

Case Summary

Following the unsuccessful direct appeal of his conviction for child molesting as a Class A felony, Marshall Cobb, Sr., filed a petition for post-conviction relief. The post-conviction court denied his petition, and Cobb now appeals. Specifically, Cobb contends that the post-conviction court did not give him a full and fair evidentiary hearing and that both his trial and appellate counsel were ineffective. Cobb also raises a number of freestanding claims of error. Concluding that Cobb's freestanding claims are waived, that the post-conviction court did give him a full and fair evidentiary hearing, and that Cobb has failed to demonstrate prejudice as a result of his counsels' performance, we affirm the post-conviction court.

Facts and Procedural History

The underlying facts of this case, taken from this Court's memorandum decision on direct appeal, are as follows:

In June of 2002, Cobb – then fifty years old – hosted a slumber party at his house for two of his grandchildren and his granddaughter's eleven-year-old friend, S.S. After a long night of playing games and swimming, Cobb instructed the children that it was time for bed. S.S. had planned on sleeping in her clothes, but Cobb ordered her to wear one of his t-shirts to bed instead. Sometime after the two girls had retired for the night in the back bedroom, Cobb entered the room and asked the girls if they would like to swim naked with him in the pool. The girls refused and went back to sleep. A little later, Cobb returned to the room and told his granddaughter to go sleep on the sofa bed in the living room.

After his granddaughter left the room, Cobb removed S.S.'s panties, held a towel over her mouth and nose, and instructed her to keep her eyes closed. Cobb then put an unidentified substance on his hands and on one of S.S.'s hands and began fondling S.S.'s vagina. He then placed S.S.'s hand on his penis and made her masturbate him. At one point, S.S. opened her eyes and observed "white stuff coming out" of Cobb's penis as he repositioned himself to insert his penis into her vagina. As Cobb penetrated S.S.'s vagina, he forced her to kiss him on the lips. After hearing what he

believed to be his grandson waking up, Cobb told S.S. to get dressed and go out to the sofa bed with his granddaughter.

The next morning, Cobb instructed S.S. to remain at the house for the gas man while he and his grandchildren went to pick up a third grandchild. Cobb took the cordless telephone with him when he left. Cobb returned alone, locked the front door, and ordered S.S. to lock the back door. S.S. went to the back door, but instead of locking it, she escaped through it. As S.S. fled from Cobb's house, she slipped off her shoes so that she could run faster and did not even stop to pick up some money that she dropped as she jumped over the backyard fence. Cobb apparently fled to another state after S.S. made her escape.

After Cobb's son realized that both his father and S.S. were unaccounted for, he called over to S.S.'s house to see if she may be there and whether she knew where his father might be. S.S. explained to Cobb's son what had happened during the slumber party, as well as that morning. Cobb's son called the police and S.S. was taken to the hospital. At the hospital, S.S. complained of vaginal soreness, and a physical exam revealed bruising on her labia. Additionally, the hospital staff performed a vaginal wash on S.S. An analysis of the vaginal wash revealed DNA matching Cobb's to a certainty of 220,000,000,000,000,000,000 (220 quintillion) to one.

A few days later, Cobb contacted his daughter and asked for money. He explained that he had abandoned his car in a Wal-Mart parking lot before absconding to Fort Worth, Texas. Eventually, authorities located Cobb in Tulsa, Oklahoma, and extradited him to Indiana. The State charged Cobb with Child Molesting as a Class A felony and Rape as a Class B felony.

Subsequently, a jury convicted Cobb as charged, and the trial court entered judgment of conviction on the child molesting charge. At the sentencing hearing, the trial court found six aggravating circumstances: (1) the nature and circumstances of the crime; (2) Cobb's criminal history; (3) Cobb was on probation at the time he committed his offense; (4) Cobb's absconding from Missouri while he was on probation; (5) the impact on the victim; and (6) his failure to appreciate the seriousness of his acts and their impact. The trial court found no mitigating circumstances. Consequently, the trial court sentenced Cobb to forty-five years incarceration.

Cobb v. State, No. 03A01-0306-CR-209 (Ind. Ct. App. Apr. 13, 2004) (citation and footnotes omitted), slip op. at 2-5. Cobb appealed, arguing on direct appeal that his right to confront witnesses was violated, that the trial court abused its discretion by refusing

his request for funds to hire an independent expert, that two jury instructions were erroneous, and that his sentence was inappropriate. This Court affirmed his conviction and sentence. *Id.*, slip op. at 2.

Cobb filed a petition for post-conviction relief in Bartholomew Circuit Court on August 5, 2004.¹ An attorney from the State Public Defender's office entered an appearance on Cobb's behalf later that month but then withdrew the appearance after Cobb became displeased with his attorney's assessment of his case, expressed his desire to proceed *pro se*, and waived the representation. Cobb, now *pro se*, filed numerous affidavits to the post-conviction court in support of his requests that the trial court issue subpoenas to individuals associated with the original trial, including a doctor and nurse who testified for the State, his grand-daughter, his son, the detectives who investigated the case, his trial attorney, his appellate attorney, the prosecutor, and the trial court judge (who also presided over the post-conviction proceedings). In April 2008, Cobb amended his petition for post-conviction relief. In the Amended Petition, Cobb stated that he no longer wished to subpoena his appellate counsel, the trial court judge, or his son to testify at his post-conviction hearing but instead wished to subpoena S.S. and two other individuals. The State opposed Cobb's request for subpoenas, except as to Cobb's attorneys, on the ground that it was clear from Cobb's requests that he sought the listed

¹ The first CCS entry for Cobb's post-conviction relief proceedings, which reads "Petition for Post Conviction Relief," is dated March 23, 2007. Appellant's App. p. 9. But it is apparent from the record that this date is not the date Cobb filed his petition. Both Cobb and the State assert that Cobb filed his petition for post-conviction relief on August 5, 2004. Cobb's Appendix includes a letter to the Bartholomew Circuit Court clerk written by Cobb indicating that he included his *pro se* Verified Petition for Post Conviction Relief. *Id.* at 103. The letter is stamped as having been filed August 5, 2004. *Id.* Also included in the Appendix is an order from the post-conviction court dated August 6, 2004, acknowledging that Cobb filed a Verified Petition for Post Conviction Relief. *Id.* at 105. However, Cobb has failed to include in the record for our review the actual Verified Petition for Post Conviction Relief.

witnesses in order to relitigate his trial. Appellant's App. p. 177-78. The post-conviction court granted Cobb's request to subpoena only as to his trial attorney and denied the request as to all the other requested individuals because Cobb failed to provide addresses for the individuals and because he failed to show sufficient good cause. *Id.* at 179.

The post-conviction court held a hearing on Cobb's petition, and Cobb's trial attorney was the only witness to testify. Cobb attempted to introduce Petitioner's Exhibit #1, which he purported to be the transcript from his original trial, at the hearing. Tr. p. 37. Petitioner's Exhibit #1 apparently consisted of pages with numbers handwritten on them. The pages were out of order, some of the pages were duplicates, some of the pages had handwritten editorial comments regarding the proceedings on them, and the document did not appear to be certified by a court reporter. The State objected to the exhibit on the grounds that the document was not a complete transcript and Cobb was uncertain as to how he received the document. The court sustained the State's objection, and Cobb did not make an offer to prove or include the document on appeal. The post-conviction court denied Cobb's petition. Cobb now appeals.

Discussion and Decision

Cobb, still *pro se*, appeals from the denial of post-conviction relief. He raises a host of issues regarding his post-conviction relief evidentiary hearing, freestanding claims of error at trial, and his trial and appellate counsels' performance.

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). The post-conviction court is the sole judge of the evidence and the credibility of

witnesses. *Hall v. State*, 849 N.E.2d 466, 468-69 (Ind. 2006). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). The reviewing court will not reverse the judgment unless the evidence unerringly and unmistakably leads to the opposite conclusion. *Patton v. State*, 810 N.E.2d 690, 697 (Ind. 2004). Pursuant to Indiana Post-Conviction Rule 1(6), the post-conviction court issued findings of fact and conclusions of law. We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. *Hall*, 849 N.E.2d at 469.

A. Post-conviction Relief Hearing

On appeal, Cobb argues that the post-conviction court did not give him a full and fair evidentiary hearing. First, Cobb argues that the post-conviction court erred by denying all his requests to subpoena witnesses other than his trial attorney. The trial court denied his requests for subpoenas on two grounds: one, that Cobb failed to provide addresses and two, that Cobb failed to show sufficient good reason. Cobb argues that he was not required to provide addresses and that he did show good reason because he needed to subpoena the witnesses since “[t]his was the only way Appellant knew how to present the truth that [S.S.] had never been raped or made to have sex.” Appellant’s Br. p. 23.

Second, Cobb complains that, instead of timely ordering the State to comply with his discovery requests, the post-conviction court took action to make sure he would be unprepared for his post-conviction hearing. Cobb argues that the post-conviction court

did not give him sufficient notice that the hearing on his “Motion to Compel Prosecutor to Comply with Order Granted on March 27, 2007 for Discovery,” which Cobb had filed on April 18, 2008, had been set for the same time as his post-conviction relief hearing. The post-conviction court ordered and sent notice on May 12 that the hearing on the Motion to Compel Prosecutor would be held along with the post-conviction relief hearing. The court then ordered that Cobb be transported from the Bartholomew County Jail on May 13, resulting in his alleged failure to receive the notice. Cobb implies that the post-conviction court judge is biased against him.²

The *pro se* post-conviction petitioner is bound to follow the procedural rules the same as a trained attorney. *Majors v. State*, 441 N.E.2d 1375, 1378 (Ind. 1982). However, Cobb has failed to make cogent arguments supported by citations to authorities, statutes, and the record on appeal as required by Indiana Appellate Rule 46(A)(8)(a).³ We find these arguments waived. *See Johnson v. State*, 832 N.E.2d 985, 994 n.3 (Ind. Ct. App. 2005), *trans. denied*. Waiver notwithstanding, Cobb’s arguments are unsuccessful.

² We note that the post-conviction court denied Cobb’s “Motion for Change of Judge in Post-Conviction Proceedings.” Appellant’s App. p. 120-21.

³ In support of his argument that the trial court erroneously refused to grant the requested subpoenas, Cobb cites to cases holding that in order for a defendant to knowingly waive his Sixth Amendment right to counsel, he must be warned of the dangers and disadvantages a defendant risks by representing himself at trial. *See Dowell v. State*, 557 N.E.2d 1063, 1066 (Ind. Ct. App. 1990), *trans. denied*; *Kirkham v. State*, 509 N.E.2d 890, 892 (Ind. Ct. App. 1987), *reh’g denied, trans. denied*. These cases do not apply to post-conviction proceedings. *See Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989) (“The right to counsel in post-conviction proceedings is guaranteed by neither the Sixth Amendment of the United States Constitution nor art. 1, § 13 of the Constitution of Indiana.”). Nor do these cases otherwise support Cobb’s arguments.

“Merely asserting bias and prejudice does not make it so. The law presumes that a judge is unbiased and unprejudiced.” *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002). To rebut that presumption, the petitioner must establish bias or prejudice from the judge’s conduct. *See id.* As for the subpoenas, Cobb admits in his brief that he was requesting the subpoenas in order to relitigate his trial and prove his innocence, which is not the purpose of post-conviction review. *See Rouster v. State*, 705 N.E.2d 999, 1003 (Ind. 1999) (“Post-conviction procedures do not afford the petitioner with a super-appeal. Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules.”), *reh’g denied*.

As for the Motion to Compel Discovery, Cobb himself filed this motion. He argues on appeal that his case depended on this discovery, yet when the trial court asked if he was ready to proceed on his Petition for Post Conviction Relief, Cobb failed to ask the trial court to resolve the discovery issue, which he knew was outstanding because he filed the Motion to Compel. Instead, Cobb proceeded by calling his trial attorney to the stand. Thus, Cobb has not persuaded us that the post-conviction court erred or manifested bias against him. *See Pruitt v. State*, 903 N.E.2d 899, 939 (Ind. 2009) (stating that the post-conviction court is presumed to be not biased).

B. Freestanding Claims of Error at Trial

Cobb raises a number of freestanding claims of error regarding events that occurred at trial.⁴ In post-conviction proceedings, claims that are known and available at

⁴ Cobb argues that the trial court erroneously prepared notes for use by a doctor testifying for the State, that the trial court violated the United States Constitution by not holding a hearing before bodily

the time of direct appeal, but are not argued, are waived. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *reh'g denied*. Issues raised on direct appeal but decided adversely are barred by *res judicata*. *Id.* They cannot be subsequently raised in the post-conviction setting. *Id.* All of Cobb's freestanding claims of error regarding actions taken by the trial court and the prosecutor are unavailable for review.

C. Ineffective Assistance of Counsel

One exception to the waiver rule is the argument that a defendant was deprived of the right to effective counsel as guaranteed by the Sixth Amendment to the United States Constitution. *Singleton v. State*, 889 N.E.2d 35, 38 (Ind. Ct. App. 2008). We review the effectiveness of trial counsel and appellate counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Martin v. State*, 760 N.E.2d 597, 600 (Ind. 2002); *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied*. A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). We presume that counsel rendered effective performance, and a defendant must

fluids were taken from Cobb for testing, that the trial court erred by denying his motion to suppress the results of the DNA testing, that the trial court violated the United States Constitution by holding a hearing where no counsel was present to represent Cobb, that the trial court conspired with the prosecutor to stage a dramatic event wherein the victim cried and pointed to Cobb as her molester, and that the trial court abused its discretion in sentencing him. Cobb also argues that the prosecutor committed misconduct by conspiring with the trial court to stage the dramatic event described above and by failing to accurately describe the evidence in her closing argument.

offer strong and convincing evidence to overcome this presumption. *Loveless v. State*, 896 N.E.2d 918, 922 (Ind. Ct. App. 2008) (citing *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *reh'g denied, cert. denied, trans. denied*). “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Strickland*, 466 U.S. at 697.

1. Trial Counsel

Cobb raises a number of arguments with regard to his trial counsel’s performance.⁵ As an initial matter, we note that Cobb failed to introduce a transcript of the proceedings at trial. The transcript must be admitted into evidence just like any other exhibit. *Bahm v. State*, 789 N.E.2d 50, 58 (Ind. Ct. App. 2003), *clarified on reh’g on other grounds*, 794 N.E.2d 444 (Ind. Ct. App. 2003), *trans. denied*. As our Supreme Court has observed, “[i]t is practically impossible to gauge the performance of trial counsel without the trial record, as we have no way of knowing what questions counsel asked, what objections he leveled, or what arguments he presented.” *Tapia v. State*, 753 N.E.2d 581, 588 n.10 (Ind. 2001). Although Cobb attempted to introduce at the post-conviction hearing a collection of seemingly randomly-assorted papers without a court reporter’s certificate that he purported to be a transcript, the trial court declined to admit

⁵ In addition to arguing that his trial counsel was deficient for failing to object to the events comprising his freestanding claims of error, Cobb argues that his trial counsel was deficient for failing to meet with him quickly enough after he was appointed as Cobb’s counsel, losing a chance to file a motion for a speedy trial, failing to speak to witnesses provided to him, failing to collect evidence showing that one of the detectives investigating his case was violating a warrant, failing to call one of the detectives or the nurse who performed the blood draw to testify about the blood draw and how the tested blood was stored, failing to impeach the victim with inconsistent statements, refusing to ask questions that Cobb told him to ask during trial, failing to ask the detective who collected the rape kit from the hospital about whether the kit was sealed, failing to cross-examine the nurse who examined the victim regarding what she found in the specimen taken from the victim, failing to question the doctor testifying for the State regarding whether the trial court had coached him, and failing to ask the doctor about why S.S. had no internal injuries.

the exhibit and Cobb did not make an offer to prove. And we simply cannot rely on Cobb's version of what happened at trial. Whether a defendant has received ineffective assistance of counsel is a highly fact-sensitive determination, and we have no record here with which we can evaluate Cobb's claims. See *Taylor v. State*, 882 N.E.2d 777, 782 (Ind. Ct. App. 2008). As a result, we are unable to review any of Cobb's ineffective assistance of trial counsel claims except for the ones for which evidence was introduced at the post-conviction hearing. See *Diaz v. State*, 753 N.E.2d 724, 728 n.4 (Ind. Ct. App. 2001) ("Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and *portions of the record.*") (emphasis added), *trans. denied*.

At the post-conviction hearing, Cobb introduced evidence through his trial counsel's testimony that counsel first went to see Cobb several months after he was appointed after Cobb wrote a letter to the trial court requesting to see his attorney. Cobb also questioned his trial counsel about why counsel did not further cross-examine the doctor who testified for the State that S.S. suffered external but not internal injuries as a result of the rape. Trial counsel responded that he felt the doctor's answer accomplished the goal of proving that the doctor did not know for certain how the injury occurred and that any further questions would allow the prosecutor to rehabilitate the witness.

We need not decide whether counsel's performance was deficient because Cobb has failed to demonstrate that these actions caused him prejudice. We conclude that these actions were not reasonably likely to have affected the outcome of Cobb's trial. As our Court previously described, the evidence introduced at trial demonstrated that S.S.

suffered trauma to her labia and that a rape kit revealed the presence of what was almost certainly Cobb's DNA. This evidence almost conclusively disproved Cobb's claim of innocence. Cobb was not so prejudiced that there was a reasonable probability the result of his trial would have been different. *See Tobias v. State*, 666 N.E.2d 68, 73 (Ind. 1996).

2. *Appellate Counsel*

Cobb raises one argument regarding the performance of his appellate counsel: that counsel was deficient for making arguments on direct appeal that he knew would not succeed. In support of this claim, Cobb cites to a letter from appellate counsel that he has attached to his brief. There is no indication from the record that Cobb submitted this letter to the trial court, and we will not consider it on appeal. *See Staples v. State*, 452 N.E.2d 985, 987 (Ind. 1983). Cobb chose not to subpoena his appellate counsel to testify, he did not testify himself, and he presented no other evidence regarding the effectiveness of appellate counsel. Because Cobb presented no evidence to the trial court regarding the performance of his appellate counsel, he failed to carry his burden to persuade us that his counsel's performance was deficient and that he suffered prejudice.

For these reasons, we affirm the denial of Cobb's request for post-conviction relief.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.