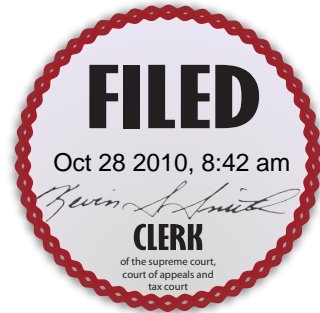


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

DION ALEXANDER WALKER
Terre Haute, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DION ALEXANDER WALKER,)
)
Appellant-Petitioner,)
)
vs.) No. 02A03-1005-PC-250
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth Scheibenberger, Judge
Cause Nos. 02D04-9606-CF-273 and 02D04-0806-PC-273

October 28, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Dion A. Walker (Walker), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUES

Walker raises four issues on appeal, which we consolidate and restate as the following two:

- (1) Whether the post-conviction court properly denied Walker's petition for post-conviction relief which alleged that he discovered new evidence establishing that his conviction rested on perjured testimony; and
- (2) Whether his trial and appellate counsel were ineffective.

FACTS AND PROCEDURAL HISTORY

The facts, as found by this court in its memorandum opinion on direct appeal, are as follows:

In 1995, the Allen County Police Department was investigating a drug-dealing ring that involved Contrell Coleman. On October 2, 1995, Jason Brooks, who became a confidential informant for the police, reported that he had delivered cocaine from Coleman to Walker. On January 17, 1996, in the course of a traffic stop, police confiscated a cellular phone, two pagers, and \$1,836 in cash from Walker. Then, in February of 1996, a second confidential informant, Leophus Holman, reported that Walker and Coleman had purchased large quantities of cocaine together and then processed the cocaine into crack cocaine. In March of 1996, Brooks reported that Walker had gone to Chicago with Coleman to purchase cocaine and that Walker had purchased cocaine from Coleman at Coleman's apartment.

In May of 1996, Officer Craig Wise saw Walker's car parked in the parking lot at Coleman's apartment complex for about two minutes. In June of 1996, a

photograph that was recovered from Coleman's trash depicted Coleman, Walker, and two other individuals together. Based on evidence collected from other searches of Coleman's trash, officers obtained a search warrant for Coleman's apartment. When police officers searched Coleman's apartment on June 17, 1996, they found cocaine, scales, pagers, cell phones, plastic baggies, and over \$20,000 in cash.

Walker v. State, 02A03-0006-CR-199 (Ind. Ct. App. December 14, 2000).

On June 21, 1996, the State filed an Information charging Walker with conspiracy to commit dealing in cocaine with a number of other individuals between the dates of June 1, 1995 and June 17, 1996. A jury found Walker guilty as charged. The trial court sentenced Walker to forty years in the Indiana Department of Correction. Walker appealed his conviction, challenging the sufficiency of the evidence to convict him and the admission into evidence of a police report. On December 14, 2000, we affirmed the trial court in all respect.

On June 27, 2008, Walker filed a petition for post-conviction relief and the State filed a Response. On April 9, 2010, the post-conviction court denied his petition.

Walker now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION¹

Initially, we note that the State failed to submit an appellee's brief in this appeal. When the appellee has failed to submit an answer brief, we need not undertake the burden of developing an argument on the appellee's behalf. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006). Rather, we will reverse the court's judgment if the appellant's brief presents a case of *prima facie* error. *Id.*

¹ Walker failed to provide this court with the transcript of the trial proceedings. We will decide Walker's arguments based on the documents he provided us in his appendix.

I. *Standard of Review*

Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Strowmatt v. State*, 779 N.E.2d 971, 974-75 (Ind. Ct. App. 2002). To succeed on appeal from the denial of relief, the post-conviction petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that was reached by the post-conviction court. *Id.* at 975. The purpose of post-conviction relief is not to provide a substitute for direct appeal, but to provide a means for raising issues not known or available to the defendant at the time of the original appeal. *Id.* If an issue was available on direct appeal but not litigated, it is waived. *Id.*

II. *Newly Discovered Evidence*

First, Walker contends that the post-conviction court erred by not granting him an evidentiary hearing on his motion for post-conviction relief. Specifically, Walker asserts that he filed the affidavit of Brooks and Holman, who both recanted their trial testimony which was used by the State to convict him. Based on this newly discovered evidence, Walker now requests this court to reverse his conviction or at least grant him an evidentiary hearing.

Our supreme court has enunciated nine criteria for admission of newly discovered evidence in a post-conviction proceeding:

new evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

Taylor v. State, 840 N.E.2d 324, 329-30 (Ind. 2006). We analyze these nine factors with care, as the basis for the newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized. *Id.* at 330. The burden of showing that all nine requirements are met rests with the petitioner for post-conviction relief. *Id.*

Holman stated the following in his affidavit:

To the concern of the conspiracy to deal cocaine conviction against [Walker]. I want the truth and facts to be known about the conviction against [Walker]. All of the statements and testimony in case number 02D04-9606-CF-276 [sic] against Mr. Walker are deliberately false and reckless and no truth exists in the affidavit of probable cause or in any trial testimony. I've never known [Walker] and I've never been present around Mr. Walker before or around Mr. Walker while cocaine being present. In 1997 some things were said in the affidavit of probable cause and they are all false. The officers that questioned me insisted that I said that I know [Walker] and that we had cocaine dealings together and agree to the officers plan even though I know that everything they were charging [Walker] with was false. Me and [Brooks] talked about how we didn't know Mr. Walker. The officers stated that we wouldn't have to prove that we knew Mr. Walker because they were charging [Walker] with conspiracy. The officers said all we had to do was go to trial and say the things that we agreed to say even though they were lies. I want it to be known that all the information given against [Walker] is false and if called to court I'll let it be known.

(Appellant's App. p. 21).

Analyzing Holman's affidavit, we note that he reiterates that the information and the charges filed against Walker are false; however, he fails to specify how his own trial testimony is now recanted. Moreover, in his amended petition for post-conviction relief Walker mentions that:

At trial [Holman] gave his testimony straight to the point. When the prosecution asked [Holman] about the incident of kilos of cocaine being cooked up and made into crack cocaine, he responded by saying he doesn't

know, and said he doesn't know [Walker] Holman repeated several times that he didn't know [Walker]. [Defense counsel] asked [Holman] whether he saw [Walker] on February 26, 1996, which Holman responded too by saying he didn't know the guy.

(Appellant's App. p. 41). As such, we conclude that Holman's affidavit is immaterial and irrelevant, and its contents were discovered prior to Walker's trial and testified to during trial. Thus, Walker failed to show that Holman's affidavit complied with all nine requirements for the admission of newly discovered evidence.

Brooks' affidavit reads as follows:

This is [Brooks] and this is to whomever it may concern. This is an Affidavit concerning the criminal conviction for conspiracy to deal cocaine cause number 02D04-9606-CF-273. This is concerning [Walker] and I admit that the testimony I gave against Mr. Walker was false testimony along with the statements in the Affidavit of probable cause. I want the truth to be known to the courts that I have never been present with [Coleman] around [Walker] and drugs being present. I was facing criminal penalties at that time, and I was told if I could supply some information on [Walker] it would help me in my matters so that is when I gave the false information.

(Appellant's App. p. 18).

Walker has not shown that Brooks' affidavit meets all criteria. Most notably, the affidavit would be used merely to impeach Brooks' trial testimony. Although the use of the affidavit might weaken the State's case against Walker, Walker has not established that it is enough to make it probable that a different result would be produced at a new trial. Therefore, we affirm the post-conviction court.

III. *Ineffective Assistance of Trial and Appellate Counsel*

Lastly, Walker argues that he was denied the effective assistance of trial and appellate counsel in violation of his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Indiana Constitution. Walker asserts that his trial counsel was ineffective when he failed to prevent certain documents, which contained harmful information about Walker's past, from being admitted at trial. Also, Walker contends that his appellate counsel was ineffective because he failed to raise his trial counsel's ineffectiveness on direct appeal.

The standard by which we review claims of ineffective assistance of counsel is well established. In order to prevail on a claim of this nature, a defendant must satisfy a two-pronged test, showing that: (1) his counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Blanchard v. State*, 802 N.E.2d 14, 34 (Ind. Ct. App. 2004) (citing *Strickland v. Washington*, 466 U.S. 668, 690, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *reh'g denied*).

Counsel's performance is presumed effective, however, and a defendant must offer strong and convincing evidence to overcome this presumption. *Id.* Moreover, we do not need to determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Strickland*, 466 U.S. at 697. To satisfy a showing of prejudice, Walker must demonstrate that there is a

reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Blanchard*, 802 N.E.2d at 34.

In support of his argument, Walker references specific trial testimony, exhibits, and his counsel's objections to evidence. However, even though Walker admits to having received a copy of the trial transcript, he failed to make the transcript part of the evidence the post-conviction court considered when denying his petition, nor did he make the transcript part of the record on appeal. *See Douglas v. State*, 800 N.E.2d 599, n.4 (Ind. Ct. App. 2003), *trans. denied*. Absent evidence in support of petitioner's claim of ineffective assistance of counsel, a court can infer that counsel would not corroborate the allegations. *Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989). Because Walker failed to provide the evidence he needed to establish his claim, we conclude that the post-conviction court did not abuse its discretion by concluding that Walker's petition should be denied.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court properly denied Walker's petition for post-conviction relief.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.