

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*

Jarvis Nelson Peele
Pendleton, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Megan M. Smith
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jarvis Nelson Peele,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

April 12, 2021

Court of Appeals Case No.
20A-PC-965

Appeal from the Clark Circuit
Court

The Honorable Bradley B. Jacobs,
Judge

Trial Court Cause No.
10C02-2001-PC-1

Bailey, Judge.

Case Summary

- [1] Jarvis Nelson Peele (“Peele”) appeals the denial of his petition for post-conviction relief, which largely focused on his habitual-offender adjudication. In his petition, Peele alleged ineffective assistance of counsel, raised other freestanding claims of trial error, and sought correction of a clerical error that incorrectly showed that he had admitted to being a habitual offender.
- [2] While we affirm the denial of relief as to the allegations of ineffective assistance of counsel and all freestanding claims of trial error, we reverse and remand for correction of a clerical error that the post-conviction court intended to correct.

Facts and Procedural History

- [3] In 2017, the State charged Peele with several criminal offenses and later alleged that Peele had the status of a habitual offender. A trial was held in 2019, at which Peele was represented by a public defender. The jury found Peele guilty of all criminal charges. Following the guilt phase, Peele waived his right to have the habitual-offender allegation tried before a jury. A bench trial ensued, and the trial court adjudicated Peele a habitual offender. Peele then pursued a direct appeal. *See Peele v. State*, No. 19A-CR-781, 2019 WL 3978333 (Ind. Ct. App. Aug. 23, 2019), *trans. denied*. Through the assistance of appointed appellate counsel, Peele obtained the reversal of one of his convictions. *See id.*
- [4] On January 9, 2020, Peele filed a *pro se* petition for post-conviction relief, in which he raised several claims and identified various documents that he

anticipated entering into evidence.¹ In the petition, Peele largely focused on matters related to his having been adjudicated a habitual offender. Peele alleged procedural irregularities concerning the filing of the habitual-offender allegation and the proceedings thereon, asserting that the court did not properly inform him of potential penalties. Peele also alleged ineffective assistance of trial counsel because his counsel purportedly failed to directly inform him of the habitual-offender allegation prior to trial. Peele further alleged ineffective assistance of appellate counsel for failing to raise the purported procedural irregularities or challenge the sufficiency of the evidence supporting the adjudication. Peele also sought correction of the Chronological Case Summary (“CCS”). He asserted that the CCS showed that he had admitted to the allegation, when he had only waived his right to have a jury decide the matter.

[5] In addition to focusing on the habitual-offender allegation, Peele claimed procedural irregularities in the revocation of his pre-trial placement.²

[6] Attached to Peele’s petition were brief excerpts from transcripts of the underlying criminal proceedings. In late January 2020, Peele separately filed an affidavit in support of his petition. Therein, Peele averred that he had not been directly informed of the habitual-offender allegation prior to his trial.

¹ Later that month, Peele filed what appears to be a substantially similar petition containing the same claims.

² The State refers to a revocation of Peele’s bond. However, to consistently track with Peele’s arguments, we will refer to the revocation of pre-trial placement. Moreover, as to additional arguments contained in the petition, Peele also alleged that the post-conviction court should revisit a Criminal Rule 4 issue that was raised on direct appeal and resolved unfavorably to him. Peele has abandoned this argument on appeal.

[7] A fact-finding hearing was held on February 27, 2020. At the hearing, the post-conviction court acknowledged the CCS issue, telling Peele, “you are right about that”—“that was an entry that was made in error[.]” Tr. Vol. 2 at 4. The court ultimately took judicial notice that Peele “did not admit to being a habitual offender” and that the matter “was assigned to the bench not the jury.” *Id.* at 13. The court told Peele that it would “fix[] that” error. *Id.* at 29.

[8] As to the remaining claims for relief, Peele failed to seek admission of his prior-filed affidavit or any of the documents identified in his petition. Although Peele at times referred to documents that appeared to be in his possession at the hearing, no evidence was formally tendered or admitted, with the hearing generally consisting of Peele’s unsworn factual assertions and related arguments. At the hearing, Peele raised an additional claim that his trial counsel had been unprepared for trial.

[9] The post-conviction court later entered a written order wholly denying the petition for post-conviction relief. Therein, the court found that Peele (1) “did not subpoena any witnesses for the hearing on his petition,” (2) “did not submit any affidavits in support of his petition,” and (3) “did not call anyone to testify in support of his petition.” App. Vol. 2 at 55.³ The court determined that,

³ We refer throughout to the volumes of the Appendix physically file-stamped on December 1, 2020.

“[w]ithout any evidence to support his claims, Peele failed to meet his burden of proof.” *Id.* The court did not refer to the clerical error shown in the CCS.⁴

Discussion and Decision

[10] Post-conviction proceedings are civil proceedings in which a person may present limited challenges to a criminal conviction or a sentence. *See* Ind. Post-Conviction Rule 1; *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *cert. denied*. Generally, “[t]he scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal.” *Gibson*, 133 N.E.3d at 681. In a post-conviction action, the petitioner “has the burden of establishing his grounds for relief by a preponderance of the evidence.” P-C.R. 1(5). Where, as here, the petitioner “appeals from a negative judgment denying post-conviction relief, he must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court’s decision.” *Wilson v. State*, 157 N.E.3d 1163, 1170 (Ind. 2020) (internal quotation marks omitted) (quoting

⁴ After the post-conviction court issued its order denying relief, Peele filed a document that he characterized as an amended petition, which contained several additional claims for relief. A CCS entry reflects that the court denied relief on the additional claims, determining that the document was not an amended petition but, instead, a successive petition. Notably, Post-Conviction Rule 1(12)(a) requires that a party seek permission before filing a successive petition, and there is no indication that Peele sought permission before filing the document. Thus, the additional claims contained therein were not properly before the post-conviction court.

Despite having improperly raised the additional claims below, Peele asks us to address those claims on appeal. Ultimately, however, because Peele did not properly present those claims to the post-conviction court, he has waived appellate review of the claims. *See Leonard v. State*, 80 N.E.3d 878, 884 n.4 (Ind. 2017) (noting that a party waives an argument by raising it for the first time on appeal). We therefore do not further address those additional claims, which include whether Peele should have been represented at a particular hearing, whether trial counsel should have sought a competency evaluation and lodged certain objections, and whether appellate counsel should have presented the foregoing additional matters on appeal.

Gibson, 133 N.E.3d at 681). If the petitioner “fails to meet this ‘rigorous standard of review,’ we will affirm[.]” *Id.* (quoting *Gibson*, 133 N.E.3d at 681).

Ineffective Assistance of Counsel

[11] To prevail on a claim of ineffective assistance of counsel, the petitioner must show “(1) that his counsel’s performance fell short of prevailing professional norms, and (2) that counsel’s deficient performance prejudiced his defense.” *Id.* at 1177. Moreover, where counsel’s testimony “is not presented in support, the post-conviction court may infer that . . . counsel would not have corroborated [the petitioner’s] allegations.” *Dickson v. State*, 533 N.E.2d 586, 689 (Ind. 1989).

Trial Counsel

[12] In alleging ineffective assistance of trial counsel, Peele has largely focused on whether counsel directly informed him that the State was seeking a habitual-offender adjudication. Putting aside the lack of testimony from trial counsel on this issue, Peele nonetheless asserted below—and reasserts on appeal—that trial counsel “delivered [his] case filings” to him long before trial, at which point Peele “was . . . presented with the State’s Notice of Intent to Seek Habitual Offender Status.” Br. of Appellant at 12. Indeed, according to Peele, he became aware of the allegation at some point in late 2018, months before trial. Thus, because Peele does not dispute that he was aware of the habitual-offender allegation well before trial, he cannot demonstrate prejudice from the alleged failure of counsel to directly inform him of that allegation. Therefore, Peele has not demonstrated error in the denial of relief as to this post-conviction claim.

- [13] At the post-conviction hearing, Peele asserted that his counsel was unprepared. Although Peele did not fully develop this contention at the hearing, Peele asserts on appeal that because his trial counsel did not file an appearance until one week before trial,⁵ “it is unrealistic to believe [that trial counsel] would have been properly prepared to present an effective defense.” Br. of Appellant at 13. Peele also contends that his trial counsel should have sought a continuance for additional time to prepare. Peele further contends that trial counsel gave “unprofessional advice” and a “lack of effective effort” when counseling him to waive the right to have a jury decide the habitual-offender allegation. *Id.* at 14.
- [14] Assuming *arguendo* that a claim regarding counsel’s advice and preparation was properly presented below, because Peele failed to establish a record regarding counsel’s preparation and strategy, what transpired at trial, and what advice was given, Peele did not meet his burden of establishing that trial counsel’s performance was deficient.⁶ Thus, the court did not err in denying relief.

⁵ It appears that Peele was initially represented by appointed counsel, then Peele elected to proceed *pro se*. At some point prior to the trial, the court appointed different trial counsel.

⁶ Peele asserts that he “submitted over 20 pages of trial transcripts with his initial petition” and “presented trial transcripts and court records at the hearing . . . [t]o which the State did not object[.]” Reply Br. at 11. Peele further asserts that the court “seemingly allowed and accepted [those documents] as factual[.]” *Id.* Our review of the record indicates that Peele seemingly referred to documents in his possession and that the court, at times, reviewed CCS entries and shared its recollection of events. Moreover, contrary to Peele’s assertion, at no point was the potential evidence offered and admitted at the hearing. Thus, we are unpersuaded that the post-conviction court mischaracterized the record when it stated that Peele had failed to seek admission of “any evidence to support his claims.” App. Vol. 2 at 55; *see also, e.g., Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014) (“[A] *pro se* litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented.”).

Appellate Counsel

- [15] As best we discern the allegations in Peele’s petition, Peele alleged that appellate counsel should have (1) argued that there were procedural irregularities concerning the filing of the habitual-offender allegation and (2) challenged the sufficiency of the evidence supporting that adjudication.
- [16] Because Peele provided no evidentiary support for these claims—failing to provide a complete transcript of the proceedings and the evidence relied upon at trial—Peele failed to carry his burden of proof. Thus, we are not persuaded that the court erred in declining to grant relief due to ineffective assistance.

Freestanding Claims of Trial Error

- [17] “Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available.” *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002) (quoting *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001)). Indeed, if an issue was known and available but not raised on direct appeal, it is waived. *Id.* Thus, a petitioner generally may not raise freestanding claims of trial error. *Id.* In other words, “complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.” *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002); *see also Latta v. State*, 743 N.E.2d 1121, 1132 (Ind. 2001) (noting that even a claim of fundamental error is generally unavailable and the proper avenue for relief is to claim ineffective assistance).

[18] To the extent Peele argues that the court erred by denying his freestanding claims related to the revocation of pre-trial placement, procedural irregularities, the sufficiency of the evidence—or any other freestanding claim of trial error—the claims alleged were not available through post-conviction proceedings because they were known and available when Peele pursued his direct appeal. Indeed, contrary to Peele’s assertion, even a freestanding claim of fundamental error is generally unavailable. *See id.* Moreover, even assuming *arguendo* that these freestanding claims were available, Peele failed to provide evidentiary support for the claims. Therefore, the post-conviction court did not err in declining to grant relief upon them.

CCS

[19] Peele asserts, and the State agrees, that remand is proper for correction of a clerical error in the CCS showing that Peele admitted to having the status of a habitual offender, rather than showing only that Peele consented to having a bench trial on the allegation. We agree that the court should have corrected this error. We therefore reverse that portion of the order denying relief as to the clerical error and remand with instructions to correct the error in the record.⁷

⁷ To the extent Peele raises new arguments in his Reply Brief, he waived those arguments. *See Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011) (“[P]arties may not raise an issue . . . for the first time in a reply brief.”).

Conclusion

[20] Although remand is proper for correction of a clerical error, Peele otherwise has not demonstrated error in the denial of his petition for post-conviction relief.

[21] Affirmed in part, reversed in part, and remanded.

May, J., and Robb, J., concur.