

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



---

### APPELLANT PRO SE

James L. Davidson  
Carlisle, Indiana

### ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Attorney General of Indiana

Sierra A. Murray  
Deputy Attorney General  
Indianapolis, Indiana

---

## IN THE COURT OF APPEALS OF INDIANA

---

James L. Davidson,  
*Appellant-Petitioner,*

v.

State of Indiana,  
*Appellee-Respondent,*

January 29, 2021

Court of Appeals Case No.  
20A-PC-517

Appeal from the Orange Circuit  
Court

The Honorable Steven L. Owen,  
Judge

Trial Court Cause No.  
59C01-1712-PC-1302

**Robb, Judge.**

## Case Summary and Issue

- [1] James Davidson pleaded guilty to robbery resulting in serious bodily injury, a Class A felony. In accordance with the plea agreement, the trial court sentenced Davidson to forty years in the Indiana Department of Correction (“DOC”).
- [2] Davidson subsequently filed a petition for post-conviction relief wherein he alleged, in part, ineffective assistance of trial counsel. The post-conviction court denied the petition. Davidson, pro se, now appeals, raising one issue for our review, which we restate as: whether the post-conviction court erred in concluding Davidson’s trial counsel was not ineffective. Concluding Davidson did not receive ineffective assistance of trial counsel and therefore, the post-conviction court did not err in denying his petition, we affirm.

## Facts and Procedural History

- [3] On June 23, 2014, Davidson was involved in the robbery of Nicky Fields, Corey Harris, and Steven Smitson. During the robbery both Fields and Harris were killed and Smitson was shot and seriously injured. The State charged Davidson with two counts of murder; robbery resulting serious bodily injury, a Class A felony; and attempted murder, a Class A felony. The State also alleged that Davidson was an habitual offender.
- [4] On July 13, 2017, the State filed an amended charging information. The amended charges alleged that Davidson committed two counts of felony

murder and robbery resulting in a serious injury, a Class A felony.<sup>1</sup> *See* Appendix of Appellee, Volume 2 at 24-25. The amended charging information also removed the attempted murder charge and habitual offender enhancement. *See* App. of Appellee, Vol. 2 at 24-25. Davidson’s trial counsel made no objection to the State amending the charging information at this time.

[5] On July 17, 2017, Davidson pleaded guilty to robbery resulting in serious bodily injury. The plea agreement stated that Davidson would receive a forty-year sentence in the DOC and in exchange for his guilty plea, the remaining charges would be dismissed and the State would not pursue an habitual offender enhancement. *See id.* at 26-28. The trial court held a guilty plea hearing the same day, determined that the factual basis was sufficient, and accepted Davidson’s guilty plea. The sentencing order stated, “Pursuant to plea agreement . . . defendant waives right to appeal and post-conviction relief.” *Id.* at 32.

[6] On December 4, 2017, Davidson filed a pro se petition for post-conviction relief. A hearing was conducted, at which Davidson’s trial counsel testified.<sup>2</sup> After the presentation of evidence, the post-conviction court denied Davidson’s

---

<sup>1</sup> Robbery resulting in serious bodily injury was classified as a Class A felony at the time of the crime. It has since been changed to a Level 2 felony. *See* Ind. Code § 35-42-5-1(a).

<sup>2</sup> Davidson was initially represented by Alice Blevins. William Gray then took over the representation of Davidson and was his attorney at the time he pleaded guilty. Davidson’s initial petition for post-conviction relief alleged that both attorneys were ineffective, *see* Appellant’s Appendix, Volume I at 14 (citation based on .pdf pagination); however, his claim on appeal refers only to Gray, *see* Brief of Appellant at 4. Both attorneys testified at the post-conviction hearing.

petition. *See* Transcript of Evidence, Volume 1 at 80. Davidson now appeals. Additional facts will be added as necessary.

## Discussion and Decision

### I. Standard of Review

[7] Post-conviction proceedings are civil in nature and the petitioner must therefore establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A post-conviction proceeding does not afford defendants the opportunity for a “super-appeal.” *Atchley v. State*, 730 N.E.2d 758, 762 (Ind. Ct. App. 2000) (citation omitted), *trans. denied*. Instead, such proceedings provide defendants with an opportunity to raise issues that were not known at the time of the trial, or that were unavailable on direct appeal. *Id.* When appealing the denial of post-conviction relief, the appellant faces a “rigorous standard of review,” *id.*, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court, *Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010), *trans. denied*. The appellate court must accept the post-conviction court’s findings of fact and may reverse only if the findings are clearly erroneous. *Id.* A petitioner denied post-conviction relief must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court. *Id.*

[8] We review claims of ineffective assistance of counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, the petitioner must show 1) his counsel's performance was deficient, and 2) he was prejudiced by the deficient performance. *Id.* at 687. Counsel's performance is deficient when it falls "below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). Where a defendant challenges counsel's performance after pleading guilty, the second prong can only be met by the defendant showing that there is a reasonable probability he would not have pleaded guilty and instead would have insisted on proceeding to trial but for counsel's deficient performance. *Hendrickson v. State*, 660 N.E.2d 1068, 1072 (Ind. Ct. App. 1996), *trans. denied*. Failure to satisfy either prong will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002).

## II. Ineffective Assistance of Trial Counsel

[9] Davidson claims the post-conviction court erred in concluding his trial counsel was not ineffective. Specifically, he claims he was denied effective assistance when: (1) trial counsel did not object to the State's untimely amendment of the charging information; (2) trial counsel failed to adequately investigate; (3) trial counsel improperly advised him of the elements of the charging information; (4) trial counsel allowed him to plead guilty even though there was not a factual basis for his plea; (5) trial counsel failed to ensure that Criminal Rule 4(a) was not violated; and (6) trial counsel allowed him to sign a plea agreement waiving

his right to post-conviction relief. *See* Br. of Appellant at 4. Each claim will be addressed separately.

### **A. Failure to Object to Amendment of Charging Information**

[10] Davidson argues that trial counsel's failure to object to the State's amended charging information was ineffective assistance. Specifically, he contends the amendment was untimely and counsel should have objected on that basis. We disagree.

[11] Counsel has wide latitude in selecting trial strategy and tactics, which we afford great deference. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). We "will not speculate as to what may have been counsel's most advantageous strategy, and isolated poor strategy, bad tactics, or inexperience does not necessarily amount to ineffective assistance." *Sarwacinski v. State*, 564 N.E.2d 950, 951 (Ind. Ct. App. 1991) (citation omitted).

[12] Here, the State's amended charging information changed Davidson's two murder charges to felony murder charges, removed the attempted murder charge, and did not refile the habitual offender enhancement. *See* App. of Appellee, Vol. 2 at 2-3, 24-25. When asked during the post-conviction evidentiary hearing why he did not object to the State amending the charges,

trial counsel stated that “the amendment would have benefited [Davidson]” so there was “no reason for [him] to object to it.”<sup>3</sup> Tr., Vol. 1 at 20.

- [13] There is a “strong presumption . . . that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Ward*, 969 N.E.2d at 51 (internal quotations omitted). Davidson has failed to overcome this presumption. The amendment benefited Davidson because it reduced his criminal exposure by omitting the attempted murder charge and the habitual offender enhancement. Thus, not objecting was a reasonable strategy. We conclude that Davidson has not shown that trial counsel’s failure to object to the amended charging information constituted deficient performance.

## **B. Failure to Adequately Investigate**

- [14] When deciding a claim of ineffective assistance for failure to investigate, we apply a great deal of deference to counsel’s judgments. *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002). Establishing failure to investigate as a ground for ineffective assistance of counsel requires going beyond the trial record to show what an investigation, if undertaken, would have produced. *McKnight v. State*, 1 N.E.3d 193, 201 (Ind. Ct. App. 2013). “This is necessary because

---

<sup>3</sup> Trial counsel also stated that “[h]ad [Davidson gone] to trial . . . the State would have been allowed to amend the charges to conform to the evidence anyway.” Tr., Vol. 1 at 23.

success on the prejudice prong of an ineffectiveness claim requires a showing of a reasonable probability of affecting the result.” *Id.* (citation omitted).

[15] Davidson argues that trial counsel failed to adequately investigate his case when he did not acquire transcripts of testimony that Smitson, one of the victims, and Elbert Brooks, a co-defendant, gave in a related case.<sup>4</sup> *See* Br. of Appellant at 5. However, trial counsel testified that he filed a motion to obtain the testimony of Smitson but because Davidson pleaded guilty there was no longer a reason for the testimony to be transcribed. *See* Tr., Vol. 1 at 24. At the post-conviction hearing, Davidson did not ask trial counsel why he did not get Brooks’ testimony. *See id.* And Davidson fails to present any evidence that the failure to acquire Brooks’ testimony was ineffective assistance. Furthermore, Davidson made no showing regarding what Smitson’s or Brooks’ testimony would have produced or how it would have changed his decision to plead guilty. Thus, we conclude that trial counsel’s investigation did not fall below objective standards of reasonableness.

---

<sup>4</sup> Davidson also claims that trial counsel failed to raise a proper defense; specifically, that trial counsel failed to raise an issue about the photo identification in his case and did not attack the probable cause affidavit as based on hearsay. However, during the post-conviction evidentiary hearing, he questioned Blevins regarding these claims, not Gray. As previously stated, on appeal Davidson only claims that Gray was ineffective. Therefore, we find Davidson’s claim of failure to raise a proper defense waived. For the sake of completeness, we do note that during the post-conviction hearing Blevins testified that the probable cause affidavit and photo identification “did not appear to have weaknesses that would have valid validity for [her] to attack[.]” Tr., Vol. 1 at 18.



## C. Failure to Advise of the Elements of the Charging Information

[16] Davidson seemingly argues that trial counsel misinformed him about what he would be pleading guilty to. Davidson states that he told trial counsel that he “did not want to plea [sic] to harming anyone” but at the guilty plea hearing trial counsel had him “plea [sic] guilty to harming [Smitson].” Br. of Appellant at 6.

[17] Indiana Appellate Rule 46(A)(8)(a) states that the argument section of an appellant’s brief “must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on[.]” It is well settled that we will not consider an appellant’s assertion on appeal when he has not presented a cogent argument supported by authority and references to the record as required by the rules. *Pitman v. Pitman*, 717 N.E.2d 627, 633 (Ind. Ct. App. 1999). Additionally, “[w]e will not become an advocate for a party, nor will we address arguments which are either inappropriate, too poorly developed or improperly expressed to be understood.” *Ramsey v. Review Bd. Of Ind. Dep’t of Workforce Dev.*, 789 N.E.2d 486, 487 (Ind. Ct. App. 2003) (quotation omitted). Because Davidson does not make a cogent argument to support his contention, we find this section of Davidson’s argument waived.

## D. Factual Basis for Plea

[18] Pursuant to Indiana Code section 35-35-1-3(b), a trial court may not accept a guilty plea unless a sufficient factual basis for the plea has been established. An adequate factual basis for the acceptance of a guilty plea may be established in several ways: 1) by the State's presentation of evidence on the elements of the charged offenses; 2) the defendant's sworn testimony regarding the events underlying the charges; 3) the defendant's admission of the truth of the allegations in the information read in court; or 4) the defendant's acknowledgment that he understands the nature of the crimes charged and that his plea is an admission of the charges. *Minor v. State*, 641 N.E.2d 85, 89 (Ind. Ct. App. 1994), *trans. denied*.

[19] Davidson argues that trial counsel allowed him to plead guilty to robbery resulting in serious bodily injury even though "there was not enough factual basis for said plea." Br. of Appellant at 6. The State's amended charging information stated:

Davidson did knowingly take property, to-wit: guns, from another person or the presence of another person, to-wit: [Fields], by threatening the use of force, to-wit: to shoot him with a gun; said act resulting in serious bodily injury [Smitson.]

App. of Appellee, Vol. 2 at 25. Davidson argues that he did not aid in the serious bodily injury of Smitson because he was not present at the time he was shot.

[20] Here, Davidson pleaded guilty to robbery resulting in serious injury, a Class A felony. “A person who knowingly or intentionally takes property from another person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear; commits robbery . . . a Class A felony if it results in serious bodily injury to any person other than a defendant.” Ind. Code § 35-42-5-1 (1984).

[21] During the plea hearing, trial counsel questioned Davidson about his involvement in the robbery at issue to establish a factual basis. Davidson’s responses, in relevant part, are as follows:

[Mr. Gray]: The State alleges that on [June 23, 2014] you did knowingly take property, to-wit: guns, from another person, that being [Fields] and the allegation would include that you carried, ah, a sack full of merchandise or property out of the trailer belonging to [Fields], after he had been murdered, is that correct?

[Davidson]: Well, it was before he was murdered, yes.

[Mr. Gray]: But, you did carry property out of that trailer?

[Davidson]: Yes.

\* \* \*

[Mr. Gray]: It’s also been alleged in the Information . . . that you aided in this robbery and it also resulted in the . . . serious bodily injury . . . [to Smitson], were you present when [Smitson] was shot?

[Davidson]: No, I was outside.

[Mr. Gray]: Okay, but, you do understand that [Smitson] was shot?

[Davidson]: Yes.

[Mr. Gray]: And you aided in some small part, carrying property out of that . . . trailer, so you did at least aid in the Robbery of [Fields], is that correct?

[Davidson]: Yes.

\* \* \*

[Mr. Gray]: And . . . you do understand that you had a role in this double murder, ah, in that you participated in some part, um, at least going to the place, carrying property outside and that is the crime of Aiding Robbery with Serious Bodily Injury, is that right, you understand that?

[Davidson]: Yes.

[Mr. Gray]: And you do understand that [Fields] was threatened, um, by the use of deadly force, in fact ordered on the gun, ah, by, ah, [Brooks], you do understand that, correct?

[Davidson]: Yes, I do.

Exhibits, Volume 1 at 17-20.

[22] We conclude that there was an adequate factual basis supporting Davidson’s guilty plea for robbery resulting in serious bodily injury. Thus, trial counsel’s performance did not fall below an objective standard of reasonableness.

### **E. Criminal Rule 4(a)**

[23] Davidson argues that he was entitled to release under Indiana Criminal Rule 4(a) and that trial counsel “worked with [the] prosecutor . . . to where [he] did not get this release.” Br. of Appellant at 6. Indiana Criminal Rule 4 provides, in relevant part:

No defendant shall be detained in jail on a charge, without a trial, for a period in aggregate embracing more than six (6) months from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge (whichever is later); except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar[.]

[24] Trial counsel testified that he filed a motion for a six-month release under Indiana Criminal Rule 4(a) and a hearing was set for July 24, 2017. *See* Tr., Vol. 1 at 26. However, Davidson pleaded guilty on July 17, prior to the release hearing. *See* App. of Appellee, Vol. 2 at 26. Davidson makes no showing that allowing a defendant to plead guilty prior to a possible Criminal Rule 4(a) release constitutes deficient performance. We conclude that Davidson failed to show that trial counsel’s performance was deficient in terms of Davidson’s right to a Criminal Rule 4(a) release, as even if he would have been entitled to release for the few weeks before his trial, he was still ultimately answerable to the

charges against him. Thus, Davidson fails to show how this affected his decision to plead guilty.

## **F. Waiver of Post-Conviction Relief**

- [25] Davidson argues that trial counsel's assistance was ineffective because counsel "allowed [him] to sign an invalid plea." Br. of Appellant at 7. Davidson's plea agreement stated, "defendant waives right to appeal and post conviction relief." App. of Appellee, Vol. 2 at 27. However, provisions in plea agreements that waive a defendant's right to seek post-conviction relief are void and unenforceable. *Creech v. State*, 887 N.E.2d 73, 75-76 (Ind. 2008).
- [26] Here, Davidson was allowed to file a petition for post-conviction relief and had a post-conviction relief hearing. The post-conviction court acknowledged this provision was unenforceable and told Davidson, "[Y]ou cannot waive your right to Post-Conviction Relief . . . I permitted you to file your Post-Conviction Relief, so that's why you're here." Tr., Vol. 1 at 79. Davidson's petition for post-conviction relief was decided on the merits.
- [27] Allowing Davidson to sign a plea agreement containing a clause preventing him from seeking post-conviction relief, even if not upheld, is likely representation that falls below the reasonable standard. However, the post-conviction court allowed him to file a petition, held a hearing, and rendered a decision on the merits. Thus, we conclude that Davidson failed to establish that he was prejudiced by trial counsel's deficient representation. Specifically, Davidson has failed to show that if not for counsel's deficient performance, he would not have

pleaded guilty and instead would have insisted on proceeding to trial.

*Hendrickson*, 660 N.E.2d at 1072.

## Conclusion

[28] Davidson failed to demonstrate ineffective assistance of trial counsel. Therefore, we conclude that the post-conviction court did not err when it denied Davidson's petition for post-conviction relief. Accordingly, we affirm.

[29] Affirmed.

Bailey, J., and Tavitas, J., concur.