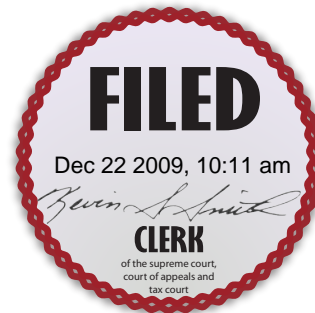


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DONYALL EARL WHITE,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 18A04-0904-PC-235

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Linda Ralu Wolf, Judge
Cause No. 18C03-0301-FB-6

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Donyall Earl White, *pro se*, appeals the denial of his petition for post-conviction relief. He raises claims of ineffective assistance of trial and appellate counsel, prosecutorial misconduct, and double jeopardy/sentencing. Finding that the freestanding claims of prosecutorial misconduct and double jeopardy/sentencing are not available on post-conviction and that White has not met his burden of proving ineffective assistance of counsel because neither his attorney testified nor was his trial transcript admitted into evidence at the hearing, we affirm.

Facts and Procedural History

In January 2003 the State charged White with two counts of Class B felony armed robbery and two counts of Class B felony criminal confinement. Following a jury trial, White was convicted of all counts, and the trial court sentenced him to an aggregate term of twenty-four years. On direct appeal, White raised two issues: (1) whether the trial court erred by admitting his boots in evidence and (2) whether the evidence was sufficient to sustain his convictions. *White v. State*, No. 18A02-0308-CR-672 (Ind. Ct. App. Apr. 22, 2004). We affirmed.

In 2005 White filed a *pro se* petition for post-conviction relief, which he amended in 2008. At the hearing on his amended petition, White briefly testified but did not call any other witnesses. In addition, he did not admit the transcript from his trial into evidence. Following the hearing, the post-conviction court issued findings of fact and conclusions of law denying relief. White, *pro se*, now appeals.

Discussion and Decision

White appeals the denial of his petition for post-conviction relief. Specifically, he argues that he received ineffective assistance of both trial and appellate counsel. He also raises the freestanding claims of prosecutorial misconduct and double jeopardy/sentencing. 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.* at 644 (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).

As for White's freestanding issues of prosecutorial misconduct and double jeopardy/sentencing, we note that they are not available on post-conviction. 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). We therefore proceed to address his ineffective assistance of counsel claims only.

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*.

White was represented by the same attorney at trial and on direct appeal, Ross Rowland. White claims that as trial counsel, Attorney Rowland failed to interview witnesses, communicate with him, object to the admission of evidence, and object to prosecutorial misconduct. White claims that as appellate counsel, Attorney Rowland

failed to raise the issues of ineffective assistance of trial counsel, prosecutorial misconduct, and double jeopardy/sentencing. However, Attorney Rowland did not testify at the hearing, and White did not present an affidavit from him. *See Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989) (“Where trial counsel is not presented in support, the post-conviction court may infer that trial counsel would not have corroborated appellant’s allegations.”). White briefly testified at the hearing, Tr. p. 3-5, but he mostly presented legal argument in support of his petition. In addition, White did not admit the trial transcript into evidence.

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 transcript, we are presented with no means by which we can evaluate the error and prejudice allegedly suffered by White. *Taylor*, 882 N.E.2d at 782. As our Supreme Court observed, “[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.” *Tapia v. State*, 753 N.E.2d 581, 588 n.10 (Ind. 2001). Whether a defendant received ineffective assistance of counsel is a highly fact-sensitive determination. *Taylor*, 882 N.E.2d at 782. Lacking a record with which we can evaluate White’s claims, we cannot say that he has met his burden of proving that he was subjected to error and prejudiced by Attorney Rowland’s alleged failures as both trial and appellate counsel.

White has not shown that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.

Affirmed.

RILEY, J., and CRONE, J., concur.