APPELLANT PRO SE:

WAYNE WILLIAMS
Michigan City, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

WAYNE WILLIAMS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 45A03-0701-PC-8
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION
The Honorable Natalie Bokota, Magistrate
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0407-PC-4

November 14, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Wayne Williams (Williams), appeals the post-conviction court's denial of his Petition for Post-conviction Relief.

We affirm.

ISSUES

Williams raises three issues on appeal, which we restate as:

(1) Whether Williams was denied effective assistance of trial counsel;

(2) Whether he was denied effective assistance of appellate counsel; and

(3) Whether he was denied due process due to misconduct by the prosecutor and police officers.

FACTS AND PROCEDURAL HISTORY

We previously explained the facts which supported Williams conviction in our memorandum decision *Williams v. State*, 45A04-0305-CR-242, slip op. (Ind. Ct. App. Nov. 26, 2003), as follows:

> On April 21, 2001, Williams and his wife Kimberly Williams ("Kimberly") were guests at a barbecue held at the home of Kimberly's nephew Carlos Green ("Green"). Kimberly's sister Celestine Bonita Green ("Nita") was also a guest. Nita referred to Williams as a "crack-head." [] Kimberly and Nita began to argue, moving from the kitchen to the bedroom.
>
> Williams attempted to follow the sisters and intervene in the argument, but Green temporarily convinced Williams to sit down and "be cool." [] Subsequently, the sisters returned to the guests, but Williams and Green began to argue. Green told Williams that he was "disrespecting his house" and asked Williams to leave. [] Green and Williams began to push each other.

> Green's uncle, Derrick Summers ("Summers") stepped between the men, urging an end to the hostility. However, Williams exclaimed: "Fuck this shit!" and pulled out a gun. [] Williams fired two shots and the occupants of the room scattered. Williams reached over Summers' shoulder and shot Green in the chest. Williams then ran out the door. Nita followed, asking Williams why he had shot her son. Williams fired two more shots. Nita "felt the heat" from the bullets but was not struck. [] Green died from the gunshot wound to his chest.
>
> On April 23, 2001, the State charged Williams with murdering Green and attempting battery by means of a deadly weapon against Nita. On October 1, 2001, the State alleged that Williams is a habitual offender. His jury trial commenced on March 3, 2003. At trial, Williams tendered a reckless homicide instruction, which was refused by the trial court. On March 6, 2003, the jury convicted Williams of voluntary manslaughter and criminal recklessness. Williams admitted to the habitual offender allegation.

Id. at 2-3. The issue Williams presented on appeal was "whether the trial court abused its discretion by refusing his tendered instruction on the lesser-included offense of reckless homicide." *Id*. at 2. We determined, although Williams may have fired some of his shots recklessly, there was no evidence in dispute that "the fatal shot was purposefully directed toward Green," and affirmed the trial court. *Id*. at 6.

After exhausting his remedies on direct appeal, Williams sought post-conviction relief, alleging his trial and appellate counsels ineffective, and prosecutorial and police misconduct. The post-conviction court made findings, including:

> 6. At the hearing on the petition for post-conviction relief, [Williams] provided the court with the record of proceedings and testified [on] his own behalf. He also presented testimony from his trial attorney [] and his appellate attorney []. Based on the evidence presented, the court finds as follows.
>
> 7. The State's civilian witnesses were all family and friends of [Williams], and the shooting occurred inside a family member's home. [Trial counsel] deposed all of the State's witnesses and reviewed their statements. She learned that even [Williams'] wife testified that petitioner attacked the victim.

Only [Williams] related a different view of the events. [Trial counsel] repeatedly wrote letters to [Williams], updating him on the status of the case as well as the depositions.

8. [Trial counsel] met with [Williams] in the Lake County Jail to discuss his self-defense claim and whether he should testify in his own behalf. They discussed his prior convictions and his parole status at the time the offense occurred. [Trial counsel] feared that should [Williams] decide to testify in spite of his prior convictions and in spite of the fact that he was a parolee in possession of a firearm when he was not in his own home, his testimony could jeopardize his ability to receive a self-defense instruction.

9. [Trial counsel] did not utilize any defense witnesses proposed by [Williams]. The proposed defense witnesses were neighbors from across the street and next door to the home where the shooting occurred. Those witnesses, in [trial counsel's] assessment, could add nothing to their defense in regard to what happened inside the house. Furthermore, she directed the investigator for the Office of Lake County Public Defender to talk with the neighbors. She discovered that they did not possess any information that would have been useful to the defense at trial.

10. [Trial counsel] traveled to the Indiana State Police post in Lowell, Indiana to personally interview the firearm's expert, Paul Fotia, about his report.

11. [Williams] concedes that prior to trial he met in-person with counsel, received copies of the depositions and sent her letters about the [inconsistencies] within the depositions. [Trial counsel] received [Williams'] letters and used them in her cross-examination at trial. Through her cross-examination, she confronted both civilian and law enforcement witnesses with the discrepancies and contradictory statements described by [Williams] in the amended petition for post conviction relief.

12. [Williams] also acknowledges speaking with [trial counsel] about how his prior convictions and parole status would be presented to the jury if he testified. Furthermore, he acknowledges that he had a discussion with Judge Clarence Murray, on the record and outside the presence of the jury, that it was his, [Williams'], decision not to testify.

13. Appellate Counsel [] reviewed the record of proceedings and searched for potential issues for direct appeal. He determined that only one good issue presented itself; other potential issues presented to him via correspondence

> from the petitioner, were dismissed as not being strong enough to pursue. He was aware of [*Davis*] petitions but determined the record did not support pursuing one. He saw no evidence of ineffectiveness by trial counsel. Furthermore, it is not his practice to raise such a claim on direct appeal because post-conviction review would then be foreclosed.

(Appellant's Brief pp. 54-55).[1] Thereafter, the post-conviction court concluded there was no evidence of ineffective assistance from either trial or appellate counsel. Additionally, the post-conviction court found that Williams failed to present any evidence to substantiate his claims of prosecutorial or police misconduct, deemed those claims waived, and denied Williams' petition.

Williams now appeals.[2] Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filling a post-conviction petition. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied*, *cert. denied*, 540 U.S. 830 (2003). Post-conviction hearings do not afford defendants the opportunity for a "super appeal."

[1] The page numbers marked at the bottom of the pages for the post-conviction court's Order contained in the Appellant's Brief do not represent accurately where they are found in the Appellant's Brief. Thus, we choose to identify them by assigning page numbers that represent where the pages are located if they were numbered consecutively relative to the other pages in the Appellant's Brief.

[2] We grant the State's Verified Motion to Strike Extra-Record Documents from Appellant's Appendix and strike all witness statements and police reports contained in the Appellant's Appendix.

Moffitt v. State, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. Williams has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). Because Williams is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no way within the law that a post-conviction court could have denied his post conviction relief petition. *See Stevens*, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but do accept its factual findings unless they are "clearly erroneous." *Id*. (citing Ind. Trial Rule 52(A)).

II. *Assistance of Trial Counsel*

Williams argues that his trial counsel's performance fell below an objective standard of reasonableness. Specifically, Williams contends that his counsel should have: (1) produced evidence that two guns may have been fired at the crime scene; (2) hired an expert who would testify that the victim was not killed by Williams' gun; (3) brought attention to the fact that the witnesses and victim were intoxicated; (4) called Williams to testify; (5) called neighbors to testify; and (6) tracked down the person who made a call to 911 on the night of the incident. Moreover, he claims all of the witnesses who provided testimony for the State were lying, and his counsel did not do everything that she could have to convince the jury of his version of the events which led to his conviction.

The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "The benchmark for judging

any claim of ineffectiveness must be whether the counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To succeed on his claim of ineffective assistance of counsel, Williams needed to prove by a preponderance of the evidence that his trial counsel's representation fell below an objective standard of reasonableness, and that his counsel's errors were so serious as to deprive him of a fair trial because of a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Stevens*, 770 N.E.2d 746. More succinctly stated, Williams needed to demonstrate first, that his counsel performed deficiently; and second, that prejudice resulted. *See State v. McManus*, 868 N.E.2d 778, 790 (Ind. 2007), *reh'g denied, cert denied*, 546 U.S. 831. If Williams fails to satisfy either prong, his ineffective assistance of counsel claim must fail. *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999), *reh'g denied, cert. denied*, 529 U.S. 1113 (2000).

As an initial matter, Williams' claims of ineffective assistance of counsel may be raised for the first time in a post-conviction proceeding. *See Dawson v. State*, 810 N.E.2d 1165, 1172 (Ind. Ct. App. 2004). Thus, he has not waived his ineffective assistance of trial counsel claim by not raising it on direct appeal.

Interlaced with Williams' arguments is his claim that his trial counsel failed to perform a professional investigation. However, the post-conviction court found that his counsel repeatedly corresponded with Williams, deposed all of the State's witnesses,

interviewed the State's expert, and vigorously contended the evidence produced by the State at trial. Thus, we conclude that Williams' counsel performed a professional investigation.

First, Williams contends the bullet retrieved from the victim's body did not match shell casings retrieved from the house where the victim was shot, and that his counsel was somehow deficient for not having discovered this fact and failed to present it to the jury. However, the portion of the record to which Williams cites to support this fact represents the moment during the trial when his counsel elicited a concession from the State's expert that the casings found in the house were not fired from the same gun as the bullet found in the victim's body. (Transcript pp. 514-15). Williams' counsel highlighted this point for the jury during closing arguments. Thus, we cannot conclude that Williams' trial counsel was deficient for not presenting this fact to the jury.

Likewise, Williams argues that the State's witnesses lied during the trial about being intoxicated, claiming his counsel failed to challenge these claims with factual evidence. However, every witness from the party where the victim was shot testified that people at the party had been drinking alcohol. Additionally, Williams counsel garnered testimony from the pathologist who performed the autopsy on the victim that the victim had a high level of alcohol content in his blood. Again, we cannot conclude that Williams' trial counsel was deficient for not presenting evidence to the jury which was actually presented to the jury.

Further, Williams argues his trial counsel was deficient for failing to "produce a firearm[s] expert who would have informed the jury that the victim was not killed by the Petitioner's handgun." (Appellant's Br. p. 9). However, Williams did not produce any

evidence to the post-conviction court that a firearms expert could determine the victim was not killed by Williams' handgun. Indeed, Williams' handgun has never been produced for admission as evidence, nor has Williams stated that he provided his weapon to his trial counsel so that she could have it tested to determine if the bullet retrieved from the victim's body came from his gun. Thus, we cannot conclude that Williams' counsel was deficient for failing to do something Williams has not shown was possible.

Williams also contends that his counsel was ineffective for failing to call him as a witness. As the post-conviction court found, Williams' counsel explained to him there was a strong possibility that if he testified, evidence of his prior convictions, including convictions for violence would be introduced to impeach him as a witness. Additionally, the post-conviction court found Williams knew he had a right to testify, and he chose not to do so relying on the advice of his attorney. Williams' counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. *Stevens*, 770 N.E.2d at 746-47. Moreover, we are persuaded that Williams' counsel's advice that Williams not testify was a reasonable strategic decision. *See id*. at 752 (holding advice to a defendant that he not testify because doing so would open the door to damaging evidence otherwise inadmissible is a reasonable strategic decision); *see also Ford v. State*, 523 N.E.2d 742, 747 (Ind. 1988) (holding defense council's advice that a defendant not testify to protect the defendant from exposure of his criminal record was a tactical choice that should not be second guessed). Therefore, Williams' counsel was not deficient for not calling Williams as a witness.

Finally, Williams contends that his trial counsel was deficient for not calling neighbors of the house where the crime took place to testify. However, Williams presented no evidence to the post-conviction court explaining what the neighbors would have testified to if called as witnesses, nor did he explain how their testimony could be useful. Williams identified only one neighbor, Marcia McCollum, (McCollum), in his Brief as a possible individual that his counsel could have called on his behalf. His counsel deposed McCollum, and she testified at deposition that she saw a man shooting in the street, but did not see his face, nor did she know who the man was. Additionally, McCollum explained to the police that she called 911 when she saw the man shooting in the street. "A decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess although a failure to call a useful witness can constitute a deficient performance." *Brown v. State*, 691 N.E.2d 438, 447 (Ind. 1998). Because Williams has not demonstrated how any of the neighbors could have been useful witnesses, including McCollum, we cannot conclude that his trial counsel was deficient for failing to call them as witnesses.

In sum, Williams has not demonstrated that his trial counsel's performance was deficient for any reason. Thus, we cannot conclude that his trial counsel was ineffective.

III. *Assistance of Appellate Counsel*

Williams argues that his appellate counsel was ineffective. Specifically, he contends that his appellate counsel failed to conduct a proper investigation because he relied solely upon a review of the record to determine what issues were available for argument on appeal.

The standard of review for a claim of ineffective assistance of appellate counsel is the same as that for trial counsel. *Allen v. State*, 749 N.E.2d 1158, 1166 (Ind. 2001), *reh'g denied, cert. denied*, 525 U.S. 1073. Thus, for Williams to prevail on an ineffective assistance of appellate counsel claim he must show both deficient performance and resulting prejudice. *Id*.

In *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998), *reh'g. denied, cert. denied*, 528 U.S. 861, our supreme court explained, "there is no constitutional requirement for appellate counsel to search outside the record for error." *Id*. at 1222. Therefore, we cannot say that William's appellate counsel was ineffective for failing to search outside the record to develop issues on appeal.

Moreover, Williams characterizes his appellate counsel's actions as a meaningless exercise, which failed to raise meritorious issues or numerous fundamental errors. However, we note that we did not find Williams' arguments on appeal to be without merit. Further, the supposed errors that Williams directs our attention to are merely his characterization that the State's witnesses lied and the jury believed them. However, as we frequently explain, judging the credibility of the witnesses is exclusively within the province of the jury. *See Buckner v. State*, 857 N.E.2d 1011, 1017 (Ind. Ct. App. 2006) (citing *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005)). Thus, Williams' appellate counsel was not deficient.

IV. *Prosecutorial and Police Misconduct*

Lastly, Williams argues that the prosecutor and police who worked on his case committed misconduct by not properly investigating and by lying. The purpose of the

process for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. *Taylor*, 840 N.E.2d at 330. Unlike claims for ineffective assistance of counsel, when an issue is known and available but not raised on direct appeal, it is waived for post-conviction proceedings. *Id*. When reviewing the record, we find that Williams did not raise these claims of prosecutorial and police misconduct prior to these post-conviction proceedings. To develop his arguments in support of his misconduct claims, he directs our attention to police reports and other evidence that has been available throughout his trial and subsequent appeal. Therefore, we conclude that Williams has waived any claims of misconduct by the prosecutor or police.

CONCLUSION

Based on the foregoing, we conclude Williams was provided effective assistance of trial and appellate counsel, and he has waived any claim of prosecutorial and police misconduct.

Affirmed.

BAKER, C.J., and SHARPNACK, J., concur.