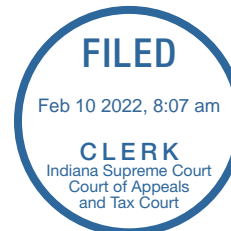


MEMORANDUM DECISION

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

Somchanh Amphonephong
Carlisle, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Tyler Banks
Supervising Deputy Attorney
General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Somchanh Amphonephong,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 10, 2022

Court of Appeals Case No.
21A-PC-412

Appeal from the Allen Superior
Court

The Honorable David Zent, Judge

Trial Court Cause No.
02D06-1604-PC-48

Robb, Judge.

Case Summary and Issue

- [1] Following a jury trial in 2011, Somchanh Amphonephong was convicted of Count I, Class A felony child molesting, and Counts II and III, both Class C felony child molesting. The trial court sentenced Amphonephong to serve an aggregate term of thirty-four years in the Indiana Department of Correction. On direct appeal, Amphonephong appealed only his conviction of Count III, and we affirmed his conviction. *Amphonephong v. State*, 32 N.E.3d 825, 833 (Ind. Ct. App. 2015). Subsequently, Amphonephong filed a petition for post-conviction relief, which the post-conviction court denied. Amphonephong, pro se, now appeals the denial of post-conviction relief, raising one issue for our review which we restate as whether the post-conviction court erred in concluding his trial counsel was not ineffective. Concluding Amphonephong did not receive ineffective assistance of counsel and therefore, the post-conviction court did not err in denying his petition, we affirm.

Facts and Procedural History

- [2] We summarized the facts of this case in Amphonephong’s direct appeal:

On June 5, 2010, then five-year-old J.B. spent the night with her aunt, Geri Westmoreland (“Aunt”), who dated and lived with Amphonephong. That night, J.B. got into bed with Aunt and Amphonephong, and she lay down in between them. Aunt was asleep, J.B. was lying on her back, and Amphonephong was lying on his side and facing J.B. when “[h]e put his hands in [J.B.’s] pants” and “in her underwear.” He touched the “[i]nside” of her “private” that she used to “[p]ee.” About ten

times, J.B. “kept on putting his hands out but he kept on putting his hands back in.”

The next day, J.B. told her Aunt what Amphonephong had done to her. Aunt then asked her other niece, N.B., who was also five years old, if Amphonephong had done anything to her. N.B. indicated that he had touched her and had sexual intercourse with her on more than one occasion when she was four and five years old. After J.B.’s mother learned what had happened, she called the police. J.B. and N.B. were then interviewed by the Child Advocacy Center, and they each had a physical examination.

The State charged Amphonephong with: Count I, Class A felony child molesting for his act of sexual intercourse against N.B.; Count II, Class C felony child molesting for his act of touching N.B.; and Count III, Class C felony child molesting for his act of touching J.B.

Id. at 827-28 (record citations omitted).

- [3] In July 2012, a jury trial was held. At the start of trial, Amphonephong’s counsel explained to the jury that Amphonephong was from Laos and that although he did not read or write English, he understands the language.¹ Amphonephong did not present any evidence in his defense, nor did he testify on his own behalf. However, Amphonephong’s counsel cross-examined nearly

¹ Testimony presented at trial reiterated that Amphonephong understands the English language. Aunt and Aunt’s sister each testified that they communicate with Amphonephong in English. *See* The Transcript, Volume 1 at 201, 227. A Fort Wayne Police Department detective also testified that she interviewed Amphonephong in English after he indicated that he understands the language. *See* Tr., Vol. 2 at 86.

all of the State's witnesses and in so doing, attempted to demonstrate the evidence was insufficient to find him guilty of the crimes.

- [4] The State presented testimony from J.B. and N.B. about the events detailed above. *See supra* ¶ 2. On cross-examination, Amphonephong's counsel addressed inconsistencies in both victims' testimonies. He also identified inconsistencies between J.B.'s prior statements to the Child Advocacy Center and her trial testimony regarding the number of times she tried to remove Amphonephong's hands from her pants as well as whether Amphonephong was asleep when he touched her.
- [5] The State also offered testimony from the sexual assault nurse who examined J.B. and N.B. as well as multiple forensic scientists in charge of reviewing the physical evidence. However, as Amphonephong's counsel drew out on cross-examination, there was no physical evidence linking Amphonephong to the crimes.
- [6] At the conclusion of the trial, the jury found Amphonephong guilty on all three counts. Thereafter, the trial court held a sentencing hearing and imposed an aggregate sentence of thirty-four years. On direct appeal, Amphonephong challenged the sufficiency of the evidence supporting his conviction as to Count III, and this court affirmed. *See Amphonephong*, 32 N.E.3d at 832-33.
- [7] In 2016, Amphonephong filed a pro se petition for post-conviction relief alleging ineffective assistance of counsel. He amended his petition in August 2019. Amphonephong's claim was, in part, based upon his counsel's alleged

failure to communicate the State’s plea offer to him. An August 2011 letter from the State to Amphonephong’s counsel suggests that the State prepared a plea offer. However, that offer was never accepted, and it is unclear whether it was ever communicated to Amphonephong. His counsel indicated during the post-conviction proceedings that Amphonephong rejected the offer.²

Amphonephong alleged that it was never communicated to him and he would have accepted a plea.³

[8] In his petition, Amphonephong also claimed ineffective assistance of trial counsel for failing to elicit certain testimony and to call unnamed witnesses. At the State’s request, the case was submitted by affidavit, and in his affidavits, Amphonephong claimed that his counsel also failed to attend all pretrial proceedings, make a translator available to Amphonephong, and provide an adversarial defense. On January 26, 2021, the post-conviction court issued findings of fact and conclusion of law, denying Amphonephong’s petition for relief.

² The exact contents of the plea offer are not agreed upon. In the post-conviction proceedings, Amphonephong’s counsel suggested that the plea was for an executed term of eight years followed by probation. *See* Appellant’s Appendix, Volume 3 at 25. Alternatively, the State submitted an affidavit from the former deputy prosecutor in charge of the case indicating that any offer would have been for a significantly longer sentence. *See id.* at 33. The deputy prosecutor also provided a copy of the alleged plea offer. *See id.* at 36-37.

³ Amphonephong has repeatedly asserted his innocence and he does not now admit guilt or offer evidence supporting his claim that he would have admitted guilt if given the chance. Rather, he simply indicates that he would have accepted a plea.

[9] Amphonephong now appeals.⁴ Additional facts will be provided as necessary.

Discussion and Decision

I. Standard of Review

[10] A petitioner for post-conviction relief must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who has been denied relief faces a “rigorous standard of review.” *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001). To succeed on appeal, the petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Jervis v. State*, 28 N.E.3d 361, 365 (Ind. Ct. App. 2015), *trans. denied*. When reviewing the post-conviction court’s order denying relief, we will “not defer to the post-conviction court’s legal conclusions,” and the “findings and judgement will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017) (citation omitted). The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Barber v. State*, 141 N.E.3d 35, 41 (Ind. Ct. App. 2020), *trans. denied*.

⁴ Amphonephong’s petition for post-conviction relief also claimed ineffective assistance of appellate counsel which was denied by the post-conviction court. However, Amphonephong does not appeal the post-conviction court’s denial as to his claim of ineffective assistance of appellate counsel.

[11] Post-conviction proceedings are not an opportunity for a super-appeal. *Id.* at 40-41. Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002). If not raised on direct appeal, a claim of ineffective assistance of counsel is properly presented in a post-conviction proceeding. *Id.*

II. Ineffective Assistance of Counsel

[12] When reviewing claims of ineffective assistance of counsel, we apply the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019). To prevail, a petitioner must first demonstrate that counsel's performance was deficient and second, that the petitioner was prejudiced by the deficient performance. *Barber*, 141 N.E.3d at 42. Deficient performance exists if counsel's performance falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* Prejudice exists if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Failure to prove either prong causes the petitioner's claim to fail. *Id.*

[13] Counsel is afforded considerable discretion in choosing strategy and tactics and on review, we will accord those decisions deference. *Jervis*, 28 N.E.3d at 365. As such, we will not speculate as to what may or may not have been

advantageous trial strategy. *Id.* Ultimately, there is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.*

A. Pretrial Hearings

[14] Amphonephong first argues that his trial counsel rendered ineffective assistance by failing to attend all pretrial proceedings. Amphonephong contends his counsel's failure to attend November 2011 and February 2012 pre-trial conferences as well as two January 2012 motions hearings presumptively prejudiced him. However, Amphonephong provides no support for his argument that failure to attend these specific pretrial proceedings, without more, resulted in prejudice. Further, Amphonephong offers no indication as to how these exact failures negatively impacted his counsel's performance or the outcome at trial. Counsel cannot be found ineffective where the petitioner fails to demonstrate that certain failings effected the ultimate outcome. *See Barber*, 141 N.E.3d at 42. The post-conviction court did not err in concluding counsel's failure to attend all pretrial proceedings did not amount to ineffective assistance.

B. Translator

[15] Amphonephong next argues his counsel was ineffective by failing to ensure that a translator was present at all attorney-client meetings and at trial. Specifically, he contends that a "a non-English speaking criminal defendant has [the] right to have court proceeding[s] translated for him." *See* Appellant's Amended Brief at

7 (citing *Martinez Chavez v. State*, 534 N.E.2d 731, 736 (Ind. 1989)).⁵ However, there is nothing in the record to indicate that Amphonephong does not speak or understand the English language.

[16] At trial, Amphonephong’s counsel indicated that although Amphonephong, who is originally from Laos, “does not read or write English . . . he understands it.”⁶ The Transcript, Volume 1 at 136.⁷ Aunt, having known Amphonephong for twenty-five years, and Aunt’s sister, having known Amphonephong for more than five years, each testified that they communicate with Amphonephong in English. *See id.* at 201, 227. A Fort Wayne Police Department detective interviewed Amphonephong prior to trial in English only after he advised her that he understands the language. *See Tr.*, Vol. 2 at 86. Further, Amphonephong never indicated prior to or during the trial or at sentencing that he was having difficulty understanding his counsel or the proceedings. He never expressed confusion or asked for anything to be clarified. In fact, on multiple occasions, when provided the opportunity to address the trial court, Amphonephong indicated either that he understood or that he had no objections or additions to make. *See Tr.*, Vol. 3 at 19; *see also Tr.*, Vol. 4 at 4. There is nothing to support Amphonephong’s argument that he had “NO control of the English language,” Appellant’s Amended Br. at 7, and

⁵ Citations to the Appellant’s Amended Brief are to the .pdf pagination.

⁶ Amphonephong has been living and working in the United States since approximately 1980.

⁷ Citations to all volumes of the trial transcript are to the .pdf pagination.

therefore, we conclude the post-conviction court did not err in finding that the lack of a translator did not result in ineffective assistance of counsel.

C. Adversarial Defense

[17] Amphonephong also argues that he received ineffective assistance of counsel because he was not provided any type of adversarial defense. Specifically, Amphonephong argues that counsel did no investigation and took no action in his defense at any time. However, he provides no detail as to what specific actions should have been taken or how they would have resulted in a different outcome at trial. Such claims amount to general allegations which are not enough to show counsel to be ineffective. *See Hunter v. State*, 578 N.E.2d 353, 357-58 (Ind. 1991). In fact, at trial, Amphonephong's counsel cross-examined nearly all of the State's witnesses, drawing out inconsistencies in the victims' testimonies, *see Tr.*, Vol. 1 at 154-55, 157, 177, and highlighting on multiple occasions that the State was unable to provide any physical evidence linking Amphonephong to the crimes, *see Tr.*, Vol. 2 at 37, 56, 69-70, 78, 79-80. His counsel attempted to show that the evidence was insufficient to support a conviction, but his attempt was unsuccessful. The tactics an attorney uses to achieve a particular result are presumed to be adequate and made in the exercise of reasonable professional judgment. *Pierce v. State*, 135 N.E.3d 993, 1003 (Ind. Ct. App. 2019), *trans. denied*. Amphonephong fails to show the approach utilized by his counsel was insufficient.

[18] To the extent Amphonephong claims that his counsel's failure to call unnamed witnesses or allow him to testify on his own behalf further exhibited a failure to provide an adversarial defense, the decision regarding which witnesses to call is a strategic choice to be made by counsel. *Ford v. State*, 523 N.E.2d 742, 747 (Ind. 1988). This court will not second guess such decisions unless the choice falls below objectively professional standards. *Id.* Here, Amphonephong fails to indicate who would have testified on his behalf. *See Hunter*, 578 N.E.2d at 355 (reasoning that failure to show what a witness' testimony would contain supports the post-conviction court's determination that counsel's assistance was not ineffective). Additionally, he offers no information regarding his own failure to testify, just that his counsel did not call him at trial. As such, we have no basis to judge his counsel's actions. Under these circumstances, we cannot say counsel's performance was ineffective.

D. Plea Offer

[19] Finally, Amphonephong argues that his counsel failed to communicate the State's plea offer to him which resulted in ineffective assistance of counsel. In order to show ineffective assistance of counsel due to a lapsed or rejected plea, a petitioner must meet the two-prong *Strickland* test. *Missouri v. Frye*, 132 S.Ct. 1399, 1405 (2012). To make the necessary showing of prejudice under the second prong, the petitioner must show there was a reasonable probability he would have accepted the plea and neither the State nor the trial court would have thwarted implementation of the petitioner's plea agreement. *Id.* at 1409. If prejudice cannot be shown, this court need not inquire as to whether

counsel's performance was adequate per the first *Strickland* prong. *See Jervis*, 28 N.E.3d at 367.

[20] Here, Amphonephong fails to establish prejudice in that he cannot demonstrate that he would have accepted the State's alleged plea deal. In his petition for post-conviction relief as well as this appeal, he has offered no evidence that he would have accepted the plea. Instead, he has only ever offered a self-serving statement that he would not be in his "right mind" if he failed to accept a plea when facing the jail time he could have been sentenced to serve. *See Appealed Order* at 5. However, mere post hoc assertions of what the petitioner would have done when presented with a plea agreement are not enough to establish ineffective assistance of counsel under *Frye*. *Cf. Bobadilla*, 117 N.E.3d at 1284.

[21] The record demonstrates that Amphonephong repeatedly denied the allegations and asserted his innocence throughout the duration of the case. When Aunt confronted Amphonephong with the allegations made by J.B. and N.B., he denied guilt and stated "have [J.B. and N.B.] tested if you don't believe me." *Tr.*, Vol. 1 at 221. While under investigation, he again denied the allegations. *See Tr.*, Vol. 2 at 90-91. Additionally, at trial Amphonephong proceeded with an argument that he was not guilty and during his pre-sentence interview he again denied guilt. *See Appellant's App.*, Vol. 3 at 69.⁸ Even now, he does not assert he is guilty. As Amphonephong has maintained his innocence

⁸ Citations to the Appellant's Appendix are to the .pdf pagination.

throughout the entirety of this case, there is little reason to believe he would have accepted the State's offer and pleaded guilty. *See Jervis*, 28 N.E.3d at 367 (reasoning that multiple pronouncements of innocence throughout the lifetime of a case, without more, prevent a petitioner from demonstrating the prejudice needed to show counsel's performance was inadequate). As Amphonephong failed to establish he would have accepted the plea deal, we cannot say that he received ineffective assistance of counsel.

Conclusion

[22] The post-conviction court did not err in concluding Amphonephong is not entitled to post-conviction relief on his claims that he received ineffective assistance of counsel. Accordingly, we affirm.

[23] Affirmed.

Riley, J., and Molter, J., concur.