel, but counsel chose to ignore this fact, like he did so many others.

Appellant's Brief at 15. It thus appears that Staten has abandoned his claim of newly-discovered evidence and instead implicitly argues that the letter was received during the trial.

We perceive Staten's allegation of deficient performance to be that counsel failed to offer the Perrine letter as evidence tending to incriminate another person and exculpate Staten.

Staten did not call his trial counsel as a witness in the post-conviction proceedings. He proffered the Perrine letter, but it was excluded upon the State's objections of hearsay and lack of authentication. From the record, we cannot discern the substance of the defense strategy allegedly available but ignored by trial counsel. Bald assertions of counsel's omissions or mistakes are inadequate to support a post-conviction claim of ineffectiveness of counsel. See Tapia v. State, 753 N.E.2d 581, 587 (Ind. 2001).

Staten further claims that his appellate counsel was ineffective for failing to raise "the issues being complained of herein." Appellant's Br. at 18. It would appear that Staten believes his appellate counsel should have raised the following allegations of error: Staten was improperly interrogated by police because he did not feel free to leave and he had requested an attorney; the crime scene was not properly processed; the jury was erroneously provided the means to view a videotape of the crime scene during deliberations; and his sentence is manifestly unreasonable.

Appellate ineffectiveness claims are evaluated under the standard of Strickland, 466 U.S. at 668. Appellate courts should be particularly deferential to an appellate counsel's strategic decision to include or exclude issues, unless the decision was "unquestionably unreasonable." Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997). To prevail on his claim of ineffective assistance of appellate counsel, Staten must show that counsel failed to present a significant and obvious issue and that this failure cannot be explained by reasonable

strategy. See Stevens v. State, 770 N.E.2d 739, 760 (Ind. 2002).

The memorandum decision issued upon Staten's direct appeal indicates that appellate counsel did in fact challenge the propriety of Staten's enhanced sentence, albeit without the result desired by Staten. Staten v. State, slip op. at 17. Staten did not call his appellate attorney as a post-conviction witness in order to explore the reasons for omitting the remaining issues on direct appeal. Rather, Staten testified on his own behalf.

Staten testified that after he received Miranda warnings, he "asked for counsel and they refused to let me go." (P-C.R. Tr. 9.) Staten also offered his opinion that "it was extremely important to obtain casts of tire tracks and footprints" and "there should have been photos taken, samples around the body should have been taken and tested for blood." (P-C.R. Tr. 13.) The post-conviction court inquired as to whether Staten's statements were derived from the trial record, and Staten indicated that he was testifying from his recollection.[3] From the post-conviction record available, it does not appear that the factual circumstances surrounding Staten's statement to police were developed in a pretrial hearing or at trial. Nor is there a record of Staten presenting argument or evidence to the trial court tending to show how he was prejudiced by any omission by police officers processing the crime scene. In the absence of a supporting record for appeal, it was not unquestionably unreasonable on the part of Staten's appellate counsel to exclude issues on the voluntariness of his police statement or the processing of the crime scene.

[3] Staten advised the post-conviction court that he had no copy of his trial transcript, and the post-conviction court granted Staten permission to belatedly file the trial transcript after the post-conviction hearing.

Staten also argues that his appellate counsel failed to challenge judicial misconduct that occurred when the trial court provided equipment to the jury to view a videotape of the crime scene during deliberations. All exhibits were sent into the jury room with the jury at the start of deliberations. During the deliberations, the jury sent out a note with a request for a TV and VCR for viewing the videotape, which the trial court honored. Had appellate counsel challenged this, he could not have reasonably anticipated a reversal of Staten's conviction. See Lawson v. State, 664 N.E.2d 773, 778 (Ind. Ct. App. 1996) (finding no error in the trial court's "providing the means to view an exhibit" after deliberations have commenced), trans. denied. As such, Staten's appellate counsel did not fail to present a significant and obvious issue in this regard.

Staten did not overcome the presumption that he received the effective assistance of trial and appellate counsel. Accordingly, he was properly denied post-conviction relief.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.