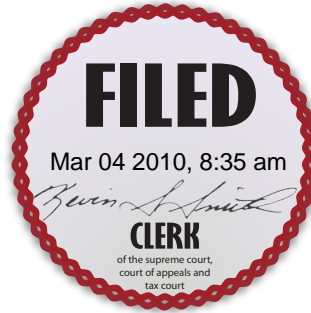


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ARTHUR L. BEATTY
Greencastle, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ARTHUR L. BEATTY,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-0907-PC-648
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
Cause No. CR 82-005B

March 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following his 1982 conviction for the voluntary manslaughter of his father, Arthur L. Beatty unsuccessfully sought post-conviction relief. Beatty, *pro se*, now appeals the post-conviction court's denial of his petition raising two freestanding issues: (1) whether the trial court erroneously instructed the jury on voluntary manslaughter over his trial counsel's objection when the evidence at trial did not support the giving of the instruction and (2) whether the evidence is insufficient to support his conviction for voluntary manslaughter in light of the evidence that he acted in defense of his mother. Because freestanding issues are not available on post-conviction review, we affirm the post-conviction court.

Facts and Procedural History

The underlying facts, taken from an earlier appeal in this case, are as follows:

On the night of December 31, 1981, Beatty's father, Henry Beatty, arrived at the Pump Room Tavern in Indianapolis, which was the workplace of Beatty's mother, Mary Ann Beatty. Henry and Mary Ann had a long history of domestic violence and were estranged at the time of the incident.

Beatty arrived at the Pump Room at approximately 3:00 a.m. to drive Mary Ann home after her shift had ended. Henry followed them out of the bar and then followed them in his vehicle. When Beatty pulled his vehicle into the parking lot of a gas station at 30th and Illinois Streets, Henry followed.

At the gas station, Henry pulled Mary Ann out of Beatty's vehicle and held her to the ground. Mary Ann was armed with a knife and struck at Henry with the weapon. Mary Ann and Beatty's girlfriend testified that they observed Beatty exit the vehicle and then plead with his father to stop and to release Mary Ann. Two gas station attendants who witnessed the scene observed Beatty exit his vehicle with a gun in his hand, walk over to Henry, point the gun at him, and begin firing. Ultimately, Beatty shot and killed Henry.

On January 1, 1982, the State charged Beatty with murder and carrying a handgun without a license. Beatty's jury trial began on April 19,

1982. At the close of evidence, the State requested that the trial court instruct the jury on the lesser-included offense of voluntary manslaughter. The trial court agreed and presented the instruction over Beatty's objection. On April 20, 1982, the jury convicted Beatty of voluntary manslaughter and carrying a handgun without a license. On May 14, 1982, the trial court sentenced Beatty to five years of imprisonment, suspending four years and committing Beatty to Riverside Treatment Facility for one year.

Beatty v. State, 854 N.E.2d 406, 407-08 (Ind. Ct. App. 2006), *reh'g denied*.

Beatty's probation ended sometime in 1986. However, Beatty took no action regarding his voluntary manslaughter conviction until 2002, when he filed a *pro se* petition for post-conviction relief in a separate cause number, which eventually led to the above-mentioned appeal.¹ The State public defender filed a notice of non-involvement because Beatty's sentence had already been completed. Beatty retained counsel, and he withdrew his petition in 2004. However, in 2005 Beatty filed another *pro se* petition for post-conviction relief, and the State moved to dismiss the petition because Beatty had not yet pursued a direct appeal. The post-conviction court granted the State's motion to dismiss.

In 2005 Beatty filed a *pro se* petition to file a belated notice of appeal. The State objected arguing that Beatty had not established that he had been diligent in pursuing the appeal and that the delay was not his fault. The trial court granted Beatty's petition to file a belated notice of appeal, and Beatty appealed arguing that the trial court erred in instructing the jury and that the evidence was insufficient to support his conviction. The State cross-appealed arguing that the trial court erred in granting Beatty's petition to file a belated notice of appeal. We agreed with the State, holding that "Beatty ha[d] not

¹ In 1991 Beatty was convicted of murder in an unrelated case, and his sentence was aggravated because of his 1982 voluntary manslaughter conviction. *Beatty*, 854 N.E.2d at 408.

established that he was without fault in failing to file a timely notice of appeal or that he was diligent in requesting permission to file a belated notice of appeal.” *Id.* at 410. We therefore dismissed his appeal.

This then brings us to the present cause number. Having finally exhausted his direct appeal process, Beatty, *pro se*, filed a petition for post-conviction relief in May 2008. A hearing was held in November 2008. In March 2009 the post-conviction court issued findings of fact and conclusions of law denying relief. Beatty, *pro se*, now appeals.

Discussion and Decision

Beatty appeals the denial of his petition for post-conviction relief. Initially, we note that the State has failed to file an appellee’s brief. “The obligation of controverting arguments presented by the appellant properly remains with the State.” *Mateyko v. State*, 901 N.E.2d 554, 557 (Ind. Ct. App. 2009), *trans. denied*. Where, as here, the appellee fails to submit a brief, the appellant may prevail by making a prima facie case of error, *i.e.*, an error at first sight or appearance. *Id.* Still, we must correctly apply the law to the facts of the record to determine if reversal is required. *Id.*

Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *reh’g denied*. Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. *Id.* (citing Ind. Post-Conviction Rule 1(1)). The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind.

2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court’s legal conclusions, “[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.” *Id.* at 644 (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh’g denied*).

In addition, 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. *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002).

Beatty does not argue that his trial counsel was ineffective or that the issues he now raises were demonstrably unavailable at the time of trial or direct appeal. Rather, he raises two freestanding issues.² First, he argues that the trial court, over his own trial counsel’s objection, erroneously instructed the jury on voluntary manslaughter when the

² In Beatty’s “Issues” section of his brief (he also has a “Statement of Issues” section where he identifies the two freestanding issues, Appellant’s Br. p. 1), he identifies approximately five issues, three of which appear to relate to ineffective assistance of counsel. *Id.* at 2-3. However, Beatty’s “Summary of the Arguments,” *id.* at 12, and “Argument,” *id.* at 12-20, sections of his brief only address the two freestanding issues. That is, Beatty only provides argument and cogent reasoning for the two freestanding issues. Therefore, despite initially identifying additional issues, he only raises two issues for our review and therefore waives the remainder. See Ind. Appellate Rule 46(A)(8)(a). *Pro se* litigants are held to the same standard as trained legal counsel and are required to follow procedural rules. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2005), *trans. denied*.

evidence at trial did not support the giving of this instruction, that is, because there was no evidence of sudden heat. This is a freestanding issue of trial court error that cannot be raised on post-conviction review.³ See *Stephenson v. State*, 864 N.E.2d 1022, 1029 (Ind. 2007), *reh'g denied*. Second, Beatty argues that the evidence is insufficient to support his conviction for voluntary manslaughter because the evidence shows that he acted in defense of his mother. This, too, is a freestanding issue that cannot be raised on post-conviction review.⁴ Both of these issues should have been raised in a timely direct appeal. Or, if Beatty was able to establish that he acted diligently and without fault, which this Court has already determined that he was not able to do, they should have been raised in a Post-Conviction Rule 2(1) belated appeal. Because this is not a super-appeal, Beatty cannot use post-conviction to raise these issues. See *Crank v. State*, 502 N.E.2d 1355, 1360 (Ind. Ct. App. 1987) (because Crank waived his right to a direct appeal, the court declined to review the alleged trial errors which were raised for the first time in the petition for post-conviction relief: “It is clear that the remedy of post-conviction relief is not a substitute for a direct appeal.”), *reh'g denied, trans. denied*. We

³ We note that the status of the law on this issue changed between the time of Beatty’s 1982 trial and when his petition for post-conviction relief was pending before the post-conviction court. That is, in May 2008, the Indiana Supreme Court issued *Watts v. State*, in which it held that it is reversible error for a trial court to instruct a jury, over a defendant’s objection, on voluntary manslaughter when there is no evidence of sudden heat. 885 N.E.2d 1228, 1230 (Ind. 2008). In reaching this holding, our Supreme Court overruled several opinions from both this Court and the Supreme Court. *Id.* at 1233.

But, as noted above, the trial court’s instruction of the jury over Beatty’s objection is not available as a freestanding issue in the post-conviction context. Rather, it is only available when couched in terms of trial counsel ineffectiveness. Here, Beatty’s trial counsel objected to the instruction on grounds that there was no evidence of sudden heat; therefore, there could be no ineffective assistance on this ground. In any event, Beatty’s counsel could not have been ineffective in 1982 for failing to anticipate a change in the law in 2008.

⁴ The post-conviction court concluded that the issue of whether the State properly disproved Beatty’s defense of self-defense was waived for review.

therefore affirm the post-conviction court.

Affirmed.

RILEY, J., and CRONE, J., concur.