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**IN THE
COURT OF APPEALS OF INDIANA**

OTIS CHANDLER,)
)
 Appellant-Defendant,)
)
 vs.) No. 71A05-0601-PC-36
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Freese, Judge
Cause No. 71D03-0501-PC-3

NOVEMBER 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Petitioner Otis Chandler (“Chandler”) is appealing from the denial of his petition for post-conviction relief.

We affirm.

ISSUES

Chandler states the issues as:

1. “Whether the Post Conviction Court erred in determining Chandler was provided with effective assistance of counsel at trial, where counsel failed to present exculpatory evidence to the jury.”
2. “Whether the Post Conviction Court erred in determining appellant Chandler was provided with effective assistance of counsel when appellate counsel failed to preserve for review on appeal exculpatory evidence, violated appellant’s right to a fair trial in violation of the guarantees of Article 1, 12, and 23 of the Constitution of the State of Indiana, and of the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.”

FACTS

Chandler was convicted by a jury of robbery on May 19, 1982. He took a direct appeal of his conviction, which is reported at *Chandler v. State*, 451 N.E.2d 319 (Ind. 1983). The Indiana Supreme Court affirmed his conviction, and held that the evidence was sufficient to support the conviction; the issue of the propriety of identification procedures was waived for purposes of appellate review; and *sua sponte* ordered Chandler’s thirty-year robbery sentence to run consecutively to his prior fifty-year sentence for murder.

Chandler filed a petition for post-conviction relief, and a hearing was held thereon. The petition was denied on January 10, 2006. The post-conviction court held, among

other things, that Chandler's trial counsel was not ineffective for choosing not to introduce the results of a hair analysis, because it would have been counterproductive to his defense strategy regarding Chandler's identification.

Additional facts will be added as needed.

DISCUSSION AND DECISION

Standard of Review

Post-conviction proceedings are civil proceedings, and a defendant must establish his claims by a preponderance of the evidence. *Smith v. State*, 822 N.E.2d 193, 198 (Ind. Ct. App. 2005). Because the defendant is now appealing from a negative judgment, to the extent his appeal turns on factual issues, he must convince this court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the PCR court. *Id.* In other words, the defendant must convince this court that there is *no* way within the law that the court below could have reached the decision it did. *Id.* (emphasis in original).

Chandler's petition for post-conviction relief contains three allegations of error. The first, based upon Ind. Post-Conviction Rule 1(1)(a)(4), alleges that evidence of material facts, not previously presented and heard, exists that requires vacation of the conviction or sentence, in the interest of justice. The other two allegations of error relate to ineffective assistance of trial and appellate counsel, and cite violations of various provisions of the state and federal constitutions.

Major portions of the latter two allegations of error are considered waived for several reasons. First, because of the generalized nature of Chandler's argument about

alleged constitutional violations, coupled with the lack of cogent argument to support his allegations, those allegations of error cannot be evaluated, and must be considered waived. Ind. Appellate Rule 46(A)(8)(a). We require pinpoint citations of authorities. *Barth v. Barth*, 693 N.E.2d 954, 956 (Ind. Ct. App. 1998). Additionally, the failure to cite authority for a given legal proposition waives that argument for review. *Camm v. State*, 812 N.E.2d 1127, 1136 (Ind. Ct. App. 2004). Also, a party cannot raise new grounds of error on appeal. *Wallace v. State*, 836 N.E.2d 985, 997 (Ind. Ct. App. 2005).

Issue 1

We review claims of ineffective assistance of counsel under the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). *Smith*, 822 N.E.2d at 202. First, the defendant must show that counsel's performance was deficient. *Id.* 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 the defendant by the Sixth Amendment. *Id.* Second, the defendant must show that the deficient performance prejudiced him. *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.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

In addition, counsel's performance is presumed effective; therefore, a defendant must offer strong and convincing evidence to overcome this presumption. *Id.* Consequently, isolated poor strategy or bad tactics do not necessarily amount to

ineffective assistance of counsel unless, taken as a whole, the defense was inadequate. *Id.* Furthermore, we will not speculate about the choice of a trial strategy, which, at the time and under the circumstances, seems best. *Id.*

The alleged exculpatory evidence concerns hair samples taken from the cap and a stocking, which apparently was used as a mask, and was worn by the robber. A serologist examined those hairs and determined that they showed characteristics typical of Negroid hair. The police obtained permission to obtain hair samples from Chandler and did so. After further analysis the serologist found that the hair obtained from the cap and stocking worn by the robber was dissimilar to the hair taken from Chandler. Neither Chandler nor the State introduced the serologist's report at trial.

Chandler argues that a DNA test made of his hair and the hair found on the cap and stocking of the robber should have been conducted and introduced at his robbery trial. In making his ruling on this issue, the post-conviction court judge first observed that the hair samples taken from the robber's hat and stocking are no longer available, and that there was no showing that such a loss was intentional or negligent. The argument about the introduction of a DNA test at this time is moot because of the lack of the hair sample from the robber's cap and stocking. The post-conviction court further observed that DNA testing in May, 1982, the time of the trial, was not a component of the forensic scientific testing arsenal.

The post-conviction court then stated:¹

¹ Chandler says the post-conviction court did not comply with P-C. R.1(6) which requires the findings of fact and conclusions of law. The post-conviction court's judgment on the post-conviction hearing is captioned as the

“Mr. Keckley (Chandler’s trial attorney) testified at the evidentiary hearing that since [the victim of the robbery] had made a strong and immediate identification of the Defendant’s face from the photospread he saw in the hospital three days after being shot, and since he described the shooter’s hair, skin, and facial features as something that was burned into his memory and that he would remember the rest of his life, Mr. Keckley felt that it was counter-productive tactically to push the theory that the shooter was wearing a stocking mask and cap when confronting the victim. Instead, Mr. Keckley’s theory was to suggest that [the victim] had seen the Defendant’s face on televised news accounts of his escape from the St. Joseph County Courthouse the same day on which [the victim] was later shot, and may have seen that televised face repeatedly in the news programs during the next two days, before seeing the photospread. [The victim] was unwavering about seeing the shooter’s face. Therefore, the strongest argument for defense counsel was to suggest that the Defendant’s face on television was seized upon by [the victim] as the shooter’s face. A person might well substitute one face seen on television for another he saw for several seconds a day or two before under extremely stressful circumstances. But it is much harder to argue that [the victim] was confronted by a man wearing a baseball cap and a mask, and that he then confused that with a face he saw on a television news program.” (original emphasis.)

The post-conviction court then ruled:

“Consistent with his trial theory, Mr. Keckley chose not to focus on the cap and mask or the hair samples retrieved from them, because he wanted to argue the [victim] confused a face he saw on television with the face of the robber. Wherefore, Mr. Keckley’s reasonable selection of one trial tactic or theory over another is not a basis for finding he was ineffective counsel.”

In assessing an ineffective assistance of counsel claim, counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. *Parish v. State*, 838 N.E.2d 495, 500 (Ind. Ct. App. 2005). Chandler, in order to prevail, must present strong and convincing evidence that his counsel was not competent and provided adequate assistance. *Sprecht v. State*, 838

“Court’s Findings and Rulings Following Evidentiary Hearing.” While the subsections of the document are not headed as findings of fact and conclusions of law, it is obvious that is what they are.

N.E.2d 1081, 1087 (Ind. Ct. App. 2005). We are of the opinion that Chandler has failed to do that.

Issue 2.

Chandler's trial attorney was also the attorney who brought the direct appeal. Chandler's argument on this issue is repetitious of the first issue. We conclude that Chandler's appellate counsel was not ineffective for the reasons stated in the prior issue.

CONCLUSION

Chandler received effective assistance of counsel. Judgment affirmed.

SHARNACK, J., and MATHIAS, J., concur.