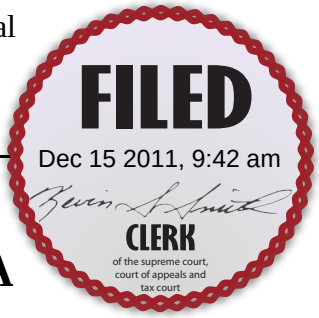
ATTORNEY FOR APPELLANT:

MICHAEL C. KEATING
Keating & LaPlante, LLP
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

BRIAN REITZ
Deputy Attorney General
Indianapolis, Indiana



IN THE COURT OF APPEALS OF INDIANA

JOSHUA HUDSON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 87A05-1105-PC-280
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No. 87D01-1003-PC-56

December 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Joshua Hudson appeals the post-conviction court's denial of his petition for post-conviction relief. Hudson raises two issues for our review, which we consolidate and restate as whether he received ineffective assistance from his appellate counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

The facts underlying Hudson's convictions were stated by this court on his direct appeal:

> On November 26, 2003, Hudson and Nicholas Duffy ("Duffy") were in a hotel in Henderson, Kentucky, while they planned to rob a Newburgh, Indiana, Burger King restaurant. Hudson and Duffy had formerly worked at this restaurant.
>
> Before robbing the Burger King, Hudson went to a store and purchased bandanas to use in the robbery. At 10:15 p.m., Hudson and Duffy left their hotel so they could be at the Burger King at 11:00 p.m., when it closed. Upon arriving at the Burger King parking lot, Hudson and Duffy surveyed the Burger King's interior with binoculars, and Hudson set his wristwatch alarm for 11:00 p.m.
>
> At 11:00 p.m., Hudson and Duffy entered the Burger King's backdoor, which was unlocked so trash could be taken out. Hudson and Duffy were wearing bandanas and were armed with a .22 caliber rifle and an assault rifle.
>
> Duffy ran to the front of the building and ordered everyone to the floor, ordered everyone to empty their pockets, and collected the employees' wallets. Hudson ran into the building's office, where Yolanda Elkins ("Elkins") and Crystal Clark ("Clark") were standing. Hudson pointed his rifle at Elkins' head and told her to put the money in the bag. When Elkins turned to the safe, Hudson fired two rounds into the fax machine. After Elkins removed the money, Hudson ordered Elkins and Clark, who was three-months pregnant, to get in the building's freezer. The remaining employees were also forced into the freezer, and Duffy and Hudson moved a dish rack in front of the freezer door to prevent the employees from leaving.
>
> Hudson shot at the building's phone after locking the employees in the freezer. As Hudson and Duffy were leaving, they yelled, "[W]e're shooting this place up before we leave so you better stay in the freezer."

> Hudson and Duffy then drove to their hotel, where Duffy went to sleep while Hudson left to meet a friend.
>
> On the following morning, Hudson decided to rob a convenience store he was driving by. After entering the store, Hudson placed a pillowcase on the counter and ordered the clerk to fill it up. The clerk recognized Hudson and began laughing. Hudson stated that he was not playing, cocked his assault rifle, and accidentally ejected a cartridge. The clerk continued to laugh and Hudson, once again, cocked the assault rifle and accidentally ejected a cartridge. Hudson then stated, "Well son of a bitch" and ran out of the store.
>
> Hudson then drove back to his hotel and went to sleep. The police apprehended Hudson and Duffy shortly thereafter.

Hudson v. State, No. 87A01-0405-CR-199, slip op. at 2-3 (Ind. Ct. App. Mar. 30, 2005) (footnote and citations omitted; alteration original).

Thereafter, the State charged Hudson with twenty-four counts, and he eventually pleaded guilty to three counts of armed robbery, each as a Class B felony; five counts of criminal confinement, each as a Class B felony; attempted armed robbery, as a Class B felony; and pointing a loaded firearm, as a Class D felony. At the ensuing sentencing hearing:

> the trial court found the following mitigating sentencing factors[:] (1) Hudson confessed to his crimes; (2) Hudson was not a discipline problem while in jail; (3) Hudson expressed remorse; (4) Hudson did not plan to hurt anyone through his conduct; and (5) Hudson's youthful age. The trial court's aggravating sentencing factors included: (1) Hudson planned the robbery; (2) Hudson fired a gun in a small room risking the room's occupants with ricochet; (3) Hudson unnecessarily confined employees in a freezer; (4) Clark lost consciousness while in the freezer; (5) Hudson pointed a gun at people; (6) Hudson committed a second robbery after having time to reflect upon his first; (7) Hudson referred to himself as "Jesse James[";] (8) Hudson was the leader; (9) Hudson had a prior false informing conviction; and (10) there was a strong possibility that Hudson would re-offend.

Id. at 4. The trial court then sentenced Hudson to an aggregate term of sixty-five years executed with twenty-five years suspended.

On direct appeal, Hudson's appellate counsel raised two issues for our review, namely, whether the trial court violated Blakely v. Washington, 542 U.S. 296 (2004), when it sentenced him and whether his sentence was inappropriate under Indiana Appellate Rule 7(B). We affirmed Hudson's sentence under both issues. Regarding the Blakely issue in particular, we stated as follows:

> Hudson also claims the trial court was not permitted to find aggravating factors to enhance his sentences beyond their presumptive term. However, Hudson admitted, either directly or indirectly, to the factors used to aggravate his sentence. See Appellant's App. pp. 111, 159 [the State's probable cause affidavits]; Tr. p. 17. Blakely does not apply to facts admitted by the defendant. Teeters v. State, 817 N.E.2d 275, 279 (Ind. Ct. App. 2004) (citing Blakely, 124 S. Ct. at 2537).
>
> * * *
>
> Only the [aggravating] factor concerning the risk that Hudson might re-offend was not contained within Hudson's admission. Appellant's App. pp. 113-131, 237-63. Furthermore, the conclusion that Hudson was likely to re-offend follows directly from his admission that he referred to himself as "Jesse James" and had committed two crimes in a short period of time. See Carson v. State, 813 N.E.2d 1187, 1189 (Ind. Ct. App. 2004).
>
> Even if the likelihood that Hudson might reoffend were an improper aggravating factor, it is only one factor out of nine, the trial court aggravated Hudson's sentences by five years rather than giving him the statutory maximum, and a single aggravating factor may support an enhanced sentence.
>
> Any Blakely error is harmless under these facts and circumstances . . . .

Hudson, slip op. at 6-7 (emphasis added; some citations omitted).

Hudson did not file a petition for rehearing on or transfer from our decision on his direct appeal. Indeed, Hudson's trial counsel informed Hudson that, rather than file such a petition, Hudson instead should file a petition to modify his sentence in the trial court. Hudson did so and, on May 4, 2009, the trial court granted Hudson's petition, which

reduced his sentence to an aggregate term of fifty-five years executed and twenty years suspended.

On March 24, 2010, Hudson filed his petition for post-conviction relief. In relevant part, Hudson alleged that his appellate counsel rendered ineffective assistance when he neither sought a petition for rehearing or transfer from this court's decision on his direct appeal nor raised as an issue on appeal the fact that the trial judge had previously been married to Duffy's mother. The post-conviction court held an evidentiary hearing on Hudson's petition on November 15, and, on April 11, 2011, the court entered extensive findings of fact and conclusion of law denying Hudson's petition. This appeal ensued.

DISCUSSION AND DECISION

Hudson appeals the post-conviction court's denial of his petition for post-conviction relief. Our standard of review is well established:

> 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). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment, Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004), and we will not reverse the judgment unless the evidence unerringly and unmistakably leads to the opposite conclusion, Patton v. State, 810 N.E.2d 690, 697 (Ind. 2004). We also note that the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006). Such deference is not given to conclusions of law, which we review de novo. Chism v. State, 807 N.E.2d 798, 801 (Ind. Ct. App. 2004).

Taylor v. State, 882 N.E.2d 777, 779-84 (Ind. Ct. App. 2008).

Although Hudson styles his brief in a manner that suggests he raises two issues for review, in substance Hudson raises a single issue, namely, whether he received ineffective assistance from his appellate counsel. A claim of ineffective assistance of counsel must satisfy two components. Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Id. at 687-88. Second, the defendant must show prejudice: a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Hudson contends that his appellate counsel failed to properly raise certain issues on appeal. "Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal." Reed v. State, 856 N.E.2d 1189, 1196 (Ind. 2006). This is so because the choice of what issues to raise on appeal is one of the most important strategic decisions appellate counsel makes. Stevens v. State, 770 N.E.2d 739, 760 (Ind. 2002). To establish deficient performance for failing to raise an issue, the petitioner must show that the unraised issue was significant and obvious on the face of the record and that it was clearly stronger than the issues raised. Fisher, 810 N.E.2d at 677. " 'We give considerable deference to appellate counsel's strategic decisions and will not find deficient performance in appellate counsel's choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made.' " Brown v.

State, 880 N.E.2d 1226, 1230 (Ind. Ct. App. 2008) (quoting Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999) (emphasis omitted)), trans. denied. We must consider the totality of an attorney's performance and "should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy." Reed, 856 N.E.2d at 1195-96.

Hudson's first argument, in essence, is that this court erred in his direct appeal when we concluded that Hudson's admission to the factual accuracy of the State's probable cause affidavits, which constituted the basis for the trial court's aggravating circumstances, was sufficient for Blakely purposes. In support of his argument in this appeal, Hudson relies on this court's opinion in Vela v. State, 832 N.E.2d 610, 613-14 (Ind. Ct. App. 2005), in which we held that the defendant's "acknowledgment [that] the pre-sentence report was correct is not, without more, an admission sufficient [under Blakely] to support an aggravator based on the nature and circumstances of the crime."

Hudson recognizes that Vela is in conflict with other decisions of this court. See, e.g., Sullivan v. State, 836 N.E.2d 1031, 1036 (Ind. Ct. App. 2005) ("Sullivan admitted that C.S. was his daughter when he confirmed the accuracy of the presentence report. Having admitted that, it was readily apparent that he occupied a position of trust with respect to C.S. and the trial court's statement recognizing that also was valid under Blakely."). Hudson fails to mention, however, that Vela was handed down by this court in August of 2005, about three months after Hudson's direct appeal had been certified.

Assuming for the sake of argument that a presentence report is comparable to a probable cause affidavit, Hudson's argument is that his appellate counsel rendered ineffective assistance for not foreseeing a potential conflict among the judges of this

court. The issue here is whether appellate counsel acted reasonably in light of the facts of this case and the precedent available to him at the time the decision now in question was made. See Brown, 880 N.E.2d at 1230. Hudson identifies no precedent available either before this court decided his direct appeal or within thirty days of our decision—the time in which a petition for rehearing or transfer would have been due—that supports his assertion that our decision was legally erroneous. As such, Hudson cannot demonstrate that his appellate counsel acted unreasonably in light of the precedent available to him, and we cannot say that his counsel rendered deficient performance on this issue.

Hudson also contends that his appellate counsel rendered ineffective assistance when he failed to raise as an issue the trial judge's prior marriage to Duffy's mother. At Hudson's initial hearing in December of 2003, the trial judge informed Hudson and his counsel that the judge had previously been married to Duffy's mother but that the marriage had ended in the early 1970s, well before Duffy was even born. Hudson conferred with his counsel and stated that he did not have a problem with the trial judge's former relationship with Duffy's mother. Hudson's appellate counsel did not consider this potential conflict of interest worthy of this court's time on direct appeal.

Hudson's appellate counsel was correct not to raise this alleged issue on direct appeal. In the instant appeal, Hudson asserts that the trial judge's supposed conflict resulted in an aggravated sentence for Hudson, while Duffy, who was tried in another court and sentenced by another judge, is no longer in jail. In particular, Hudson argues that "the judge found, as two (2) aggravating circumstances, that [Hudson] planned the crime and was the leader of the enterprise . . . ." Appellant's Br. at 7. Hudson's

suggestion of impropriety by the trial judge belies a basic fact: in his direct appeal, we held that Hudson admitted to the factual basis for the trial court's aggravating circumstances. As such, it is simply not credible for Hudson to now suggest that the court would have concluded that the trial judge relied on anything other than Hudson's own admissions when it sentenced him.

Further, Hudson has not shown than the trial judge was actually biased. Hudson plead guilty under an open plea. The trial judge imposed a sentence which, as the post-conviction court found, "any trial judge could have legally, justifiably, and reasonably imposed under the facts of this case." Appellant's App. at 24. Duffy's lesser sentence in another court by another judge does not demonstrate that Hudson's appellate counsel was ineffective when he did not raise recusal as an issue on appeal in this case. In the language of Strickland, Hudson cannot demonstrate that he was prejudiced by this alleged error of his appellate counsel and has not shown that the post-conviction court clearly erred when it denied post-conviction relief on this issue.

In sum, the post-conviction court's order denying Hudson's petition for post-conviction relief is not clearly erroneous. Hudson has not demonstrated that his appellate counsel acted unreasonably in light of the precedent available to him at the time of Hudson's direct appeal. And Hudson cannot show that his appellate counsel's decision not to raise the alleged conflict-of-interest issue resulted in prejudice to Hudson. As such, we affirm the post-conviction court's denial of Hudson's petition for relief.

Affirmed.

ROBB, C.J., and VAIDIK, J., concur.