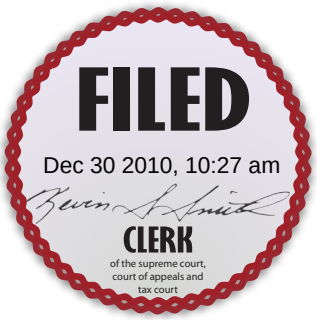

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IN THE
COURT OF APPEALS OF INDIANA

CHARLES HARTSELL, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 20A04-1005-PC-359
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT NO. II
The Honorable Stephen R. Bowers, Judge
Cause No. 20D02-0901-PC-1

December 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Charles Hartsell, Jr. (Hartsell), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUE

Hartsell raises one issue on appeal, which we restate as follows: Whether the post-conviction court erred in denying his petition for post-conviction relief, which alleged that the trial court exceeded the sentence as contained in his written plea agreement.

FACTS AND PROCEDURAL HISTORY

On June 6, 2005, the State filed an Information charging Hartsell with two Counts of burglary. Hartsell subsequently entered into a plea of guilty to Count I, burglary, as a Class B felony, Ind. Code § 35-50-2-5, pursuant to a written plea agreement. The agreement provided that there would be a six year cap on any executed sentence Hartsell would receive and that Hartsell would pay restitution. In addition, the agreement stipulated that the trial court would dismiss all other pending charges against Hartsell, including Count II, burglary, a Class A felony, I.C. § 35-50-2-4.

On October 20, 2005, the trial court accepted this written plea agreement and sentenced Hartsell to ten years, with six years executed and four years suspended. The trial court also ordered that Hartsell pay restitution through the Victim Offender Reconciliation Program, a fine of two thousand dollars, and court costs. On April 25, 2008, Hartsell filed a petition for post-conviction relief concerning the terms of his sentence, arguing that his ten

year sentence violated the six year 'execution cap' in his plea agreement because he might be required to execute his suspended sentence in addition to his executed sentence. On April 20, 2010, the post-conviction court denied his petition for post-conviction relief.

Hartsell now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Waiver*

As a preliminary issue, we must first address whether or not this court has jurisdiction to decide Hartsell's case. The State contends that Hartsell procedurally defaulted his claim because he knew the language of his plea agreement at the time of his sentencing and failed to file a direct appeal; alternatively, the State also argues that Hartsell waived his claim because he failed to include a copy of his written plea agreement in his appendix.

Post-conviction proceedings do not grant a petitioner a "super-appeal;" they are limited to those grounds available under the Post-Conviction Rules. *Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010). The purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. *Hooker v. State*, 799 N.E.2d 561, 569 (Ind. Ct. App. 2003). As a result, issues that were known and available at trial but not raised on direct appeal are waived and unavailable for post-conviction review. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied*, 534 U.S. 1164, 122 S. Ct. 1178, 152 L.Ed.2d 120 (2002).

Post-conviction Rule 1(a)(3) allows a petitioner to file a petition for post-conviction relief to challenge any sentence that "exceeds the maximum authorized by law, or is

otherwise erroneous." Because issues known at trial are unavailable for post-conviction review, though, courts have narrowed the applicability of Post-Conviction Rule 1(a)(3) to exclude sentences imposed pursuant to "open" plea agreements. An "open plea" is one in which sentencing is left to the trial court's discretion. *Gutermuth v. State*, 817 N.E.2d 233, 234 (Ind. 2004). An individual who pleads guilty to an offense in an "open plea" is not entitled to challenge the sentence imposed by means of a post-conviction petition, but must raise such claims on direct appeal, if at all. *Collins v. State*, 817 N.E.2d 230, 233 (Ind. 2004). This category includes agreements based on sentencing caps or ranges, because a judge still has discretion to decide whether to impose the maximum sentence or a lesser sentence. *Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006).

Here, Hartsell's claim falls directly within the exception to Post-Conviction Rule 1(a)(3) as applicable to open pleas. Under the rule established in *Childress*, Hartsell's plea agreement was an "open plea" because it granted the trial court discretion to impose any sentence up to a six year executed sentence. Accordingly, Hartsell should have filed a direct appeal. Because Hartsell did not file a direct appeal, we conclude that he procedurally waived his claim and cannot now petition for post-conviction relief. In spite of this determination, though, we will also address the State's second waiver argument.

The State's second argument is that Hartsell waived his claim by failing to include a copy of his plea agreement in his appendix. Ind. Appellate Rule 46(A)(8)(a) states that:

> The appellant's brief shall contain the following sections under separate headings and in the following order…
>
> (a) The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each

> contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on[.]

It is the duty of the party bringing an appeal to include in the record so much of the proceedings below as is necessary for adjudication of the issues raised on appeal, and his claim is waived if he does not do so. *See Sumbry v. Pera*, 795 N.E.2d 470, 472 n. 62 (Ind. Ct. App. 2003).

Here, Hartsell's entire claim is dependent upon the language in his plea agreement, which he did not file with this court. Because we do not have the language of the plea in our record, we conclude that Hartsell also waived his claim in this respect. Waiver notwithstanding, though, we will address the merits of this case in the following sections.

II. *Standard of Review*

When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). This court will not reverse a judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id*. at 643-44. In addition, the petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). On review, we do not accord deference to conclusions of law, but we accept findings of fact unless clearly erroneous. *Fisher v. State,* 810 N.E.2d 674, 679 (Ind. 2004). The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Id*. In addition, we consider only the evidence that supports the decision of the

post-conviction court, together with any reasonable inferences. *Page v. State,* 706 N.E.2d 230, 231 (Ind. Ct. App. 1999).

III. *Compliance of Hartsell's Sentence with his Plea Agreement*

Here, Hartsell argues that the trial court's sentence violates his plea agreement because he could be required to serve a ten year executed sentence if he violates any condition of his probation. He interprets the six year 'execution cap' of his plea agreement as a cap on *any* executed sentence, not just a cap on his initial executed sentence. The State disagrees with this interpretation and contends that such a reading of the agreement makes the term "executed" superfluous because it would turn the six year executed cap into an absolute cap on any sentence.

A plea agreement is a contract, binding upon both parties when accepted by the trial court. *Brewer v. State,* 830 N.E.2d 115, 118 (Ind. Ct. App. 2005). "It is within the trial court's discretion to accept or reject a plea agreement and the sentencing provisions therein; however, if the court accepts such an agreement, it is strictly bound by its sentencing provision and is precluded from imposing any sentence other than required by the plea agreement." *Bennett v. State*, 802 N.E.2d 919, 921-22 (Ind. 2004); *See also* I.C. § 35-35-3-3(e) ("If the court accepts a plea agreement, it shall be bound by its terms."). Once the trial court has accepted a plea agreement, the court is bound by the terms of that agreement throughout the defendant's sentence and probationary period. *Cox v. State*, 850 N.E.2d 485, 489 (Ind. Ct. App. 2006). The agreement does not disappear after the trial court imposes its initial sentence. *Id.* at 490.

While we are bound to the terms of Hartsell's plea agreement, this court has already addressed the issue of whether an executed sentence cap in a plea agreement is equivalent to an absolute sentence cap. In *Cox*, the State charged Cox with burglary as a Class B felony and theft as a Class D felony. *Id.* at 487. Cox subsequently agreed to plead guilty to his burglary charge in exchange for a cap of ten years on the amount of executed time he would have to serve and the dismissal of his theft charge. *Id.* The trial court accepted this plea agreement and sentenced Cox to twelve years, with six years executed, six years suspended, and three years of probation. *Id.* Cox later violated the terms of his probation, and the trial court ordered that he serve his suspended six year sentence. *Id.*

Cox challenged this decision, arguing that he should not have to serve his suspended sentence because his plea agreement capped his executed sentence at ten years. *Id.* at 490. This court decided that the terms of his initial sentence complied with his plea agreement, noting that Indiana Code section 35-38-2-3(g)(3) authorized the trial court to order execution of all or part of Cox's sentence that was suspended at the time of initial sentencing upon finding that Cox had violated a condition of his probation. *Id.* at 490-91. In citing section 35-38-2-3(g)(3), the court inherently emphasized the fact that Cox's own actions led to the increase in his executed sentence, rather than the trial court's interpretation of his plea agreement. *See id.* Because of Cox's actions, the court could not ignore its statutory authority under section 35-38-2-3(g)(3). *See id.*

Likewise, in *Crump*, we held that a sentence of eight years, two years executed on a work release, five years probation, and one year of electronically monitored home detention,

did not violate a plea agreement placing a five year cap on Crump's executed sentence. *Crump v. State*, 740 N.E.2d 564 (Ind. Ct. App. 2000). In *Page*, we concluded that the trial court's imposition of a ten year sentence with two years executed and eight years suspended was in accordance with terms of a plea agreement providing that the defendant was to receive a sentence of no more than six years executed. *Page*, 706 N.E.2d at 231, 233. Similarly, in *Shaffer v. State*, we held that a trial court's imposition of a six year sentence with two years executed and four years suspended complied with the three year cap on executed time in the defendant's plea agreement. *Shaffer v. State*, 755 N.E.2d 1193, 1194-95 (Ind. Ct. App. 1999).

We affirm the denial of the post-conviction court here because we cannot hold that the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. In contrast, Hartsell's claims fall directly within the scope of this court's previous decisions, which hold that a cap on executed time is not equivalent to an absolute cap on a sentence. By agreeing to an executed sentence cap of six years, Hartsell did not foreclose the possibility that the trial court would also sentence him to a non-executed suspended sentence.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court properly denied Hartsell's petition for post-conviction relief.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.