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ATTORNEYS FOR APPELLANT:

**SUSAN K. CARPENTER**  
Public Defender of Indiana

**TASHA S. REED**  
Deputy Public Defender  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**ELLEN H. MEILAENDER**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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DONALD E. PETERS, )

Appellant-Petitioner, )

vs. )

STATE OF INDIANA, )

Appellee-Respondent. )

No. 48A02-0604-PC-288

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APPEAL FROM THE MADISON CIRCUIT COURT  
The Honorable Fredrick R. Spencer, Judge  
Cause No. 48C01-8903-FC-29

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**November 6, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-petitioner Donald E. Peters appeals the denial of his petition for post-conviction relief. Specifically, Peters argues that the post-conviction court erred in finding that he failed to establish that (1) the trial court erred in extending his probationary period by fifteen months beyond his original five-year suspended sentence, (2) the trial court erred in revoking his probation based upon an offense that he committed after his probationary period had ended, and (3) he received ineffective assistance of trial counsel. Finding no error, we affirm the judgment of the post-conviction court.

### FACTS

On May 17, 1989, Peters pleaded guilty to class C felony burglary. On July 17, 1989, pursuant to the terms of Peters's plea agreement, the trial court imposed a five-year sentence that was entirely suspended to probation. Additionally, Peters was ordered to pay restitution to the victim. Originally, therefore, Peters's probation was scheduled to end on July 17, 1994.

On January 17, 1992, the State filed a first petition to revoke probation, alleging that Peters had failed to report, to pay his fees and restitution, and to report a change of address. On February 24, 1992, Peters admitted the violations and was continued on probation with orders to complete 120 hours of community service, pay a minimum monthly amount toward restitution, and pay his probation fees. The lapse in time between the State's petition and the hearing on February 24 was 38 days, extending the term of probation until August 24, 1994.

At Peters's next probation hearing, held on February 8, 1993, Peters's probationary period was extended until February 7, 1995.<sup>1</sup>

On May 20, 1994, the State filed a second petition to revoke probation, alleging that Peters had failed to pay restitution and to appear for a scheduled probation review hearing. The trial court never ruled on this petition; instead, it held a number of probation review hearings to ascertain the progress of the restitution payments and held the petition in abeyance rather than revoking Peters's probation. On February 8, 1995, the trial court held a probation review hearing at which Peters agreed to an extension of his probationary period until September 27, 1995, so that he could avoid revocation of his probation based on his failure to make the required restitution payments. Appellant's App. p. 3; PCR Tr. p. 9.

On September 18, 1995, the State filed a third petition to revoke probation, alleging that Peters had committed new crimes of murder and armed robbery on August 1, 1995. On October 11, 1995, the trial court found that Peters had violated the terms of his probation and ordered him to serve the previously-suspended five-year sentence.<sup>2</sup> The trial court advised Peters of his right to appeal the revocation of his probation, appellant's app. p. 4, but Peters did not do so.

On April 9, 2002, Peters filed a petition for post-conviction relief, seeking review of the October 11, 1995, revocation of his probation. On September 19, 2005, Peters filed an

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<sup>1</sup> The record does not reveal the reason for this extension—the Chronological Case Summary merely states “Defendant's probation extended to 2/7/95,” appellant's app. p. 3, and this extension was not addressed at the post-conviction hearing.

<sup>2</sup> At the October 11 hearing, Peters admitted to violating the terms of his probation by committing the crime of armed robbery. Appellant's App. p. 76. The record does not reveal whether the trial court revoked

amended petition, alleging that the trial court was without authority to extend the period of his probation, that his probationary term had expired before he committed the new offenses in August 1995, and that he received ineffective assistance of trial counsel during the probation revocation hearing held in October 1995. At the post-conviction hearing held on November 14, 1995, Peters presented testimony from his probation revocation counsel but failed to introduce into evidence any of the transcripts from any prior proceedings in the case, including the October 1995 probation revocation hearing. On February 7, 2006, the post-conviction court denied Peters's petition. Peters now appeals.

On February 13, 2006, Peters filed a motion to reopen the evidence in the post-conviction court. In particular, he sought to submit the trial court transcripts that he had failed to submit prior to the post-conviction hearing. The post-conviction court denied Peters's motion, and Peters does not challenge that denial on appeal. Peters has, however, included the originally-omitted transcripts in his appendix on appeal, and the State has filed a motion to strike that portion—pages 134-182—of Peters's appendix.

## DISCUSSION AND DECISION

### I. The Appendix

First, we will briefly consider whether Peters properly included the trial court transcripts in his appendix herein. Peters failed to submit the transcripts as evidence in his post-conviction hearing. Then, the post-conviction court denied his motion to reopen the

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Peters's probation based solely upon the armed robbery or based on a combination of the robbery and the violation alleged in the State's May 20, 1994, petition.

evidence and refused to give him an opportunity to include it as part of the record below. Notwithstanding that denial, and notwithstanding the fact that he does not challenge that denial on appeal, Peters baldly included the transcripts in his appendix. An appellant is not entitled to include materials in his appendix that were not part of the lower court proceeding. Ind. Appellate Rule 50(B)(1).

In his response to the State's motion to strike, Peters raises, for the first time, a substantive argument challenging the post-conviction court's denial of his motion to reopen the evidence. Inasmuch as he did not include that argument in his opening brief and the State has had no opportunity to respond thereto, we will not consider whether the post-conviction court properly denied his motion to reopen the evidence. Similarly, we deny Peters's request to amend his brief to include this issue, inasmuch as we are skeptical about the claim that his counsel "did not anticipate the current controversy over the four transcripts" until the State filed its motion to strike. Resp. to Mtn. to Strike p. 4. Given that the post-conviction court explicitly denied Peters's request to enter these transcripts into evidence—the only way in which they could have become part of the record—he cannot plausibly claim to have been surprised by the State's objection to the inclusion of those same transcripts in his appendix.

We also decline Peters's request to stay this appeal and remand to the post-conviction court with instructions to admit the transcripts. See Bellamy v. State, 765 N.E.2d 520, 520-22 (Ind. 2002) (holding that this court erred in granting an unsuccessful post-conviction petitioner's request to dismiss his appeal and remand back to the post-conviction court to allow him to present additional evidence in support of his claims). Contemporaneously with

this opinion, therefore, we are issuing an order granting the State’s motion to strike pages 134-182 of Peter’s appendix, denying Peters’s motions to remand or for leave to amend his brief, and granting the State’s motion for leave to file a reply.

## II. Extension of Probation

Peters argues that the post-conviction court erred in finding that he failed to establish that the trial court improperly extended his period of probation by fifteen months beyond his originally-suspended five-year sentence and improperly revoked his probation based upon a violation that occurred after his probationary period had allegedly ended.

As we consider these arguments, we observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

Here, Peters neglected to raise these arguments in a direct appeal to either the extension or revocation of his probation. Issues that were known and available, but not

raised, on direct appeal are waived for the purposes of a post-conviction review. Bunch v. State, 778 N.E.2d 1285, 1289 (Ind. 2002). Peters, therefore, has waived these arguments because of his failure to raise them on direct appeal. Moreover, he may not claim that any alleged error committed by the trial court was fundamental, inasmuch as

[t]he fundamental error exception to the contemporaneous objection rule applies only to direct appeals. In post-conviction proceedings, 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).

Although Peters was explicitly advised at the October 1995 revocation hearing of his right to appeal that ruling, he neither pursued a timely direct appeal of that ruling nor sought to bring a belated direct appeal. Under these circumstances, he has waived the allegations of error regarding the extension and revocation of his probation.

### III. Effective Assistance of Counsel

Finally, Peters contends that the post-conviction court erred in finding that he failed to establish that he received ineffective assistance of trial counsel at the October 1995 probation revocation hearing. Specifically, he argues that his attorney should have objected to the revocation because Peters was allegedly no longer on probation at the time of the hearing. He bases that conclusion on the fact that, when the period of time during which his probation tolled is taken into account, his probation had allegedly expired on February 7, 1995. But on February 8, 1995—one day after the end of his probationary term, according to Peters—the trial court extended his probation until September 27, 1995. Because that final extension of probation was problematic, according to Peters, he was not on probation at the time he

committed the new crimes in August 1995. Thus, there were no proper grounds for the probation revocation, and Peters contends that his attorney should have lodged an objection to that effect at the October 1995 revocation hearing.

As we consider Peters's argument, we observe that when evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 446 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. To establish ineffective assistance for counsel's failure to object, a petitioner must establish that the trial court would have sustained the objection had one been made and that he was prejudiced by the failure to object. Jones v. State, 847 N.E.2d 190, 197-98 (Ind. Ct. App. 2006), trans. denied.

Initially, we emphasize that at the February 8, 1995, hearing, Peters agreed to the extension of his probation until September 27, 1995. Thus, even if his attorney had objected at the revocation hearing based upon the fact that Peters's probation should have ended on



February 7, 1995, the trial court would have denied the objection based on Peters's invited error. See Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005) (“[a] party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct”) (quoting Witte v. Mundy, 820 N.E.2d 128, 133 (Ind. 2005)).<sup>3</sup>

Moreover, we note that on May 20, 1994, the State filed a petition to revoke probation and a subpoena. Pursuant to Indiana Code section 35-38-2-3(c), “[t]he issuance of a summons or warrant tolls the period of probation until the final determination of the charge.” When the trial court held the February 8, 1995, hearing, the State's May 20, 1994, petition was still pending. Consequently, Peters's period of probation had been tolled and had not expired as of February 8, 1995.<sup>4</sup>

We must conclude, therefore, that even if Peters's attorney had raised an objection at the probation revocation hearing based upon the probation extension stemming from the February 8, 1995, hearing, the trial court would have denied the objection based either on Peters's invited error or on the fact that the period of probation had tolled pursuant to the State's petition. Thus, Peters suffered no prejudice as a result of his attorney's failure to

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<sup>3</sup> The invited error analysis also applies to the extent that Peters contends that the trial court was without statutory authority to extend his probation. Inasmuch as he agreed to the extension, the trial court would not have sustained an objection on that basis at the probation revocation hearing.

<sup>4</sup> Peters argues, based on Slinkard v. State, 625 N.E.2d 1282 (Ind. Ct. App. 1993), that because the probation violation alleged by the State in its September 18, 1995, petition did not occur within the original term of probation the trial court was without authority to revoke probation. But the record does not reveal whether the trial court revoked Peters's probation based upon that violation or the violation alleged in the still-pending May 20, 1994, petition, which occurred within his original term of probation. It is Peters's burden to establish grounds for relief by a preponderance of the evidence, and we find that he did not meet that burden because he failed to include sufficient materials in the record below.

object and the post-conviction court properly denied his petition for post-conviction relief based upon ineffective assistance of counsel.

The judgment of the post-conviction court is affirmed.

VAIDIK, J., and CRONE, J., concur.