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APPELLANT PRO SE:

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**IN THE  
COURT OF APPEALS OF INDIANA**

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DARREN B. STONE, )  
 )  
Appellant-Petitioner, )  
 )  
vs. ) No. 51A01-1103-PC-154  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Respondent. )

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APPEAL FROM THE MARTIN CIRCUIT COURT  
The Honorable Lynne E. Ellis, Judge  
Cause No. 51C01-0909-PC-128

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**October 19, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Petitioner, Darren B. Stone (Stone), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

## ISSUES

Stone raises five issues on appeal, two of which we find dispositive and restate as follows:

- (1) Whether the post-conviction court violated Stone's due process rights when it denied him the opportunity to present evidence at his post-conviction hearing; and
- (2) Whether he received ineffective assistance of counsel.

## FACTS AND PROCEDURAL HISTORY

On January 18, 2005, the State filed an Information charging Stone with conspiracy to escape, a Class C felony, Ind. Code §§ 35-44-3-5(a), 35-41-5-2, under Cause Number 51C01-0501-FC-12 (Cause FC-12). At the time, Stone was incarcerated and awaiting the outcome of charges for attempted murder and being an habitual offender in Cause Number 51C01-0406-FA-115 (Cause FA-115). Stone also had pending charges under other cause numbers. On March 28, 2006, Stone pled guilty to the charges filed in Cause FC-12 and Cause FA-115 pursuant to a written plea agreement that fixed his sentence at twenty years for Cause FA-115, five years for Cause FC-12, and dismissed the charges filed against him in other causes. The plea agreement also called for the sentences to be served consecutively,

with the sentence for conspiracy to escape to be served first. On April 24, 2006, the trial court sentenced Stone according to the terms of his plea agreement.

Stone did not initiate an appeal or file a motion to correct error. Instead, on September 15, 2009, Stone filed a petition for post-conviction relief, alleging that he was denied due process because he was not arraigned within 72 hours of the charge, he was denied the appointment of a public defender, and he was denied the right to a speedy trial. On December 10, 2010, he filed a motion to amend his petition. In his amended petition, Stone added allegations that the trial court had violated his *Blakely* rights during his sentencing, had improperly ordered the sentences to run consecutively, and had improperly sentenced him to five years incarceration when the presumptive sentence for conspiracy to escape is four years. On February 16, 2011, the post-conviction court held a hearing on the amended petition. On March 16, 2011, the post-conviction court issued findings of fact and conclusions of law denying Stone's amended petition.

Stone now appeals. Additional facts will be provided as necessary.

### DISCUSSION AND DECISION

On appeal from the denial of post-conviction relief, a petitioner stands in the position of one appealing from a negative judgment. *Mauricio v. State*, 941 N.E.2d 497, 498 (Ind. 2011). In such cases, a petitioner must show that the evidence, taken as a whole, leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Id.* We do not defer to the post-conviction court's legal conclusions, but we accept the post-conviction court's findings of fact unless they are clearly erroneous. *Benefield v. State*,

945 N.E.2d 791, 797 (Ind. Ct. App. 2011). Moreover, this court will only consider the probative evidence and all reasonable inferences therefrom that support the post-conviction court's determination and will not reweigh the evidence. *Bigler v. State*, 732 N.E.2d 191, 194 (Ind. Ct. App. 2000), *trans. denied*.

### I. *Due Process Rights*

First, Stone argues that the post-conviction court violated his due process rights when it denied him the opportunity to present evidence at his post-conviction hearing. At the hearing, the post-conviction court determined that all of Stone's allegations challenged evidence known to him at trial, which he should have raised through a direct appeal rather than a petition for post-conviction relief. Accordingly, the trial court held that Stone had waived his right to present evidence before the post-conviction court during the hearing.

On review, we note that post-conviction proceedings do not grant a petitioner a "super-appeal." *Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010). Post-conviction proceedings are limited to those grounds available under the Post-Conviction Rules. *Id.* The purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. *Hooker v. State*, 799 N.E.2d 561, 569 (Ind. Ct. App. 2003). As a result, issues that were known and available at trial but not raised on direct appeal are waived and unavailable for post-conviction review. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied*, 534 U.S. 1164, 122 S. Ct. 1178, 152 L.Ed.2d 120 (2002).

However, a post-conviction proceeding under Post-Conviction Rule 2(1) will

generally still be available when the post-conviction court determines that the trial court at a guilty plea hearing does not advise a defendant that he has the right to appeal. *Jackson v. State*, 853 N.E.2d 138, 140 (Ind. Ct. App. 2006). Further, in *Lindsey*, we noted two exceptions in which due process claims can be raised in a petition for post-conviction relief rather than a direct appeal: (1) “[d]eprivation of the Sixth Amendment right to effective assistance of counsel,” or (2) “an issue demonstrably unavailable to the petitioner at the time of his [or her] trial and direct appeal.” *Lindsey v. State*, 888 N.E.2d 319, 335 (Ind. Ct. App. 2008), *trans. denied* (quoting *Canaan v. State*, 683 N.E.2d 227, n.6 (Ind. 1997), *reh’g denied, cert. denied*). All other errors not assigned at the trial level nor argued on direct appeal are deemed waived in the context of post-conviction relief. *Lindsey*, 888 N.E.2d at 323.

In light of this standard, we determine that the post-conviction court did not violate Stone’s due process rights when it denied him the opportunity to present evidence, because we find that he had already waived his claims by failing to file a direct appeal. First, Stone argues that he falls under the exception to the requirement that a defendant must file known and available issues on direct appeal because the trial court did not inform him that he had the right to appeal. However, we must deny this assertion because Stone had the burden to produce evidence to support his claims, and he did not file the complete trial transcript so we could review the issue of whether the trial court advised him of his right to appeal.

Therefore, we will analyze Stone’s claims individually. His first three allegations—the trial court’s failure to arraign him, assign counsel, and ensure a fast and speedy trial—were all issues known by Stone before he signed his plea agreement. Stone’s fourth

allegation was that the trial court violated his *Blakely* rights. In *Blakely*, the United States Supreme Court held that a sentence violates the Sixth Amendment right to a jury trial if it exceeds the general statutory maximum and a jury has not found the aggravating factors beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 314, 124 S.Ct. 2531, 2543 (2004), *reh'g denied*. Stone argued in his petition that the trial court violated his *Blakely* rights because his five-year sentence for conspiracy to escape is one year over the four-year presumptive sentence for a Class C felony, and this increase was not found by a jury beyond a reasonable doubt. However, Stone's plea agreement fixed his sentence at five years, so that issue was known and available to him on direct appeal. Finally, Stone also disputed the trial court's order that he serve his sentences consecutively. This issue was also known by him at sentencing and available for direct appeal.

Because Stone's allegations were available for review on direct appeal, he waived them by failing to file a direct appeal, and we conclude that the post-conviction court did not violate his due process rights when it denied him the opportunity to present evidence regarding the claims at his hearing. In addition, because we have determined that Stone waived his claims regarding the trial court's failure to arraign him, appoint counsel, provide a speedy trial, as well as the trial court sentence of five years for Stone's escape conviction, and its order that Stone serve his sentences consecutively, we will not address the merits of those issues on appeal.<sup>1</sup>

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<sup>1</sup> By extension, we also will not address the mistakes that Stone alleges the trial court made in its findings of fact that pertain to these issues. As we will not address the merits of the issues, we find that any potential mistakes in the supporting facts are harmless.

### III. *Ineffective Assistance of Counsel*

Next, Stone alleges that his counsel was ineffective for advising him to accept the guilty plea (1) without investigating Cause FC-12; and (2) when the trial court should have dismissed Cause FC-12 due to the alleged due process violations, as well as for failing to advise him that he had the right to appeal his sentence. We will not address this claim because Stone did not raise ineffective assistance in his petition for post-conviction relief, and we are limited to the issues raised before the post-conviction court on appeal. *See Pruitt v. State*, 903 N.E.2d 899, 905 (Ind. 2009), *reh'g denied* (“[o]ur review on appeal is limited to the [post-conviction court’s] findings and conclusions.”).

### CONCLUSION

Based on the foregoing, we conclude that the post-conviction court properly denied Stone’s petition for post-conviction relief.

Affirmed.

NAJAM, J. and MAY, J. concur