MEMORANDUM DECISION

APPELLANT PRO SE

James W. Parks
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IN THE COURT OF APPEALS OF INDIANA

James W. Parks,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

February 22, 2021

Court of Appeals Case No. 19A-PC-3098

Appeal from the Lake Superior Court

The Honorable Samuel L. Cappas, Judge

Trial Court Cause No. 45G04-0706-PC-8

Baker, Senior Judge.

Statement of the Case

[1] James W. Parks appeals the post-conviction court's judgment denying his petition for post-conviction relief, alleging ineffective assistance of both trial and appellate counsel. He also challenges the post-conviction court's denial of his request to admit evidence months after his evidentiary hearing was held. We affirm.

Issues

[2] Parks presents the following restated issues for our review:

> I. Did the court err by finding and concluding that Parks failed to establish ineffective assistance of trial and appellate counsel?
>
> II. Did the court err by denying Parks' request to admit evidence months after his evidentiary hearing had concluded?

Facts and Procedural History

[3] The facts supporting Parks' convictions were recited by this Court in our opinion on his direct appeal and follow.

> On January 16, 2004, Parks attended a party in Gary, as did Antonio Jones ("Jones") and Lenzo Aaron ("Aaron"). Jones informed Parks and Aaron that someone had called him to buy cocaine. Jones then suggested that they rob the caller. Parks and Aaron agreed, and the three left the party and drove off in Jones's car. As they drove, Aaron observed an assault rifle on the back seat of the car.
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> The three arrived at the second-floor apartment occupied by Anthony McClendon ("McClendon"), Jimmie Jones, and

Laurice Jones. When Jones knocked at the door, someone asked who was there and Jones replied, "It's Tone man, Tone. Open the door." Tr. p. 945.[1] The door opened, Jones entered the apartment and Aaron heard eight shots being fired. Parks and Aaron then followed Jones into the apartment.

Parks and Jones went behind a curtain to the back of the apartment, while Aaron remained just a few steps inside the front door where he saw Laurice Jones seated on the couch holding twenty-three-month-old A.M. Aaron heard Parks say "Where the [expletive deleted] at? Where the [expletive deleted] at, man? Where the money at? Where the [expletive deleted] at?" Tr. p. 946. A male voice responded, "Is it like this Tone? Is it like this James G?" Tr. p. 949. Aaron then heard another series of gunshots.

Meanwhile, Laurice Jones pleaded with Aaron not to kill her. Aaron shook his head, indicating that he was not going to hurt her. Parks came out to the front of the apartment and took the assault rifle from Aaron. Parks returned to the back of the apartment and Aaron heard more shots fired. Then both Parks and Jones came from the back of the apartment and Parks told Aaron to "finish her off." Tr. p. 950. Aaron fled the apartment and as he went down the stairs heard two more gunshots. Parks and Jones then came out of the apartment and the three drove back to the party.

Shortly after midnight, A.M.'s mother Ronyale Hearne ("Hearne") arrived at the apartment to pick up her son. When she entered the apartment, she saw Laurice Jones's bloodied body and ran back downstairs. She called McClendon's brother, Roosevelt, who immediately came over to the apartment. Roosevelt and Hearne's cousin went back up to the apartment,

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[1] Antonio Jones's nickname is "Tone." Tr. p. 204. Parks's nickname is "Gusto." Tr. p. 206. Aaron's nickname is "Thirst." Tr. p. 164.

> where they discovered Laurice Jones holding A.M. Hearne entered the apartment and saw Jimmie Jones's body in the bathroom and McClendon's body in a doorway.
>
> Hearne and her cousin drove A.M. to a hospital. He was later taken by ambulance to the University of Chicago hospital, where he died. Autopsies revealed that Laurice Jones had been shot nine times, Jimmie Jones four times, McClendon five times, and A.M. twice. All four died as a result of multiple gunshot wounds.
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> On January 29, 2004, the State charged Parks with four counts of felony murder. A jury trial commenced on January 26, 2005. The jury convicted Parks on all four felony murder counts. After a sentencing hearing on March 24, 2005, the trial court sentenced Parks to consecutive sixty year terms on each count, for an aggregate sentence of 240 years.

Parks v. State, No. 45A03-0504-CR-191, slip op. at 2-4 (Ind. Ct. App. July 21, 2006), *trans. denied*.

[4] In his direct appeal of his convictions, Parks argued that the trial court erred: (1) when it limited his cross-examination of Aaron; (2) when it admitted evidence of his altercation with Aaron; (3) when it admitted hearsay testimony of a detective; and (4) when it sentenced him. *Id*. at 4-6. We affirmed his convictions and sentence. *Id*. at 6.

[5] Parks filed a petition for post-conviction relief in 2007, but later withdrew it. He then reactivated his petition for post-conviction relief in 2017, but the public defender later declined representation. Private counsel entered an appearance on Parks' behalf on June 21, 2018, after which Parks' final amended petition was filed in July 2018.

[6] An evidentiary hearing was held on October 11, 2018, during which Parks was represented by counsel. At that hearing, trial counsel testified that he did not pursue an alibi defense because Parks had written a letter to him in which Parks implicated himself in the crimes. When asked by Parks why trial counsel was in favor of an instruction stating that the jury could not consider Parks' decision not to testify, counsel replied that it was a good instruction. Parks also challenged an instruction on inconsistent statements. Additionally, he challenged trial counsel for failing to file a motion to dismiss the charging informations filed against him. As for appellate counsel, when Parks asked why counsel had not presented the argument that the trial court erred by admitting hearsay evidence, counsel replied that he did raise the issue. Several months after the evidentiary hearing, Parks requested that the post-conviction court admit an affidavit into the record. That request was denied. The post-conviction court denied Parks' petition and he now appeals from that order.

Discussion and Decision

Standard of Review

[7] "Post-conviction proceedings do not provide criminal defendants with a 'super-appeal.'" *Garrett v. State*, 992 N.E.2d 710, 718 (Ind. 2013). Rather, they provide a narrow remedy to raise issues that were not known at the time of the original trial or were unavailable on direct appeal. *Id.* Issues available but not raised on direct appeal are waived, while issues litigated adversely to the defendant on direct appeal are res judicata. *Pruitt v. State*, 903 N.E.2d 899, 905 (Ind. 2009).

[8] A petitioner who has been denied post-conviction relief appeals from a negative judgment. *Saunders v. State*, 794 N.E.2d 523, 526 (Ind. Ct. App. 2003). A post-conviction court's denial of relief will be affirmed unless the petitioner shows that the evidence leads unerringly and unmistakably to a decision opposite to that reached by the post-conviction court. *Id.* We review the post-conviction court's factual findings for clear error but do not defer to its conclusions of law. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). We will not reweigh the evidence or judge the credibility of the witnesses. *Hinesley v. State*, 999 N.E.2d 975, 981 (Ind. Ct. App. 2013), *trans. denied*.

I. Ineffective Assistance of Counsel

[9] Parks alleges ineffective assistance of both trial and appellate counsel in this appeal. When reviewing claims of ineffective assistance of counsel, we have stated the following:

> We evaluate claims of ineffective assistance under the two-part test originally set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner must demonstrate that his or her counsel performed deficiently, resulting in prejudice. Counsel renders deficient performance when his or her representation fails to meet an objective standard of reasonableness. Prejudice exists when a petitioner demonstrates that, if not for counsel's deficient performance, there is a reasonable probability that the result would have been different. A petitioner must prove both parts of the test, and failure to do so will cause the claim to fail.
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> We strongly presume counsel provided adequate assistance and exercised reasonable professional judgment in all significant

> decisions. Counsel's conduct is assessed based on facts known at the time and not through hindsight.

Cole v. State, 61 N.E.3d 384, 387 (Ind. Ct. App. 2016) (citations omitted), *trans. denied.*

[10] We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Walker v. State*, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006), *trans. denied*.

A. Trial Counsel

[11] As restated, Parks contends that his trial counsel rendered ineffective assistance in three ways. We address each in turn.

1. Alibi Evidence

[12] Parks claims that his trial counsel had planned to raise an alibi defense but was prevented from doing so because he failed to comply with the requirements of the alibi statute. The trial transcript reveals that before trial, the prosecutor asked what Parks' theory of the defense would be, indicating that she had not received a formal discovery response from the defense. Tr. Vol. I, pp. 25-26. Parks' counsel responded that he believed Parks' previous counsel had filed the discovery response. *Id*. at 26. Trial counsel found prior counsel's draft of the discovery response in his file, noting that Parks' defense was "insufficiency of the evidence, inability of the State to prove their case beyond a reasonable doubt, and alibi." *Id*. The State objected on the grounds that no notice of alibi had been filed. *Id*. at 27. Trial counsel responded that he was not sure if Parks

intended to present alibi witnesses and that his main defense was that "he didn't do it." *Id*. Based on this record, the trial court ruled that Parks had not complied with the alibi statute, and the only alibi evidence that would be permitted would be through Parks' own testimony. *Id*. at 33.

[13] Subsequently, during a break in the trial, trial counsel stated, for purposes of preserving the record,

> I just wanted to make it for[sic] [A] future court may question my motive or lack of action or whatever. But I am specifically indicating it is for me to comply with Rule 3.3.[2]

Id. at 47. During the evidentiary hearing, trial counsel explained that the reason he did not pursue an alibi defense was because Parks "had sent [him] a letter implicating himself, telling [trial counsel] exactly what he did." PCR Tr. p. 15. In its findings, the post-conviction court specifically found,

> As counsel clearly explained, this defense avenue was unavailable upon his receipt of the letter from Parks outlining his culpability in the murders. Counsel was not ineffective for abandoning a false and perjurious defense.

PCR App. Vol. 2, p. 38.

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[2] Ind. Professional Conduct Rule 3.3(a)(3) provides that "A lawyer shall not knowingly. . .offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer believes is false."

[14] Parks challenged his trial counsel's credibility, attempting to do so by asking the post-conviction court to take judicial notice, long after the completion of the evidentiary hearing, of his counsel's disciplinary record. Counsel explained to the post-conviction court why the alibi defense was not pursued. The post-conviction court was in the best position to determine the credibility of the witnesses. *Lambert v. State*, 743 N.E.2d 719, 749 (Ind. 2001). "Whether a witness' testimony at a postconviction hearing is worthy of credit is a factual determination to be made by the trial judge who has the opportunity to see and hear the witness testify." *State v. Craney*, 719 N.E.2d 1187, 1191 (Ind. 1999). The post-conviction court did not err by failing to find ineffective assistance of trial counsel on this ground. *See Pierce v. State*, 135 N.E.3 993, 1006 (Ind. Ct. App. 2019), *trans. denied* (no ineffective assistance where strategic decision not to call witness intending to perjure herself for defendant).

[15] Nonetheless, had we found that Parks established that trial counsel's performance was deficient, he has failed to establish any prejudice therefrom. Parks claimed that "Anita Golsby told police" that he "was at a party she hosted and that he never left the party when the crime as charged occurred." Appellant's Br. p. 13. However, when asked by police shortly after the murders if Parks and his companions ever left her card party, Golsby told police, "I'm not for sure, I wasn't really paying attention to them, but they were at the party." PCR Ex. 1, Ex. Vol. p. 7. Parks has not demonstrated that he suffered prejudice from trial counsel's decision not to offer an alibi defense. The post-conviction court did not err.

2. Instructional Errors

[16] Parks challenges trial counsel's conduct as respects two instructions that were given at trial. We address them in turn.

a. Parks' Failure to Testify

[17] First, Parks argues that his trial counsel was ineffective because he should have objected to one of the trial court's final instructions to the jury. This particular instruction covered the subject that the defendant was not required to testify and that his decision not to testify could not be considered by the jury. Appellant's Br. pp. 17-18. Parks' trial counsel requested an instruction addressing exactly that. Tr. Vol. VI, p. 141. The trial court indicated that it had included that instruction among the court's final instructions. *Id.*

[18] The final instruction given read as follows:

> The Defendant is a competent witness to testify in his own behalf and in this case the Defendant has not testified in his own behalf, and this fact is not to be considered by the jury as any evidence of guilt, neither has the jury any right to comment upon, refer to or in any manner consider the fact that the Defendant did not testify in arriving at your verdict in this case.

PCR App. Vol. 2, p. 160.

[19] We start with the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Lambert*, 743 N.E.2d at 730. Here, Parks' argument is that trial counsel should have objected to the instruction. "Where, as here, a claim of ineffective assistance is based on counsel's failure to object, the petitioner must

demonstrate that if an objection had been made, the trial court would have had no choice but to sustain it." *Cole*, 61 N.E.3d at 387.

[20] The State correctly observes that under the federal constitution, a trial court may instruct the jury in that manner even over a particular defendant's objection. Appellee's Br. p. 14 (citing *Lakeside v. Oregon*, 435 U.S. 333, 340-41 (1978)). The State also directs us to the holding under the Indiana Constitution that a trial court may instruct the jury in that manner only if the defendant does not object. *Id.* (citing *Bush v. State*, 775 N.E.2d 309, 310-11 (Ind. 2002)). Doing so over a defendant's objection would constitute a violation of article 1, section 14 of the Indiana Constitution. *Lucas v. State*, 499 N.E.2d 1090, 1093 (Ind. 1986) (citing *Priest v. State*, 386 N.E.2d 686 (Ind. 1979)).

[21] Here, trial counsel did not object to the instruction, but instead requested it. A defendant's preference about whether such an instruction should be given is a matter of trial strategy. *Lucas*, 499 N.E.2d at 1093. "If, as a trial tactic, the defense determines that such an instruction would assist its case, it may request the judge to so instruct." *Id.* (quoting *Gross v. State*, 306 N.E.2d 371, 372 (Ind. 1974)).

[22] Trial counsel testified at the evidentiary hearing that he was in favor of the instruction because he believed it was "a normal and customary instruction given to jurors when a defendant does not testify" and that it was a "good instruction." PCR Tr. p. 18. In *Carter v. Kentucky*, 450 U.S. 288, 305 (1981), the United States Supreme Court held that such an instruction to the jury can

"minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." Therefore, we agree with the post-conviction court's conclusion that Parks failed "to prove that counsel's decisions concerning the instruction were other than strategic." PCR App. Vol. 2, p. 38. The post-conviction court did not err.

b. Prior Inconsistent Statements

[23] Next, Parks argues that trial counsel rendered ineffective assistance by failing to object to a final instruction about prior inconsistent statements. In particular, he takes issue with an instruction stating that the jurors could consider a prior inconsistent statement by a witness as substantive evidence in determining Parks' guilt. Our standard of review for this claim is the same as stated above.

[24] In his brief, Parks refers to Aaron's testimony and claims that it was inconsistent with *other* testimony or physical evidence. *See* Appellant's Br. pp. 31-32. However, Parks has not directed us, nor did he direct the post-conviction court, to any prior inconsistent statements by *Aaron* that were introduced at trial.

[25] "If we can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient." *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). Here, the post-conviction court found that Parks failed "to identify any inconsistent statements in the record that the jury would have considered vis-à-vis this instruction. He does not therefore, articulate how the instruction might

have prejudiced him." PCR App. Vol. 2, p. 38. We agree and conclude that Parks has not demonstrated ineffective assistance of trial counsel.

3. Charging Information and Probable Cause Affidavit

[26] Parks claims that his counsel rendered ineffective assistance by failing to file a motion to dismiss prior to trial because, as he put it in his petition, "there was no information listed regarding what alleged property was taken or from what victim to support the underlying offense of Robbery." *Id*. at 116. To establish this claim, Parks bore the burden of demonstrating a reasonable probability that the motion to dismiss would have been granted if made. *See Garrett v. State*, 992 N.E.2d 710, 723 (Ind. 2013) (to prevail on such claim petitioner must show reasonable probability that motion to dismiss would be granted if made).

[27] The post-conviction court found that Parks failed "to prove he was prejudiced by counsel's failure to challenge the wording of the charging information." PCR App. Vol. 2, p. 35. The four counts of the charging information against Parks and his co-defendants alleged with respect to each of the victims that Parks "knowingly or intentionally did kill [the victim] while committing or attempting to commit robbery." Direct Appeal App. Vol. 1, p. 16.

[28] The post-conviction court found that because "the charging informations alleged that Parks killed the victims while committing or *attempting to commit* Robbery. . . [the] State was not required to show that any property was taken." PCR App. Vol. 2, p. 35. The post-conviction court concluded that Parks had

failed "to prove he was prejudiced by counsel's failure to challenge the wording of the charging information." *Id.*

[29] The post-conviction court's conclusion finds support in *Burris v. State*, 465 N.E.2d 171 (Ind. 1984). In *Burris*, the defendant was charged with felony murder and argued that the information did not charge him with the crime of robbery because it failed to allege that he knowingly or intentionally took money from the victim. *Id.* at 181. Our Supreme Court concluded that the defendant had failed to establish error because the charging information sufficiently informed him of the charges by alleging that the murder occurred while in the commission of robbery, a felony. *Id.*

[30] Even where a charging information may lack appropriate factual detail, and we are not saying that this charging information did, we have held that additional materials such as the probable cause affidavit supporting the charging instrument may be taken into account in assessing whether a defendant has been made sufficiently aware of the charges he faces. *See State v. Laker*, 939 N.E.2d 1111, 1113 (Ind Ct. App. 2010) (citing support from *Patterson v. State*, 495 N.E.2d 714, 719 (Ind. 1986)), *trans. denied*.

[31] The probable cause affidavit specified that Parks and his co-defendants were hoping to steal cash from one of the victims. Direct Appeal App. Vol. I, pp. 12-13. Prior to the murders, Parks and the others talked about robbing a male known as "Smoke," who they believed to have $6,000 cash. *Id.* at 12. The

group then went to Smoke's apartment to carry out the robbery while armed with multiple firearms. *Id.*

[32] At trial, evidence was introduced that Jones told Aaron and Parks, "A dude just called me, man, he got six G's, he wants me to take him to get a 9-piece. Y'all want to go rob him?" Trial Tr. Vol. IV, pp. 934-35. Further testimony was admitted, showing that Parks stated during the crimes, "Where the money at?" *Id.* at 946. Also, the evidence at trial showed that Parks told an individual after the crimes took place that the purpose of the robbery was to take money. Trial Tr. Vol. V, p. 1092. All of this is consistent with trial counsel's statement during the evidentiary hearing that he was fully apprised of the nature of the offenses Parks faced. PCR Tr. Vol. II, p. 31.

[33] Furthermore, the language of the charging documents was such that Parks was protected from being subject to double jeopardy. The counts in the information specifically named the defendants, that they were seeking to commit a robbery, the place and date of the offense, the name of the charged offenses, and the names of each victim killed. We conclude that the post-conviction court correctly found that Parks has not established that the language of the charging information prevented him from being apprised of the charges he faced and he has failed to show that the drafting of the information resulted in any prejudice to him. Trial counsel was not ineffective.

B. Appellate Counsel

[34] Parks alleges that his appellate counsel rendered ineffective assistance by failing to claim that the trial court abused its discretion "in allowing police officers to testify to out-of-court statements made by witnesses who were not present to testify." PCR App. Vol. 2, p. 113. Claims of ineffective assistance of appellate counsel tend to fall into one of three categories: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues competently. *Timberlake v. State*, 753 N.E.2d 591, 604 (Ind. 2001). Parks questioned appellate counsel during his evidentiary hearing about why he had not raised the issue on appeal. Appellate counsel testified that he "did raise that on appeal." PCR Tr. p. 41. Appellate counsel's testimony is confirmed by the direct appeal brief which he filed on Parks' behalf. Direct Appeal Appellant's Br. pp. 14-16. Parks did not challenge appellate counsel's testimony, nor did Parks direct appellate counsel to any hearsay testimony at trial that Parks believed should have been challenged on appeal. Therefore, Parks has not established ineffective assistance of appellate counsel under categories (1) and (2).

[35] Parks acknowledged that appellate counsel raised the claim on appeal, but, in his proposed findings of fact and conclusions of law after the evidentiary hearing, he stated that his "counsel raised a weak claim of allowing hearsay statements." PCR App. Vol. 2, p. 238. Parks made this argument without stating what appellate counsel should have done differently and did not cite to any portion of the trial transcript. *See id.* The post-conviction court found that

"Parks' claim lacks merit because [appellate counsel] did raise this issue." *Id.* at 40.

[36] The post-conviction court was correct to conclude, based on the record, that it was undisputed that Parks' appellate counsel did raise a hearsay argument on appeal and Parks had failed to identify what else appellate counsel should have argued on the point. The other argument Parks made in his appellate brief was that appellate counsel should have challenged the admission of testimony by a detective about hearsay statements made by an individual. Because Parks did not present this argument to the post-conviction court, his claim of error is waived. *See Whitfield v. State*, 699 N.E.2d 666, 669 (Ind. Ct. App. 1998) (issue raised for first time on appeal is waived).

[37] The post-conviction court did not err by finding that Parks had failed to establish ineffective assistance of appellate counsel on any ground.

II. Admission of Evidence Post Evidentiary Hearing

[38] Parks contends the post-conviction court erred by denying his request to admit an affidavit he submitted several months after the evidentiary hearing was held and concluded. "The admission or exclusion of evidence is within the post-conviction court's discretion; therefore, we defer to the post-conviction court and will not disturb its ruling unless it abused its discretion." *Williams v. State*, 160 N.E.3d 563, 576 (Ind. Ct. App. 2020), *trans. denied*.

[39] After the October 17, 2018 evidentiary hearing, Parks filed a "Motion to Admit Affidavit of Jeffery Lydell Lewis as Newly Discovered Evidence." PCR App.

Vol. 2, p. 64. The post-conviction court denied the motion deciding, "Because the Petition for Post-Conviction Relief, as amended on July 25, 2018, raises no claim of newly discovered evidence and, because the evidentiary hearing on the Petition was held and concluded on October 17, 2018, the Petitioner's Motion is denied." *Id*. at 66.

[40] At the evidentiary hearing, Parks brought up the issue of Lewis' credibility. PCR Tr. p. 51. The issue was included in the September 12, 2017 version of Parks' petition for post-conviction relief. It follows that (1) the evidence is not newly discovered, and (2) Parks had the opportunity to present this evidence to the post-conviction court in a timely manner. We previously have found that a post-conviction court did not err by precluding the petitioner from calling a witness to testify after the evidence was closed. *See Rose v. State*, 120 N.E.3d 262, 268 (Ind. Ct. App. 2019), *trans. denied*. Similarly, the post-conviction court here did not err by excluding an affidavit, on a subject previously known and available, filed several months after the close of evidence.

[41] Additionally, there was no prejudice to Parks. He was able to challenge Lewis' credibility, and the State was able to cross-examine the witness about the issue of Lewis' credibility. Had the post-conviction court allowed the evidence at that late date, it would have deprived the State of the opportunity to cross-examine the affiant. Our supreme court held as much in *Overstreet v. State*, 877 N.E.2d 144, 168 (Ind. 2007) ("the problem with the affidavit is not one of relevance, but the ability of the State to question and cross-examine the affiant."). The post-conviction court did not err.

Conclusion

[42] Parks has failed to show that the evidence leads unerringly and unmistakably to a decision opposite to that reached by the post-conviction court. For the foregoing reasons, we affirm the judgment of the post-conviction court.

[43] Affirmed.

Bradford, C. J., and May, J., concur.