

STATEMENT OF THE CASE

Appellant-Defendant, Michael D. Allen (Allen), appeals the post-conviction court's denial of his Petition for Post-Conviction Relief.

We affirm.

ISSUE

Allen raises one issue on appeal, which we restate as: Whether Allen was entitled to post-conviction relief.

FACTS AND PROCEDURAL HISTORY

On September 4, 1996, the State filed an Information charging Allen with murder. The amended Information filed July 7, 1997, states, “[a]ffiant, upon oath, says that on or about May 16, 1995, in the County of Lake, State of Indiana, [ALLEN] did knowingly or intentionally kill JOHN YATES, contrary to [Ind. Code § 35-42-1-1], and against the peace and dignity of the State of Indiana.” (Appellant’s App. p. 17). On July 7, 9, 10, and 11, 1997, a jury trial was held; the jury found Allen guilty of murder. On August 13, 1996, Allen was sentenced to forty years, but on September 24, 1996, was re-sentenced to forty-five years. On October 28, 1998, this court in a memorandum decision affirmed Allen’s conviction and sentence.

On January 10, 2000, Allen filed a *pro se* Petition for Post-Conviction Relief. On January 6, 2005, he re-filed his Petition. On April 14, 2005, a hearing was held and on October 19, 2005, the post-conviction court denied Allen’s Petition.

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

DISCUSSION AND DECISION

Allen contends the post-conviction court improperly denied his Petition for Post-Conviction Relief. Specifically, Allen alleges the charging information filed by the State was insufficient to apprise him of the nature and cause of death. Conversely, the State maintains the charging information met the statutory and constitutional requirements since the specific means or manner of killing are not required to be in the charging information. In addition, the State notes that Allen impermissibly raised a freestanding claim for the first time on appeal.

Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Strowmatt v. State*, 779 N.E.2d 971, 975 (Ind. Ct. App. 2002). To succeed on appeal from the denial of relief, the post-conviction petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Strowmatt*, 779 N.E.2d at 975. The purpose of post-conviction relief is not to provide a substitute for a direct appeal, but to provide a means for raising issues not known or available to the defendant at the time of the original appeal. *Id.* If an issue was available on direct appeal but not litigated, it is waived. *Id.*

In the instant case, Allen fails to show that this issue was unavailable on direct appeal. As such, we find the issue waived. Even if Allen had raised his argument as an ineffective assistance of counsel argument, due to his trial counsel's failure to object to the charging information, we find the argument without merit. Claims of ineffective assistance of counsel are evaluated under the test set forth in *Strickland v. Washington*,

466 U.S. 668 (1984); *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). Thus, a claimant must demonstrate that his counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. *Grinstead*, 845 N.E.2d at 1031. 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." *Id.* (quoting *Strickland*, 466 U.S. at 694). A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome." *Grinstead*, 845 N.E.2d at 1031 (quoting *Strickland*, 466 U.S. at 694). Although the two parts of the *Strickland* test are separate inquiries, a claim may be disposed of on either prong. *See Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999), *cert. denied, reh'g denied*.

In criminal prosecutions, the charging information exists to guarantee the accused certain protections. *Jones v. State*, 766 N.E.2d 1258, 1262 (Ind. Ct. App. 2002), *reh'g denied, trans. denied*. The charging information must state with particularity the date and location of the alleged offense as well as set forth the specific name of that offense, a citation to the statutory provision alleged to have been violated, and the elements of the offense charged. I.C. § 35-34-1-2(a); *see also id.* The purposes of the information are to apprise the accused of the nature of the accusation made so that preparations for mounting a defense can be made and to provide a basis for a double jeopardy defense in the event of a subsequent prosecution. *Jones*, 766 N.E.2d at 1262. Also, "errors in the [charging information] are fatal only if they mislead the defendant or fail to give him

notice of the charge filed against him.” *Dickenson v. State*, 835 N.E.2d 542, 550 (Ind. Ct. App. 2005), *trans. denied*.

Here, as aforementioned, the State’s Information stated, “[a]ffiant, upon oath, says that on or about May 16, 1995, in the County of Lake, State of Indiana, [ALLEN] did knowingly or intentionally kill JOHN YATES, contrary to [Ind. Code § 35-42-1-1], and against the peace and dignity of the State of Indiana.” (Appellant’s App. p. 17). Thus, we conclude Allen’s counsel’s performance did not fall below an objective standard of reasonableness based on prevailing professional norms. The charging information clearly gave notice of the charge filed against Allen as set forth in I.C. § 35-34-1-2.

We also decline to find Allen’s counsel’s performance resulted in any prejudice to him. Our supreme court has held that information in the probable cause affidavit will not cure a defect in the charging information; rather it puts a defendant on notice of the charges against him. *See Clemons v. State*, 610 N.E.2d 236, 244 (Ind. 1993), *reh’g denied*. As we have previously found the charging information was not deficient, we do not find Allen was prejudiced in any way.

CONCLUSION

Based on the foregoing, we find the post-conviction court properly denied Allen’s petition for post-conviction relief.

Affirmed.

BAILEY, J., and MAY, J., concur.