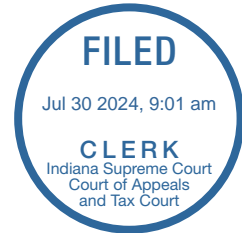


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE Court of Appeals of Indiana

Kenneth L. Williams,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent

July 30, 2024

Court of Appeals Case No.
22A-PC-1671

Appeal from the Dearborn Circuit Court
The Honorable James D. Humphrey, Judge
Trial Court Cause No.
15C01-1710-PC-16

Memorandum Decision by Judge Crone
Judges Bradford and Tavitas concur.

Crone, Judge.

Case Summary

- [1] Kenneth L. Williams appeals the denial of his petition for post-conviction relief (PCR). We affirm.

Facts and Procedural History

- [2] In July 2015, after a jury trial, Williams was convicted of two counts of rape, attempted rape, and criminal confinement, and he admitted to being a habitual offender. The trial court sentenced him to fifty-two years. On direct appeal, Williams challenged the admission of certain evidence, the sufficiency of the evidence supporting his confinement conviction, and the appropriateness of his sentence. Another panel of this Court affirmed Williams’s convictions and sentence, characterizing the evidence of his guilt as “overwhelming.” *Williams v. State*, No. 15A01-1511-CR-1899, 2016 WL 3685383, at *3 (Ind. Ct. App. July 12, 2016), *trans. denied*.
- [3] In October 2017, Williams filed a pro se PCR petition in which he asserted numerous claims of ineffective assistance of trial counsel and prosecutorial misconduct, among other things. Notably, however, Williams did not specifically allege that trial counsel was ineffective in failing to object to the prosecutor’s allegedly improper remarks, nor did he allege that appellate

counsel was ineffective in failing to argue on appeal that the prosecutor's remarks constituted both prosecutorial misconduct and fundamental error.¹

[4] In July 2021, Williams appeared with private counsel at the hearing on his petition.² Williams was the only witness. Regarding the prosecutor's allegedly improper remarks, Williams stated only, "I don't understand how [trial counsel] didn't object to how the prosecutor just already opened up the statement and there's other things like he said during trial that Bamboozle, just because I went to visit my mom, you know. Nobody told me I couldn't go visit my mother." Tr. Vol. 2 at 16. When Williams's counsel asked if Williams thought that his "lawyer's failure to object hurt [him] at trial[,] " Williams replied, "It led the jury to believe that I was guilty because I'm not objecting and saying things. I didn't – I feel like I went in with a gag on my mouth and hands behind my back, and couldn't do nothing." *Id.* at 17-18.

[5] In June 2022, the post-conviction court issued an order denying Williams's petition. Williams filed a notice of appeal, but his appeal was dismissed in

¹ "Generally, in order to properly preserve a claim of prosecutorial misconduct for appeal, a defendant must not only raise a contemporaneous objection, he must also request an admonishment and, if the admonishment is not given or is insufficient to cure the error, then he must request a mistrial." *Lainhart v. State*, 916 N.E.2d 924, 931 (Ind. Ct. App. 2009). "Failure to do so results in waiver." *Jerden v. State*, 37 N.E.3d 494, 498 (Ind. Ct. App. 2015). Where a claim of prosecutorial misconduct has been waived due to a failure to preserve it, on appeal "the defendant must establish not only the grounds for prosecutorial misconduct but also that the prosecutorial misconduct constituted fundamental error." *Id.*

² Williams included a copy of the hearing transcript in his appellant's appendix in contravention of Indiana Appellate Rule 50(F) ("Because the Transcript is transmitted to the Court on Appeal pursuant to Rule 12(B), parties should not reproduce any portion of the Transcript in the Appendix.").

January 2023 because he failed to secure the record. Williams filed a successive PCR petition, and his appeal was reinstated.

Discussion and Decision

[6] Our standard of review in post-conviction proceedings is well settled:

Post-conviction proceedings are civil proceedings in which the defendant must establish his claims by a preponderance of the evidence. Post-conviction proceedings do not offer a super appeal, rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. Those grounds are limited to issues that were not known at the time of the original trial or that were not available on direct appeal. Issues available but not raised on direct appeal are waived, while issues litigated adversely to the defendant are res judicata. Claims of ineffective assistance of counsel and juror misconduct may be proper grounds for post-conviction proceedings.

Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment and bears the burden of proof. Thus, the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision. 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.

Wilkes v. State, 984 N.E.2d 1236, 1240 (Ind. 2013) (citations and quotation marks omitted).

[7] In his brief, Williams purports to present his claims of prosecutorial misconduct, which were known and available on direct appeal, as freestanding

claims of fundamental error. This he may not do. *See Hinesley v. State*, 999 N.E.2d 975, 988 (Ind. Ct. App. 2013) (holding that appellant waived claim of prosecutorial misconduct that “was known and available on direct appeal but not raised,” and reiterating that “[f]reestanding claims of fundamental error are not available in post-conviction proceedings”), *trans. denied* (2014).

- [8] To the extent that Williams attempts to present the issue as an ineffective assistance of trial counsel claim, he has waived that claim as well, both for failing to raise it in his PCR petition and for failing to offer anything beyond bald assertions that he was prejudiced by any deficient performance on counsel’s part. *See Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001) (“Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal.”) (citing Ind. Post-Conviction Rule 1(8)), *cert. denied* (2002); *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (stating that defendant “must demonstrate that counsel’s performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice,” which “occurs when the defendant demonstrates that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different’”) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); *Gibson v. State*, 133 N.E.3d 673, 688 (Ind. 2019) (“‘[B]ald assertions of prejudice’ don’t satisfy the defendant’s burden under *Strickland*.”) (quoting *Timmons v. State*, 500 N.E.2d 1212, 1217 (Ind. 1986)), *cert. denied* (2020); *Barrett v. State*, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005) (“Failure to put forth a cogent argument acts as

a waiver of the issue on appeal.”), *trans. denied* (2006). Consequently, we affirm the denial of Williams’s PCR petition.

[9] Affirmed.

Bradford, J., and Tavitas, J., concur.

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