MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Loren Wayne Tidwell,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

October 6, 2023

Court of Appeals Case No. 23A-PC-55

Appeal from the Dearborn Circuit Court

The Honorable Jonathan Cleary, Special Judge

Trial Court Cause No. 15C01-2206-PC-8

Memorandum Decision by Judge Riley
Judges Mathias and Crone concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Loren Tidwell (Tidwell), appeals the post-conviction court's denial of his petition for post-conviction relief.

[2] We affirm.

ISSUES

[3] Tidwell proceeds pro se and presents this court with at least nine issues, which we consolidate and restate as the following three issues:

(1) Whether Tidwell's right to due process was violated;
(2) Whether Tidwell received ineffective assistance of trial counsel; and
(3) Whether Tidwell's post-conviction counsel's performance deprived Tidwell of a procedurally fair proceeding.

FACTS AND PROCEDURAL HISTORY

[4] The facts pertaining to Tidwell's underlying convictions are that on August 3, 1991, after an evening of consuming alcohol, Tidwell fought with Matt Lightfield (Lightfield) outside a bar near Lawrenceburg, Dearborn County, Indiana, over the affections of a woman, Sharon Reed (Reed). The fight ended when a police car arrived. Lightfield left the bar with Reed, but not before Tidwell threatened to kill Lightfield. Tidwell went to the home of his friend, Eddie Dunn (Dunn), who lived in Ohio County, Indiana. Dunn agreed to drive Tidwell back to Lawrenceburg, where they knew that Lightfield and Reed were staying the night with friends. Tidwell and Dunn entered the friends'

apartment through a door that had a broken lock, and Tidwell located Lightfield and Reed asleep in a bedroom. Tidwell shot Lightfield in the head with a small-frame .25-caliber Raven semiautomatic handgun, severely injuring him.

[5] On August 6, 1991, the State filed an Information, charging Tidwell with attempted murder, aggravated battery, and residential entry. On August 7, 1991, Lightfield died as a result of the injuries Tidwell had inflicted upon him. On August 9, 1991, the State dismissed its initial Information and filed a second Information, charging Tidwell with murder and conspiracy to commit murder. The conspiracy charge alleged in relevant part that Tidwell and Dunn had conspired to kill Lightfield and performed an overt act in furtherance of that conspiracy by driving "from [] Dunn's Ohio County, Indiana residence to the apartment residence where [] Lightfield was present in Lawrenceburg, Indiana[.]" (PCR Exh. Vol. I, p. 41). On November 13, 1991, the State filed an additional Information, alleging that Tidwell was an habitual offender due to having accumulated two prior unrelated felony convictions, namely, a June 9, 1975 conviction and sentence in Circuit Court of Franklin County, Indiana, for assault and battery with intent to commit a felony (Franklin County felony) for which he received a sentence of one-to-ten years in the Indiana Department of Correction and a subsequent March 21, 1985, conviction and sentence in the Court of Common Pleas of Hamilton County, Ohio, for breaking and entering (Hamilton County felony) for which he received one year in the Ohio State Penitentiary.

[6] On March 5, 1992, the trial court convened Tidwell's five-day jury trial. Prosecutor James Humphrey tried the case against Tidwell, and Tidwell was represented by two public defenders (collectively, Trial Counsel). The jury found Tidwell guilty of murder and conspiracy to commit murder, after which the bifurcated habitual offender proceedings took place. To prove the predicate felonies, the State offered into evidence certified copies of records from the Franklin and Hamilton County proceedings, fingerprint evidence, expert testimony linking the fingerprint evidence to Tidwell, and the testimony of an officer involved in the Hamilton County case. Trial Counsel raised timely objections to the admission of all the State's proffered certified records. Trial Counsel also attempted to show that the Franklin County felony was an invalid conviction because there was no transcript of the guilty plea hearing in the case available, arguing that it could not be assumed that Tidwell's guilty plea was knowing and voluntary. At the conclusion of the presentation of the evidence, the jury found that Tidwell was an habitual offender.

[7] On April 14, 1992, the trial court sentenced Tidwell to forty years for his murder conviction, enhanced by thirty years for being an habitual offender, and to thirty years for his conspiracy conviction. The trial court ordered Tidwell to serve both sentences consecutively, for an aggregate sentence of 100 years. Tidwell pursued a direct appeal of his convictions and was represented by Direct Appeal Counsel appointed from the office of the Public Defender of Indiana (PDI). On December 16, 1994, our supreme court affirmed Tidwell's convictions in *Tidwell v. State*, 644 N.E.2d 557 (Ind. 1994) (*Tidwell I*).

[8] On February 24, 2000, Tidwell filed a pro se petition for post-conviction relief (Dearborn County PCR), and, at his request, the post-conviction court referred the matter to the PDI. On March 16, 2000, Post-Conviction Counsel (PCR Counsel) appeared for Tidwell. PCR Counsel reviewed the case and determined that the best course of action was to attack Tidwell's habitual offender enhancement by attempting to invalidate the Franklin County felony through a post-conviction relief proceeding in Franklin County. PCR Counsel made this decision after reviewing the evidence presented at Tidwell's habitual offender enhancement trial and concluding that the State had presented sufficient evidence to prove the existence and proper sequencing of the predicate felonies. PCR Counsel chose Franklin County as the venue to make this challenge because he concluded it was the proper venue for doing so.

[9] A post-conviction proceeding occurred in Franklin County (Franklin County PCR).[1] On July 23, 2002, PCR Counsel sent Tidwell a letter along with an amended Franklin County petition for post-conviction relief which deleted allegations of ineffective assistance of counsel and insufficient factual basis for Tidwell's 1975 guilty plea. PCR Counsel instructed Tidwell that if the amendment was acceptable, Tidwell should sign the amended PCR and return it to PCR Counsel. On August 12, 2002, the amended Franklin County petition for post-conviction relief was filed claiming that, because Tidwell could

[1] The records from the Franklin County PCR are not part of the record on appeal. It is unclear whether PCR Counsel initiated the Franklin County PCR or whether Tidwell had already filed a pro se petition in Franklin County before PCR Counsel was appointed.

show that the transcript of his guilty plea hearing could not be produced or reconstructed, the Franklin County felony must be set aside, as there was insufficient evidence that he had been properly advised of his *Boykin* rights and that his plea was voluntary. The State raised the defense of laches, and the Franklin County post-conviction court ruled in the State's favor on the defense. Tidwell appealed the denial of his Franklin County petition for post-conviction relief and was represented by PCR Counsel. PCR Counsel raised two issues: Whether there was sufficient evidence supporting the post-conviction court's conclusion that laches barred relief and whether Tidwell proved that the record of his guilty plea proceedings could not be reconstructed. This court affirmed in *Tidwell v. State*, No. 24A01-0302-PC-60, slip op. at 5-7 (Ind. Ct. App. Sept. 3, 2003), *trans. denied* (*Tidwell II*), finding sufficient evidence that Tidwell had unreasonably delayed in seeking relief after twenty-four years and that the State had been prejudiced. PCR Counsel petitioned for transfer to the Indiana Supreme Court, but transfer was denied.

[10] While the Franklin County PCR proceedings were ongoing, the Dearborn County PCR remained open but dormant. After Tidwell's appeal of the Franklin County PCR was unsuccessful, PCR Counsel personally met with Tidwell and informed him that the allegations of the Dearborn County PCR were meritless. PCR Counsel advised that he would withdraw from the Dearborn County proceedings but that Tidwell could proceed pro se or hire his own counsel. PCR Counsel supplied Tidwell with a pro se PCR kit that contained sample motions and basic instructions for conducting a post-

conviction proceeding. On January 15, 2004, PCR Counsel formally withdrew from the Dearborn County PCR proceedings. On March 11, 2005, Tidwell filed a pro se amended petition for post-conviction relief.

[11] On November 20, 2020, Tidwell sought permission to file a successive petition for post-conviction relief which this court denied in December 2020. On July 15, 2021, Tidwell filed a motion to correct erroneous sentence in Dearborn County claiming that the documentary evidence presented at trial was insufficient to prove his habitual offender status. Senior Judge Eugene A. Stewart granted Tidwell's motion. The State filed a motion to correct error and requested that Dearborn Circuit Court Judge Humphrey recuse, as he had prosecuted Tidwell's habitual offender enhancement. Judges Humphrey and Stewart[2] both recused, and Dearborn Superior Court Judge Jonathan N. Cleary was appointed as special judge. On September 29, 2021, the trial court granted the State's motion to correct error and reinstated Tidwell's 1992 sentence in full.

[12] Tidwell appealed the trial court's grant of the State's motion to correct error. *See Tidwell v. State*, No. 21A-CR-2223, slip op. (Ind. Ct. App. May 5, 2022) (*Tidwell III*). Tidwell argued, among other things, that Judge Humphrey had improperly appointed "his friend and everyday colleague" to the case. *Id*. at 2. This court found that Indiana Trial Rule 79(D), which provides a procedure for

[2] Judge Stewart had previously represented Tidwell in the Franklin County felony case that was used to support Tidwell's habitual offender status.

the selection of a special judge by the agreement of the parties, explicitly states that "'[t]his provision shall not apply to criminal proceedings.'" *Id*. The *Tidwell III* court further noted that Trial Rule 79(H), however, provides that if Rule 79(D) does not apply, the selection of a special judge is done according to local rule, which in light of Dearborn County Local Rule 15-AR-7(B), meant that "the judge of either of the Dearborn Superior Courts was the first eligible to quality for the assignment." *Id*. Accordingly, we concluded that the selection of Dearborn Superior Court Judge Cleary through this process was not improper. *Id*. Tidwell also argued that his habitual offender enhancement was unsupported by properly signed, certified, and authenticated documents, an argument which we concluded was barred by res judicata, having been decided on appeal on the basis of laches in *Tidwell II*. *Id*. at 3.

[13] During the pendency of *Tidwell III*, Tidwell filed a motion with this court seeking remand to the trial court so that he could pursue post-conviction relief. On December 17, 2021, this court denied Tidwell's motion but ruled that "at the conclusion of [*Tidwell III*], [Tidwell] may resume litigation of his petition for post-conviction relief." (Docket, No. 21A-CR-2223). On June 29, 2022, after *Tidwell III* was issued, the post-conviction court granted Tidwell's motion for leave to file an amended petition for post-conviction relief, appointed Tidwell post-conviction counsel, and referred the matter to the PDI. According to PDI internal policy, PCR Counsel was assigned to represent Tidwell because he had previously worked on the matter. PCR Counsel reviewed Tidwell's amended petition and found it to be without merit. After complying with internal PDI

review procedures, PCR Counsel moved the post-conviction court for relief from the appointment as Tidwell's counsel. On August 16, 2022, the post-conviction court granted PCR Counsel's motion, and he was removed from the case.

[14] On October 14, 2022, Tidwell filed the amended petition for post-conviction relief which forms the basis for the instant appeal. In his final amended petition, Tidwell raised the following relevant issues:

- Trial Counsel was ineffective for failing to argue there was insufficient evidence to support the habitual offender enhancement, including that the State had failed to prove the proper sequence of his prior felony convictions;
- Trial Counsel was ineffective for failing to file for severance of the murder and conspiracy to commit murder charges because the offenses were committed in separate counties;
- PCR Counsel[3] was ineffective for "failing to raise issues for appeal in the proper court, and argue those issues correctly"; and
- Infringement of Tidwell's right to due process due to purported irregularities in the selection of Special Judge Cleary to preside over his post-conviction proceedings.

[3] Tidwell refers to PCR Counsel as "Appellate counsel" and by name. (Appellant's App. Vol. II, p. 168).

(Appellant's App. Vol. II, p. 168). On October 18, 2022, the State filed its answer in which it raised the affirmative defense of laches. After PCR Counsel was relieved from representing Tidwell in the instant proceedings, Tidwell filed several motions with the post-conviction court seeking to have new post-conviction counsel appointed, either a PDI attorney or a private attorney. In none of his motions did Tidwell argue that his right to equal protection under the law had been violated by proceeding pro se after PCR Counsel was relieved from representing him. The post-conviction court denied Tidwell's motions.

[15] On November 9, 2022, the post-conviction court held an evidentiary hearing on Tidwell's petition at which Tidwell appeared pro se. Tidwell's main attack on Trial Counsel's effectiveness was based on his theory that the evidence supporting his habitual offender enhancement was lacking because the State could not produce a transcript of his 1975 guilty plea in the Franklin County felony case. The State introduced certified records from the two predicate felony proceedings and had the trial court take judicial notice of the fingerprint evidence and testimony it had offered during Tidwell's trial, and the post-conviction court explained to Tidwell that a transcript of his guilty plea hearing was not necessary to support the existence of the Franklin County felony. Nevertheless, Tidwell pursued his theory on this issue that, without a transcript, his 1975 Franklin County felony did not exist. Trial Counsel testified that habitual offender enhancements are routinely proven through certified records, they had reviewed the evidence supporting Tidwell's habitual offender enhancement prior to trial, and that they had concluded that the State had a

prima facie case on the enhancement. Judge Humphrey testified that both detectives who had worked on the murder, conspiracy to commit murder, and the habitual offender enhancement were deceased. PCR Counsel offered testimony consistent with the aforementioned conduct of his representation in the Franklin and Dearborn County PCRs. In PCR Counsel's judgment, even if he had mounted every challenge Tidwell argued he should have to the habitual offender enhancement in Dearborn County, it would not have been possible to have the enhancement overturned because the State offered sufficient evidence to prove the existence and sequence of the predicate felonies.

[16] On December 2, 2022, the State filed its proposed findings of fact and conclusions thereon, and on December 13, 2022, Tidwell filed his proposed findings and conclusions. On December 15, 2022, the post-conviction court entered its Order denying relief in a detailed Order addressing each of Tidwell's claims and additionally concluding that his claims of ineffectiveness of Trial Counsel were barred by the defense of laches, based on the same facts as found by this court in *Tidwell II.* The post-conviction court further found that

> [i]n this case there are additional facts that are applicable to laches. [PCR Counsel] testified that in 2004 he gave Tidwell a "help" package to assist Tidwell in proceeding pro se. Here, the delay was even longer–thirty (30) years. And [the] State proved even stronger evidence of prejudice: the two lead investigators, who obtained interviews and gathered items of evidence, are both deceased. [The court] finds that [the] State has proved that Tidwell has unreasonably sat on his rights and there is substantial prejudice to the State. Laches would bar granting relief.

(Appellant's App. Vol. II, p. 36).

[17] Tidwell now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Standard of Review

[18] Tidwell appeals following the denial of his petition for post-conviction relief. Petitions for post-conviction relief are civil proceedings in which a petitioner may present limited collateral challenges to a criminal conviction and sentence. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018). In such a proceeding, the petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id*. When a petitioner appeals from the denial of his petition for post-conviction relief, he stands in the position of one appealing from a negative judgment. *Hollowell v. State*, 19 N.E.3d 263, 269 (Ind. 2014). To prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence "as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court." *Id*. In addition, where a post-conviction court enters findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to its legal conclusions, but we will reverse its findings and judgment only upon a showing

of clear error, meaning error which leaves us with a definite and firm conviction that a mistake has been made.[4] *Id*.

I. *Due Process*

[19] Tidwell claims that the instant proceedings were conducted in contravention of his due process rights. More specifically, Tidwell claims that his due process rights were violated by his deprivation of post-conviction counsel and by Judge Cleary's appointment and actions as special judge in this matter. We address each of these contentions in turn.

A. *Denial of Post-Conviction Counsel*

[20] Tidwell argues that he was deprived of counsel for his post-conviction relief proceedings by the post-conviction court and the PDI "because of his poverty" in violation of his right to due process. (Appellant's Br. p. 10). Tidwell bases this claim on the facts that PCR Counsel was relieved from his case and the post-conviction court denied his multiple motions for appointment of non-PDI or private counsel. In addressing this issue, we first observe that the Indiana courts have long recognized that a post-conviction relief petitioner's right to counsel is not guaranteed by either the Sixth Amendment or by Article 1, Section 11 of our state constitution. *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind.

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[4] In his reply brief, Tidwell asserts that the State failed to respond to some of his arguments, which he claims "operates as a waiver of those issues by the State[."] (Reply Br. p. 3). If an appellee fails to respond to certain issues presented by an appellant, we will apply a prima facie error standard to those issues. *Posso v. State*, 180 N.E.3d 326, 336 (Ind. Ct. App. 2021). However, even under this relaxed standard of review, we are not relieved of our obligation to review the record, correctly apply the law, and determine whether reversal is warranted. *Id*.

1989). Therefore, Tidwell had no constitutionally based right to counsel for his petition for post-conviction relief.

[21] However, Indiana's Rules of Post-Conviction Remedies provide that a trial court must refer a petition for post-conviction relief to the PDI for assignment of counsel if requested and petitioner follows certain procedures. Ind. Post-Conviction Rule 1(2). The Rules further provide that "the Public Defender may represent any petitioner committed to the Indiana Department of Correction in all proceedings under this Rule, including appeal, if the Public Defender determines the proceedings are meritorious and in the interests of justice." P-C.R. 1(9)(a). The "[p]etitioner retains the right to employ his own counsel or to proceed pro se, but the court is not required to appoint counsel for a petitioner other than the Public Defender." *Id.* Subsection (c) of the Rule(1)(9) provides that counsel must confer with the petitioner to ascertain the grounds for relief and amend the petition if necessary. P-C.R. 1(9)(c). The Rule also mandates that "[i]n the event that counsel determines the proceeding is not meritorious or in the interests of justice, before or after an evidentiary hearing is held, counsel *shall* file with the court counsel's withdrawal of appearance[.]" *Id.* (emphasis added).

[22] Here, in accordance with the Post-Conviction Rules, the court referred the matter to the PDI in 2000 at the beginning of the Dearborn County PCR, and PCR Counsel was appointed. On Tidwell's behalf, PCR Counsel pursued the Franklin County PCR from the initiation of the petition through a transfer petition to the Indiana Supreme Court, albeit unsuccessfully. Following the

conclusion of the Franklin County PCR and after having concluded that the allegations of the Dearborn County PCR had no merit, PCR Counsel withdrew after providing Tidwell with personal notice, providing Tidwell with a pro se starter kit, and petitioning the post-conviction court to withdraw. When Tidwell resuscitated the Deaborn County PCR in 2022 and PCR Counsel was again appointed to the matter, PCR Counsel reviewed Tidwell's amended petition, again found it to be without merit, and, after following internal PDI procedures, moved the post-conviction court to remove himself from the case. On August 16, 2022, PCR Counsel successfully petitioned the post-conviction court to be relieved of his appointment.

[23] On appeal, Tidwell does not argue that the post-conviction court, the PDI, or PCR Counsel failed to follow the Post-Conviction Rules for the appointment and withdrawal of counsel. Rather, he complains that he "could not get the court to assign counsel from outside the [PDI]." (Appellant's Br. p. 12). However, under the Post-Conviction Rules, Tidwell was not entitled to counsel from outside the PDI. *See* P-C.R. 1(9)(a) ("[T]he court is not required to appoint counsel for a petitioner other than the Public Defender."). We also observe that even a criminal defendant whose right to counsel is constitutionally based does not have the right to the public defender of his choosing. *Bowie v. State*, 203 N.E.3d 535, 545 (Ind. Ct. App. 2023), *trans. denied*.

[24] Tidwell also claims, without citation to authority, that he was entitled to another PDI attorney because PCR Counsel's continued representation

constituted an actual conflict of interest. Although Tidwell's argument on this point is convoluted and appears to criticize PCR Counsel's performance in the Franklin County PCR, a matter which is not before us, we discern that he claims that, in 2022, he desired to raise a claim of ineffective assistance of PCR Counsel in his resuscitated Dearborn County PCR, a claim which PCR Counsel could not raise against himself. However, we cannot credit this argument, because, as we explain more in depth below, a claim of ineffective assistance of post-conviction counsel is not a valid claim a petitioner may make, and, therefore, no conflict of interest could have arisen in PCR Counsel's representation as Tidwell asserts. Because Tidwell had no constitutional right to post-conviction counsel and he has not identified any discrepancies with the Post-Conviction Rules for the appointment or withdrawal of counsel, we find no violation of his due process rights.[5]

B. *Judge Cleary*

[25] Tidwell also argues that his rights to due process and to a fair post-conviction proceeding were violated by Judge Cleary. Tidwell contends that Judge Cleary demonstrated bias against him by failing to appoint him new counsel as he requested, by ruling that his selection as special judge was proper, and by ruling

[5] Tidwell also raises an equal protection claim based on PCR Counsel being relieved from the case and the post-conviction court's denial of his motions for additional counsel. Tidwell waived this argument by failing to raise it in his various motions for counsel. *See B.Z. v. State*, 943 N.E.2d 384, 394 (Ind. Ct. App. 2011) ("[W]e do not address constitutional arguments that are raised for the first time on appeal.").

on his petition for post-conviction relief two days after Tidwell filed his proposed findings of fact and conclusions thereon.

[26] We presume that a trial court judge is unbiased and unprejudiced. *Harvey v. State*, 751 N.E.2d 254, 259 (Ind. Ct. App. 2001). In order to rebut that presumption, "a defendant must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy." *Id*. Actual bias or prejudice exists "only where there is an undisputed claim or where the judge has expressed an opinion on the merits of the pending controversy." *Id*. The fact that a judge has entered adverse rulings against a defendant is insufficient to establish personal bias or a lack of impartiality. *Harrison v. State*, 707 N.E.2d 767, 790 (Ind. 1999).

[27] Here, Tidwell does not claim that Judge Cleary expressed an opinion on the merits of his disputed petition for post-conviction relief; rather, he merely claims that Judge Cleary demonstrated bias by not granting his requests for the reappointment of counsel after having relieved PCR Counsel from his appointment. This is insufficient to demonstrate that the post-conviction court judge was biased against Tidwell. *See id*.

[28] Neither can we credit Tidwell's argument that Judge Cleary exhibited bias by ruling that his appointment as a special judge was proper. The doctrine of res judicata bars the subsequent relitigation of disputes that are essentially the same. *Miller v. Patel*, 212 N.E.3d 639, 646 (Ind. 2023). This issue of the propriety of Judge Cleary's appointment has already been considered and

decided adversely to Tidwell in *Tidwell III*. Tidwell may not now repackage his claim as one of violation of due process or bias in order to relitigate what is essentially the same claim.

[29] Tidwell's claim that Judge Cleary somehow deprived him of a fair proceeding by entering judgment two days after receiving his proposed findings of fact and conclusions thereon is equally without merit. At the conclusion of the post-conviction hearing, Judge Cleary informed the parties that they had thirty days to submit their proposed findings and conclusions before he would enter judgment. The State and Tidwell both submitted their proposals within the allotted timeframe. Contrary to Tidwell's implication on appeal, Judge Cleary did not expressly state or imply that he would refrain from considering the case or from drafting the judgment until he received the parties' proposals, and Tidwell does not provide us with any authority dictating that a trial court is obligated to do so. Again, we presume that a trial court judge is unbiased. *Harvey*, 751 N.E.2d at 259. We conclude that Tidwell has failed to rebut that presumption.

II. *Assistance of Trial Counsel*

[30] Tidwell next argues that his convictions should be reversed because he received ineffective assistance of Trial Counsel at his trial on the murder and conspiracy to commit murder charges and on the habitual offender enhancement. We evaluate ineffective assistance of trial counsel claims under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, a defendant must show that 1) his counsel's performance was deficient

based on prevailing professional norms; and 2) that the deficient performance prejudiced the defense. *Weisheit*, 109 N.E.3d at 983 (citing *Strickland*, 466 U.S. at 687). To establish that counsel's performance was deficient, a petitioner must show that counsel's actions were unreasonable under prevailing professional norms. *Id*. In evaluating this element on appeal, we afford considerable deference to counsel's choice of tactics and strategy. *Id*. In order to demonstrate sufficient prejudice, the defendant must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id*. A defendant's failure to satisfy either the 'performance' or the 'prejudice' prong of a *Strickland* analysis will cause an ineffective assistance of counsel claim to fail. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006).

A. *Laches*

[31] We first address the State's contention that we should affirm the post-conviction court's conclusion that all the issues presented in Tidwell's petition for post-conviction relief were barred by laches. "The doctrine of laches operates to bar consideration of the merits of a claim or right of one who has neglected for an unreasonable time, under circumstances permitting due diligence, to do what in law should have been done." *Oliver v. State*, 843 N.E.2d 581, 586 (Ind. Ct. App. 2006), *trans. denied*. The doctrine of laches applies to the failure to prosecute post-conviction proceedings. *Thompson v. State*, 31 N.E.3d 1002, 1007 (Ind. Ct. App. 2015)*, trans. denied*. In order to successfully assert the defense, the State

must show that the petitioner unreasonably delayed in seeking relief and that the delay prejudiced the State. *Oliver*, 843 N.E.2d at 586.

[32] The State raised the defense of laches to Tidwell's petition for post-conviction relief, and the post-conviction court found in the State's favor on the defense. On appeal, contrary to the State's assertion, Tidwell does challenge the sufficiency of the evidence supporting the post-conviction court's conclusions on laches: Tidwell asserts that the State failed to show that Tidwell knew that he could write his petition himself, undermining the evidence that his delay was unreasonable. However, at the post-conviction hearing, PCR Counsel testified that prior to his withdrawal from the Dearborn County PCR in 2004, he informed Tidwell that he could proceed pro se and provided Tidwell with a "Pro-Se Packet" that contained sample motions and basic instructions for conducting a post-conviction proceeding. (PCR Transcript p. 131). Indeed, on March 11, 2005, after PCR Counsel had withdrawn, Tidwell filed a pro se amended petition for post-conviction relief. The post-conviction court could have reasonably inferred from this evidence that Tidwell knew that he could write his own petition. In light of this evidence, the post-conviction court's conclusion was not clearly erroneous, and Tidwell has failed to meet his burden of persuasion on appeal. *See Hollowell*, 19 N.E.3d at 269 (holding that on appeal from the denial of post-conviction relief, the petitioner must show that the evidence "as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.").

[33] Even though we affirm the post-conviction court's conclusion that laches barred Tidwell's post-conviction claims, we will address Tidwell's appellate arguments.

B. *Severance*

[34] Tidwell's first claim of Trial Counsel ineffectiveness is that Trial Counsel should have objected to the joining of the murder and conspiracy charges and/or should have moved to sever the charges. Where the defendant's claim is based on his counsel's failure to object at trial, in order to establish the 'performance' prong, the defendant must show that, if the objection had been raised, there was a reasonable probability it would have been granted by the trial court. *Garrett v. State*, 992 N.E.2d 710, 723 (Ind. 2013).

[35] The gravamen of Tidwell's argument on this point is that he was entitled to severance under Indiana Code section 35-34-1-11(a), which provided at the time of Tidwell's convictions as it does now, that whenever two offenses have been joined for trial "solely on the ground that they are of the same or similar character, the defendant shall have a right" to severance. Tidwell asserts that his offenses were solely joined because they were of the same or similar character, and, thus, that he was entitled to severance.[6] This argument is not well-taken because a defendant is not entitled to mandatory severance if charges

[6] We agree with the State that this is not the severance claim Tidwell raised in his last amended petition for post-conviction relief. However, at the post-conviction hearing, Tidwell developed testimony on this issue from Direct Appeal Counsel and from Trial Counsel, so we will address it.

are properly joined under Indiana Code section 35-34-1-9(a)(2), which provides for the joinder of offenses "based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." *Robinson v. State*, 56 N.E.3d 652, 656 (Ind. Ct. App. 2016), *trans. denied*. Our supreme court has held that the joinder of a murder and conspiracy to commit the same murder charges is proper because they arise from a single scheme. *See Abner v. State*, 497 N.E.2d 550, 554 (Ind. 1986) (holding that Abner's murder and conspiracy to commit murder charges were properly joined because "both arose from a single scheme, beginning as an agreement at the Abner kitchen table and ending in [the victim's] death"). Because any objection to the joinder of the charges would not have prevailed, Tidwell has failed to demonstrate that Trial Counsel was ineffective.[7] *Garrett*, 992 N.E.2d at 723.

C. *Habitual Offender Enhancement*

[36] Tidwell also asserts that Trial Counsel was ineffective for failing to adequately challenge the evidence offered by the State in support of its allegation that he was a habitual offender. In 1991 when Tidwell committed his offenses, our habitual offender statute contained considerably fewer provisions than its present version and simply provided that, in order to establish that a defendant was an habitual offender, the State was required to demonstrate that the

[7] Tidwell does not challenge the post-conviction court's findings and conclusions that his offenses were both properly tried in Dearborn County, which was the argument regarding severance that he presented in his petition.

defendant had "accumulated two (2) prior unrelated felony convictions." I.C. § 35-50-2-8(a) (1990).

[37] The lion's share of Tidwell's argument on this issue is based on his fervently held, yet incorrect, belief that because the State could not produce a transcript of his guilty plea hearing, his 1975 Franklin County felony "does not legally exist[.]" (Appellant's Br. p. 28) (emphasis in the original). From this mistaken premise flows Tidwell's contentions that Trial Counsel should have investigated his Franklin County felony to a greater degree prior to trial, should have argued that there was inadequate evidence of the existence of the Franklin County felony, and should have argued that there was insufficient evidence of the required sequencing of the two unrelated prior felonies. However, Tidwell is simply wrong when he argues that the State could not prove the existence of the Franklin County felony without his guilty plea transcript, and this is because other documentary evidence of his conviction existed independently of the transcript. This evidence included the certified copies of the Information, probable cause affidavit, and judgment from the Franklin County felony case showing that on June 9, 1975, Tidwell pleaded guilty to the offense of assault and battery with intent to commit a felony alleged to have occurred on April 2, 1975, and that on June 9, 1975, he was sentenced to one to ten years in the Department of Correction, all of which the State had admitted into evidence to prove his habitual offender enhancement. It has long been the law in Indiana that habitual offender enhancements may be proven through the admission of certified records of the prior felony convictions. *See Schlomer v. State*, 580

N.E.2d 950, 958 (Ind. 1991) ("Certified copies of judgments or commitments containing a name the same or similar to the appellant's may be introduced to prove the commission of prior felonies.").

[38] Prior to trial, Trial Counsel knew that no transcript of Tidwell's Franklin County felony guilty plea hearing could be produced. At Tidwell's habitual offender trial, Trial Counsel objected to the admission of all the State's certified records, mounted a collateral attack on the Franklin County felony by arguing it could not be shown Tidwell had been advised of his *Boykin* rights or that there was an adequate factual basis for his plea, and challenged the judge's signature on the Hamilton County felony judgment, among other challenges. The post-conviction court concluded that Trial Counsel's performance defending the habitual offender enhancement was not deficient, and Tidwell has failed to persuade us that the evidence leads "unerringly and unmistakably" to an opposite conclusion. *Hollowell*, 19 N.E.3d at 269.

[39] We also briefly address two ancillary claims made by Tidwell regarding Trial Counsel's performance. Tidwell argues that Trial Counsel should have challenged the State's habitual offender case on the grounds that the evidence presented at trial varied from the allegations contained in the habitual offender Information, allegations which Tidwell asserts were insufficient because they did not allege the dates of the commissions of the two prior felonies, the dates he was convicted, his sentencing dates, and the dates he was released from his sentence on each felony. We conclude that this argument is actually based on a challenge to the sufficiency of the habitual offender Information, which was not

an issue that Tidwell raised in his petition for post-conviction relief. Nevertheless, Tidwell has not demonstrated deficient performance on Trial Counsel's part. Indiana law at the time of Tidwell's convictions dictated that

> the allegations of habitual criminal must contain all of the procedural matters and safeguards of the original and underlying charges in that they are brought by sworn affidavit contained in an information and endorsed by the prosecuting attorney, *setting out the facts sufficient and adequate for the defendant to defend himself and giving the defendant an opportunity to plead to such allegations.*

Griffin v. State, 439 N.E.2d 160, 165 (Ind. 1982) (emphasis added). Our supreme court has held that an habitual offender information was sufficient where it alleged that the defendant had been convicted and sentenced of specified felonies on certain dates and where it identified the courts of conviction. *See Cole v. State*, 561 N.E.2d 756, 757 (Ind. 1990) (observing that the court "fail[ed] to see how the State could have been more specific and succinct in its charge"); *see also Parrish v. State*, 453 N.E.2d 234, 237 (Ind. 1983) (finding the habitual offender information to be adequate where it alleged three specific felony convictions, the counties of conviction, the sentences given, and where the defendant was committed). The habitual offender Information in this case alleged the dates and counties of conviction and sentencing for the Franklin and Hamilton County felonies, identified the felonies at issue, provided the terms of Tidwell's sentences and where they were served, and alleged that the Hamilton County felony was committed subsequently to the Franklin County felony. In light of *Cole* and *Parrish*, these allegations were

adequate, and, therefore, Tidwell has failed to establish that Trial Counsel's performance was deficient for failing to challenge the habitual offender Information.

[40] Tidwell also asserts that Trial Counsels' performance was deficient because they did not argue at trial that the State's habitual offender showing was inadequate because his Franklin County felony was more than ten years old. This argument is based on Tidwell's incorrect assertion that in 1991 when he was charged, the habitual offender statute required all predicate felonies to be less than ten years old. However, the habitual offender statute in effect at the time had no such requirement. *Compare* I.C. § 35-50-2-8(a), (b) (1990) (providing the only limitations on the use of prior felonies was that the State could not charge prior felonies that had been set aside or for which the defendant had been pardoned) *with* I.C. § 35-50-2-8(a)-(c) (2023) (containing a ten-year limitation on the charging of certain predicate felonies, where the habitual enhancement is not attached to a murder conviction). The case relied upon by Tidwell, *Johnson v. State*, 87 N.E.3d 471 (Ind. 2017), involves a later version of the statute that contains the ten-year provision. Accordingly, Tidwell has failed to establish Trial Counsel's deficient performance on this basis.

III. *Performance of PCR Counsel*

[41] Lastly, Tidwell claims that PCR Counsel rendered him ineffective assistance of counsel prior to his withdrawal from the Dearborn County PCR in 2004. In *Baum*, 533 N.E.2d at 1201, our supreme court held that because a post-conviction proceeding is not a criminal matter to which a constitutionally based

right to counsel attaches, the *Strickland* constitutional standards for assessing the performance of counsel do not apply to the performance of post-conviction counsel. Rather, we apply "a lesser standard responsive more to the due course of law or due process of law principles which are at the heart of the civil post-conviction remedy." *Id*. That standard is whether "counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court[.]" *Id*. In order to prevail on such a claim, the petitioner must show that "'his lawyer abandoned the case and prevented the client from being heard, either through counsel or pro se.'" *Graves v. State*, 823 N.E.2d 1193, 1196 (Ind. 2005) (quoting *Harris v. United States*, 367 F.3d 74, 77 (2nd Cir. 2004)). A claim that post-conviction counsel was simply ineffective "poses no cognizable grounds for post-conviction relief[.]" *Baum*, 533 N.E.2d at 1200.

[42] Tidwell claims that PCR Counsel was ineffective in the Dearborn County PCR by not raising the issues of ineffective assistance of Trial Counsel for failing to challenge the lack of sufficient evidence of the Franklin County felony and for failing to seek severance of the charges. We conclude that the *Baum* standard does not apply to these allegations because PCR Counsel's conduct of the Dearborn County PCR did not result in the judgment which is being appealed because PCR Counsel withdrew in 2004 after the first phase of the Dearborn County PCR. *See id*. at 1201. However, even if the *Baum* standard did apply, PCR Counsel appeared for Tidwell in the Dearborn County PCR and represented him in a procedurally fair setting, as set forth above, until his withdrawal in 2004. PCR Counsel's election to decline to pursue these issues in

the Dearborn County PCR and to rather attempt to invalidate the Franklin County felony through the Franklin County PCR did not constitute "abandonment" and did not deprive Tidwell of a procedurally fair post-conviction proceeding. *See Baird v. State*, 831 N.E.2d 109, 116-17 (Ind. 2005) (rejecting Baird's challenges to his post-conviction counsel's performance based on his failure to raise certain issues, where counsel, in the exercise of his judgment, pursued another strategy by raising other issues). Inasmuch as Tidwell attempts to challenge PCR Counsel's performance in the Franklin County PCR or on appeal from the denial of the Franklin County PCR, those matters are not properly before us in this appeal from the denial of the Dearborn County PCR. Accordingly, we do not disturb the post-conviction court's judgement.

CONCLUSION

[43] Based on the foregoing, we conclude that Tidwell's right to due process was not infringed in the underlying post-conviction proceedings, Tidwell has not demonstrated that the post-conviction court's conclusion that Trial Counsel rendered effective assistance was clearly erroneous, and that PCR Counsel's performance did not deprive Tidwell of a procedurally fair proceeding.

[44] Affirmed.

[45] Mathias, J. and Crone, J. concur