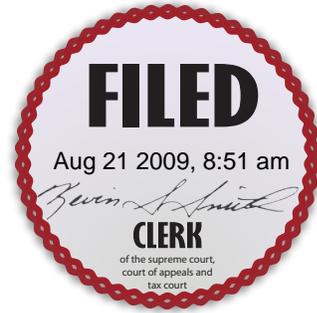


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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CLYDE PIGGIE, )

Appellant-Defendant, )

vs. )

No. 20A03-0902-PC-41

STATE OF INDIANA, )

Appellee-Respondent. )

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable David C. Bonfiglio, Judge  
Cause No. 20D06-0609-PC-9

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**August 21, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Clyde Piggie appeals the denial of his petition for post-conviction relief. We reverse and remand.

### Issues

Piggie raises several issues on appeal, which we consolidate and restate as:

- I. whether the post-conviction court correctly found that he did not receive ineffective assistance of trial counsel;
- II. whether Piggie received ineffective assistance of appellate counsel;
- III. whether his post-conviction counsel was ineffective; and
- IV. whether he was improperly denied exculpatory evidence by the post-conviction court.

### Facts

On April 12, 1993, Piggie was sentenced to forty-two years in the Department of Correction after a jury found him guilty of Class A felony dealing in cocaine. This court affirmed his conviction on direct appeal. See Piggie v. State, No. 20A05-9308-CR-284, slip op. (Ind. Ct. App. June 15, 1994). In January 2005, Piggie filed a petition for post-conviction relief under Indiana Post-Conviction Rule 1 alleging ineffective assistance of trial counsel. In April 2006, Piggie added an allegation of ineffective assistance of appellate counsel in an amended petition for post-conviction relief. The post-conviction court, without a hearing, denied Piggie's petition on January 22, 2007. On appeal, this

court reversed and remanded for an evidentiary hearing. See Piggie v. State, No. 20A05-0703-PC-142, slip op. (Ind. Ct. App. September 28, 2007).

On October 31, 2008, the post-conviction court held an evidentiary hearing on Piggie's petition. At the commencement of the hearing, Piggie's post-conviction attorney informed the court that it would only be considering Piggie's claim of ineffective assistance of trial counsel. His attorney called two witnesses during the hearing, Piggie's trial counsel, Mark Doty, and Piggie himself; however, she failed to introduce the trial transcript into evidence. Despite Piggie's amended petition alleging ineffective assistance of appellate counsel, his attorney neither argued ineffective assistance of appellate counsel nor did she call witnesses or present evidence on that claim. She did not file any proposed findings of facts and conclusions of law on Piggie's behalf.

After hearing the evidence and considering the State's proposed findings of facts and conclusions of law, the post-conviction court denied Piggie's petition. Piggie now appeals.

### **Analysis**

Piggie appeals the trial court's denial of post-conviction relief. Because post-conviction proceedings are civil proceedings, a petitioner must establish his claims by a preponderance of the evidence. Kien v State, 866 N.E.2d 377, 381 (Ind. Ct. App. 2007), trans. denied. When appealing the denial of post-conviction relief, a petitioner faces a rigorous standard of review. Id. To prevail, "the petitioner must establish that the evidence is uncontradicted and leads unerringly and unmistakably to a decision opposite

that reached by the post-conviction court.” Id. “The reviewing court may consider only the evidence and reasonable inferences supporting the judgment of the post-conviction court.” Id. Although we show no deference to the post-conviction court’s conclusions of law, we accept its factual findings unless they are clearly erroneous. Id.

### *I. Ineffective Assistance of Trial Counsel*

Piggie first argues that he received ineffective assistance of trial counsel, basing his argument on several different theories. Claims of ineffective assistance of counsel are reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668 (1984). To prevail, a claimant must first demonstrate that counsel’s performance fell below an objective level of reasonableness based upon prevailing professional norms. Taylor v. State, 882 N.E.2d 777, 781 (Ind. Ct. App. 2008). Second, the claimant must demonstrate that the deficient performance resulted in prejudice. Id. “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).

Here, although Piggie elicited Doty’s testimony and his own testimony during the hearing, he failed to submit the trial record into evidence. Our supreme court has observed that “[i]t is practically impossible to gauge the performance of trial counsel without the trial record. . . .” Tapia v. State, 753 N.E.2d 581, 588 n.10 (Ind. 2001). This is especially true here, where the passage of sixteen years has clouded memories

regarding the specifics of Piggie's trial. Determining whether a defendant has received ineffective assistance of counsel is extremely fact-sensitive. Taylor, 882 N.E.2d at 782. Without the trial record, we cannot objectively evaluate the merit of Piggie's claim. Thus, we cannot say Piggie met his burden of proving he received ineffective assistance of trial counsel.

## *II. Ineffective Assistance of Appellate Counsel*

Piggie next argues that appellate counsel was ineffective because he failed to raise ineffective assistance of trial counsel on direct appeal, committed fundamental errors in the brief, had a conflict of interest, and "improperly presented [sic] error on admission of testimony." Appellant's Reply Br. p. 3. "The standard of review for a claim of ineffective assistance of appellate counsel is identical to the standard for trial counsel. . . ." Williams v. State, 724 N.E.2d 1070, 1079 (Ind. 2000), cert. denied. Thus, Piggie must demonstrate that counsel's performance fell below an objective level of reasonableness and that the deficient performance resulted in prejudice. See Taylor, 882 N.E.2d at 781.

Although Piggie included a count of ineffective assistance of appellate counsel in his amended petition for post-conviction relief, he effectively abandoned that claim during the post-conviction hearing. Piggie bore the burden of establishing all claims by a preponderance of the evidence. See Kien, 866 N.E.2d at 381. During the hearing, however, he only argued and presented testimony on his claim of ineffective assistance of trial counsel; he neither argued ineffective assistance of appellate counsel, nor did he call

any witnesses or present any evidence on that issue. Piggie, therefore, failed to sustain his burden of proving that he received ineffective assistance of appellate counsel.

### *III. Post-Conviction Counsel*

Piggie also argues that his post-conviction attorney performed so poorly that he was deprived of a procedurally fair hearing. We agree. When evaluating whether the conduct of post-conviction counsel has deprived a petitioner of a procedurally fair hearing, we do not apply the rigorous standard announced in Strickland. Baum v. State, 533 N.E.2d 1200, 1201 (Ind. 1989). Rather, we apply a lesser standard of review that is more responsive to principles of due process. See id. (“We adopt the standard that if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court, it is not necessary to judge his performance by the rigorous standard set forth in Strickland. . . .”). “Where we determine that a petitioner was denied a procedurally fair setting for review of the petition, we will remand for new post-conviction proceedings.” Taylor, 882 N.E.2d at 783 (citing Waters v. State, 574 N.E.2d 911, 912 (Ind. 1991)).

This court has concluded that counsel’s failure to submit the trial record when asserting ineffective assistance of trial counsel during a post-conviction hearing deprives a petitioner of a procedurally fair hearing. See id. (concluding that counsel’s failure to present evidence, such as the trial record, deprived petitioner of a procedurally fair hearing, noting that “[s]uch sparse information rendered it impossible for the post-conviction court to conduct the necessary Strickland analysis.”); Bahm v. State, 789

N.E.2d 50, 61-62 (Ind. Ct. App. 2003) (concluding that petitioner was deprived of a procedurally fair hearing when counsel failed to submit the trial record, noting that “counsel should know ‘[i]t is practically impossible to gauge the performance of trial counsel without the trial record. . . .’” (alteration in original) (citation omitted)).

Here, although counsel elicited the testimony of Doty and Piggie, she failed to submit the trial record into evidence, thereby preventing the post-conviction court from conducting the necessary Strickland analysis. As our supreme court has noted, without the trial record, there is no way of accurately knowing what questions were asked, what objections were leveled, or what arguments were presented. Tapia, 753 N.E.2d at 588 n.10. This is especially true here, where the passage of sixteen years has clouded memories. Counsel, therefore, failed to perform a basic function required at a post-conviction hearing. See Taylor, 882 N.E.2d at 783. Moreover, counsel did not present evidence or argue Piggie’s claim of ineffective assistance of appellate counsel at the hearing, and failed to submit proposed findings of facts and conclusions of law despite a reminder from the court informing her that she had not done so. Thus, we conclude that Piggie was deprived of a procedurally fair hearing and is entitled to a new hearing to re-raise his ineffective assistance claims, as in Taylor.

#### ***IV. Exculpatory Evidence***

Piggie also argues that the post-conviction court improperly denied him exculpatory evidence, specifically the trial transcript and the direct appeal record. Piggie asserts that “[t]he Judges, Clerks, and Prosecutors of Elkhart County is [sic] retaliating

against Piggie, conspiring together to obstruct justice in denying him access to the court and due process, when they refuse to provide him his right to exculpatory evidence free of charge since he was found to be indigent.” Appellant’s Br. p. 29. “[W]hile a defendant is not required to prove conclusively that the destroyed evidence is exculpatory, there must be some indication that the evidence was exculpatory.” Terry v. State, 857 N.E.2d 396, 407 (Ind. Ct. App. 2006), trans. denied. We first note that there is no evidence that the trial or direct appeal record have been destroyed. That notwithstanding, Piggie has failed to demonstrate whether there is any evidence contained in the trial transcript and/or direct appeal record that would have been exculpatory. See Williams v. State, 455 N.E.2d 299, 307 (Ind. 1983) (concluding that “a defendant must demonstrate that exculpatory evidence exists before he can succeed on appeal with an argument that he was denied access to exculpatory evidence.”). Moreover, Piggie’s bold assertion, alone, is insufficient to establish bad faith. See Terry, 857 N.E.2d at 408 (“The mere assertion that the circumstances suggest bad faith is not sufficient to establish that the State acted in bad faith.”). We, therefore, conclude that Piggie has failed to demonstrate that the post-conviction court improperly denied him exculpatory evidence.

### **Conclusion**

The post-conviction court did not err in finding that Piggie failed to establish that he received ineffective assistance of trial counsel. Piggie failed to establish that he received ineffective assistance of appellate counsel, and he has not demonstrated that the

post-conviction court improperly denied exculpatory evidence. However, we conclude that Piggie was deprived of a procedurally fair hearing due to the performance of his post-conviction counsel. Therefore, we reverse and remand for a new post-conviction hearing.

Reversed and remanded.

NAJAM, J., and KIRSCH, J., concur.