APPELLANT PRO SE:

CHARLES PHIFER
Greencastle, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

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Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

CHARLES PHIFER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0705-PC-368
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick Spencer, Judge
Cause No.48C01-9603-CF-57

December 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Charles Phifer was convicted of conspiracy to commit murder, a Class A felony, and sentenced to fifty years. He subsequently sought post-conviction relief. He now appeals the post-conviction court's denial of his petition, raising several issues that will be discussed in more detail below. Concluding that the post-conviction court did not err in denying the petition, we affirm.

Facts and Procedural History

The facts, as detailed by this court in Phifer's direct appeal, are as follows:

> Kim Phifer (Kim) and Charles Phifer (Phifer) were married in 1980. Their relationship deteriorated and on several occasions Phifer held a gun to Kim's head and threatened to kill her. They separated in 1993 and Kim filed for divorce in September, 1994.
>
> In June, 1995, Phifer offered to pay money to Jayson Reed and Danny Reynolds if they would kill Kim. In October, 1995, according to a plan devised among Reed, Reynolds, and Phifer, Reynolds attempted to shoot Kim with a shotgun while she was driving to work one morning. Kim was uninjured. Several days later, Phifer struck upon a different plan. In Phifer's kitchen, the three men constructed a pipe bomb, which Reed would attach to Kim's car. In the early morning hours of October 16, 1995, Phifer and Reynolds dropped Reed off near Kim's house. Reed was armed with the bomb and a shotgun. The plan called for Reed to shoot Kim with the shotgun if the bomb did not detonate. Reed planted the bomb underneath Kim's car, but disarmed it so that it would not detonate. Reed remained secluded nearby for approximately two hours. He then hid the shotgun under a bridge and walked to a restaurant and called the other two. Reynolds picked Reed up from the restaurant, drove to Kim's house to see if the bomb had exploded, and discovered that it had not. Later, after learning that the bomb had not exploded, the three men concocted an alibi.

Phifer v. State, No. 48A04-9703-CR-114, slip op. at 2 (Ind. Ct. App., July 27, 1998). On direct appeal, Phifer challenged only the trial court's finding and balancing of the aggravating and mitigating circumstances in sentencing him. We affirmed Phifer's fifty-year

sentence. See id. at 7-8.

On March 16, 2006, Phifer filed a pro se petition for post-conviction relief, which he amended on May 15, 2006. Phifer also filed a motion for change of venue from the judge for alleged bias on the part of the judge hearing the post-conviction petition. At the beginning of the post-conviction hearing, the post-conviction court heard evidence on Phifer's motion for change of judge and denied the motion. Phifer then presented his post-conviction case, alleging as grounds for relief: 1) lack of probable cause; 2) exclusion of alibi evidence; 3) ineffective assistance by trial counsel; 4) ineffective assistance by appellate counsel; and 5) newly discovered evidence.

The post-conviction court issued the following findings of fact and conclusions of law denying Phifer's petition:

> FINDINGS OF FACT
>
> 1. Petitioner, Charles Phifer, was charged with Conspiracy to Commit Murder, a Class A felony, on March 8, 1996.
>
> 2. That same day a probable cause hearing was held where the Court heard oral testimony regarding probable cause.
>
> 3. A written probable cause was submitted on April 24, 1996, which had been prepared by Detective Bob Blount of the Madison County Police Department.
>
> 4. At trial, Detective Blount was vigorously cross-examined by the defense attorney, at trial, regarding the submission of a written probable cause affidavit after the case's inception.
>
> 5. The trial ended in a guilty verdict on the 12th of November, 1996, the Defendant being found guilty as charged.
>
> 6. On the 4th of December, 1996, the trial court sentenced Petitioner to a fifty (50) year term of incarceration, all executed.
>
> 7. An appeal to the Court of Appeals of Indiana was perfected by William D. McCarty, Esq.
>
> 8. The Court of Appeals affirmed the trial court in all respects on July 27, 1998, a copy of which was certified to the trial court on September 9, 1998.
>
> 9. On March 16, 2006, the Petitioner filed a Petition for Post-Conviction Relief *pro se*, along with a motion for Change of Venue from the

Judge (later denied).

10. The Petition raises issues regarding probable cause, a faulty arrest warrant, and trial counsel's failure to object.

11. The Petition also raises issues regarding trial counsel's failure to raise an alibi defense, and ostensibly for failure to investigate whether the Petitioner was in fact guilty of the conspiracy.

12. An Amended Petition filed on May 15, 2006, raised an issue of ineffectiveness of appellate counsel.

13. The [Petitioner] gave rambling and incoherent testimony in support of the Petition at a hearing held on the 26th day of January, 2007.

14. The Petitioner did not present the testimony of trial counsel Erskine Cherry nor did he present he testimony of William D. McCarty, either orally or by affidavit.

15. The Petitioner did not tender his Brief of Appellant, nor did he tender the Brief of Appellee.

16. The chief complaint the Petitioner had was that probable cause was determined orally at the outset of the case, and that was a fundamental error.

17. An oral probable cause hearing was commonplace at the time.

CONCLUSIONS OF LAW

1. The law is with the State of Indiana and against the Petitioner.

2. No issue raised [by Petitioner] rises to the level of fundamental error.

* * *

4. The Petitioner failed to call either trial or appellate counsel as a witness, and as a result could not establish why either may or may not have made an error.

5. There is no prejudice to the Petitioner as there was substantial evidence, including eyewitness testimony of co-defendants establishing his guilt, and the jury found him guilty accordingly.

6. Accordingly, the Petitioner's Petition for Post-Conviction relief is DENIED.

Appendix at Tab "A." Phifer now appeals.

Discussion and Decision[1]

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing the grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). 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 of the post-conviction court unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. 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. Id. In this review, findings of fact are accepted unless they are clearly erroneous and no deference is accorded to

[1] Since filing his brief with this court, Phifer has filed several motions. Phifer's Brief of the Appellant was filed on July 20, 2007. This court gave the State thirty days from an order dated August 10, 2007, in which to file its brief. On August 22, 2007, and again on September 10, 2007, Phifer filed a motion alleging that the State had failed to timely file its brief and requesting that he be granted all relief sought on appeal. His motions were denied by this court in an order dated September 10, 2007, because the deadline had not yet elapsed. The State in fact had filed its brief on September 7, 2007. Phifer subsequently filed on September 12, 2007, a motion for summary judgment; on September 26, 2007, two separate summary judgment briefs; on October 3, 2007, a notice of the summary judgment requesting a ruling; on October 13, 2007, a request that this court grant his summary judgment because the State had failed to reply; and on November 2, 2007, a request for a ruling on his summary judgment. All of these motions are premised on allegations that the State's brief was not served by the deadline, was filed under an "illegal" cause number, and failed to respond to certain arguments in his brief. The State's brief was clearly filed by the deadline. To the extent Phifer did not receive it by the deadline, there is no error, as the Appellate Rules require only that a brief be filed by the deadline. See Ind. Appellate Rule 45. The type-written cause number on the State's brief does contain an error, but it was corrected by hand. The lack of response to a motion filed in this court does not affect our discretion in ruling on the motion. See App. R. 34(C). Finally, if in fact the State has failed to respond to any issues raised by Phifer's brief, he may be entitled to the relief he requested, but he must show prima facie error. See App. R. 45(D). We will address the merits of his issues and State's response or lack thereof in this opinion. Phifer's motions are therefore denied.

conclusions of law. Id.

We first address the deficiencies in Phifer's brief. The sentence fragments, run-on sentences, general disorganization, and lack of developed argument[2] have made it exceedingly difficult to decide this appeal. As a general rule, pro se litigants are held to the same standard as attorneys admitted to the practice of law with regard to adhering to our rules. Smith v. State, 822 N.E.2d 193, 202 (Ind. Ct. App. 2005), trans. denied. Our rules require that each issue be concisely and particularly described, the argument be succinctly, clearly, and accurately summarized, the standard of review for each issue be concisely stated, and the argument be supported by cogent reasoning. See App. R. 46. Phifer's brief fails in all of these particulars. Nonetheless, given our preference for deciding cases on their merits, see Downs v. State, 827 N.E.2d 646, 651 (Ind. Ct. App. 2006), trans. denied, we have tried to discern the salient arguments and address them herein.[3]

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[2] As an example, we reproduce in its entirety one of Phifer's arguments:

> Affiant Det. Blount amended charging information on 3-12-96 see Appendix "J" listing Jason Reed as a co-defendant. Which is a variance from the 4-22-96 Probable Cause Affidavit see Tr. p. 92, 93 listing Jason Reed's 3-5-96 statement as a witness. Appellant/Petitioner cites. Where there is a variance the affidavit and the proof, it must have been of such a nature to have mislead the defendant in the preparation of his defense, or have been of such a degree as to have been likely to have place him in double jeopardy in order to be considered prejudicial. Moore v. State, 1973, 293 N.E.2d 28, 260 Ind. 154; Payne v. State, 1970, 257 N.E.2d 818, 254 Ind. 100.

Brief of Appellant at 19. We note also that Phifer filed his petition for post-conviction relief pro se, and has been acting pro se throughout these proceedings, so it has been difficult to discern the arguments he made below, as well.

[3] In his Statement of the Issues, Phifer includes the following:

> 2. Whether there was Double Jeopardy.
> * * *
> 5. Whether Petitioner filing memorandum decision as Petitioners Exhibit "A" meets both Appellant, Appellee Briefs.
> 6. Whether trial and appellant counsel subpoena.

II. Change of Judge

Phifer claimed that the post-conviction judge, who also served as the trial judge in his case, was biased against him and sought a change of judge. In support of his motion, Phifer presented testimony from his mother, Maude Phifer, that during the trial, she heard the judge approach the victim and say, "We got him. You're past. We got him." Transcript at 12. The post-conviction court denied that such an exchange occurred and denied Phifer's motion. Phifer contends that the post-conviction court erred in denying his motion.

Indiana Post-Conviction Rule 1(4)(b) states:

> Within ten (10) days of filing a petition for post-conviction relief under this rule, the petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner. The petitioner's affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists . . . . A change of judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice.

When a petitioner requests a change of judge, such change is neither "automatic" nor "discretionary." Bahm v. State, 789 N.E.2d 50, 54 (Ind. Ct. App. 2003), trans. denied. Rather, it requires a legal determination by the post-conviction court. Id. We review the court's determination under the clearly erroneous standard. Id.

We presume a judge is not prejudiced against a party. Id. To require a change of judge, a judge's bias must be personal. Id. Personal bias "stems from an extrajudicial source

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Brief of Appellant at 3. As Phifer was tried once and convicted of only one charge, there is no double jeopardy issue here. See Laux v. State, 821 N.E.2d 816, 819 (Ind. 2005) (stating the double jeopardy clause "yields three protections: (1) protection from reprosecution for the same offense after an acquittal; (2) protection from reprosecution for the same offense after conviction; and (3) protection from multiple punishments for the same offense."). Phifer has included no corresponding argument for his issues 5 and 6 and we therefore do not address those issues.

meaning a source separate from the evidence and argument presented at the proceedings." Lambert v. State, 743 N.E.2d 719, 728 (Ind. 2001), cert. denied, 534 U.S. 1136 (2002). Adverse rulings on judicial matters do not indicate a personal bias that calls the trial court's impartiality into question. Bahm, 789 N.E.2d at 54.

Even if we assume that the events to which Mrs. Phifer testified occurred, we are unable to say that the post-conviction court erred in denying Phifer's change of judge motion. Without further context for the judge's comments, we have no way of knowing that the judge and the victim were even talking about Phifer. We are not left with a definite and firm conviction that a mistake has been made, and Phifer has therefore failed to demonstrate clear error.

III. Lack of Probable Cause

The crux of Phifer's argument with regard to probable cause seems to be that an oral probable cause hearing was held on March 8, 1996, he was arrested and charged in this case, and then a written probable cause affidavit was subsequently filed on April 24, 1996. He claims the filing of the "new original" probable cause affidavit rendered the March 8, 1996 finding of probable cause "inferior" and required a new probable cause hearing. Tr. at 65. Without such a hearing, Phifer claims the trial court had no jurisdiction to hold and try him. This was an issue known and available at the time of Phifer's direct appeal, and as such, is waived as a free-standing claim of trial court error. See Lambert, 743 N.E.2d at 731 n.10 ("[F]reestanding claims of trial court error . . . must be raised on direct appeal and are not available in collateral proceedings.").

Phifer also claims that this was fundamental error. However, the fundamental error exception applies only in direct appeals. Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). "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." Id. Consequently, we will address Phifer's claim regarding probable cause only as the claim relates to his ineffective assistance of counsel arguments.

IV. Ineffective Assistance of Counsel

To establish a claim for ineffective assistance of counsel, a defendant must satisfy two prongs: first, the defendant must demonstrate that counsel performed deficiently; second, the defendant must demonstrate that prejudice resulted. McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). These two prongs present independent inquiries, either of which may be sufficient for disposing of a claim. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999), cert. denied, 529 U.S. 1113 (2000). "When considering the first prong of the Strickland test, deficient performance, the question is not whether the attorney could – or even should – have done something more. Rather, the question is whether the attorney's performance amounted to a reasonably competent defense or did not." Reed v. State, 866 N.E.2d 767, 769 (Ind. 2007). 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. Shanabarger v. State, 846 N.E.2d 702, 707 (Ind. Ct. App. 2006), trans. denied. A

claim of ineffective assistance must overcome the strongest presumption of adequate assistance. Long v. State, 867 N.E.2d 606, 615 (Ind. Ct. App. 2007).

Phifer claims that his trial counsel was ineffective for failing to raise at trial the alleged deficiencies in probable cause. To the extent it was error to file a second probable cause affidavit, it was purely a procedural error. Phifer himself stated at the post-conviction hearing that the detective who prepared the second affidavit testified at trial that it did not contain any new or additional information from that given at the original probable cause hearing. See Tr. at 63. Phifer does not allege that there was no probable cause to support the original probable cause determination.[4] There was no apparent substantive deficiency in the probable cause determination, and counsel is not ineffective for failing to raise a non-issue. See Lockert v. State, 627 N.E.2d 1350, 1354 (Ind. Ct. App. 1994) ("Attorneys are not incompetent for failing to raise an issue which has no merit."). Moreover, Phifer's trial counsel questioned the detective who prepared the probable cause affidavit and pursued any possible discrepancies during Phifer's trial. Phifer has failed to show his trial counsel's representation was deficient.

Phifer also claims his trial counsel was ineffective for failing to present certain evidence in support of his alibi defense. Specifically, Phifer contends trial counsel kept from the jury statements made to police by his co-defendants Reed and Reynolds. Phifer highlights a few lines from each statement that, considered out of context, could be construed as favorable to him. However, the statements in their entireties implicate him in the crime.

See Petitioner's Exhibit C at 9 (Reed stating that Phifer used a grinder to cut off the shotgun used in the attempt on Kim's life); id. at 16 (Reed stating that Phifer would not shoot the gun himself because he wanted to have an alibi); id. at 22 (Reed stating that Phifer assembled the bomb); Petitioner's Exhibit D at 10 (Reynolds stating that Phifer offered to buy Reed a house if Reed killed Kim); id. at 24 (Reynolds stating that Phifer threw the sawed-off shotgun into the water at a rest stop); id. at 24-29 (Reynolds describing Phifer buying the materials for and assembling the bomb). Counsel's strategic and tactical decisions are not subject to attack as ineffective assistance of counsel, unless the strategy is so deficient that it falls outside the objective standard of reasonableness. Wright v. State, 836 N.E.2d 283, 295 (Ind. Ct. App. 2005), trans. denied. Trial counsel's decision not to focus on these statements was a reasonable tactical decision, as the statements were at least as damaging to Phifer as they were helpful. Again, Phifer has failed to show that his trial counsel's performance was deficient.

Phifer next contends that his appellate counsel was ineffective for failing to raise the free-standing claim of error regarding probable cause. We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006). Prejudice will be found when there is a reasonable probability that the outcome of the direct appeal would have been different. Thompson v. State, 793 N.E.2d 1046, 1051-52 (Ind. Ct. App. 2003). Phifer claims his appellate counsel was ineffective for failing to raise the probable cause

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[4] Phifer cites Indiana Code section 35-34-1-5 in his brief with respect to the probable cause issue.

issue on direct appeal. As noted above, Phifer has not demonstrated any error in the probable cause determination, let alone reversible error. Having failed to show a reasonable probability that the outcome of his appeal would have been different if appellate counsel had raised this issue, we conclude that Phifer did not receive ineffective assistance of appellate counsel.

Phifer also claims his appellate counsel was ineffective for failing to raise the deficient performance of his trial counsel as an issue on appeal. We have concluded that there was no deficient performance on the part of trial counsel, and therefore, appellate counsel cannot be said to have rendered deficient performance for failing to raise that issue on direct appeal.[5] See Shoulders v. State, 578 N.E.2d 693, 698 (Ind. Ct. App. 1991) (holding that because there was no merit to defendant's claims of ineffective assistance of trial counsel, appellate counsel was not ineffective for failing to raise the issue on appeal), trans. denied.

V. Newly Discovered Evidence

Phifer also claims that newly-discovered evidence entitles him to relief. In order for newly-discovered evidence to merit relief, the claimant must establish each of the following prongs: (1) that the evidence was not available at trial; (2) that it is material and relevant; (3) that it is not cumulative; (4) that it is not merely impeaching; (5) that it is not privileged or incompetent; (6) that due diligence was used to discover it in time for trial; (7) that the

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That section concerns the amendment of an indictment or information.

[5] Moreover, we note that had Phifer's appellate counsel raised any claim of ineffective assistance of trial counsel on direct appeal, he would have been foreclosed from raising ineffective assistance as a claim on post-conviction. See Woods v. State, 701 N.E.2d 1208, 1220 (Ind. 1998) (holding that "a Sixth Amendment

evidence is worthy of credit; (8) that it can be produced upon a retrial of the case; and (9) that it will probably produce a different result. Stephenson v. State, 864 N.E.2d 1022, 1048 (Ind. 2007). "A sufficient probability of a different result upon retrial is present where the omitted evidence would create a reasonable doubt that did not otherwise exist." Rhymer v. State, 627 N.E.2d 822, 824 (Ind. Ct. App. 1994). "The party requesting the new trial has the burden of demonstrating the existence of all nine factors." Allen v. State, 791 N.E.2d 748, 754 (Ind. Ct. App. 2003), trans. denied.

The "newly discovered evidence" to which Phifer refers are two letters from the Madison County Prosecutor's Office to Phifer. The first, dated May 12, 2003, informs Phifer that Kim and Randy Phifer (Phifer and Kim's son) had filed a complaint against Phifer for allegedly harassing Randy by mail and states that formal charges would not be filed at that time. Petitioner's Exhibit E. The second letter, dated April 8, 2004, clarifies that the complaint referenced in the first letter was made by Kim alone. Petitioner's Exhibit F. It is unclear why Phifer believes these letters constitute newly-discovered evidence pertinent to his case for conspiracy to commit murder. The evidence is not material, it is not relevant, and there is no probability that it would produce a different result on retrial. Phifer has thus failed to prove all nine of the required factors for newly-discovered evidence to warrant a new trial.[6]

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claim of ineffective assistance of trial counsel, if not raised on direct appeal, may be presented in postconviction proceedings") (emphasis added), cert. denied, 528 U.S. 861 (1999).

[6] To the extent we have not addressed any issue raised in Phifer's brief, the issue is waived for failure to support it with cogent argument. See Davis v. State, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) ("A party waives an issue where the party fails to develop a cogent argument . . . ."), trans. denied.

Conclusion

Phifer has failed to demonstrate that the evidence at his post-conviction hearing unerringly and unmistakably leads only to a conclusion opposite that reached by the post-conviction court. Accordingly, the post-conviction court's denial of his petition is affirmed.

Affirmed.

KIRSCH, J., and BARNES, J., concur.