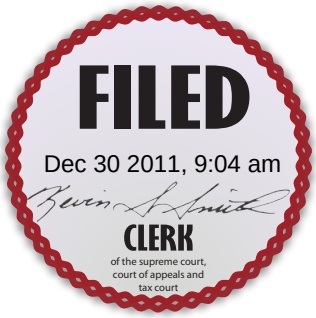

APPELLANT PRO SE:

DANIEL M. CARDINE
Bunker Hill, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana
Indianapolis, Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DANIEL CARDINE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 45A04-1105-PC-267
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Kathleen A. Sullivan, Magistrate
The Honorable William T. Enslen, Judge Pro Tem
Cause No. 45G01-1004-PC-5

December 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Petitioner-Appellant Daniel Cardine appeals from the denial of his petition for post-conviction relief.

We affirm.

ISSUES

Cardine presents three issues for our review, which we consolidate and restate as:

I. Whether the post-conviction court erred by denying his claim that his sentence violates his constitutional rights.

II. Whether the post-conviction court erred by denying his claim of ineffective assistance of trial and appellate counsel.

FACTS AND PROCEDURAL HISTORY

Cardine was convicted of both attempted murder and aggravated battery, which the trial court merged into a single conviction of attempted murder, a Class A felony. *See* Ind. Code §§ 35-41-5-1 (1977), 35-42-1-1 (2001). Cardine was sentenced in October 2003 to an enhanced sentence of thirty-seven years. He filed a direct appeal, and on May 13, 2004, this Court affirmed his conviction and sentence in a memorandum decision. *See Cardine v. State*, No. 45A04-0311-CR-563 (Ind. Ct. App. May 13, 2004).

In April 2010, Cardine filed a pro se petition for post-conviction relief, which he amended on June 15, 2010 and August 2, 2010. The post-conviction court held a hearing on the petition on September 14, 2010, after which it issued an order denying Cardine's request for post-conviction relief on April 26, 2011. This appeal ensued.

DISCUSSION AND DECISION

A post-conviction petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post–Conviction Rule 1(5); *West v. State*, 938 N.E.2d 305, 309 (Ind. Ct. App. 2010), *trans. denied*. To the extent the post-conviction court has denied relief, the petitioner appeals from a negative judgment and faces the rigorous burden of showing that the evidence, as a whole, leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Harris v. State*, 762 N.E.2d 163, 166 (Ind. Ct. App. 2002), *trans. denied*. 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. *Kistler v. State*, 936 N.E.2d 1258, 1261 (Ind. Ct. App. 2010), *trans. denied*. In this review, findings of fact are accepted unless they are clearly erroneous, and no deference is accorded to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Witt v. State*, 938 N.E.2d 1193, 1196 (Ind. Ct. App. 2010), *trans. denied*.

I. UNCONSTITUTIONAL SENTENCE

Cardine contends that his enhanced sentence is unconstitutional. Cardine was convicted of attempted murder, and the court sentenced him to the presumptive term at that time of thirty years, with an additional seven-year enhancement. *See* Ind. Code § 35-50-2-4 (1995). In so doing, the court cited as aggravating circumstances that "1. [t]he impact on the victim is beyond that normally associated with this offense and the impact was foreseeable by [Cardine]" and "2. [t]he injury to the victim, who is now a paraplegic,

is irreparable and life altering in that he can no longer use his hands and legs." Appellant's Brief p. 23. In this post-conviction appeal, Cardine argues that the facts that were used to enhance his sentence should have been presented to a jury and found beyond a reasonable doubt. In his original petition for post-conviction relief, Cardine cited *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), to support his sentencing argument. In the second amendment of his petition, Cardine replaced *Blakely* with *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) to support his claim that his sentence is unconstitutional.

The United States Supreme Court issued its decision in *Apprendi* on June 26, 2000, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Four years later, in *Blakely*, the Supreme Court defined the term "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303.

Following *Blakely*, the validity of Indiana's presumptive sentencing scheme began to be questioned, and, in 2005, the Indiana Supreme Court definitively resolved the issue and held that Indiana's presumptive sentencing scheme violated the Sixth Amendment pursuant to *Blakely* because it provided for an enhanced sentence based on facts neither found by a jury nor admitted by the defendant. *See Smylie v. State*, 823 N.E.2d 679, 683

(Ind. 2005). In analyzing Indiana's sentencing scheme in light of *Blakely*, the Indiana Supreme Court held:

> While *Blakely* certainly states that it is merely an application of "the rule we expressed in *Apprendi v. New Jersey*," 542 U.S. at ----, 124 S. Ct. at 2536, it is clear that *Blakely* went beyond *Apprendi* by defining the term "statutory maximum." As the Seventh Circuit recently said, it "alters courts' understanding of 'statutory maximum'" and therefore runs contrary to the decisions of "every federal court of appeals [that had previously] held that *Apprendi* did not apply to guideline calculations made within the statutory maximum." *Simpson v. United States*, 376 F.3d 679, 681 (7th Cir. 2004) (collecting cases). Because *Blakely* radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent, we conclude that it represents a new rule of criminal procedure.

Smylie, 823 N.E.2d at 687.

Although Cardine claims a violation of the rule set forth in *Apprendi*, his argument is actually based upon an interpretation of *Apprendi* that came four years later in *Blakely*. At the time Cardine was sentenced in October 2003, *Apprendi* had not been interpreted in a manner that would have invalidated his sentence. Indeed, the *Apprendi* decision changed nothing at the time; rather, it was *Blakely* and its interpretation of *Apprendi* that prompted a change in our state's sentencing scheme. *See Smylie*, 823 N.E.2d at 682-83. We note that the decision in Cardine's direct appeal was issued on May 13, 2004, over a month before *Blakely* was issued on June 24, 2004. In addition, the decision in Cardine's direct appeal was certified as final on June 23, 2004, one day before the *Blakely* decision was issued and almost a year before the Indiana Supreme Court decided *Smylie* on March

9, 2005.[1] Thus, the post-conviction court's denial of Cardine's claim that his sentence is unconstitutional based upon *Apprendi* is not clearly erroneous.[2]

II. ASSISTANCE OF COUNSEL

Cardine also argues that his trial counsel and appellate counsel were ineffective for failing to raise a sentencing argument in light of *Apprendi*.[3] In general, claims of ineffective assistance of counsel are reviewed under a two-part test: (1) a demonstration that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) a showing that the deficient performance resulted in prejudice. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Prejudice occurs when the defendant demonstrates that there is a reasonable probability that, if not for counsel's unprofessional errors, the result of the proceeding would have been

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[1] *Smylie* also addressed the question of *Blakely*'s applicability to pre-*Blakely* sentences and determined that *Blakely* would be applied retroactively to all cases pending on direct review at the time the *Blakely* decision was issued. 823 N.E.2d at 690-91. Additionally, the Supreme Court held that the fundamental error doctrine is not available to attempt retroactive application of *Blakely* through post-conviction relief. *Id*. at 689 n.16.

[2] In his petition, Cardine also cited *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and he included *Bostick v. State*, 773 N.E.2d 266 (Ind. 2002), in his argument at the hearing on his petition. As we have stated, *Blakely* is the case that prompted a change in Indiana's sentencing scheme, and these cases, like *Apprendi*, were prior to *Blakely*. Thus, these cases do not invalidate Cardine's sentence enhancement either.

[3] In its brief, the State claims that Cardine has waived this issue by replacing it with another issue when he amended his petition for post-conviction relief. However, we note that Cardine's first amendment to his petition added subsections (c) and (d) to paragraphs 8 and 9 to include his claims of ineffectiveness of counsel. In the second amendment to his petition, it is clear that he was amending only subsections (a) and (b) of paragraphs 8 and 9, without affecting his ineffectiveness claims contained in subsections (c) and (d). Additionally, in support of his ineffectiveness claims, he presented testimony from both his trial and appellate counsel at the hearing on his petition. Therefore, we address Cardine's argument regarding the alleged ineffectiveness of his trial and appellate counsel.

different. *Id.* A reasonable probability occurs when there is a probability sufficient to undermine confidence in the outcome. *Id.* Failure to satisfy either prong of the two-part test will cause the defendant's claim to fail. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008).

Having determined that *Apprendi* did not impact Indiana's sentencing scheme so as to invalidate Cardine's sentence, there can be no claim of ineffectiveness of counsel based upon their failure to raise the issue at trial or on appeal. Indeed, the Court expressly stated, "[A] trial lawyer or an appellate lawyer would not be ineffective for proceeding without adding a *Blakely* claim before *Blakely* was decided." *Smylie*, 823 N.E.2d at 690. Cardine was sentenced in October 2003, nearly a year before *Blakely* was decided, and his appellate brief was filed four months prior to the decision in *Blakely*. Cardine's trial and appellate counsel's failure to anticipate that *Apprendi* would lead to the holding in *Blakely*, and eventually the holding in *Smylie*, cannot be considered ineffective assistance. *See Walker v. State*, 843 N.E.2d 50, 59-60 (Ind. Ct. App. 2006) (holding that trial and appellate counsel's failure to raise sentencing argument based upon *Apprendi* did not constitute ineffective assistance of counsel when defendant was sentenced prior to the decision in *Blakely*), *trans. denied*. The post-conviction court properly denied Cardine's petition for relief.

CONCLUSION

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

Affirmed.

ROBB, C.J., and NAJAM, J., concur.