

Obadyah Ben-Yisrayl, formerly known as Christopher Dwayne Peterson, appeals the trial court's denial of his successive motion for post-conviction relief. Ben-Yisrayl raises three issues, which we revise and restate as whether the post-conviction court erred in denying Ben-Yisrayl's successive petition for post-conviction relief. We affirm.

The relevant facts as set forth in Ben-Yisrayl's direct appeal in this case follow:

[O]n January 28, 1991, [Ben-Yisrayl] robbed the victim, Ronald Nitsch, as Nitsch attempted to make a bank deposit. During the course of the robbery, [Ben-Yisrayl] shot Nitsch in the head, severely injuring him. [Ben-Yisrayl] was arrested and charged with the crimes; he confessed while in police detention.

The first trial of this action commenced on March 8, 1992, at which time [Ben-Yisrayl] was represented by attorney Charles Graddick. After the jury was selected and sworn, the State informed the trial court that Graddick had a conflict of interest because a member of Graddick's firm had interviewed another individual involved in the same crime. Thereafter, Graddick withdrew and the trial court granted [Ben-Yisrayl's] motion for a mistrial. After a second jury was impaneled and sworn, [Ben-Yisrayl] was convicted of attempted murder[, a class A felony,] and robbery [as a class B felony].

Peterson v. State, 653 N.E.2d 1022, 1023 (Ind. Ct. App. 1995), trans. denied.

The crimes in this case were allegedly part of a shotgun shooting spree in northwestern Indiana involving at least ten victims. See Ben-Yisrayl v. State, 729 N.E.2d 102, 105 (Ind. 2000), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). In two other separate cases, Ben-Yisrayl was convicted for the murders of four other persons. See id.

First, Ben-Yisrayl was convicted for the murder of a motel clerk and a gas station attendant in Porter County on December 15 and 16, 1990. See Ben-Yisrayl v. State, 690 N.E.2d 1141, 1144 (Ind. 1997), reh'g denied, cert. denied, 525 U.S. 1108, 119 S. Ct. 877

(1999) (the “Porter County Double Murder Case”). A Porter County motel clerk was killed as the result of a shotgun wound to the neck and \$467.00 was missing from the cash register. Id. The next day, an attendant at a nearby gas station was killed by a shotgun blast to the head, and \$327.55 was missing. Id. After his arrest, Ben-Yisrayl confessed to the shotgun murders. Id. at 1152. Ben-Yisrayl was sentenced to death for the Porter County murders. Ben-Yisrayl v. State, 753 N.E.2d 649, 652 (Ind. 2001), reh’g denied, cert. denied, 536 U.S. 918, 122 S. Ct. 2382 (2002).

Second, Ben-Yisrayl was convicted for the murder of two brothers in Lake County, Indiana, on the afternoon of December 18, 1990. See Peterson v. State, 674 N.E.2d 528, 531-532 (Ind. 1996), reh’g denied, cert. denied, 522 U.S. 1078, 118 S. Ct. 858 (1998) (the “Lake County Double Murder Case”). The two victims were found dead inside their tailor shop from shotgun wounds to the head. Id. at 532. A sawed-off shotgun later recovered from Ben-Yisrayl’s apartment was found to have fired a spent casing recovered at the crime scene. Id. Ben-Yisrayl also confessed to the two shotgun murders in Lake County. Id. at 535. Ben-Yisrayl was sentenced to death for the Lake County murders. Id.

At the time the trial court sentenced Ben-Yisrayl in this case, he had been convicted in the Porter County Double Murder Case and the Lake County Double Murder Case. The trial court found the following aggravating circumstances in sentencing Ben-Yisrayl: (1) that Ben-Yisrayl had been convicted of two murders in the Porter County Double Murder Case; (2) that he had been convicted of two murders in the Lake County Double Murder Case; and (3) that “the murders, according to Ben-Yisrayl’s statement,

were racially motivated and there is a high risk that [Ben-Yisrayl] will commit other murders.” Amended Appellant’s Appendix at 78. The trial court also found the following mitigating factors: (1) that Ben-Yisrayl graduated from high school; (2) that he had been gainfully employed prior to entering the U.S. Marine Corps.; (3) that he had “served between two and three years in the [U.S.] Marine Corps. but was AWOL at the time of the commission of this crime;” and (4) that he “had no prior criminal record until he returned home AWOL from the [U.S.] Marine Corps[,] in 1989.” Id. at 77-78. The trial court found that “the mitigating factors are overwhelmingly outweighed by the aggravating factors” Id. at 78. The trial court sentenced Ben-Yisrayl to fifty years for attempted murder and twenty years for robbery as a class B felony, to be served consecutively.¹ This court affirmed Ben-Yisrayl’s convictions in this case on direct appeal. See Peterson, 653 N.E.2d at 1025.

Ben-Yisrayl also appealed his convictions in the Porter County Double Murder Case and the Lake County Double Murder Case. In the Porter County Double Murder Case, the Indiana Supreme Court affirmed Ben-Yisrayl’s convictions and sentence on direct appeal and affirmed the denial of his petition for post-conviction relief. See Ben-

¹ At the sentencing hearing, Ben-Yisrayl’s counsel argued that he “was aware of an error in the Porter County case that, in all probability, will result in a reversal of that case. The Lake County case is a different story, perhaps it will be, perhaps it won’t be” Transcript at 2446. Ben-Yisrayl’s counsel later argued that “[t]here were two trials, Your Honor. The Porter County case, the error committed by the prosecuting attorney, in closing argument, I think will be enough to reverse that case.” Id. at 2448. Ben-Yisrayl’s counsel also argued that “it would be unreasonable to use those earlier convictions for enhancement purposes” because “they’re going to be reversed. In all likelihood, they’re going to be reversed.” Id. at 2447-2448. After sentencing Ben-Yisrayl to maximum, consecutive terms for attempted murder and robbery as a class B felony, the trial court stated: “Again, I’ll tell you that [Ben-Yisrayl’s enhanced sentence] is based on the prior convictions. If they are, in fact reversed, the Court may look at this again.” Id. at 2451.

Yisrayl, 690 N.E.2d at 1144 (affirming convictions and sentence on direct appeal); Ben-Yisrayl, 753 N.E.2d at 662 (affirming denial of post-conviction relief). However, the United States District Court for the Northern District of Indiana granted a writ of habeas corpus in part due to the prosecutor's remarks during closing arguments regarding Ben-Yisrayl's failure to testify, and the Seventh Circuit of the United States Court of Appeals affirmed the judgment of the district court. Ben-Yisrayl v. Davis, 277 F. Supp. 2d 898, 898-907 (N.D. Ind. 2003), affirmed by 431 F.3d 1043, 1045 (7th Cir. 2005), reh'g denied, reh'g en banc denied. As of the briefing in this case, a retrial in the Porter County Double Murder Case has not occurred.

In the Lake County Double Murder Case, the Indiana Supreme Court affirmed Ben-Yisrayl's convictions and sentence on direct appeal and the denial of his petition for post-conviction relief. See Peterson, 674 N.E.2d at 532-543 (Ind. 1996) (affirming convictions and sentence on direct appeal); Ben-Yisrayl, 729 N.E.2d at 113 (affirming the denial of post-conviction relief). Ben-Yisrayl then filed a motion for writ of habeas corpus challenging his conviction and sentence, which was denied. Ben-Yisrayl v. Davis, 245 F. Supp. 2d 960 (N.D. Ind. 2002). While his appeal from that decision was pending, the Indiana Supreme Court issued Saylor v. Indiana, 808 N.E.2d 646 (Ind. 2004), ruling that a defendant could not be sentenced to death over a jury's recommendation to the contrary. See Ben-Yisrayl v. Buss, 540 F.3d 542, 545 (7th Cir. 2008), reh'g denied, reh'g en banc denied, cert. denied, 129 S. Ct. 2890 (2009). Ben-Yisrayl then filed a new

petition for post-conviction relief, which the Indiana Supreme Court granted, vacating his death sentence.² See id.

On re-sentencing, Ben-Yisrayl received two consecutive sixty-year terms. Id. Ben-Yisrayl appealed his sentence, arguing that the trial court erroneously relied on his criminal history as an aggravating circumstance. See Ben-Yisrayl v. State, No. 45A05-0501-CR-22, slip op. at 7-8 (Ind. Ct. App. Dec. 13, 2005), reh'g denied, trans. denied. Specifically, Ben-Yisrayl claimed that the Northern District's grant of his petition for writ of habeas corpus in the Porter County Double Murder Case meant that the convictions in that case could no longer be relied upon as criminal history aggravators. Id. at 8. This court affirmed Ben-Yisrayl's re-sentencing, holding that the trial court properly relied on the Porter County convictions when re-sentencing Ben-Yisrayl as those convictions remained valid because the State had appealed the Northern District's decision and the Seventh Circuit Court of Appeals had not yet issued its decision.³ Id. (affirming re-sentencing). The Seventh Circuit of the United States Court of Appeals denied federal habeas corpus relief and affirmed Ben-Yisrayl's re-sentencing. See Ben-Yisrayl, 540 F.3d at 555.

² After the Indiana Supreme Court vacated Ben-Yisrayl's death sentence, the Seventh Circuit Court of Appeals dismissed Ben-Yisrayl's appeal of the denial of his motion for writ of habeas corpus for lack of jurisdiction, but noted that Ben-Yisrayl could refile his habeas petition after re-sentencing and after he exhausted his state court remedies. See Ben-Yisrayl, 540 F.3d at 545.

³ The court also stated that, "even assuming, *arguendo*, that the Porter County murder convictions are invalid, Ben-Yisrayl's enhanced sentences are proper." See Ben-Yisrayl, No. 45A05-0501-CR-22, slip op. at 8. The court noted that the Porter County convictions were only two of three aggravating circumstances found by the trial court. Id.

In this case, Ben-Yisrayl filed his first petition for post-conviction relief in April 1997 challenging the effectiveness of his trial and appellate counsel, which was denied in May 2000. This court affirmed the denial of Ben-Yisrayl's petition. See Ben-Yisrayl v. State, No. 45A03-0006-PC-218 (Ind. Ct. App. March 20, 2001), trans. denied. Ben-Yisrayl petitioned this court to grant him leave to file a successive petition for post-conviction relief, which this court granted on March 31, 2008.

In his successive petition for post-conviction relief, Ben-Yisrayl alleged that “[b]ecause [Ben-Yisrayl’s] sentence in this case was enhanced by the prior convictions in Porter County, which have since been reversed, [Ben-Yisrayl’s] sentence is based on inaccurate information and must be vacated.” Amended Appellant’s Appendix at 110. Ben-Yisrayl also filed a memorandum in support of his successive petition for post-conviction relief, arguing in part that “a resentencing hearing is compelled in this case because it would be impossible to conclude with confidence that the sentencing judge would have imposed maximum, consecutive sentences had he not explicitly relied on the now-vacated Porter County murder convictions.” Id. at 65.⁴ After conducting an evidentiary hearing on Ben-Yisrayl’s successive petition on November 6, 2008, the post-conviction court denied the petition on February 29, 2009. In its denial, the post-conviction court stated that it “feels confident that the trial court would have come to the same sentencing conclusion if the petitioner had stood in front of the court with only two

⁴ Ben-Yisrayl also argued that he “is entitled to a new sentencing hearing, not merely a new sentencing order” because “the sentencing judge . . . is no longer on the bench,” because “the previous sentencing record is fifteen years old and therefore stale,” and because Ben-Yisrayl “should be allowed to present evidence of new mitigating factors, his exemplary eighteen-year record of behavior in prison, and the changes in his life during that period that make him unlikely to commit another crime.” Amended Appellant’s Appendix at 68-69.

prior murder convictions, rather than four prior murder convictions on the petitioner's record at the time.” Id. at 24. Ben-Yisrayl now appeals the denial of his successive petition for post-conviction relief.

Before discussing Ben-Yisrayl's arguments, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). “A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” Fisher, 810 N.E.2d at 679. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

The sole issue is whether the post-conviction court erred in denying Ben-Yisrayl's successive petition for post-conviction relief. Ben-Yisrayl argues that “[t]he post-conviction court was required to grant relief unless it could find with ‘confidence’ that

the sentencing judge's consideration of a now-vacated double murder played no significant role in his sentencing decision." Appellant's Amended Brief at 7. Ben-Yisrayl argues that "[b]oth the United States Supreme Court and the Indiana Supreme Court have long held that a sentence must be vacated where, as in this case, it is predicated in significant part on a conviction that is later overturned." Id. Ben-Yisrayl further argues that the post-conviction court ignored the fact that the sentencing judge "explicitly acknowledged on the record that he was taking the Porter murder convictions into account," the fact that "the aggravating factor that has now been conclusively removed in this case was the ultimate aggravator," and the fact that the sentence imposed in this case "was the maximum sentence for both crimes, to be served consecutively." Id. at 10-11. Ben-Yisrayl also argues that "[t]he post-conviction court's rationale does not support its conclusion" because the sentencing court's statement that the homicides "would far outweigh the fact that he graduated from high school" was "a reference to *both* the vacated Porter county murders and the [Lake County] murders," and because the sentencing court stated that it would reconsider the sentence "if the Porter County murders were vacated." Id. at 12-13. The State argues "[w]hile one of the four⁵ aggravating circumstances has changed, that is Ben-Yisrayl is no longer convicted of the Porter County murders, the others remain and are particularly weighty." Appellee's Brief

⁵ In its brief, the State argues that Ben-Yisrayl's confession that the murders were racially motivated and the fact that there is a high risk that Ben-Yisrayl will commit other murders are actually two separate aggravating factors even though the sentencing court combined them into one point in its written sentencing order. The State also argues that "[o]f course, whether they are expressed as one or two aggravating circumstances makes no difference to the sentencing calculus." Appellee's Brief at 4 n.2.

at 6. The State also argues that “[w]hile not now convicted of the Porter County murders, Ben-Yisrayl has nonetheless confessed to [the murders in the Porter County Double Murder Case].”⁶ Id. at 7.

Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances.” Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). When a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. Bacher v. State, 722 N.E.2d 799, 803 (Ind. 2000). A single aggravating circumstance may serve to both enhance a sentence and to impose consecutive sentences. Allen v. State, 722 N.E.2d 1246, 1253 (Ind. Ct. App. 2000). When a reviewing court “can identify sufficient aggravating circumstances to persuade it that the trial court would have entered the same sentence even absent the impermissible factor, it should affirm the trial court’s decision.” Means v. State, 807 N.E.2d 776, 788 (Ind. Ct. App. 2004) (citing Day v. State, 560 N.E.2d 641, 643 (Ind. 1990)), trans. denied. When a reviewing court “cannot say with confidence that the permissible aggravators would have led to the same result, it should remand for re-sentencing by the trial court or correct the sentencing on appeal.” Id.

⁶ The State also argues that “Ben-Yisrayl does not raise a cognizable post-conviction claim” because “Ben-Yisrayl’s claim is not that the trial court made a mistake of fact or law at the time of sentencing.” Appellee’s Brief at 7. However, the State does not cite any authority for the premise that a prior conviction which served as an aggravating factor to enhance a sentence and which was subsequently vacated cannot form the basis of a post-conviction challenge to the enhanced sentence. Further, it appears that the State failed to raise this argument to the post-conviction court.

Here, Ben-Yisrayl was convicted of two counts of murder in the Porter County Double Murder Case in March 1992 prior to his convictions in this case in October 1993, and the sentencing court used the two Porter County murder convictions as an aggravating factor to enhance Ben-Yisrayl's sentence in this case. However, Ben-Yisrayl's petition in the federal court for habeas relief in the Porter County Double Murder Case was granted, and the State has not yet retried Ben-Yisrayl for the Porter County murders. See Ben-Yisrayl, 277 F. Supp. 2d at 898-907; Ben-Yisrayl, 431 F.3d at 1045.

We observe that the Porter County convictions constituted only one of three aggravating circumstances found by the sentencing court. All three aggravators were clearly set forth in the court's sentencing statement and Ben-Yisrayl does not challenge the remaining aggravators.⁷ The first of the two other aggravating factors was that Ben-Yisrayl had been convicted of two murders in the Lake County Double Murder Case. Those Lake County murder convictions remain valid aggravators. See Peterson, 674 N.E.2d at 532-543 (affirming convictions on direct appeal); Ben-Yisrayl, No. 45A05-0501-CR-22, slip op. at 7-9 (affirming re-sentencing); Ben-Yisrayl, 540 F.3d at 555 (affirming denial of federal relief and affirming re-sentencing). Ben-Yisrayl had entered the tailor shop of Ilija (Eli) Balovski and George Balovski in Lake County, Indiana, and

⁷ In his reply brief, Ben-Yisrayl appears to challenge the aggravator that the offenses were racially motivated. However, Ben-Yisrayl did not raise this issue in his initial appellant's brief. Consequently, Ben-Yisrayl has waived this issue. See French v. State, 778 N.E.2d 816, 826 (Ind. 2002) (holding that the defendant waived issue by not raising it in his principal brief); see also Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief.").

shot the two brothers in the head with a sawed-off shotgun. See Peterson, 674 N.E.2d at 531-542; Ben-Yisrayl v. State, 729 N.E.2d at 108-109.

The second of the two other aggravating factors found by the sentencing court in this case was that “the murders, according to Ben-Yisrayl’s statement, were racially motivated and there is a high risk that [Ben-Yisrayl] will commit other murders.” Amended Appellant’s Appendix at 78. We also observe that in its sentencing order, the trial court found that “the mitigating factors are overwhelmingly outweighed by the aggravating factors.” Amended Appellant’s Appendix at 78. We conclude that the post-conviction court did not err in concluding that it could say with confidence that the trial court would have entered the same sentence even absent the improper factor.⁸ See Means, 807 N.E.2d at 788 (noting that although the trial court considered an improper aggravator in sentencing the defendant, among other convictions, to the maximum term of fifty years for attempted murder and the maximum term of twenty years for robbery as a class B felony, the remaining valid aggravators were sufficient to support the imposition of enhanced maximum sentences and the court was confident that a remand for re-sentencing would not change the term of years imposed); see also Sullivan v. State,

⁸ The State also argues that “Ben-Yisrayl’s confession to the Porter County murders remains, so the trial court could have properly cited that confession as an aggravating circumstance even absent a conviction.” Appellee’s Brief at 9. Indeed, it appears that the sentencing court noted Ben-Yisrayl’s confession when it found as a third aggravating factor that “[t]he murders, according to the defendant’s statement, were racially motivated and there is a high risk that the deft. will commit other murders.” See Amended Appellant’s Appendix at 78. Nevertheless, because we conclude that the sentencing court would have imposed the same sentence based upon the remaining aggravating factors of the Lake County murder convictions, the finding that the murders were racially motivated, and the finding that there is a high risk that Ben-Yisrayl will commit other murders, we need not address whether Ben-Yisrayl’s confession could have served as an additional aggravating factor or if the confession was implicitly included in the sentencing court’s third aggravating factor.

836 N.E.2d 1031, 1037 (Ind. Ct. App. 2005) (affirming defendant’s maximum sentence based upon a valid aggravator and noting that the trial court would have imposed an identical maximum sentence even if it had not considered impermissible aggravators).⁹

For the foregoing reasons, we affirm the post-conviction court’s denial of Ben-Yisrayl’s motion for post-conviction relief.

Affirmed.

MATHIAS, J., and BARNES, J., concur.

⁹ Ben-Yisrayl cites Abercrombie v. State, 275 Ind. 407, 414, 417 N.E.2d 316, 320 (1981), and Pearson v. State, 543 N.E.2d 1141, 1145 (Ind. Ct. App. 1989), for the proposition that he “should receive a new sentencing hearing, not merely a new sentencing order.” Appellant’s Amended Brief at 14. We find these cases distinguishable. In Abercrombie, the Court held that “[s]ince we find no statement of reasons or of specific aggravating and mitigating circumstances which would support the imposition of [an enhanced sentence] for the instant crimes, the cause must be remanded to the trial court with instructions to grant defendant a new sentencing hearing and enter sufficient findings to support the sentence imposed.” Abercrombie, 275 Ind. at 414, 417 N.E.2d at 320. In Pearson, the trial court failed “to state any aggravating circumstances whatsoever.” Pearson, 543 N.E.2d at 1145. Here, unlike in Abercrombie and Pearson, the trial court entered a sufficient statement of aggravating factors. Further, we have concluded that the denial of Ben-Yisrayl’s successive petition for post-conviction relief was proper and that Ben-Yisrayl is not entitled to a new sentencing order.