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**IN THE
COURT OF APPEALS OF INDIANA**

RAPHAEL L. MARTIN, SR.,)

Appellant-Defendant,)

vs.)

No. 02A03-0809-PC-438

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ALLEN COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0508-PC-78
02D04-0202-FB-24

May 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Raphael Martin, pro se, appeals the denial of his petition for post-conviction relief.

Martin presents six issues for our review, which we consolidate and restate as the following four:

1. Did the post-conviction court properly deny Martin's request for change of judge?
2. Did the post-conviction court properly deny Martin's petition for post-conviction relief without holding an evidentiary hearing?
3. Did the post-conviction court properly deny Martin's motion to correct erroneous sentence without a hearing?
4. Did the post-conviction court properly deny Martin's petition for post-conviction relief?

We affirm.

During the early morning hours of December 2, 2001, the home of Patricia Trier was burglarized and set on fire. Trier immediately suspected Martin because of his dissatisfaction with the termination of their long-term relationship. Kelley Madden, with whom Martin lived at the time, eventually implicated Martin in the crimes.

On February 14, 2002, the State charged Martin with arson and burglary, both as class B felonies. A jury found Martin guilty as charged. The trial court, having merged the arson charge with the burglary charge, entered a judgment of conviction for class B felony burglary and sentenced Martin to fifteen years imprisonment. Martin perfected an appeal of his conviction, and on August 6, 2004, this court issued a memorandum decision affirming Martin's conviction after rejecting Martin's sole appellate claim of insufficient evidence. *Martin v. State*, 02A03-0402-CR-95 (Ind. Ct. App. Aug. 6, 2004).

On June 17, 2005, Martin filed a motion to correct erroneous sentence. The trial court denied the motion on June 22, 2005, without holding a hearing. Martin timely filed a notice of appeal from the denial of this motion, but this court dismissed the appeal, with prejudice, on November 23, 2005, by reason of Martin's failure to timely file his appellant's brief.

Martin filed his petition for post-conviction relief on August 8, 2005. At the same time, Martin also filed a motion for change of judge. The post-conviction court denied Martin's motion for change of judge on August 30, 2005. The State then filed its answer to Martin's PCR petition. On December 5, 2007, the State Public Defender moved to withdraw from its representation of Martin, which the post-conviction court allowed. Thereafter, on December 17, 2007, the State filed its motion for the court to hear the case by affidavit. The post-conviction court granted the State's request the following day.

Martin filed his affidavit and an unverified memorandum in support of his affidavit on May 27, 2008. The State filed its response thereto on June 25, 2008. On July 2, 2008, the post-conviction court issued its findings of fact and conclusions of law denying Martin the relief he requested. Martin now appeals.¹

¹ On March 18, 2009, the State filed a Motion to Strike Portions of Appellant's Appendix for the reason that certain portions of Appellant's Appendix (including what purports to be portions of the trial transcript and trial record, a page from an appellate brief, a police record, letters from Martin to counsel and counsel to Martin, a letter from Martin to the trial court, and correspondence in a disciplinary action) were not made part of the record in the post-conviction proceeding. On March 28, 2009, Martin filed a response to the State's motion to strike. Inasmuch as it is improper to support an appellate argument with evidence outside of the record, we grant, by separate order, the State's Motion to Strike. *See In re A.P.*, 882 N.E.2d 799 (Ind. Ct. App. 2008).

1.

Martin argues that the post-conviction court erred in denying his motion for change of judge. Martin, however, has failed to cite any authority or make a cognizable argument in support of his claim. We therefore find the issue waived. *See* Ind. Appellate Rule 46(A)(8); *Ross v. State*, 877 N.E.2d 829 (Ind. Ct. App. 2007), *trans. denied*.

Waiver notwithstanding, Martin's claim would nonetheless fail. When a petitioner requests a change of judge, such change is neither "automatic" nor "discretionary." *Lambert v. State*, 743 N.E.2d 719, 728 (Ind. 2001). Rather, it requires a legal determination by the post-conviction court. *Lambert v. State*, 743 N.E.2d 719. As stated in Ind. Post-Conviction Rule 1(4)(b), the petitioner may request a change of judge by filing an affidavit alleging that the judge has a personal bias or prejudice against the petitioner and stating "the facts and the reasons for the belief that such bias or prejudice exists. . . . A change of judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice." To require a change of judge, a judge's bias must be personal. *Lambert v. State*, 743 N.E.2d 719. Personal bias "stems from an extrajudicial source meaning a source separate from the evidence and argument presented at the proceedings." *Id.* at 728.

In his affidavit, Martin presented no historical grounds to support a finding that the post-conviction judge was biased or prejudiced against him. Martin merely alleged that the judge made rulings during his jury trial that were adverse to him. Adverse rulings on judicial matters do not indicate a personal bias that calls the trial court's impartiality into question. *Harrison v. State*, 707 N.E.2d 767 (Ind. 1999). Having failed to demonstrate that the judge

had a personal bias against him, Martin cannot establish that the denial of his motion for change of judge was clearly erroneous. *See Azania v. State*, 778 N.E.2d 1253 (Ind. 2002) (noting that we review the court’s determination on a motion for change of judge under clearly erroneous standard).

2.

Martin argues that the post-conviction court abused its discretion in denying his PCR petition without holding an evidentiary hearing. Specifically, Martin contends that, in light of the fact that he raised claims of ineffective assistance of trial and appellate counsel, which he maintains presented questions of fact, an evidentiary hearing was “a necessity.” *Appellant’s Brief* at 5.

Here, after the State Public Defender withdrew from its representation of Martin on December 5, 2007, the State filed its motion for the court to hear the case by affidavit. The trial court granted the State’s request pursuant to the authority of Ind. Post-Conviction Rule 1(9)(b), which provides that the post-conviction court may order the case submitted by affidavit if the petitioner elects to proceed pro se.

We review a post-conviction court’s decision to forego an evidentiary hearing when affidavits have been submitted pursuant to P-C.R. 1(9)(b) under an abuse of discretion standard. *Smith v. State*, 822 N.E.2d 193 (Ind. Ct. App. 2005) (citing *Fuquay v. State*, 689 N.E.2d 484 (Ind. Ct. App. 1997), *trans. denied*), *trans. denied*.

In *Smith*, the petitioner filed his pro se petition for post-conviction relief alleging his trial counsel was ineffective, and the post-conviction court, pursuant to P-C.R. 1(9)(b),

directed the parties to submit affidavits in support of and in opposition to the petition. The petitioner filed his affidavit, but did not request the issuance of subpoenas for witnesses. The State submitted affidavits of the petitioner's three trial attorneys. The petitioner also filed a motion to set an evidentiary hearing, which the trial court denied along with denying the petitioner's petition for post-conviction relief. On appeal, we held the trial court did not abuse its discretion in refusing to hold an evidentiary hearing because the petitioner presented only general assertions that he was denied the opportunity to present witnesses rather than submitting affidavits of those witnesses or availing himself of the procedure for having the witnesses subpoenaed.² *Smith v. State*, 822 N.E.2d 193.

Here, Martin did not notify the court that he wished to engage counsel, but rather, submitted an affidavit in support of his petition for post-conviction relief. In his affidavit, Martin did not present any facts but simply restated his conclusory allegations for relief. Moreover, Martin did not submit any affidavits from his trial or appellate counsel or any witnesses regarding his claims of ineffective assistance of counsel or request by affidavit that subpoenas be issued. Martin also did not request that the post-conviction court include the trial record or transcript of the trial in the post-conviction proceedings. In short, Martin presented no evidence, except for an unverified memorandum, in support of his claims for post-conviction relief that raised issues of fact. In this vein, Martin failed to establish that an evidentiary hearing would have aided him or was necessary for a full and fair determination

² P-C. R. 1(9)(b) provides that a pro se petitioner who requests issuance of a subpoena for a witness at an evidentiary hearing “shall specifically state by affidavit the reason the witness’ testimony is required and the substance of the witness’ expected testimony” (emphasis supplied).

of the issues. We therefore conclude that the post-conviction court did not abuse its discretion in deciding to proceed by affidavit rather than with an evidentiary hearing. *See Smith v. State*, 822 N.E.2d 193; *Fuquay v. State*, 689 N.E.2d 484.

3.

Martin claims the trial court improperly denied his motion to correct erroneous sentence without a hearing. Aside from the fact that this court dismissed with prejudice Martin's appeal from the denial of his motion to correct erroneous sentence, Martin's claim fails. Martin's motion to correct erroneous sentence was based on his claim that his sentence was in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). The trial court denied the motion five days after it was filed, without a hearing, on grounds that *Blakely* would not be retroactively applied to Martin's case. The trial court's conclusion was correct. Although, as Martin correctly asserts, his direct appeal was pending at the time *Blakely* was decided, Martin did not challenge his sentence in any regard on direct appeal. Martin, therefore, did not preserve the *Blakely* issue for review. *See Smylie v. State*, 823 N.E.2d 679 (Ind. 2005) (holding that a criminal defendant whose direct appeal was pending at the time *Blakely* was announced but did not raise any complaint about the propriety of his or her sentence forfeited any *Blakely* claim for review). Accordingly, no hearing was necessary.

4.

Martin also presents several arguments challenging the trial court's denial of his PCR petition. In a post-conviction proceeding, the petitioner must establish the grounds for relief by a preponderance of the evidence. P-C.R. 1(5); *Overstreet v. State*, 877 N.E.2d 144 (Ind.

2007). When challenging the denial of post-conviction relief, the petitioner appeals a negative judgment. *Overstreet v. State*, 877 N.E.2d 144. To prevail, the petitioner must show that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.* We will disturb the post-conviction court's decision only where the evidence is without conflict and leads to but one conclusion and the post-conviction court reached the opposite conclusion. *Henley v. State*, 881 N.E.2d 639 (Ind. 2008).

Where the post-conviction court enters findings of fact and conclusions of law, as in the instant case, we do not defer to the post-conviction court's legal conclusions; the post-conviction court's findings and judgment will be reversed, however, only upon a showing of clear error that leaves us with a definite and firm conviction that a mistake has been made. *Overstreet v. State*, 877 N.E.2d 144.

We begin by noting that Martin presented several free-standing claims in his PCR petition. Specifically, Martin set forth free-standing claims to the effect that the prosecutor engaged in misconduct during questioning of a witness and during closing argument and the trial court erred in failing to give jury instructions on the alibi defense and the proper standard for consideration of circumstantial evidence. In his affidavit, Martin presented additional free-standing claims not asserted in his PCR petition, i.e., that the trial court erred in failing to remove the jury when one of the State's witnesses refused to answer questions and that the trial court improperly enhanced his sentence.

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentence by filing a post-conviction petition. P-C.R. 1(1). Post-conviction proceedings, however, do not afford a petitioner with a super-appeal. *Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001). In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective assistance of counsel or issues demonstrably unavailable at the time of trial or direct appeal. *Sanders v. State*, 765 N.E.2d 591 (Ind. 2002). Free-standing claims of error, including claims of fundamental error, are not available in post-conviction proceedings. *Id.* Therefore, the post-conviction court did not err in denying Martin relief on his free-standing claims of prosecutorial misconduct and trial court error.

Martin also contends that the post-conviction court erred by denying relief on his claims relating to ineffective assistance of his trial and direct appeal counsel. Our standard of review of claims of ineffective assistance of counsel follows:

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. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Failure to satisfy either prong will cause the claim to fail.

Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)) (internal citations omitted), *trans. denied*. Counsel's performance is

presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption. *Overstreet v. State*, 877 N.E.2d 144.

Martin presents several claims of ineffective assistance of counsel against both his trial counsel³ and direct-appeal counsel. Martin, however, presented no evidence in support of his allegations. As noted above, the trial court properly ordered the case heard by affidavit. In his affidavit, Martin failed to present any facts in support of his allegations and only reiterated his conclusory allegations of error. Moreover, Martin failed to present affidavits from either his trial counsel or his direct appeal counsel. The post-conviction court could therefore have inferred that Martin's trial and appellate counsel would not have corroborated his claims of ineffective assistance. *See Culvahouse v. State*, 819 N.E.2d 857 (Ind. Ct. App. 2004), *trans. denied*.

We further note that Martin did not request the post-conviction court to admit or consider as evidence the trial record or transcript. The trial record and transcript are therefore not part of the post-conviction record and may not be considered on appeal. *See Taylor v. State*, 882 N.E.2d 777 (Ind. Ct. App. 2008). We thus have no means by which to evaluate the error and prejudice allegedly suffered by Martin as a result of the performance of his trial counsel. As our Supreme Court has stated, “[i]t is practically impossible to gauge the performance of trial counsel without the trial record. . . .” *Tapia v. State*, 753 N.E.2d 581,

³ Martin raised the following allegations of ineffective assistance of trial counsel: (1) Failure to present evidence favorable to him, (2) failure to independently investigate, (3) failure to challenge, for purposes of sentencing, his prior convictions, (4) failure to object to instances of prosecutorial misconduct, (5) failure to request a mistrial based upon alleged instances of prosecutorial misconduct, and (6) preoccupation with another case.

588 n. 10 (Ind. 2001). Determination of whether a defendant received effective assistance of counsel is highly fact-sensitive. Without a record of the trial upon which to evaluate Martin's claims, we cannot determine whether he has met his burden of establishing that his trial counsel rendered deficient performance and that he was prejudiced thereby. Given that the burden is on Martin to demonstrate he received ineffective assistance of counsel, Martin failed to meet his burden by failing to present any evidence to the post-conviction court concerning his allegations of trial counsel ineffectiveness.

Turning to Martin's claim of ineffective assistance of direct-appeal counsel, as noted above, that claim is governed by the same standard for ineffective assistance of trial counsel. When reviewing a claim of ineffective assistance of appellate counsel regarding the selection and presentation of issues, a defendant must overcome the strongest presumption of adequate assistance. *Seeley v. State*, 782 N.E.2d 1052 (Ind. Ct. App. 2003), *trans. denied*. In determining whether appellate counsel's performance was deficient, we consider the information available in the trial record or otherwise known to appellate counsel. *Id.* To prevail upon the claim of ineffective assistance of appellate counsel, the petitioner must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. *Id.* Ineffective assistance claims at the appellate level of proceedings generally fall into three categories: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues competently. *See Bieghler*

v. State, 690 N.E.2d 188 (Ind. 1997). Martin’s claims fall primarily within the second category.⁴

As we observed above, Martin’s failure to have the trial record and transcript admitted as part of the post-conviction proceedings precludes us from evaluating his claim of ineffective assistance of appellate counsel. Absent a trial record, we cannot assess the other issues appellate counsel may have raised and whether the issues Martin claims should have been raised were significant, obvious, and clearly stronger than the issue raised on direct appeal. *See Taylor v. State*, 882 N.E.2d 777.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.

⁴ Martin contends that his direct appeal counsel was ineffective for failing to challenge his sentence as manifestly unreasonable, failing to raise issues relating to admission of evidence and alleged prosecutorial misconduct, failing to file a reply brief in his direct appeal, failing to raise the issue of trial counsel ineffectiveness, and failing to communicate with him.