

Terry R. Twitty, Sr. (“Twitty”) appeals from the trial court’s order denying his petition for post-conviction relief. Twitty presents the following restated issues for our review:

- I. Whether the post-conviction court erred by denying his claim of ineffective assistance of appellate counsel; and
- II. Whether the post-conviction court erred by failing to appoint counsel for Twitty’s post-conviction relief proceedings and subsequent re-sentencing.

The State cross-appeals the trial court’s order raising the following issue:

- III. Whether the post-conviction court erred by granting Twitty relief and re-sentencing him under *Blakely v. Washington*, 542 U.S. 296 (2004).

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Twitty was convicted of three counts of child molesting,¹ each as a Class A felony, and two counts of child molesting,² each as a Class C felony, and was sentenced to an aggregate term of 108 years executed. Twitty’s appellate counsel, Paula Sauer, raised three issues in Twitty’s direct appeal including a claim that Twitty’s sentence was inappropriate under Indiana Appellate Rule 7(B). Sauer did not raise a claim based on the holding in *Blakely*, 542 U.S. at 301, that a jury must decide any fact beyond a reasonable doubt that increases the penalty for a crime beyond the prescribed statutory maximum. We affirmed Twitty’s conviction and sentence. *Twitty v. State*, No. 32A01-0402-CR-55 (Ind. Ct. App. July 30, 2004).

¹ See Ind. Code § 35-42-4-3(a).

² See Ind. Code § 35-42-4-3(b).

Twitty filed a *pro se* petition for post-conviction relief in which he alleged that he received ineffective assistance of trial and appellate counsel. The trial court appointed the State Public Defender to represent Twitty after making an indigency^{32a0} determination. The State Public Defender investigated Twitty's claims and filed a withdrawal of appearance accompanied by a certification pursuant to Indiana Post-Conviction Rule 1, section (9)(c) that the petition was non-meritorious. The post-conviction court granted the State Public Defender's motion to withdraw.

Twitty then filed an amended petition for post-conviction relief and later a motion for the appointment of counsel. The post-conviction court reappointed the State Public Defender to represent Twitty. The attorney appointed to represent Twitty moved to withdraw on the basis that Twitty intended to call him as a witness at his evidentiary hearing and sent Twitty a letter explaining the determination that Twitty's petition lacked merit. Twitty objected to the motion to withdraw, and the post-conviction court denied the motion. The State Public Defender filed a motion to reconsider arguing that the rules for post-conviction proceedings did not allow for the reappointment of counsel after withdrawal based upon a determination that a petition lacked merit. Counsel then filed another withdrawal of appearance and certification that was granted by the post-conviction court.

The post-conviction court ultimately found that Twitty received effective assistance of both trial and appellate counsel. The court found that Twitty's appellate counsel could not have anticipated the changes in Indiana's sentencing laws after *Blakely*, which were announced by our Supreme Court in *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), a decision

handed down long after Twitty's direct appeal had been decided. However, the post-conviction court decided that Twitty should have the benefit of our Supreme Court's decision in *Smylie* and modified Twitty's sentence downward for an aggregate sentence of eighty-four years executed. Twitty now appeals, and the State cross-appeals.

DISCUSSION AND DECISION

I. Ineffective Assistance of Appellate Counsel

Twitty claims that the post-conviction court erred by finding that he received effective assistance of appellate counsel. Twitty claims that his appellate counsel should have presented a *Blakely* argument in his direct appeal but failed to do so.

A petitioner has the burden of establishing the grounds for relief alleged in his petition for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1 (5). Because Twitty is appealing the denial of his petition for post-conviction relief, he stands in the position of one appealing from a negative judgment. *See Willoughby v. State*, 792 N.E.2d 560, 562 (Ind. Ct. App. 2003). On appeal, we will not reweigh the evidence or reassess the credibility of the witnesses. *Id.* We will not reverse the post-conviction court's decision unless the petitioner shows that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's legal conclusions. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *Walker v. State*, 779 N.E.2d 1158, 1161 (Ind. Ct. App. 2002). As for counsel's performance, we give considerable deference to counsel's discretion in choosing strategy and tactics. *Id.* Accordingly, a defendant must show more than isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience; the defense as a whole must be inadequate. *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003).

To prevail on a claim of ineffective assistance of counsel, Twitty must show (1) that counsel's performance fell below an objective standard of reasonableness as determined by prevailing professional norms, and (2) that the lack of reasonable representation prejudiced him. *See Shane v. State*, 769 N.E.2d 1195, 1200 (Ind. Ct. App. 2000). Essentially, Twitty must show that, but for counsel's deficient performance, the result of the proceedings would have been different. *See Law*, 797 N.E.2d at 1161. We will find prejudice when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unjust or unreliable. *Id.* at 1161-62. If we can easily dismiss an ineffectiveness claim based upon the prejudice analysis, we may do so without addressing whether counsel's performance was deficient. *Id.* at 1162. We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Williams v. State*, 724 N.E.2d 1070, 1078 (Ind. 2000), *cert. denied*, 531 U.S. 1128 (2001).

Ineffectiveness is rarely found when the issue is failure to raise a claim on direct appeal. *Taylor v. State*, 717 N.E.2d 90, 94 (Ind. 1999). The decision regarding what issues to raise is one of the most important strategic decisions to be made by appellate counsel. *Id.* We give considerable deference to appellate counsel's strategic decision and will not find deficient performance in counsel's choice of some appellate issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. *Id.*

Twitty's direct appeal was fully briefed and transmitted to this court on April 21, 2004, and *Blakely* was decided on June 24, 2004. We handed down our opinion in Twitty's direct appeal on July 30, 2004, and the opinion was certified on September 9, 2004. During the time period between the *Blakely* decision and our Supreme Court's decision in *Smylie*, there were a number of unanswered questions as to how *Blakely* would be applied in Indiana. We previously stated the following when presented with this issue and a similar chronology:

Given the legal environment of the time, an environment marked by unpredictability and uncertainty on this court and elsewhere regarding the application of *Blakely*, we do not find that counsel was ineffective for failing to seek leave to file an amended brief or to raise the issue on rehearing or petition to transfer.

Kendall v. State, 886 N.E.2d 48, 56 (Ind. Ct. App. 2008).

Twitty's appellate counsel challenged his sentence on appeal, but not on *Blakely* grounds, and did not file an amended brief, petition for rehearing, or petition for transfer to add the claim. When an ineffective assistance of appellate counsel claim involves the failure to raise an issue and that failure results in waiver, a two-part test is used to determine if there

has been ineffective assistance of appellate counsel. *Id.* at 53. The issue must be significant and obvious such that a failure to raise it cannot be explained by strategy, and the issue must be “clearly stronger” than all of the issues raised by counsel. *Id.* (citing *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997)). Twitty’s trial counsel did not make a request for a jury at sentencing under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and did not object to the sentencing procedure in any way. Twitty’s appellate counsel would have had to seek to amend the brief, or seek rehearing or transfer on a matter that was not preserved. The conclusion that the issue was not properly preserved and was waived is a reasonable one at the time considering that the law was in a state of flux. *Smylie*, decided long after Twitty’s direct appeal had been decided, was the first word from our Supreme Court on the preservation of a *Blakely* issue. We agree with the post-conviction court’s conclusion that Twitty’s appellate counsel was not ineffective for failing to raise this issue, as it was not clearly stronger than all of the issues raised by counsel.

II. Appointment of Counsel

Twitty claims that he was denied a full and fair post-conviction evidentiary hearing after the State Public Defender withdrew its representation of him. He argues that since he was granted post-conviction relief by way of re-sentencing, the post-conviction court must have concluded that his petition had some merit. He claims that he was denied a full and fair hearing because the State Public Defender failed to present evidence or make an argument in support of Twitty’s petition.

We note that there is no state or federal constitutional right to counsel in post-

conviction proceedings. *Daniels v. State*, 741 N.E.2d 1177, 1190 (Ind. 2001); *see also*, *Pennsylvania v. Finley*, 481 U.S. 551, 558 (1987). Where a petitioner is indigent, as is the case here, the rules for post-conviction relief do allow the petitioner to obtain the assistance of a public defender, or to proceed *pro se*. *See* Ind. Post-Conviction Rule 1(9)(a). In this case, the post-conviction court twice appointed the State Public Defender to represent Twitty during the pendency of Twitty's petition. However, both times the State Public Defender investigated Twitty's claims, determined they lacked merit, filed a motion to withdraw, and certified that the petition lacked merit.

To the extent Twitty is arguing that the State Public Defender provided ineffective assistance of post-conviction counsel by failing to represent him, that argument fails. Claims of ineffective assistance of post-conviction counsel are reviewed under a highly deferential standard. *Daniels*, 741 N.E.2d at 1190. If counsel appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment, it is not necessary to judge his performance by the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* A claim of defective performance of post-conviction counsel presents no cognizable grounds for post-conviction relief. *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989). Only a finding that post-conviction counsel abandoned his or her client results in relief based upon a claim of ineffective assistance of post-conviction counsel. *See Waters v. State*, 574 N.E.2d 911, 912 (Ind. 1991). Such is not the case here. The State Public Defender twice investigated Twitty's claims, found they were without merit and withdrew after submitting the appropriate certification. Twitty is not entitled to relief based upon this claim.

We will address Twitty's claim of error regarding the appointment of counsel during his resentencing in the next issue.

III. Re-Sentencing Under *Blakely*

Twitty argues that the post-conviction court abused its discretion by re-sentencing Twitty without first appointing counsel and receiving evidence from Twitty regarding aggravators and mitigators. The State cross-appeals arguing that the post-conviction court improperly granted relief to Twitty pursuant to *Blakely*.

The post-conviction court first found that Twitty's appellate counsel was not ineffective for failing to foresee our Supreme Court's response to *Blakely* announced in its decision in *Smylie*. *Appellant's App.* at 18. The post-conviction court then found that, because Twitty's appellate counsel had raised a sentencing issue in Twitty's direct appeal, Twitty was entitled to the benefit of the holding in *Smylie* and modified his sentence downward, with the sentence for each felony conviction being less than the advisory sentence for the particular class of offense. *Id.* at 19. The post-conviction court erred.

“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). Here, the post-conviction court found, and we agree, that Twitty received effective assistance of appellate counsel. Our Supreme Court announced in *Smylie* that “*Blakely* claimants who have appealed their sentences will be allowed to add a tardy ‘*Blakely*’ claim” without resorting to a claim of “fundamental error.” *Smylie*, 823

N.E.2d at 689 n.16. However, the addition of that claim must come through the filing of an amended brief, or on petition to transfer. *Id.* at 690. “The fundamental error doctrine will not, as caselaw holds, be available to attempt retroactive application of *Blakely* through post-conviction relief.” *Id.* at 689 n.16. Therefore, the post-conviction court erred by re-sentencing Twitty. We remand to the post-conviction court with instructions to restore Twitty’s original sentence.

Affirmed in part, reversed in part, and remanded with instructions.

RILEY, J., and BAILEY, J., concur.