



William T. Casbon appeals, pro se, the denial of his petition for post-conviction relief, in which he challenged his convictions for class A felony conspiracy to commit kidnapping, class B felony attempted child molesting, two counts of class B felony child molesting, class C felony vicarious sexual gratification, and class D felony battery, as well as his adjudication as a habitual offender. On appeal, he presents the following consolidated and restated issues for review:

1. Did the post-conviction court properly deny Casbon's motion for default judgment following the State's untimely answer to his petition?
2. Did the court properly deny Casbon's freestanding claims of trial error?
3. Did Casbon establish ineffective assistance of trial counsel?
4. Did Casbon establish ineffective assistance of appellate counsel?

We affirm.

The facts underlying Casbon's offenses were set out by this court in his direct appeal as follows:

In the summer of 1995, Casbon, a.k.a. William Moreno, met and befriended P.B., a thirteen-year-old runaway from Trafalgar. At the time, P.B. was living in an abandoned house in Marion County. P.B. told Casbon that he feared for his safety, and Casbon offered to let the boy live with him. On the day P.B. moved in, Casbon performed oral sex on him, and he continued to repeatedly molest P.B. over the next several months. Typically, Casbon would provide P.B. with marijuana and would then "suck his penis." On one occasion, P.B. was instructed to touch Casbon's penis and, on another occasion, Casbon attempted to have anal sex with P.B.

Thereafter, Casbon suggested that he become P.B.'s legal guardian. Fearing that he would be returned to the streets, P.B. agreed and told his mother, Helen Mielke, that he wanted Casbon to be his father. Mielke informed the court that Casbon was P.B.'s biological father, when in fact he is not. She then signed the necessary paperwork which established Casbon's paternity of P.B.

Casbon also repeatedly physically abused P.B. On November 6, 1995, Casbon beat the boy's legs and buttocks with a plastic curtain rod. After the rod broke, Casbon resumed the beating with a leather belt. The next day, Casbon hit P.B.'s eye with his hand after P.B. lied to him. After these beatings, P.B. informed the Indianapolis Police Officer assigned to his school about Casbon's physical and sexual abuse. The police took photographs of the welts and bruises on P.B.'s legs. Upon questioning, Casbon admitted that he had struck P.B. with a leather belt. Child Protective Services of Marion County investigated the allegations of sexual abuse, which Casbon denied.

P.B. was subsequently placed in the Guardian's Home, but he ran away and returned to Casbon's home. On November 14, 1995, Casbon again performed oral sex on the boy. That same day, P.B. recanted his accusations of sexual and physical abuse. Child Protective Services reported that the allegations were "unsubstantiated" since both P.B. and Casbon denied the molestations, and P.B. was officially returned to Casbon's custody.

In December, P.B. ran away from his home by stealing Casbon's car. After being apprehended by police, he was returned to Casbon, who resumed the molestations. P.B. informed the police and Child Protective Services of the abuse, and he was again placed in the Guardian's Home. His placement by the Marion Superior Court included a no-contact order enjoining Casbon from seeing him.

In early January, 1996, a friend of Casbon's informed police that Casbon was planning to kidnap P.B. from the Guardian's Home. Officers Terry Hall and Albert Alford, members of the Indianapolis Police Criminal Intelligence Division, went undercover to investigate the planned kidnapping. Alford, posing as a janitor at the Guardian's Home, arranged to meet with Casbon, who agreed to pay him a quarter ounce bag of marijuana and fifty dollars to remove P.B. from the facility and return him to Casbon. On January 6, Casbon and three friends met with Alford, and they exchanged the marijuana and money. Casbon instructed Alford to lure P.B. out of the Guardian's Home by sharing a joint with him. Casbon had handcuffs and leg irons in his car that were to be used to subdue P.B. After the meeting concluded, Casbon and his co-conspirators drove to a designated place and were arrested en route.

*Casbon v. State*, No. 49A02-9803-CR-216, slip op. at 2-4 (December 30, 1998).

On direct appeal, Casbon raised two issues. The first addressed the sufficiency of the evidence with respect to each of his convictions, except the conspiracy to commit kidnapping conviction. In his second issue Casbon argued that he had established the defense of legal

authority for conspiracy to commit kidnapping and battery, claiming that as P.B.'s adjudicated father he had the legal authority to both discipline him and take steps to take him into his custody in order to speak with him about his false charges. We disagreed and affirmed his convictions.<sup>1</sup> On March 10, 1999, our Supreme Court denied Casbon's petition for transfer.

On January 10, 2007, Casbon filed the instant pro-se petition for post-conviction relief, along with a sixty-six-page supporting brief. Casbon asserted a number of grounds for relief: 1) ineffective assistance of trial and appellate counsel (thirteen different claims); 2) "Improper Charging Information in that the Charge of Kidnapping should have been Interfering with Custody, Contempt of Court, a Violation of a No Contact Order, or Criminal Confinement"; 3) improper collateral attack of a judgment of another court; 4) improper CHINS petition; 5) prosecutorial misconduct; 6) kidnapping was subsequent to entrapment; and 7) improper wiretap. *Appendix* at 629. The State filed a belated answer on February 28. In light of the State's eighteen-day delay in answering his claims, Casbon filed a number of motions seeking a default judgment against the State, which the court denied on June 1, 2007.

The post-conviction hearing was held on June 20 and August 15, 2007. Casbon called his trial counsel, Steven Spence, who testified that he vigorously defended Casbon at the bench trial, in part, on the theory that Casbon could not kidnap his own son. Moreover,

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<sup>1</sup> We also addressed, sua sponte, an apparent facial error in the trial court's sentencing order, remanding for clarification. The trial court, accordingly, reduced Casbon's aggregate sentence from forty to thirty years in prison.

Spence argued at trial that the State could not collaterally attack the judgment of paternity. The deputy prosecutor from the criminal trial similarly testified at the post-conviction hearing that Spence vigorously defended Casbon. On February 26, 2008, the post-conviction court denied Casbon's petition for post-conviction relief. Casbon now appeals.

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions by filing a post-conviction petition. Ind. Post-Conviction Rule 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 a post-conviction proceeding, the petitioner must establish the grounds for relief by a preponderance of the evidence. P-C.R. 1(5); *Wesley v. State*, 788 N.E.2d 1247 (Ind. 2003). When challenging the denial of post-conviction relief, the petitioner appeals a negative judgment, and in doing so faces a rigorous standard of review. *Wesley v. State*, 788 N.E.2d 1247. To prevail, the petitioner must convince this court 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. *Id.*

Here, the post-conviction court entered findings of fact and conclusions of law in accordance with Ind. Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm

conviction that a mistake has been made.”” *Overstreet v. State*, 877 N.E.2d 144, 151 (Ind. 2007) (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (citation omitted)).

1.

Casbon asserts that the State’s failure to timely answer his petition for post-conviction relief required that the factual averments contained in the petition be deemed admitted. *See Stoner v. State*, 506 N.E.2d 837 (Ind. Ct. App. 1987). This was the basis of his motion for default judgment below.

In denying Casbon’s motion for default judgment, the post-conviction court found as follows:

1. The State filed its answer on February 28, 2007, which was some 48 days after the date of the filing of the Petition herein.
2. Given that Petitioner’s Petition for Post-conviction was extremely lengthy and accompanied by hundreds of pages in an Appendix, the State’s 18 day delay in filing its answer was not unreasonable.

*Appendix at 775.*

In *Murphy v. State*, 477 N.E.2d 266 (Ind. 1985), our Supreme Court found no error where the trial court denied a motion to strike the State’s untimely answer, which was filed more than forty days late but still one month before the post-conviction hearing. The Court explained: “[P-C.R. 1(4)(a)] expressly provides the trial court with discretion to extend the time for filing any pleading. Here, it is clear that there was no surprise to petitioner due to late filing of the state’s answer and the state adequately explained the reason for the delay to the court.” *Id.* at 270.

Similarly, in the instant case, the post-conviction court did not abuse its discretion in

allowing the State to file its belated answer. The answer was filed only eighteen days late and nearly four months before the first day of the post-conviction hearing. Casbon was in no way prejudiced by the late-filing. *See Likens v. State*, 378 N.E.2d 24, 26 (Ind. Ct. App. 1978) (“Likens asserts no surprise from the state’s position or the evidence produced”).

Moreover, even were we to accept Casbon’s argument that the factual averments in his petition should be deemed admitted, such does not lead to the conclusion that he was entitled to a default judgment. On appeal, Casbon does not address what facts were actually contained in his petition and how said facts would change the result of the proceeding. *See Stoner v. State*, 506 N.E.2d at 839 (“even if Stoner’s factual allegations in his petition are deemed true, they do not compel relief, and the court did not err in denying Stoner summary relief based on the State’s failure to timely respond to the petition”).

2.

Casbon raises a number of freestanding claims of trial error. Our Supreme Court, however, has made clear that freestanding claims that the original trial court committed error are generally unavailable on post-conviction review. *See e.g., Stephenson v. State*, 864 N.E.2d 1022 (Ind. 2007). On post-conviction review, aside from claims of ineffective assistance of counsel, a petitioner may only raise issues that were unknown and unavailable at the time of the original trial or direct appeal. *See id.* Thus, Casbon’s freestanding claims of error, which were all available on direct appeal, are foreclosed in the instant collateral proceedings.

3.

Casbon raises the freestanding claims of trial error also in terms of ineffective assistance of trial counsel.<sup>2</sup> We will address each of the ineffective assistance of counsel claims asserted in Casbon's appellate brief<sup>3</sup> to the extent we can decipher them.

A claim of ineffective assistance of trial counsel requires a showing that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant so much that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). *See also Taylor v. State*, 840 N.E.2d 324 (Ind. 2006) (the failure to satisfy either component will cause an ineffective assistance of counsel claim to fail). When an appellant brings an ineffective assistance of counsel claim based upon trial counsel's failure to file a motion or lodge an objection, the appellant must demonstrate that the trial court would have granted said motion or sustained said objection. *Wales v. State*, 768 N.E.2d

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<sup>2</sup> We note that the first thirty-eight pages of Casbon's appellate argument address his freestanding claims. Only in the final five pages does Casbon assert his ineffective assistance of trial and appellate counsel claims. He does so in a cursory manner, generally incorporating by reference much of the material in the first thirty-eight pages of argument. "Briefs so organized and written hinder appellate review" and exhibit "disrespect for [the] principles of post-conviction review." *Lambert v. State*, 743 N.E.2d 719, 726 (Ind. 2001).

<sup>3</sup> Casbon also attempts to incorporate by reference fifty-six pages of the brief he filed with the post-conviction court, which addressed thirteen claims of ineffective assistance of trial counsel. We refuse to incorporate said argument. Ind. Appellate Rule 46(A)(8) provides that arguments contained in an appellant's brief "shall contain the appellant's contentions why the trial court...committed reversible error." Casbon may not evade this requirement, nor the word or page limitations for briefs set out in Ind. Appellate Rule 44, by referring us to arguments found in a brief filed with the post-conviction court. Thus, we will only consider the arguments contained in Casbon's appellate brief.

513 (Ind. Ct. App. 2002), *reh'g granted on other grounds*, 774 N.E.2d 116, *trans. denied*.

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.

*Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002) (citations omitted). Thus, we will not second-guess the propriety of trial counsel's tactics and will reverse only where the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. *See Davidson v. State*, 763 N.E.2d 441.

The bulk of Casbon's appellate argument is based upon his mistaken belief that in order to obtain a conviction for kidnapping the State was required to prove P.B. was not Casbon's child. With no citation to authority, Casbon argues that conspiracy to commit kidnapping was not a viable count because P.B. was legally his son. He claims that because the trial court was collaterally estopped from attacking the judgment of paternity, at most, he should have been charged with interfering with a custody order, contempt of court, violation of a no-contact order, or criminal confinement, rather than conspiracy to commit kidnapping.

As the post-conviction court correctly observed, the State was not required to establish the lack of a parent-child relationship between Casbon and his victim. This is simply not an element of the crime of kidnapping. *See* Ind. Code Ann. § 35-42-3-2 (West, PREMISE through 2008 2nd Regular Sess.). Moreover, even if Casbon's argument had merit (which it does not), we observe that his trial counsel fully presented said argument to the trial court. In

fact, Casbon’s appellate “argument” on this issue consists almost entirely of excerpts from the trial transcript, large portions of which are the arguments of defense counsel. Casbon has wholly failed to establish ineffective assistance of trial counsel in this regard.

Casbon next appears to claim that counsel was ineffective for failing to raise entrapment as a defense to the conspiracy to commit kidnapping charge. We initially observe that defense counsel argued to the trial court that it was the police informant “who suggested the physically [sic] handcuffing and shackling [P.B.]”. *Appendix* at 232. Thus, defense counsel did raise the issue of entrapment, which was quickly rejected by the trial court. Further, like most of Casbon’s appellate brief, his argument on this issue consists of excerpts from the trial transcript and is devoid of independent analysis or citation to authority. Therefore, we find the issue waived for lack of cogency. *See* App. R. 46(A)(8)(a) (requiring the argument section to be supported by cogent reasoning with citations to relevant authorities).

Casbon’s remaining claims of ineffective assistance of trial counsel relate to his freestanding claims of prosecutorial misconduct and improper wiretap. He presents no argument with respect to these issues. Rather, he directs us to “the facts alleged and stated in [his] original P.C.R. argument”. *Appellant’s Brief* at 47-48. For the reasons stated previously, this is improper. The issues are, therefore, waived on appeal.<sup>4</sup>

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<sup>4</sup> In rejecting Casbon’s ineffective assistance of counsel claims, the post-conviction court aptly noted: “This court is sensitive to legitimate claims that a Petitioner’s Sixth Amendment guarantee to the effective assistance of counsel has been violated. However this court cannot address the issue where it is merely raised as a convenient vehicle to present arguments that have been waived.” *Appendix* at 835 (citing *Lane v. State*, 521 N.E.2d 947 (Ind. 1988)). We agree. As our Supreme Court observed in *Lane*, a petitioner “cannot evade PC

4.

Casbon claims that his appellate counsel was ineffective for failing to raise meritorious issues. In addition to each of the claims addressed in the preceding issue, Casbon claims appellate counsel should have challenged the effectiveness of trial counsel.

Ineffectiveness is rarely found when the claim is based upon the failure to raise certain issues on appeal. *Bieghler v. State*, 690 N.E.2d 188 (Ind. 1997). This is because one of the most important strategic decisions to be made by appellate counsel is the decision of what issues to raise. *Id.* Thus, a petitioner “must overcome the strongest presumption of adequate assistance.” *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003), *trans. denied*. In evaluating the performance of counsel in this context, we look to whether the unraised issues are significant and obvious from the face of the record and whether the unraised issues are clearly stronger than the raised issues. *Henley v. State*, 881 N.E.2d 639 (Ind. 2008). If this analysis demonstrates deficient performance, we then look to whether the issues that counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial. *Id.*

We find no merit to Casbon’s claim that appellate counsel should have challenged the effectiveness of trial counsel on direct appeal. Our Supreme Court has explained that for a variety of reasons “a postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim.” *McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999) (quoting *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998)). While a defendant may raise such a claim on

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Rule 1, section 8, just by typing the words ‘ineffective assistance of counsel.’” *Lane v. State*, 521 N.E.2d at

direct appeal, additional claims of ineffectiveness of trial counsel will be foreclosed from collateral review. *Jewell v. State*, 887 N.E.2d 939 (Ind. 2008). Casbon’s appellate counsel did not err in reserving any potential claims of ineffective assistance of trial counsel for post-conviction review.

Casbon’s remaining claims of ineffectiveness of appellate counsel fail for the same reasons set forth above in the discussion of trial counsel’s effectiveness. In sum, his claims are without merit and are not supported by cogent argument. Casbon has entirely failed to establish that appellate counsel was deficient for failing to raise these various issues (improper charging information/improper collateral attack of paternity judgment,<sup>5</sup> prosecutorial misconduct, entrapment, and improper wiretap) instead of or in addition to the two issues raised by counsel on direct appeal.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur.

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949.

<sup>5</sup> While appellate counsel did not make the misguided arguments asserted by Casbon, we note that counsel did raise the issue of legal authority on direct appeal. Specifically, counsel argued that as the adjudicated father of P.B., Casbon had the legal authority “to both discipline [P.B.] and take steps to take him into his custody in order to speak with him about his false [child molesting] charges”. *Appendix* at 567-68.