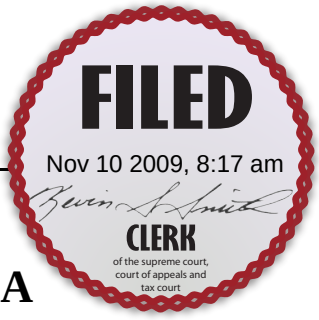
APPELLANT PRO SE:

CLEVERLY LOCKHART
Bunker Hill, Indiana



IN THE
COURT OF APPEALS OF INDIANA

CLEVERLY LOCKHART,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A05-0905-PC-293
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Thomas R. Lett, Special Judge
Cause No. 34C01-9406-CF-40

November 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Cleverly Lockhart, *pro se*, appeals the post-conviction court's denial of his petition for post-conviction relief. Specifically, he contends that his trial and appellate counsel, who were the same attorney, rendered ineffective assistance of counsel. Finding that Lockhart has not carried his burden of establishing grounds for relief by a preponderance of the evidence, we affirm the post-conviction court.

Facts and Procedural History

The underlying facts of this case, taken from the opinion in Lockhart's direct appeal, are as follows:

> The facts most favorable to the judgment follow. In November of 1993, Lockhart moved into the house of his friend, Michelle Frazier. At first, Lockhart slept on a couch, but eventually began sleeping in the bedroom of Frazier's eleven year old son, J.R. Lockhart developed a close father-son relationship with J.R.
>
> In January of 1994, while Lockhart and J.R. sat on the floor under a blanket and watched television, Lockhart reached over and placed his hand inside J.R.'s underwear. Lockhart rubbed J.R.'s penis for several minutes.
>
> A couple of weeks later, Lockhart went into J.R.'s bedroom and locked the door. He told J.R. about oral sex and then pulled J.R.'s pants down. Lockhart placed his mouth on J.R.'s penis for several minutes.
>
> One month later, Lockhart again entered J.R.'s bedroom and locked the door. He performed oral sex on J.R. and forced J.R. to perform oral sex on him. Afterwards, Lockhart placed his penis into a sock and masturbated until he ejaculated.
>
> In March of 1994, Lockhart became angry with J.R. for not completing a household chore. Lockhart spanked J.R. and ordered him to go to his bedroom. Lockhart later went to J.R.'s bedroom to apologize. Lockhart told J.R. "how to make love to a guy" and then "french-kissed" J.R. Record, p. 448. Lockhart kissed J.R. all over his body and put his mouth on J.R.'s penis. Lockhart moved out of the house later that month. Before leaving, Lockhart told J.R. that if J.R. ever decided he was homosexual, he should contact Lockhart.
>
> Approximately two weeks later, J.R. told his mother about the molestations. Frazier immediately reported the incidents to Child Protective Services.

> On June 28, 1994, the State charged Lockhart with one count of child molesting as a class C felony and three counts of child molesting, as class B felonies. After a trial by jury on July 25, 1995, Lockhart was found guilty on all counts. Later, the trial court sentenced him to eight years for the class C felony conviction and twenty years for each class B felony conviction, to be served consecutively. However, the trial court reduced the total sentence to thirty years.

Lockhart v. State, 671 N.E.2d 893, 896-97 (Ind. Ct. App. 1996). Lockhart was represented at trial and on direct appeal by William C. Menges, Jr.[1]

On direct appeal, Lockhart raised the following issues: (1) whether he was deprived of the right to an early trial; (2) whether the trial court properly denied his request to act as co-counsel of his defense (hybrid representation); (3) whether the trial court properly excluded evidence of his medical record; (4) whether the trial court properly admitted a handwriting exemplar into evidence; (5) whether the evidence was sufficient to support the Class C felony conviction; and (6) whether his sentence was reasonable. Although we found no reversible error in issues one through five, we remanded the case for a new sentencing hearing on a ground not specifically addressed by Lockhart. *Id.* at 904. That is, the State argued that the trial court erroneously reduced Lockhart's sentence to thirty years, the presumptive term for a Class A felony, because it found that the offenses arose out of an episode of criminal conduct pursuant to Indiana Code section 35-50-1-2. *Id.* We found that Lockhart committed four distinct acts of molestation against the victim at four different times and therefore they did not constitute an episode of criminal conduct. *Id.* Accordingly, we concluded the trial court erred by

[1] Menges did not represent Lockhart during the early stages.

reducing his sentence and remanded for the court to impose a statutorily authorized sentence. *Id.* at 905.

In April 1998 a resentencing hearing was held. Lockhart was represented by new counsel, Merrill W. Otterman, and a new trial court judge sentenced Lockhart to an aggregate term of fifty-three years.[2] The trial court recommended that Lockhart "be retained in the psychiatric area for further observation and treatment, all per Sentencing Order." Appellant's App. p. 89.

What follows Lockhart's resentencing hearing is a complicated morass of *pro se* filings by Lockhart, most of which are irrelevant to Lockhart's *pro se* petition for post-conviction relief filed on April 27, 1998, and amended on July 13, 2004—neither of which Lockhart has included in the record on appeal. As a snapshot into these filings, however, the CCS *after* Lockhart's April 1998 resentencing hearing comprises thirty-one pages, includes numerous petitions to modify and correct his sentence, and spans the Indiana Supreme Court's appointment of at least four special judges, ending with Special Judge Thomas R. Lett, who ultimately denied Lockhart's petition for post-conviction relief.[3] We note that this sea of filings would have been easier to navigate had the State filed a brief in this case.

[2] The previous trial court judge recused himself because of an apparent conflict of interest resulting from the attempted filing of a lawsuit by Lockhart in which Lockhart named the court as a defendant and because of actual bias of the court resulting from false allegations made by Lockhart concerning the court. Appellant's App. p. 87 (CCS entry).

[3] Lockhart *claims* that a Notice of Intent to Interpose Defense of Mental Disease or Defect was filed on both September 12, 1994, and March 29, 1995, but the CCS does not reveal that these notices were filed on these dates.

In June 2005 Special Judge Lett was appointed judge in this post-conviction case. A status hearing was held in June 2006. Following this hearing, Lockhart continued with his numerous *pro se* filings. Another status hearing was held on July 23, 2007, because Lockhart had filed so many motions. These issues were resolved, and another hearing was scheduled. This hearing was held on April 24, 2008, but Lockhart moved to continue it because his witnesses had not been subpoenaed. According to Lockhart, fifteen of his twenty-one witnesses were material to his basic post-conviction claim of ineffective assistance of counsel. Tr. p. 34. Lockhart told the court he wanted to subpoena:

> [Dr. Sarda,] [Attorney Merrill W. Otterman,] William Menges, Jr., who was the trial attorney at the time, Dr. Wasserman, Dr. McDaniel, Dr. Conant. There was a jail nurse by the name of Jane Tippy. Some of these people will have to verify to their affidavits, that should already be filed in the court. Dr. David Jarmon, James Russell, Dr. Senn, Michelle Frazier and Dr. Linda Callahan.

Id. at 34, 36. The post-conviction court then asked Lockhart what information the doctors would present to the court regarding an ineffective assistance of counsel claim, and Lockhart responded: "The mental disease that I suffer with, which is bipolar affective disorder, the doctors will be showing ahead of time that I was not in my, in treatment and some of them will be stating when I became of sound mind and that should have been a defense that should have been pursued." *Id.* at 37. The State responded:

> Judge, I'm looking, trying to find the evaluations that were conducted of Mr. Lockhart. I don't know if there's anything in addition Mr. Lockhart intends to present. There are some evaluations that were conducted by Dr. Wasserman and Dr. McDaniel and those are at least in my file. I'm not sure which pleading those went with. There's also the affidavits and I'm not sure what more that they may be able to present. They're part of the record in this case. *I would obviously stipulate to the admission of those for*

the court's consideration versus having all these witnesses, medical or psychiatric testimony presented.

Id. at 38 (emphasis added). The post-conviction court reiterated to Lockhart that the State was "offering to stipulate to all of the medical reports and evaluations that have previously been submitted in this case, [the State's] willing to stipulate to the court considering all of those in making a ruling on your request for post-conviction relief." *Id.* at 38-39. The State clarified that it "believe[d] there were some mental evaluations that were done and *made a part of the record in the trial phase of this*, I would agree to that. I think that would, I assume take care of the medical or psychiatric testimony." *Id.* at 40 (emphasis added). The State then specifically stipulated to the admission of the notes referenced in the affidavit of Dr. Sarda. *Id.* at 42. Although the post-conviction court was hesitant to do so, it reset the post-conviction hearing so that Lockhart could issue subpoenas to Lockhart's trial attorney Menges and resentencing attorney Otterman.

Another hearing on Lockhart's amended petition for post-conviction relief was held on October 3, 2008. At this hearing, Lockhart first examined Otterman, the attorney from his resentencing hearing. The gist of Otterman's testimony was that he had no recollection of representing Lockhart. During the testimony of Otterman, Lockhart attempted to introduce into evidence Exhibit 1, which contained an affidavit of Otterman and numerous documents attached to it. However, the post-conviction court marked but excluded the exhibit. *Id.* at 67. Lockhart then examined Menges, his trial attorney, and the following colloquy occurred concerning Lockhart's alleged mental illness:

[Lockhart]: Do you know anything about [my] mental illness?

* * * * *

[Menges]: I think that has been raised at various times in the past. I don't believe that any professional has ever determined that you were mentally ill.
[Lockhart]: And you're positive of that?
[Menges]: No, I'm not positive of that.
[Lockhart]: OK.
[Menges]: That's my recollection.
[Lockhart]: That's your recollection. Now—
[Menges]: I also know that if I'd had any indication of you being mentally ill or incapable of standing trial that I would have had a separate professional duty to have you examined and I don't recall whether you were examined or not examined. If you were examined obviously the professionals felt that you were competent to stand trial. If you were not examined it would be because I had no independent belief that that would be proper or necessary.
[Lockhart]: But in another case wasn't [I] analyzed and you filed for it?

* * * * *

[State]: I'm . . . going to object on not specific. I don't know the other case so I don't have a time frame. We need more.
[Lockhart]: In fact it was the same time frame.
[State]: I still—
[Menges]: I'd have no recollection or any reason to, I have absolutely no idea I guess of what you're talking about.
[Judge]: Could you give some more specificity to whatever case you're referring to?
[Lockhart]: I believe the prosecutor at that time was Ron Byal when in fact we were in Howard Circuit Court and you filed and Dr. Brignoni took the witness stand to verify that I was incompetent in that case and that case was later dismissed, but yet we proceeded to trial in this case.
[State]: I'm not sure--, we raised the objection of specificity of timing.
[Lockhart]: If Dr. Brignoni's here he will surely verify that.
[Judge]: If Dr. Brignoni's here then that would be the proper witness for this line of questioning. This witness has already testified that he didn't recall that.

Id. at 77-79. The State later followed up with Menges as follows:

[State]: There was some question as to mental defect of Mr. Lockhart. Do you recall ever receiving any information that you could verify as to Mr. Lockhart's mental defect?
[Menges]: I don't recall receiving any. What I can say as a matter of practice if I ever had anything that would shed some question on a defendant's or a client's ability to stand trial I always went for the

> examination and I've had people examined for a number, you know, one example a, a young, very young man was offered a plea agreement that he refused to take. Given the seriousness of his charges and given his reasons for not turning it down I chose to have him examined over his objection. I've had clients in other situations examined over their objection because I feel a trial lawyer, particularly an appointed lawyer, has an obligation under the statutes and under the Code of Professional Responsibility to have a client examined if there's any reason whatsoever to believe that there may be a problem and I also feel that that decision is better made by competent psychiatric people or medical professionals than it is by a trial lawyer. So if there's any indication at all, I would have somebody examined.

Id. at 85-86. Lockhart indicated that he still needed to question Dr. Brignoni. Because Dr. Brignoni did not appear, the post-conviction court agreed to once again reset the matter for another hearing. The parties then engaged in a discussion about the documents to which the State stipulated:

> [Judge]: The affidavit that was stipulated to prior at our last proceeding of Dr. Sarda, do we have a copy of that in the court's record?
> [Lockhart]: Judge, I can give you that. I'm not sure. I am under the impression, Your honor, that all items stipulated to by Mr. McCann [prosecutor] at the last proceeding, including psychological reports and the affidavit of Dr. Sarda w[ere] a part of the court's records.
> [Judge]: *They were admitted in the original trial?*
> [State]: *Correct.*
> [Judge]: That's what I thought but I wanted to make sure that Mr. Lockhart wasn't referring to some other document. So you're referring to those documents, the stipulation was to the document that had previously been admitted.
> [Lockhart]: Yes, but I was unsure if Dr. Sarda was admitted.
> [Judge]: Well, even if it was offered and excluded it would be in the trial transcript.
> [Lockhart]: But I don't know that either.
> [Judge]: You have a copy of that?
> [Lockhart]: I have a copy of it?
> [State]: If I may say, Your Honor, I am certain in my conversations with Mr. McCann that *he was unwilling to stipulate to anything not already in the trial record.*
> [Judge]: I understand. Alright. I will review, is the transcript here or is it--, I know we brought it over before. Is it in a storage unit somewhere?
> The Reporter: (Inaudible).

> [Judge]: Right. OK. Well, I don't need to know right now. We'll find it. *I'll review the transcript and I'll get a copy of the documents that were stipulated.*
> [Lockhart]: Yeah, if there's not, I don't know if they have it—
> [Judge]: *I'll have those for the next hearing, OK, and make sure that we all agree on what our documents are that we're considering for this proceeding. Alright?*
> [Lockhart]: OK.

Id. at 89-91 (emphases added).

The final hearing on Lockhart's amended petition for post-conviction relief was held on January 15, 2009. Although the final hearing was for the sole purpose of securing the presence of Dr. Brignoni, Lockhart noted at the beginning of the hearing that several of his witnesses were not present. The following colloquy then ensued:

> [Lockhart]: OK. Judge, under--, my witnesses are not here. I did mail to the court by certified mailing of these witnesses that I need a subpoena but I did contact them. I would like to place it in the record just in the event of an appeal, but I also have the original documents from Dr. Richard Senn [urologist—issue from direct appeal] and Mr. Rick Loudermilk *where they had notarized documents that were not stipulated to, such as Dr. Angel Brignoni, Jane Tippy, and Richard Catt.*
> [Judge]: And what are those documents again, please?
> [Lockhart]: OK. These are people that had notified the attorney. One would be the jail nurse, Jane Tippy, discussing my mental health issue, behavior; Dr. Brignoni who was appearing at trial and stating specifically that I was incompetent at my trial and that my testimony was clearly given through delusions and hallucinations. The court originally lost these originals with all the traveling to different counties with special, you know, with the judges that we've had which have been a lot so I did send these to Mr. Rick Loudermilk. He also sent to me a notarized copy of the visitor's log where these people did appear at Wabash Valley Correctional Facility and it is signed by the Assistant Superintendent as well, and this is notarized by someone that I have no idea who it is but Rick Loudermilk's signature is on this original and I would like to submit that into evidence as an exhibit, and I believe under Rule 902, paragraph 6, I can enter that in, since they're not here.
>
> **(Lockhart Exhibits 2 through 10 identified)**

> [State]: *I'm going to object to any documents being offered or admitted into evidence today that have not been previously stipulated to.* I do not believe that these documents fit any exception to the hearsay rules. In addition, there [are] issues as to the authenticity of the documents. Therefore, an objection would be made. In addition, Your Honor, I would like to point out having previously attended the last hearing on this matter it was my understanding that this hearing was to provide an opportunity for Dr. Brignoni to appear. I do not believe Dr. Brignoni is here. I think this was the last opportunity for that and would ask the court to proceed accordingly.
>
> [Judge]: Thank you. Mr. Lockhart, your submissions are not accepted into evidence for the purposes of this hearing today. *They will be shown as tendered and excluded.* State's objections to those are sustained. There's no foundation for the admission of those exhibits. *The State previously at the previous two hearings that we've had has stipulated to the admission of certain exhibits that were admitted at your first trial, at your trial and so those things will be considered in the decision that's made regarding your Motion for Post-Conviction Relief.* However, there's no foundation for the admission today of the documents that you are submitting so they are not going to be marked as exhibits.
>
> * * * * *
>
> [Lockhart]: OK. I would like to enter in though, these documents in for appeal and included--
>
> [Judge]: They'll be marked as exhibits and marked excluded.
>
> **(Lockhart Exhibits 2 through 10 excluded)**

Id. at 98-102 (emphases added) (capitalization omitted). Lockhart then gave a closing argument in which he argued, among other things, that he went to his own trial incompetent. Lockhart also noted that he had learned that Dr. Brignoni was no longer alive. *Id.* at 105-06. The State waived closing argument but objected to those portions of Lockhart's arguments that related to facts not in evidence. However, the State did not specify what portions. The post-conviction court granted the State's motion as to any facts not previously in evidence. The court then gave the parties forty-five days to submit proposed findings and conclusions.

On March 27, 2009, the post-conviction court issued findings of fact and conclusions of law denying Lockhart relief. Lockhart, *pro se*, now appeals.

Discussion and Decision

Lockhart appeals the denial of his petition for post-conviction relief. Initially, we note that the State has failed to file an appellee's brief. "The obligation of controverting arguments presented by the appellant properly remains with the State." *Mateyko v. State*, 901 N.E.2d 554, 557 (Ind. Ct. App. 2009), *trans. denied*. Where, as here, the appellee fails to submit a brief, the appellant may prevail by making a prima facie case of error, *i.e.*, an error at first sight or appearance. *Id.* Still, we must correctly apply the law to the facts of the record to determine if reversal is required. *Id.*

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "'[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 been made.'" *Id.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g*

denied). The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

In attempting to set forth Lockhart's issues, which he has broken down into four, we note that it is very difficult to hone in on what he is arguing, which, as noted above, is further complicated by the State's lack of a brief. For the most part, Lockhart's brief is stream of consciousness writing which bounces back and forth between related and unrelated issues. As is well established, *pro se* counsel is held to the same standard as trained legal counsel. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. We therefore condense and rephrase Lockhart's issues into the following three: (1) Attorney Menges was ineffective for failing to request a competency hearing during the trial phase of this case;[4] (2) the trial court (not the post-conviction court) abused its discretion in denying access to a certain transcript and in sentencing him; and (3) Attorney Menges was ineffective for failing to raise his own incompetence as a trial attorney on appeal. As for the second issue, we note that it is a freestanding issue which is unavailable on post-conviction review. Our Supreme Court has made clear that freestanding claims that the original trial court committed error are generally unavailable on post-conviction review. *See, e.g.*, *Stephenson v. State*, 864 N.E.2d 1022, 1029 (Ind. 2007), *reh'g denied*, *cert. denied*, 128 S. Ct. 1871 (2008). We therefore proceed to address the ineffective assistance of counsel claims only.

[4] Lockhart also raises the issue dubbed "Conflict of Interest." However, we have collapsed this into ineffective assistance of trial counsel for three reasons. Lockhart has failed to assert that Attorney Menges stood to gain significantly at his expense, it is a freestanding issue that is unavailable on post-conviction review, and it, in substance, rehashes Lockhart's competency.

We review the effectiveness of trial and appellate counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Martin v. State*, 760 N.E.2d 597, 600 (Ind. 2002); *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied*. A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability arises when there is a 'probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). We presume that counsel rendered effective performance, and a defendant must offer strong and convincing evidence to overcome this presumption. *Loveless v. State*, 896 N.E.2d 918, 922 (Ind. Ct. App. 2008) (citing *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *reh'g denied*, *cert. denied*, 129 S. Ct. 458 (2008)), *trans. denied*.

I. Trial Counsel Ineffectiveness

Lockhart contends that Attorney Menges was ineffective for failing to request a competency hearing at trial. The standard for deciding competency is whether the defendant is able to understand the nature of the proceedings and to assist in the preparation of his defense. *Timberlake v. State*, 753 N.E.2d 591, 598 (Ind. 2001) (citing Ind. Code § 35-36-3-1), *reh'g denied*. In support of his claim that he was incompetent at the time of his 1995 trial, Lockhart claims that the State stipulated at the post-conviction

hearing to numerous psychiatric records that prove his incompetency. Appellant's Br. p. 5-6. This is simply not true. As the facts section of this opinion carefully sets out, the State only stipulated to a select few psychiatric records that were admitted into evidence at Lockhart's trial. These reports are from Drs. Wasserman, McDaniel, and Sarda. *See* Tr. p. 38, 42. Also as the facts section of this opinion explains, all ten of Lockhart's post-conviction exhibits, which contain numerous psychiatric reports and affidavits, were marked but excluded from evidence at the hearing. *Id.* at 67, 102. Although Exhibits 1-10 are included in the record on appeal, Lockhart does not challenge their exclusion from evidence. Therefore, we cannot consider anything (including records from the other cause number) contained within them. Lockhart, however, wrongfully includes them in his Appellant's Appendix, acting as though they were properly admitted into evidence below. And although the State stipulated to the reports from Drs. Wasserman, McDaniel, and Sarda, which can apparently be found in the record from Lockhart's trial, Lockhart did not include the transcript from his trial in the record before us. The transcript must be admitted into evidence just as any other exhibit. *Bahm v. State*, 789 N.E.2d 50, 58 (Ind. Ct. App. 2003), *clarified on reh'g on other grounds*, 794 N.E.2d 444 (Ind. Ct. App. 2003), *trans. denied; see also Taylor v. State*, 882 N.E.2d 777, 782 (Ind. Ct. App. 2008). Without the record from Lockhart's trial, we cannot determine which reports the State stipulated to and the post-conviction court considered in denying Lockhart relief. It is apparent from the transcript of the post-conviction hearings that the parties below knew which reports the State's stipulation covered because they had access to the transcript from Lockhart's trial and the State had its file from Lockhart's trial, but we are unable to

determine this on appeal from the record we have before us. Lockhart bears that burden on appeal, and he has failed in that regard. Therefore, we cannot evaluate Lockhart's ineffective assistance of counsel claim based on Attorney Menges' failure to request a competency hearing at trial. Attorney Menges' testimony at the post-conviction hearing does not shed much light on this issue. Simply put, given the inadequate state of the record before us, we are left with nothing showing Lockhart's incompetency at the time of his 1995 trial.

Even assuming Lockhart was suffering from bipolar affective disorder at the time of his 1995 trial, as our Supreme Court has pointed out, "'[N]ot all mental conditions are serious enough to relieve one of criminal responsibility.'" *Anderson v. State*, 699 N.E.2d 257, 261 (Ind. 1998) (quoting *Cate v. State*, 644 N.E.2d 546, 547 (Ind. 1994)). Even if we were to assume, and we do not, that a prior diagnosis of bipolar affective disorder requires defense counsel to request a competency hearing, Lockhart offers no basis on this record to conclude that the request would have been granted or that the examination and subsequent hearing would have resulted in his being found incompetent. *See id.* Lockhart's ineffective assistance of trial counsel argument fails.[5]

II. Appellate Counsel Ineffectiveness

Lockhart next contends that Attorney Menges was ineffective for failing to raise his own incompetence as a trial attorney on direct appeal. We first note that it is

[5] To the extent that Lockhart argues that the trial court erred in failing to hold a competency hearing, we note that this is a freestanding issue that is not available on post-conviction review. To the extent that Lockhart argues that Attorney Menges was ineffective for failing to pursue an insanity defense, we note that, for the same reasons above, Lockhart has failed to present us with an adequate record to evaluate this claim. In addition, Lockhart has failed to cogently argue this issue in his brief. *See* Ind. Appellate Rule 46(A)(8)(a).

unreasonable to believe that Menges would raise the question of his own competency on appeal. *Askew v. State*, 500 N.E.2d 1219, 1220 (Ind. 1986), *reh'g denied*; *Johnson v. State*, 674 N.E.2d 180, 184 (Ind. Ct. App. 1996), *reh'g denied*, *trans. denied*. We have previously noted the danger in being represented by the same counsel both at trial and on appeal. *Benson v. State*, 780 N.E.2d 413, 418 n.3 (Ind. Ct. App. 2002), *reh'g denied*, *trans. denied*.

In any event, the Indiana Supreme Court has recognized three types of ineffective assistance of appellate counsel claims, namely: (1) counsel denied the defendant access to appeal; (2) counsel waived issues; and (3) counsel failed to present issues well. *Bieghler*, 690 N.E.2d at 193-95. The second category is the only category applicable here and will lead to a finding of deficient performance only when the reviewing court determines that the omitted issues were significant, obvious, and "clearly stronger than those presented." *Id.* at 194 (quotation omitted). "[T]he decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Id.* at 193 (quotation omitted).

Attorney Menges raised six issues on direct appeal, which resulted in a lengthy published opinion by this Court. Nevertheless, Lockhart argues that Menges should have raised his own incompetence—specifically his own failure to pursue an insanity defense, a conflict of interest, his non-appearance at a critical hearing, and not keeping Lockhart advised—as grounds for an ineffective assistance of trial counsel claim. Lockhart baldly asserts, without any sort of analysis, that "[t]hese issues would have clearly resulted in a reversal or an order by the Indiana Court of Appeals for a new trial." Appellant's Br. p.

19. And, as noted above, we do not have the trial transcript from which to evaluate these issues. Because of these two things, we find that Lockhart has waived this issue. Lockhart's ineffective assistance of appellate counsel argument fails.[6] Lockhart has failed to establish prima facie error.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.

[6] Lockhart does appear to argue that Attorney Menges should have argued on direct appeal that his mental illness was a mitigating factor. Once again, we do not have the trial transcript. Moreover, Lockhart was resentenced, so this issue is now irrelevant. To the extent that Lockhart argues that the resentencing court abused its discretion in failing to give his mental illness "the due weight that it deserved and warranted," Appellant's Br. p. 20, we again note that this is a freestanding issue that is unavailable on post-conviction review.