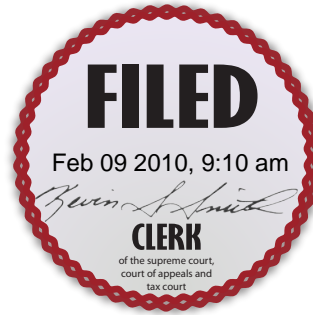


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRANDON SERNA,)
)
 Appellant-Petitioner,)
)
 vs.)
)
 STATE OF INDIANA,)
)
 Appellee-Respondent.)

No. 71A03-0905-PC-214

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D03-0508-PC-33

February 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Brandon M. Serna appeals the denial of his petition for post-conviction relief.

We affirm.

ISSUES

1. Whether Serna received ineffective assistance of trial and appellate counsel.
2. Whether the post-conviction court erred in failing to rule on Serna's allegation of newly-discovered evidence.

FACTS

The facts underlying Serna's petition for post-conviction relief were described as follows in our memorandum opinion on his direct appeal:

On January 5, 2003, Roosevelt Nelson and Jeff Smith were driving around South Bend, Indiana. Nelson stopped at Curtis Frazier's house, and Smith went inside and got Serna's cell phone number. Nelson then drove Smith to a convenience store where Smith used a pay phone to call Serna and asked if Serna knew where he could "get some dope." Serna told Smith that he did not have any cocaine but said that he would contact his supplier. Nelson and Smith left the convenience store and went to Nelson's house. Sometime during the evening, Smith asked Nelson for some money to buy the cocaine. Nelson and Smith later returned to the convenience store, and Smith used a pay phone to call Serna again. Serna told Smith to meet him at the Glo Worm bar.

Nelson drove Smith to the Glo Worm bar, and Smith got out of the car. When Serna saw Smith walking toward the car, he removed his gun from under the seat and "sat in [his] car with [his] hand over the seat and [his] gun in [his] hand." Serna unlocked the passenger door, and Smith got into the car. Nelson waited about five minutes and left his car to find Smith. Nelson knew that Smith was meeting someone in a white car and saw a maroon Cadillac with a white top, tinted windows, and the engine running. Nelson tried to open the rear driver's side door of the car, and the car started to move forward. Serna then shot Smith. Nelson heard two gunshots and ran back to his car to follow the Cadillac.

As he drove out of the parking lot, Serna opened the passenger door and pushed Smith out. Serna then saw Smith's shoe in the car and threw the shoe out of the window. Smith's body was found a short time later on the sidewalk in front of the Glo Worm bar. An autopsy revealed that Smith had gunshot entrance wounds to his head, back, and chest and that he was shot from approximately three feet away.

The next day, Officer Jamie Buford of the South Bend Police Department went to Serna's house to conduct a narcotics investigation. While Officer Buford was collecting trash from the alley behind Serna's house, Serna arrived and asked Officer Buford what he was doing. Officer Buford informed Serna that he was performing a narcotics investigation, Serna reached into his pocket, and Officer Buford ordered Serna to place his hands on the dash. Officer Buford patted Serna down and discovered a plastic baggie in Serna's pocket containing a yellow rock-like substance that appeared to be a large amount of crack cocaine and a white powdery substance that appeared to be a small amount of powder cocaine. Serna consented to a search of his house, and Officer Buford found a hand-held digital scale that field-tested positive for cocaine, an Acculab digital scale that field-tested positive for cocaine, a handgun, several boxes of ammunition, and over \$800 in cash.

The State charged Serna with felony murder and alleged that Serna killed Smith "while attempting to commit dealing in cocaine or a narcotic drug." Prior to the trial, Serna filed a motion in limine seeking to exclude the evidence found in his house during the search based upon Ind. Evidence Rule 404(b). The State argued that the evidence was relevant to establish that Serna "was engaged in preparing to or had a plan of dealing cocaine that is closely tied in time to the murder itself" and to prove that Serna was attempting to commit dealing in cocaine at the time of Smith's death. The trial court ruled that the evidence, with the exception of the handgun, was admissible to show Serna's "motive, plan, intent and ability to deal in cocaine" During the trial, the trial court admitted the evidence found in Serna's house, specifically, the hand-held digital scale, the Acculab digital scale, the handgun,¹ the ammunition, and the cash, and Serna objected to the admission of this evidence. Serna testified during

¹ In ruling on the motion in limine, the trial court found that the handgun was inadmissible because it was undisputed that the handgun was not used in the commission of Smith's murder. However, the trial court ultimately allowed the gun to be admitted over Serna's objection. See Transcript at 267. Both Serna and the State incorrectly contend that the handgun was not admitted into evidence. See Appellant's Brief at 11; Appellee's Brief at 10 n.2.

the trial that he told Smith that he could not get him any drugs, Nelson approached the car with a gun, Smith pulled out a gun and pointed it at Serna's head, and Serna shot Smith in self-defense. The jury found Serna guilty as charged, and the trial court sentenced Serna to sixty years [executed] in the Indiana Department of Correction.

Serna v. State, Cause No. 71A04-0309-CR-434, slip op. at 2-5 (Ind. Ct. App. August 26, 2004) (internal citations omitted).

On direct appeal, Serna argued that the trial court had improperly admitted Rule 404(b) evidence and that he had been denied the effective assistance of trial counsel. On August 24, 2004, in affirming Serna's conviction, we found that the trial court had properly admitted some of the ammunition into evidence and that error, if any, from the admission of the remaining evidence was harmless. We also concluded that Serna had not met his burden of proof as to his claim of ineffective assistance of trial counsel because assuming *arguendo* that Serna's counsel had rendered a deficient performance, Serna had failed to demonstrate that he had been prejudiced by the deficiencies. In light of the other evidence presented by the State to prove that Serna was attempting to deal cocaine when he shot Smith, we concluded that no reasonable probability existed that "the result of the proceeding would have been different but for trial counsel's inadequate representation." *Id.*

On August 30, 2005, Serna, *pro se*, filed a petition for post-conviction relief, wherein he argued that appellate counsel had rendered ineffective assistance by raising an ineffective assistance of trial counsel claim on certain claims to the exclusion of others, which were now foreclosed to him at the post-conviction relief level; and that he had new

evidence. On January 9, 2008, Serna, by counsel, filed an amended petition for post-conviction relief, followed by an amendment to the amended petition on July 21, 2008. On September 5, 2008, the post-conviction court conducted a hearing on Serna's petition. On April 2, 2009, it issued an order denying Serna's petition for post-conviction relief. Serna now appeals.

DECISION

Serna challenges the denial of his petition for post-conviction relief.

The purpose of a post-conviction proceeding is to give a petitioner the limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Such proceedings are not super appeals through which convicted persons can raise issues that they failed to raise at trial or on direct appeal. In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When reviewing the denial of a petition for post-conviction relief, we will neither reweigh the evidence nor judge the credibility of the witness. 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. We will disturb the post-conviction court's decision only if the evidence is without conflict and leads to but one conclusion and the post-conviction court has reached the opposite conclusion.

Donnegan v. State, 889 N.E.2d 886, 891 (Ind. Ct. App. 2008) (internal citations and quotations omitted).

1. Ineffective Assistance of Trial Counsel

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, a claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant 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 arises when there is a probability sufficient to undermine confidence in the outcome.

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (internal citations omitted).

“Although the two parts of the *Strickland* test are separate inquiries, a claim may be disposed of on either prong.” *Id.* Because the “object of an ineffectiveness claim is not to grade counsel's performance, [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.* (citing *Strickland*, 466 U.S. at 697). Isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience, do not necessarily constitute ineffective assistance. *Grinstead*, 845 N.E.2d at 1036.

Serna contends that trial counsel rendered ineffective assistance by the following:

i. Failure to Seek Suppression of Evidence

Serna argues that trial counsel erred in failing to seek suppression of all evidence obtained as a result of the search of his trash and the search of his person and his house.

The post-conviction court made certain findings of fact from which it concluded that trial counsel's performance in this regard was not deficient. It found that on July 2,

2003, weeks before Serna's jury trial, defense counsel had filed a motion in limine to prevent the presentation of any evidence obtained pursuant to the January 6, 2003 search of Serna's person and home. On July 16, 2003, the State filed a notice of intent to use Rule 404(b) evidence to be offered with the intention to prove that Serna killed Smith while Serna was attempting to deal in cocaine or was dealing in cocaine. The trial court denied Serna's motion on July 21, 2003. On appeal, Serna argued that the trial court had erred in denying his motion in limine. A panel of this court agreed with respect to the admission of two digital scales, a gun, ammunition not of the type used to kill Smith, and cash found in Serna's house; however, the error was deemed harmless in light of the "other significant evidence" which the State had presented to prove that Serna was attempting to deal or was dealing cocaine when he killed Smith. (P-C. App. 67).

The post-conviction court concluded that Serna could not prevail on his claim of ineffectiveness because he had not demonstrated prejudice. The post-conviction court concluded that, beyond the evidence obtained pursuant to the January 6, 2003 search, the State had presented considerable other evidence that Serna was either dealing drugs or attempting to deal drugs when he killed Smith.

The trial record contains ample support for the post-conviction court's findings of fact. At trial, Serna testified that shortly after he and Smith had discussed a drug transaction, he shot Smith twice in his car. Nelson testified that he and Smith had gone to the Glo Worm to buy cocaine from Serna. Jailhouse informant Everett Carver testified that Serna had admitted that he had shot Smith during a drug deal gone wrong.

Our review of the record does not lead us “unerringly and unmistakably” to an opposite conclusion than that reached by the post-conviction court. *Donnegan*, 889 N.E.2d at 891. Accordingly, we find that Serna did not suffer prejudice from trial counsel’s failure to seek suppression of all evidence obtained as a result of the searches of his person, trash and house.

ii. Failure to Object to Hearsay Testimony

Serna argues that trial counsel erred in failing to object to hearsay testimony from Nelson regarding why Nelson, Smith, and Serna had met at the Glo Worm. He argues that said hearsay testimony was the only direct evidence in the State’s case that the men had met to conduct a narcotics transaction.

The post-conviction court found that Serna was likely challenging the following colloquy, occurring on redirect between Nelson and the prosecutor, wherein counsel attempted to establish that Nelson, Smith, and Serna had met to conduct a drug deal:

Q: Isn’t it true that the reason why [Smith] asked you for money is because he wanted to purchase some drugs; some cocaine?

A: Yes.

Q: And that is why you went over to the Glo[] Worm, so that [Smith] could get the cocaine. Isn’t that true?

A: Yes.

Q: That’s what this all was about; isn’t that true?

A: Yes.

Q: [Smith] was going to meet somebody at the Glo Worm parking lot, so he can get some cocaine, right?

[Trial Counsel]: Objection, Your Honor. May we approach, Your Honor?

(Tr. 147).

The post-conviction court concluded that Nelson's statements were not clearly hearsay, noting that although his testimony

may have been based upon hearsay, . . . without further (now unattainable) information, it [would be] impossible for this [post-conviction] court to determine whether the statements underlying the testimony were admissible as an exception to the hearsay rule, e.g. [Indiana Rule of Evidence] 803(3) or whether the testimony was admissible on non-hearsay grounds.

(P-C Order 10). The post-conviction court further concluded that Nelson's testimony, even if inadmissible, was merely cumulative of other evidence presented by the State to prove why Nelson, Smith, and Serna met at the Glo Worm. Accordingly, the post-conviction court found no prejudice to Serna from the admission of the evidence.

As discussed above in subsection i, the trial record contains support for the post-conviction court's conclusion that Serna did not demonstrate any prejudice from trial counsel's failure to object to Nelson's testimony. Specifically, the State presented ample other evidence, besides Nelson's testimony, that Smith, Nelson, and Serna had met at the Glo Worm to conduct a drug transaction. As noted above, Serna himself testified that he and Smith had discussed a drug transaction; further, informant Carver testified that Serna had admitted that he had shot Smith during a drug deal gone wrong.

Our review of the record does not lead us "unerringly and unmistakably" to an opposite conclusion than that reached by the post-conviction court. *Donnegan*, 889

N.E.2d at 891. Accordingly, we find that Serna has not demonstrated that he suffered prejudice from trial counsel's failure to object to Nelson's statements.

iii. Failure to Pursue a Reasonable Theory of Defense

Serna argues that trial counsel pursued an unreasonable theory of defense by asserting a claim of self-defense to the charge of felony murder.

The post-conviction court made the following findings of fact: At the hearing on Serna's petition for post-conviction relief, trial counsel testified that after several pre-trial discussions with Serna, it was clear that Serna adamantly believed that he had acted in self-defense when he shot Smith. Fully aware that self-defense is not generally a defense to felony murder, trial counsel testified that he had concluded that, under the unique facts and circumstances of the case, self-defense was, in fact, a viable defense.

On the eve of trial, trial counsel advised the trial court of his intention to tender a self-defense instruction. Counsel successfully argued that absent a nexus between the alleged drug dealing and the killing, self-defense was a viable defense to the felony murder charge. The trial court agreed to read the following self-defense instruction to the jury:

You are instructed that because a defendant is attempting to commit a crime at the time he is claiming self-defense is not enough standing alone to deprive the defendant of a legal right to self-defense. There must be an immediate causal connection between the attempted crime and the confrontation. In other words, the evidence must show that but for the defendant attempting to commit a crime, the confrontation resulting in a killing would not have occurred.

(Trial App. 185).

In his petition for post-conviction relief, Serna argued that he only took the witness stand because trial counsel had advised him that the theory of self-defense was available to him. He argued that without his testimony, the State would not have had sufficient evidence with which to convict him because the only other evidence of his guilt came from jailhouse informant Carter.

Refusing to speculate on what might have been advantageous strategy at trial, the post-conviction court concluded that trial counsel's decision to assert a claim of self-defense was a deliberate strategic choice, which was entitled to deference from reviewing courts. The post-conviction court also concluded that Carter's testimony had been corroborated by at least four other State witnesses. (P-C. App. 71).

There is evidence in the trial record to support the post-conviction court's finding. The State presented considerable evidence of Serna's guilt, besides Serna's testimony. Nelson testified that he had seen Serna's Cadillac speeding away from the Glo Worm, and that he had heard two gunshots as the vehicle sped away. Margaret Saunders testified that she had assisted Serna in abandoning his Cadillac in Mishawaka, and that Serna had told her not to tell anyone about it. When police located Serna's Cadillac, they found Smith's blood on the front seat of the vehicle. Carver testified that Serna had admitted to shooting Smith during a drug deal gone wrong.

Our review of the record does not lead us "unerringly and unmistakably" to an opposite conclusion than that reached by the post-conviction court. *Donnegan*, 889

N.E.2d at 891. Accordingly, we find that Serna has not demonstrated that he suffered prejudice from trial counsel's strategic decision to pursue a theory of self-defense to the felony murder charge.

iv. Conflict of Interest

Serna argued that trial counsel had a conflict of interest stemming from counsel's prior representation of Perry Frazier, brother of Curtis Frazier. Serna argued that the State filed charges against him after Perry implicated him. Serna hired trial counsel after Perry had recommended his services. Serna contended that trial counsel was actively representing Perry at the time he retained counsel's services and that a conflict of interest existed thereby.

The post-conviction court made the following findings of fact: At the post-conviction relief hearing, trial counsel testified that he did not recall his representation of Perry being close in temporal proximity to his representation of Serna. He testified further that to the best of his recollection, his representation of Perry Frazier had concluded well before his representation of Serna began. He testified further that had his representations of Frazier and Serna coincided, he would have disclosed the same to Serna. Serna presented no documentary evidence of Frazier's charges and the timing thereof, which might have proved useful in determining whether trial counsel's representation of Frazier and Serna had overlapped. Based upon the foregoing, the post-conviction court concluded that Serna had not demonstrated the existence of a conflict of

interest and had not shown that he had suffered prejudice from the alleged conflict of interest.

Our review of the record does not lead us “unerringly and unmistakably” to an opposite conclusion than that reached by the post-conviction court. *Donnegan*, 889 N.E.2d at 891. Accordingly, we cannot say that trial counsel rendered ineffective assistance by his failure to disclose an alleged conflict of interest with respect to his representation of Frazier.

v. Failure to Seek Limiting Instruction Regarding Rule 404(b) Evidence

Serna argues that trial counsel erred in failing to seek a limiting instruction regarding the State’s introduction of 404(b) evidence from the police search of his property on January 6, 2003.

In concluding that Serna had not demonstrated prejudice, the post-conviction court stated that “other evidence introduced against [Serna] was sufficiently strong to overcome any concern that [his] substantial rights . . . had been affected.” (P-C App. 76).

As noted above, the State presented considerable other evidence of Serna’s guilt. Serna testified that shortly after he and Smith had discussed a drug transaction, he had shot Smith twice in his car. Nelson testified that he and Smith had gone to the Glo Worm to buy cocaine from Serna, and that he had seen Serna’s Cadillac speeding away from the Glo Worm as two gunshots rang out. Informant Everett Carver testified that Serna had admitted that he had shot Smith during a drug deal gone wrong. Saunders testified that

she had helped Serna to abandon his vehicle, and that he had warned her not to tell anyone about it. Police found Smith's blood in the front of Serna's vehicle.

Our review of the record does not lead us “unerringly and unmistakably” to an opposite conclusion than that reached by the post-conviction court. *Donnegan*, 889 N.E.2d at 891. The State argues, and we agree, that Serna has not established that had a limiting instruction been given, there is a reasonable probability that the outcome would have been different. Accordingly, we conclude that trial counsel's performance was not deficient when he failed to seek a limiting instruction regarding the State's introduction of 404(b) evidence.

vi. Failure to Object to Irrelevant Testimony

Serna argues that trial counsel erred in failing to object when the State elicited “irrelevant testimony” from Smith's girlfriend, Delphia Woods, who had testified as to the number of her loved ones and acquaintances who had been killed. Serna's Br. at 10.

At trial, the following colloquy ensued between the prosecutor and Woods on direct examination:

Q: [Ms. Woods], [y]ou've been through quite a bit; haven't you?

A: Yes, I have.

Q: Your son Brent was the victim of a murder?

A: Yes.

Q: You knew a Roderick Harmon?

A: Yes.

Q: He was also the victim of a murder; wasn't he?

A: Yes.

Q: And now Jeff Smith?

A: Yes.

(Tr. 492-93). Later, during the prosecutor's closing remarks, he stated,

Do not, I ask as a member of [f] the law enforcement community, give a drug dealer a ticket home when he killed someone else in a drug deal. We have enough violence on our streets right now. You heard Delphia Woods. Her son's been murdered. Roderick Harmon which was another case I handled, was murdered a couple of years ago that related to her. And now her boyfriend. All in this community, all within the last two years.

(Tr. 592-93). Trial counsel did not object to the prosecutor's questioning of Woods or to his closing argument.

At the hearing on the petition for post-conviction relief, trial counsel testified that he could have objected to the prosecutor's questioning of Woods. He also testified that he did not recall why he had not objected to the State's closing arguments. He testified further that he generally elects to address objectionable material in his own closing remarks, rather than to object during opposing counsel's closing argument. The post-conviction court concluded that given the considerable evidence presented at trial of Serna's guilt, he had failed to demonstrate that trial counsel's representation was deficient or that counsel had caused him to suffer prejudice.

There is evidence in the trial record to support the post-conviction court's findings. During trial counsel's own closing remarks, he addressed Woods' testimony as follows: "[Just] [b]ecause a lady [] sat here and testified [that she] had some other people in her life that were killed, [] let's lock Brandon Serna up, and that will solve it If we're just going to label people drug dealers, why have court[s?]" (Tr. 593). Further, given the significant evidence of Serna's guilt, including testimony from Nelson,

Saunders, Carver, and Serna himself, as well as forensic evidence collected from Serna's Cadillac, Serna has not demonstrated that a reasonable probability exists that but for trial counsel's failure to object to the prosecutor's eliciting of Woods' objectionable testimony, the result of the proceeding would have been different.

Our review of the record does not lead us "unerringly and unmistakably" to an opposite conclusion than that reached by the post-conviction court. *Donnegan*, 889 N.E.2d at 891. Accordingly, we cannot say that trial counsel rendered ineffective assistance when he failed to object to the State's questioning of Woods.

vii. Failure to Properly Impeach with Prior Inconsistent Testimony

Serna argues that trial counsel failed to properly impeach Nelson with his prior inconsistent testimony.

The post-conviction court made the following findings of fact: At trial, Nelson testified that police interviewed him on three occasions after the killing, and that he had lied to them during the first and second interviews. He testified that he told the police the truth at his third interview. The record reveals that trial counsel cross-examined Nelson with respect to his initial statements to police and then called attention to "the coincidence of Nelson's cooperation with the police and the discovery of his fingerprints on the Cadillac." (P-C. App. 78). Trial counsel then attempted twice to introduce videotapes of Nelson's police interviews into evidence; however, each time, the trial court deferred its ruling on the issue. During Serna's case-in-chief, trial counsel moved to enter the videotapes into evidence, which motion was denied. Trial counsel argued

that the tapes were necessary for purposes of impeachment as well as to show how Nelson's accounts of the facts had changed. The trial court concluded that trial counsel's impeachment of Nelson was already complete, given Nelson's admission that he had initially misled the police.

The post-conviction court concluded that "nothing [trial counsel] could have done would have resulted in a different ruling from the trial court," and, therefore, that Serna had not sustained his burden of proving that trial counsel had rendered ineffective assistance and that Serna had suffered prejudice therefrom. (P-C. App. 79).

In light of the testimony of Serna, Saunders, and Carver implicating Serna and the forensic evidence recovered by police, we cannot say that a reasonable probability exists that but for trial counsel's failure to seek a limiting instruction, the result of the proceeding would have been different. Our review of the record does not lead us "unerringly and unmistakably" to an opposite conclusion than that reached by the post-conviction court. *Donnegan*, 889 N.E.2d at 891. Accordingly, we find that trial counsel's performance was not deficient when he failed to properly impeach Nelson with his prior inconsistent testimony.

2. Ineffective Assistance of Appellate Counsel

Serna argues that appellate counsel rendered ineffective assistance. We disagree.

A petitioner arguing ineffective assistance of appellate counsel based upon appellate counsel's failure to properly raise and support a claim of ineffective assistance of trial counsel faces a compound burden. *Dawson v. State*, 810 N.E.2d 1165, 1177 (Ind.

Ct. App. 2004). A petitioner making such a claim must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. *Id.* The petitioner must establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. *Id.*

Serna has not met his compound burden of proof. Because his claims of ineffective assistance of trial counsel have not satisfied the *Strickland* requirements, he cannot prevail on his claim of ineffective assistance of appellate counsel. Thus, we do not reach the merits of his claim.

3. Newly-Discovered Evidence

Serna argues that the post-conviction court denied him the opportunity to present newly-discovered evidence and erred in failing to “hear or rule on the newly discovered evidence issue raised” in his petition for post-conviction relief.” Serna’s Br. at 12. This issue is waived.

Although Serna alleged the existence of newly-discovered evidence in his petition for post-conviction relief, the hearing transcript reveals that he presented no evidence or argument on the subject. *See Fox v. State*, 568 N.E.2d 1006, 1007 (Ind. 1991) (listing nine elements that defendant must establish in order for court to order a new trial based on newly-discovered evidence). Nor has he directed our attention to any portions of the record that support his contention that the trial court denied him the opportunity to present newly-discovered evidence.

The State argues, and we agree, that Serna has waived this issue by his failure to provide adequate citation to portions of the record relied upon. Ind. Appellate Rule 46(A)(8)(a). Moreover, the post-conviction court's order states that Serna raised only the issue of ineffective assistance of counsel at the hearing on the petition for post-conviction relief, which indicates that Serna did not, in fact, proffer newly-discovered evidence. In light of the foregoing, and Serna's failure to meet his burden of proof, we find no error.

Affirmed.

KIRSCH, J., and MAY, J., concur.