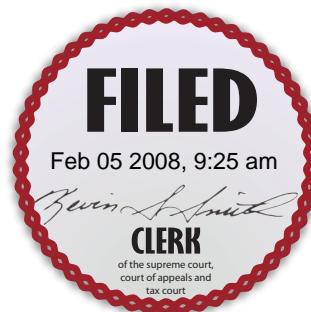


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

EDWARD CHANDLER,

Appellant,

vs.

STATE OF INDIANA,

Appellee.

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No. 49A02-0703-PC-255

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather Welch, Judge
Cause No. 49G01-0301-PC-5498

February 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Edward Chandler appeals the denial of his petition for post-conviction relief (PCR), and presents the following consolidated and restated issue: Did Chandler receive ineffective assistance from both his trial and his appellate counsel?

We affirm.

The facts, as detailed by this court in Chandler's direct appeal, are as follows:

On November 21, 2002, shortly after they closed the store at 10:00 p.m., Video Update Movie Gallery employees Lisa Heavey and James Carson saw Chandler make a hand gesture outside the store window. When Carson opened the door to investigate, Chandler asked him a question and then brandished a handgun. Chandler pushed the handgun into Carson's back and forced him behind the counter. Chandler held a gun to Carson's head, ordered him to retrieve money from the safe under the cash registers, and threatened to kill him if he did not comply. Carson replied that he did not have the keys to the safe. In response to Chandler's threat, Heavey stated that she would open the safe in the back of the store and give him the money. Chandler followed Carson and Heavey to a back room and pointed his handgun at them. Heavey used a code to open the safe and gave Chandler a bag of money. Chandler saw a VCR in the room and demanded the store's surveillance videotape, which Carson gave to him. Chandler then ran out of the store. Heavey and Carson later identified Chandler in separate photo arrays.

The State charged Chandler with robbery, two counts of criminal confinement, and unlawful possession of a firearm by a serious violent felon, and also alleged that he was a habitual offender.

On the day of trial, Carson did not appear in court. The prosecutor informed the trial court that Carson had been subpoenaed and that calls had been made to his business and home phones "to get him here." Tr. at 86. The prosecutor asserted that Carson was unavailable and sought to introduce his out-of-court testimony pursuant to Indiana Evidence Rule 804(b). The prosecutor explained that he had placed Carson under oath and that Chandler's counsel had questioned him on direct examination. Chandler's counsel acknowledged that he and the prosecutor had agreed to "take a taped statement in lieu of a deposition but would stipulate to its admissibility" in Carson's absence. *Id.* at 87. Chandler's counsel stated that he had no objection to the admission of Carson's testimony, as long as the prosecutor stipulated to Carson's 1999 theft conviction and the trial court so advised the jury for purposes of judging his credibility. The trial

court informed the jury of Carson's unavailability and theft conviction and admitted the transcript of his out-of-court testimony, which was read aloud to the jury.

Chandler v. State, No. 49A02-0311-CR-964, slip op. at 2-4 (Ind. Ct. App. July 7, 2004)(footnotes omitted). The jury ultimately found Chandler guilty of robbery and two counts of criminal confinement. Chandler then waived his right to a jury trial on the remaining charges, and the trial court found him guilty of unlawful possession of a firearm by a serious violent felon. The trial court also adjudged Chandler to be a habitual offender.

On direct appeal, Chandler argued that the admission of Carson's out-of-court testimony violated his right to confrontation under the Sixth Amendment to the United States Constitution and article 1, section 13 of the Indiana Constitution. Chandler acknowledged that his counsel had stipulated to the admission of Carson's testimony, but nevertheless, contended that the trial court's admission of the testimony constituted fundamental error. We held that the admission of Carson's out-of-court testimony was harmless error because the evidence supporting Chandler's conviction was so convincing that a jury could not have found otherwise. *Chandler v. State*, No. 49A02-0311-CR-964. We pointed out that Lisa Heavey unequivocally testified that Chandler held up her and Carson at gunpoint. *Id.* We also noted that both Carson and Heavey identified Chandler as the perpetrator in separate photo arrays. *Id.* We, however, found that Chandler's criminal confinement convictions violated principles of double jeopardy and vacated the conviction for his criminal confinement of Heavey. *Id.*

On April 19, 2006, Chandler filed a PCR petition alleging ineffective assistance of both trial and appellate counsel. After holding an evidentiary hearing, the trial court denied Chandler's PCR petition on February 16, 2007, and this appeal ensued.

The petitioner in a post-conviction proceeding must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Fisher v. State*, 810 N.E.2d 674 (Ind. 2004). "When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Fisher v. State*, 810 N.E.2d at 679. To succeed on appeal from the denial of relief, the petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite to the one reached by the post-conviction court. *Johnson v. State*, 832 N.E.2d 985 (Ind. Ct. App. 2005), *trans. denied*.

Chandler first argues that he was denied the effective assistance of trial counsel. He contends that his trial counsel was ineffective when he stipulated to the admission of Carson's out-of-court testimony because this violated Chandler's right to confront witnesses as guaranteed by the Sixth Amendment to the United States Constitution and article 1, section 13 of the Indiana Constitution.

While couching this argument in terms of ineffective assistance of trial counsel, Chandler is actually again raising the issue of his confrontation right. Chandler, though, previously raised this issue in his direct appeal where he received an adverse appellate decision. "The doctrine of res judicata prevents the repetitious litigation of that which is essentially the same dispute." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied*, 534 U.S. 1164. If an issue was raised on direct appeal, but decided

adversely, it is res judicata. *Williams v. State*, 808 N.E.2d 652 (Ind. 2004). “A petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error.” *Ben-Yisrayl v. State*, 738 N.E.2d at 258. Because we concluded in Chandler’s direct appeal that the admission of Carson’s testimony was harmless error and, thus, did not violate Chandler’s confrontation right, res judicata prevents us from addressing this same argument here.

Even if the issue was not precluded, Chandler cannot show that his trial counsel was ineffective. To prevail in his claim of ineffective assistance of counsel, Chandler must show that (1) his counsel’s performance was deficient in that it fell below an objective standard of reasonableness based on prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Johnson v. State*, 832 N.E.2d 985. A claim may be disposed of if either one of these elements is not satisfied. *Shanabarger v. State*, 846 N.E.2d 702 (Ind. Ct. App. 2006), *trans. denied*.

In this case, Chandler’s trial counsel made a strategic decision to stipulate to the admission of Carson’s out-of-court testimony. Trial counsel is afforded wide discretion in determining strategy and tactics, and we accord these decisions deference. *Id.* The record reveals that Carson’s statement contradicted Heavey’s testimony on several key points. While Heavey testified that Chandler was armed with a gun, Carson indicated in his statement that he did not see a gun. Chandler’s trial counsel pointed out to the jury at various points during the trial the differences in Carson’s and Heavey’s testimonies. The admission of Carson’s statement, then, may have been beneficial to Chandler in that it

could have caused the jury to doubt the accuracy of Heavey's testimony. We will not second-guess trial counsel's strategy in this instance. Thus, we cannot say that trial counsel's performance was deficient.

Furthermore, Chandler has not shown that but for his trial counsel's deficient performance the result of the proceeding would have been different. In Chandler's direct appeal, we determined that the admission of Carson's out-of-court testimony was harmless error because the evidence supporting his conviction was so convincing that the jury could not have found otherwise. *Chandler v. State*, No. 49A02-0311-CR-964. Heavey unequivocally testified that Chandler pointed a handgun at both her and Carson. At one point, Chandler held a gun to Carson's head and threatened to kill him if he did not open the safe. Heavey testified that after she opened the safe, Chandler took the money in the safe and a surveillance videotape. Carson and Heavey both identified Chandler as the perpetrator in separate photo arrays. If Carson's statement had not been admitted, the evidence introduced was still sufficient to support the jury's conviction of Chandler, and thus, the outcome of the trial would not have been different.

Chandler also argues that he received ineffective assistance of trial counsel because his trial counsel did not personally consult with him during the course of the matter and because he was not allowed to be present when Carson's statement was taken. Chandler contends that this violated his right to effectively participate in his own defense. Chandler did not raise these issues in his petition for post-conviction relief. "Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal." *Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001), *cert. denied*,

535 U.S. 1061; *see also* Ind. Post-Conviction Rule 1(8) ([a]ll grounds for relief available to a petitioner under this rule must be raised in his original petition). Therefore, these claims are unavailable here.

Chandler next contends that he received ineffective assistance from his appellate counsel. He argues that appellate counsel should have asserted on direct appeal that trial counsel was ineffective because he stipulated to the admission of Carson's out-of-court testimony. The State argues that this claim, like Chandler's ineffective assistance of trial counsel claim, is barred by *res judicata*. We have previously noted that claims of ineffective assistance of appellate counsel are not precluded even though the petitioner's claim of ineffective assistance of trial counsel is barred by *res judicata*. *See Seeley v. State*, 782 N.E.2d 1052, 1060 (Ind. Ct. App. 2003) (“[O]ur Supreme Court did not intend to preclude claims of ineffective assistance of appellate counsel when claims of ineffective assistance of trial counsel are precluded”), *trans. denied*; *McCary v. State*, 761 N.E.2d 389 (Ind. 2002) (reviewing the petitioner's claim of ineffective assistance of appellate counsel where his claim of ineffective assistance of trial counsel was barred by *res judicata*). Therefore, we will proceed to consider Chandler's claim of ineffective assistance of appellate counsel.

In reviewing claims of ineffective assistance of appellate counsel, we use the same standard applied to claims of ineffective assistance of trial counsel. *Harris v. State*, 861 N.E.2d 1182 (Ind. 2007). The party seeking post-conviction relief must show that appellate counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the deficient performance of counsel the

result of the proceeding would have been different. *Id.* When, as here, a petitioner raises a claim of ineffective assistance of appellate counsel for failing to make a claim of ineffective assistance of trial counsel, he faces a compound burden. *Ben-Yisrayl v. State*, 738 N.E.2d 253. If the claim relates to issue selection, the petitioner must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. *Id.* Thus, the petitioner bears the burden of establishing the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. *Id.*

We have already determined that Chandler has not proven that he received ineffective assistance from his trial counsel. Because of this, Chandler's claim of ineffective assistance of appellate counsel fails. Therefore, we conclude that the trial court properly denied Chandler's PCR petition.

Affirmed.

SHARPNACK, J., and RILEY, J., concur.