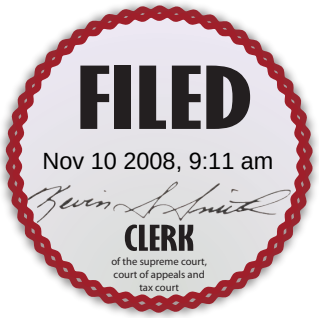

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IN THE
COURT OF APPEALS OF INDIANA

JOHN C. NEWSOME,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-0805-PC-433
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas Hakes, Judge
Cause No. 35C01-0709-PC-6

November 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

John C. Newsome appeals the denial of his amended petition for post-conviction relief. He claims the post-conviction court abused its discretion by denying his petition without holding an evidentiary hearing.

We affirm.

In 2002, the State charged Newsome with two counts of class B felony rape, one count of class B felony child molesting, and two counts of class D felony incest. He was convicted as charged following a jury trial and subsequently sentenced to an aggregate term of sixty-six years in prison. On direct appeal, we affirmed Newsome's convictions and sentence. *Newsome v. State*, 797 N.E.2d 293 (Ind. Ct. App. 2003), *trans. denied*.

Thereafter, on September 26, 2007, Newsome filed a pro-se petition for post-conviction relief, which he amended on February 21, 2008. In his amended petition, Newsome alleged that his trial counsel was ineffective for failing to seek severance of the charges, failing to obtain funds for a DNA expert, failing to challenge the reliability of the DNA testing, failing to interview, depose, and subpoena witnesses, and failing to object to certain jury instructions. Pursuant to Ind. Post-Conviction Rule 1(9)(b), the post-conviction court ordered the cause submitted upon affidavit.[1]

[1] This rule provides:

> In the event petitioner elects to proceed pro se, the court at its discretion may order the cause submitted upon affidavit. It need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing. If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness' testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena….

On April 17, 2008, the post-conviction court issued an order denying Newsome's amended petition for post-conviction relief. The order provides in relevant part:

> This Court on March 7, 2008, ordered the parties to submit their evidence by affidavit. The Plaintiff was required to submit affidavits and exhibits that would show the Plaintiff is entitled to the relief by a preponderance of the evidence.
>
> The Plaintiff submitted his affidavit on April 4, 2008 and the State filed its submission stating "It will not be submitting evidence in this case".
>
> THE COURT FINDS:
>
> 1. That the Plaintiff filed his affidavit but it was merely a restatement of his argument set forth in his amended petition. The Plaintiff presented no evidence to support his position.
> 2. The Plaintiff did not present a record of proceeding from his trial.
> 3. The Plaintiff has failed to provide the Court with credible evidence to support his claim.
> 4. The Plaintiff failed to prove by a preponderance of the evidence that he is entitled to the relief.

Appellant's Appendix at 61.[2] Newsome now appeals.

We initially observe that a post-conviction petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. P-C.R. 1(5). Further, on appeal, a petitioner faces a "rigorous standard of review" from the denial of post-conviction relief. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001). The petitioner must convince us that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Dewitt v. State*, 755 N.E.2d 167.

Here, Newsome asserts the post-conviction court abused its discretion by denying his petition without holding an evidentiary hearing. In this regard, he

[2] While the order is actually included only at the end of Newsome's appellate brief, it is apparent that it was intended to be included in his appendix at page 61.

summarily argues:

> The judgement of the Post Conviction Court was arbitrary, without factual or legal support, and founded solely upon the conclusive statements of the prosecutor "that said the petitioner presented no evidence to support the petition". The judgement was entered on the record in spite of the fact that (a) no evidence had been entered on the record; (b) the court ignored the petitioner's request for the issuance of subpoenas; (c) the court ignored the mandatory commands of PCR 1,4(g) which states that the "court shall hold an evidentiary hearing as soon as reasonably possible" and ignored the specific claims of the petitioner.

Appellant's Brief at 1.[3]

Newsome appears to ignore the post-conviction court's authority to order the cause submitted by affidavit. *See Fuquay v. State*, 689 N.E.2d 484, 486 (Ind. Ct. App. 1997) ("[w]hen a petitioner elects to proceed pro se, the post-conviction court may exercise its discretion to order the cause submitted upon affidavit) (citing P-C.R. 1(9)(b)), *trans. denied*. *See also Smith v. State*, 822 N.E.2d 193 (Ind. Ct. App. 2005), *trans. denied*. Further, he offers no cogent argument with citation to relevant authority to establish that the trial court abused its discretion by ordering the submission of affidavits in lieu of holding an evidentiary hearing. Therefore, we find the issue waived. *See Groves v. State*, 823 N.E.2d 1229, 1231 n.2 (Ind. Ct. App. 2005) ("[f]ailure to put forth a cogent argument acts as a waiver of the issue on appeal"). *See also* Ind. Appellate Rule 46(A)(8)(a) (requiring argument section of brief to contain the contentions of the appellant on the issues presented, supported by cogent reasoning and citations to relevant authorities).

The trial court properly concluded that Newsome offered no evidence in support of his ineffective assistance of counsel claims. In fact, Newsome acknowledges on appeal that "no

evidence had been entered on the record". *Appellant's Brief* at 1. We specifically note that Newsome did not provide the post-conviction court with the transcript from his trial, the record from his direct appeal, or an affidavit from his trial counsel. *See Tapia v. State*, 753 N.E.2d 581, 587 n.10 (Ind. 2001) ("[i]t is practically impossible to gauge the performance of trial counsel without the trial record, as we have no way of knowing what questions counsel asked, what objections he leveled, or what arguments he presented"). As he failed to present any evidence from which trial counsel's effectiveness could be assessed, it cannot be disputed that Newsome failed to establish his grounds for relief by a preponderance of the evidence. *See Tapia v. State*, 753 N.E.2d 581.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur

[3] We note that there are two "page ones" in Newsome's appellate brief, as well as several pages that are not numbered. This quotation is taken from the first page designated as "page one."