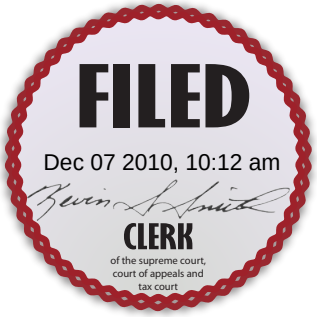

APPELLANT PRO SE:

SCOTT R. JONES
Bunker Hill, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SCOTT R. JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-1006-PC-668
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-1001-PC-13

December 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Scott R. Jones appeals the post-conviction court's denial of his petition for post-conviction relief. Jones raises two issues, which we consolidate and restate as whether Jones was denied the effective assistance of trial counsel. We affirm.

The relevant facts follow. On January 24, 2005, the State charged Jones with operating a vehicle after a lifetime suspension as a class C felony. On April 13, 2005, Jones pled guilty as charged and a plea agreement was entered.[1] On May 9, 2005, the trial court sentenced Jones to seven years with five years suspended to probation. An entry in the chronological case summary ("CCS") states that the "[e]xecuted portion of sentence may be served on in-home detention, the active system, through the Adult Probation Department." Appellant's Appendix at 3.

On July 11, 2005, the State filed a Petition for Termination of Home Detention Program Privileges. On July 12, 2005, the State filed a Notice of Violation of Suspended/Executed Sentence. On August 3, 2005, the State filed an Amended Notice of Violation of Probation and an Amended Petition for Termination of Home Detention Program Privileges. On August 15, 2005, the court held a hearing on the State's notices,[2] and Jones admitted the violations. The court found that Jones violated his probation and ordered that Jones serve "three (3) additional years ordered executed." Id. at 5. The court ordered that "[e]xecuted time . . . be served on Community Justice Center Continuum of Sanctions, with the first two years to be served at the Madison County

[1] The record does not contain a copy of the plea agreement.

[2] The record does not contain a transcript of this hearing.

Work Release Center" and that Jones "return to probation for the balance of his sentence with all terms and conditions in full force and effect." Id.

In late December 2005, the State filed a Petition to Terminate Work Release Privilege and a Notice of Violation of Suspended/Executed Sentence. On January 30, 2006, the court held an evidentiary hearing on the State's Notice of Violation of Suspended/Executed Sentence, found that Jones violated the terms of his suspended/executed sentence, and ordered Jones to serve three years in the Department of Correction and that "[u]pon completion of executed sentence, [Jones's] probation shall resume for two years." Id. at 6. The court also ordered Jones to obtain a new substance abuse evaluation at the Center for Mental Health or other treatment facility approved by the Probation Department.

On February 9, 2007, the State filed a Notice of Violation of Probation. On March 27, 2007, the court held a hearing and found that Jones violated the conditions of his probation.

On April 10, 2007, Jones was entered into the Madison County Drug Court Program and the court stated that "[i]f [Jones] is removed from the Drug Court for any reason or fails to graduate, this matter shall be set for sanctions hearing." Id. at 8-9. On March 12, 2009, the drug court staff advised the court that Jones had been terminated from the drug court program for continued program violations. In April 2009, the court held a hearing and found "two additional violations: 1) failure to successfully complete Drug Court; and 2) admission of Domestic Battery." Id. at 9. On May 11, 2009, the

court revoked the balance of Jones's probation, which the court indicated was two years, and sentenced him to serve the remaining time in the Department of Correction with no return to probation. On May 19, 2009, the court corrected the entry of May 11, 2009, to show that Jones's sentence of four years was revoked with no return to probation.

On October 9, 2009, Jones filed a Motion for Hearing on Correction of Sentence. On November 2, 2009, Jones filed a notice withdrawing his Motion for Hearing on Correction of Sentence. A CCS entry dated the same day states: "Accordingly, the Court finds that the credit time has been correctly calculated and no action is necessary on this matter." Id. at 10. On November 13, 2009, Jones filed a Renewed Motion to Correct Erroneous Sentence. The court examined and denied the motion "as a repetitive motion already addressed by the Court." Id. The court also indicated that "the entry and order of 11/02/09 is a final appealable order which will not be further reviewed by the trial court." Id. On December 10, 2009, Jones filed another Renewed Motion for Hearing on Correction of Sentence, which the trial court later denied.

On January 26, 2010, Jones filed a *pro se* petition for post-conviction relief. Jones alleged that he was "erroneously sentence [sic] to 4 years when only had [sic] 2 years probation to revoke, per modified probation order/specific conditions of sentence agreement made on Jan. 30th, 2006." Id. at 25. Jones also alleged "ineffective assistance of counsel, denied me due process, and right to move forward on motion to correct erroneous sentence as pro-se in trial court." Id. at 26.

In March 2010, the court ordered Jones to submit his case upon affidavit, brief, and proposed findings "[b]ecause the issues raised by [Jones] in his Petition for Post Conviction Relief require a review only of the records before the court and the law applicable thereto." Id. at 34. On March 11, 2010, Jones filed his *pro se* brief in support of his petition. On June 2, 2010, the court denied Jones's petition for post-conviction relief. The court's order stated in part:

> In the current case, [Jones] was originally sentenced to seven (7) years. Of that sentence, two (2) years were originally to be executed on in-home detention and the balance of five (5) years was suspended and on probation.
>
> The CCS and the various sentencing and revocation orders reveal that [Jones] was repeatedly sanctioned for repeated violations after the original sentencing. After repeated violations, the final determination by the court was that [Jones's] entire sentence would be revoked to the Department of Corrections. That it was the court's clear intent to revoke the remaining sentence, and that all of the time was to be served at the Department of Correction, is found in the transcript of the May 11, 2009 sanctions hearing. ". . . [T]he balance of the sentence in . . . 48D01-0501-FC-14, the balance of that sentence is ordered executed at the Indiana Department of Correction." [Transcript, page 24] Thus, not only was the remaining unsuspended sentence revoked to the Department of Corrections, but all of the previously revoked sentence provisionally being served at community corrections was converted to time at the Department of Correction as well.
>
> [Jones] has not demonstrated how the court's May 11, 2009, Sanctions Order, and the May 19, 2009, Memorandum Order Calculating Credit Time, are in error. [Jones] merely alleges that, "Original plea is void do (*sic*) to new agreement made on 1-30-06 and also puts trial court in breach of agreement." [Petitioner's Brief, page 4.]
>
> Although the CCS in this cause reveals that [Jones] did originally plead guilty under a plea agreement, [Jones] has failed to provide any authority or cite any evidence that supports his apparent contention that his

> admission to the latest probation violation somehow voided his original sentence or in any way reduced the total exposure he had under his sentence. Plea agreements are contractual in nature. Once accepted by the court, it is true that such an agreement binds the defendant, the state, and the trial court. However, the terms of a suspended sentence and probation leave a defendant subject to revocation and imposition of some of, or all of, the suspended portion of the original sentence.

Id. at 42-43 (citations omitted).[3]

Before discussing Jones's allegations of error, we note that although Jones is proceeding *pro se*, such litigants are held to the same standard as trained counsel and are required to follow procedural rules. Evans v. State, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), trans. denied. We also 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. 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). Id. "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

[3] Portions of bracketed text appear in original.

been made." Id. 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 issue is whether Jones was denied the effective assistance of trial counsel. Initially, we observe that Jones raises two issues on appeal: (1) "on May 11, 2009 probation was revoked for 2 years but on May 19, 2009 when court ordered memorandum of credit time and abstract of judgement [sic] trial court erroneously changed my sentence from 2 years to 4 years," and "[t]his puts court in breach of contract because original plea of May 9, 2005 was modified on [J]anuary 30, 2006;" and (2) his trial counsel was ineffective. Appellant's Brief at 1. To the extent that Jones argues that the trial court erred in its May 19, 2009 order, we observe that Jones was aware of the May 19, 2009 order and did not timely file his motion to correct error or timely appeal either the trial court's May 19, 2009 order or the denial of his motion to correct error. See Ind. Trial Rule 59(C); Ind. Appellate Rule 9(A). Jones may not now raise this freestanding claim of error in a post-conviction proceeding. Rather, 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, Jones does not argue and the record does not reveal that his argument was unavailable at the time of trial or direct appeal. Consequently, we will not address the argument as a freestanding claim. See, e.g., Reed v. State, 866 N.E.2d 767, 768 (Ind.

2007) (holding that the propriety of a defendant's sentence is not properly questioned through collateral proceedings and that only issues not known at the time of the original trial or issues not available on direct appeal may be properly raised through post-conviction proceedings); Sanders, 765 N.E.2d at 592 (holding that it is wrong to review the petitioner's fundamental error claim in a post-conviction proceeding); Lambert v. State, 743 N.E.2d 719, 726 (Ind. 2001) (holding that post conviction procedures do not provide a petitioner with a "super-appeal" or opportunity to consider freestanding claims that the original trial court committed error and that such claims are available only on direct appeal), reh'g denied, cert. denied, 534 U.S. 1136, 122 S. Ct. 1082 (2002). We will address Jones's arguments to the extent that he raises this issue within the context of his claim of ineffective assistance.

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to

undermine confidence in the outcome. Perez v. State, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. French, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

When considering a claim of ineffective assistance of counsel, a "strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Morgan v. State, 755 N.E.2d 1070, 1072 (Ind. 2001). "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." Williams v. State, 771 N.E.2d 70, 73 (Ind. 2002). Evidence of isolated poor strategy, inexperience, or bad tactics will not support a claim of ineffective assistance of counsel. Clark v. State, 668 N.E.2d 1206, 1211 (Ind. 1996), reh'g denied, cert. denied, 520 U.S. 1171, 117 S. Ct. 1438 (1997). Moreover, "[w]hen an ineffective assistance of counsel claim is based on trial counsel's failure to make an objection, the appellant must show that, had a proper objection been made, it would have been sustained." Sauerheber v. State, 698 N.E.2d 796, 807 (Ind. 1998).

Jones argues that his "main argument is that trial court is in **Breach of contract** and that original plea of 5-9-05 was modified and it is Appellants [sic] position that on 1-30-06 original plea was modified from 7 years to 3 years D.O.C. and upon release return to probation for **2 years**, and that the change of sentence on 5-19-09 is **ERRONEOUS**." Appellant's Brief at 4. Jones appears to argue that a new agreement occurred on January

30, 2006, and that the May 19, 2009 order which ordered that four years of his sentence be revoked was erroneous. Jones also states:

> On 10-9-09 [his trial counsel] filed first motion to correct sentence, but then withdrew it erroneously due to credit time that was given to him by the court.
>
> On 12-13-09 when he realized his mistake he filed a renewed motion to correct sentence and provided evidence to support the motion . . . .
>
> On 12-23-09 [his trial counsel] withdrew as counsel and it is at this time when counsel abandoned the appellant at a critical stage of the proceedings. His mistake denied me the right to a hearing and he represented the courts [sic] interest and not mine. Also he knowingly left me elegaly [sic] detained cause I had fully served my term when he withdrew from my case.

Id. at 6 (citations omitted).

Jones does not develop a cogent argument or point to the record to suggest that the January 30, 2006 entry modified his initial plea agreement. To the extent that Jones references "credit time," alleges that his trial counsel abandoned him at a critical stage, denied him his right to a hearing, or knowingly left him illegally "detained," Jones does not cite to relevant authority, develop a cogent argument, or cite to the record. Consequently, these issues are waived. See Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority"); Shane v. State, 716

N.E.2d 391, 398 n.3 (Ind. 1999) (holding that the defendant waived argument on appeal by failing to develop a cogent argument).[4]

For the foregoing reasons, we affirm the post-conviction court's denial of Jones's petition for post-conviction relief.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.

[4] Jones also argues that the trial court "vacated [his] evidentiary hearing, and [he] is entitled to a proper review of his claims on Ineffective Assistance of Counsel as presented in petition for post conviction relief and upholding [his] right to effective assistance of counsel under the **Sixth Amendment U.S.C. and Article 1&12 of the Indiana constitution.**" Appellant's Brief at 6-7. To the extent that Jones suggests that he was entitled to a hearing, Jones does not cite to relevant authority or develop a cogent argument. Consequently, this issue is waived.