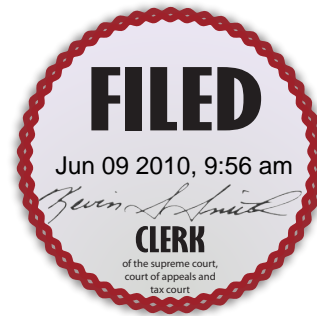


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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TERRY RAY ISAACS,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 21A01-0907-PC-328

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APPEAL FROM THE FAYETTE CIRCUIT COURT  
The Honorable Daniel Lee Pflum, Judge  
Cause No. 21C01-0812-PC-124

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**June 9, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Pro-se Appellant-Petitioner Terry Ray Isaacs (“Isaacs”) appeals the denial of his petition for post-conviction relief challenging his convictions for Rape, as a Class A felony,<sup>1</sup> and Battery, as a Class C felony,<sup>2</sup> and his adjudication as a habitual offender.<sup>3</sup> We affirm.

## Issues

Isaacs raises nine issues for review. Declining to address any issue that is waived, res judicata, or procedurally defaulted,<sup>4</sup> we address a single, consolidated issue: whether he was denied the effective assistance of trial counsel.

## Facts and Procedural History

On direct appeal, the Court recited the pertinent facts as follows:

On March 11, 1992, [L.H.] went to a bar with a friend. After the bar closed at 2:30 a.m., the two proceeded to a party at the home of a friend of [L.H.]’s brother. When that party broke up, [L.H.], Freddie Atkinson and several others drove [L.H.]’s car to Isaacs’ house where they continued to drink whiskey. In the early morning hours, [L.H.] and Freddie left for home but [L.H.]’s car became stuck in a nearby ditch. The two decided to return to Isaacs’ house to wait for daylight to move the car. [L.H.] and Freddie went into an unoccupied bedroom in Isaacs’ home and had sexual intercourse. Shortly thereafter, Isaacs entered the bedroom naked and carrying a butcher knife. Isaacs hit Freddie with “something hard” and knocked him

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<sup>1</sup> Ind. Code § 35-42-4-1.

<sup>2</sup> Ind. Code § 35-42-2-1.

<sup>3</sup> Ind. Code § 35-50-2-8.

<sup>4</sup> Post-conviction proceedings provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007), cert. denied, 128 S. Ct. 1871 (2008). If an issue was known and available but not raised on direct appeal, the issue is procedurally foreclosed. Id. If an issue was raised and decided on direct appeal, it is res judicata. Id.

The propriety of Isaacs’ sentence was addressed on direct appeal. He claimed that the trial court used improper aggravating circumstances to enhance his sentence and sentenced him under the wrong version of the habitual offender statute. Isaacs v. State, 673 N.E.2d 757, 765 (Ind. 1996). He was afforded relief upon the latter claim. To the extent that he now attempts to raise an additional sentencing issue, a free-standing claim of an alleged double jeopardy violation, it is procedurally defaulted. See id.

unconscious. Isaacs then pressed a knife against [L.H.]’s throat and leg, threatened to kill her unless she had intercourse with him, and raped her. During the course of the rape, Freddie regained consciousness, saw Isaacs having intercourse with [L.H.], and heard [L.H.] crying out “no, no, quit.” Record at 770. After blacking out again, Freddie once more regained consciousness and escaped through a back door of the home to run for help.

The police were called and Officer George Allen went to Isaacs’ home. Isaacs answered the door still in the nude. A few moments later, [L.H.] came out of the bedroom, fully clothed, but appearing quite frightened. Allen spoke to [L.H.] alone and was told of the rape and that Isaacs had a knife. Allen did not find a knife in the bedroom, but did observe an open cabinet drawer in the kitchen containing several knives. Isaacs was subsequently charged, arrested and convicted.

Isaacs v. State, 673 N.E.2d 757, 760-61 (Ind. 1996).

On direct appeal, Isaacs alleged juror misconduct, his entitlement to Criminal Rule 4(C) discharge, prosecutorial misconduct, insufficiency of the evidence to support the battery conviction, and sentencing error. See id. at 760. Isaacs’ convictions were affirmed; the matter was remanded for resentencing under the 1990 version of the habitual offender statute as opposed to the 1993 version. See id. at 766.

On December 16, 2008, Isaacs filed a petition for post-conviction relief, which was subsequently amended. Therein, he alleged ineffectiveness of trial and appellate counsel. Additionally, Isaacs challenged his thirty-year sentencing enhancement,<sup>5</sup> claiming that he had been subjected to double jeopardy because one predicate offense was a Possession of Marijuana offense that had been elevated from a misdemeanor to a felony due to his having a

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<sup>5</sup> Isaacs was sentenced to forty-five years for Rape, enhanced by thirty years under the habitual offender statute. He also received a consecutive seven-year sentence for Battery, providing for an aggregate sentence of eighty-two years.

prior Possession of Marijuana conviction.

The post-conviction court conducted a hearing on May 19, 2009. Isaacs was denied post-conviction relief and now appeals.

## **Discussion and Decision**

### Standard of Review

“For the most part, completion of Indiana’s direct appellate process closes the door to a criminal defendant’s claims of error in conviction or sentencing.” Pruitt v. State, 903 N.E.2d 899, 905 (Ind. 2009), reh’g denied. However, our law allows defendants who have exhausted the direct appeal process to raise a narrow set of claims through a petition for post-conviction relief. Id.

Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007), cert. denied, 128 S. Ct. 1871 (2008). We review the post-conviction court’s factual findings under a “clearly erroneous” standard but do not defer to the post-conviction court’s legal conclusions. Id. We will not reweigh the evidence or judge the credibility of the witnesses; we examine only the probative evidence and the reasonable inferences that support the decision of the post-conviction court. Id.

### Effectiveness of Trial 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. 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 “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).

Isaacs presents several allegations of error by trial counsel.<sup>6</sup> According to Isaacs, trial counsel “threw the fight” and allowed a “sham trial” when he failed to: (1) thoroughly investigate, (2) present expert testimony that the victims lacked credibility because of their

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<sup>6</sup> Although Isaacs’ petition for post-conviction relief contained an assertion of appellate counsel’s ineffectiveness, he presented no evidence or argument in this regard at the post-conviction hearing. On appeal, he does not articulate a separate argument concerning appellate counsel’s effectiveness.

intoxication, (3) present defense witnesses, (4) procure DNA testing, and (5) challenge a violation of an order for the separation of witnesses. Appellant's Brief at 9. He also claims that trial counsel had divided loyalties because counsel simultaneously defended Gary Copley, a State's witness, on a separate criminal charge.

The salient inquiry when determining whether an attorney rendered deficient performance is whether his or her performance fell below an objective level of reasonableness based upon prevailing professional norms. Strickland, 466 U.S. at 687-88. Bald assertions of counsel's omissions or mistakes are inadequate to support a post-conviction claim of ineffectiveness of counsel. Tapia v. State, 753 N.E.2d 581, 587 (Ind. 2001).

Here, the post-conviction record upon which we are asked to evaluate trial counsel's performance is extremely limited. At the outset of the hearing, the post-conviction court noted the absence of the trial record as an evidentiary exhibit. In the ensuing discussion regarding the possibility of a continuance to procure the record, Isaacs asserted, "I don't want a continuance; this has gone on long enough." (P.C.R. Tr. 6). Ultimately, Isaacs submitted seven exhibits, consisting of a chronological case summary, the charging information, a motion to dismiss, the defendant's list of witnesses, hospital records of the victims, a partial trial order, and the State's discovery disclosure statements. The exhibits do not support Isaacs' claims of errors and omissions on the part of his trial counsel.

At the post-conviction hearing, Isaacs' called his trial counsel, Gursaran Shoker, as a witness. Shoker testified that his trial files had been destroyed as a matter of course after ten

years, and he denied having any independent recollection of the strategy he had employed in Isaacs' trial sixteen years earlier. When confronted with the omission of DNA results, Shoker offered his assessment that the State's case against Isaacs had been built upon eyewitness testimony as opposed to forensic identification. Shoker opined that DNA testing by the defense was not warranted in those circumstances, and further explained that such testing was not readily available or generally requested by defense counsel in 1993. As to the alleged representation of clients with adverse interests, Shoker did not specifically recall representing Copley, although he noted it was "possible." (P.C.R. Tr. 22). Trial counsel made no admission of deficient performance.

In sum, Isaacs has not presented evidence to the post-conviction court to overcome the presumption that trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

### **Conclusion**

Isaacs has failed to demonstrate that trial counsel's performance was deficient and that he suffered resulting prejudice. Accordingly, the post-conviction court did not err in rejecting Isaacs' ineffective assistance claim and denying post-conviction relief.

Affirmed.

MAY, J., and BARNES, J., concur.