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APPELLANT PRO SE:

**WENDELL IDDINGS**
Carlisle, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**
Attorney General of Indiana

**J.T. WHITEHEAD**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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| WENDELL IDDINGS, | ) | |
| | ) | |
| Appellant/Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 06A01-0812-PC-584 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee/Respondent. | ) | |

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Rebecca McClure, Judge
Cause Nos. 06D02-0803-PC-262; 06D02-0803-PC-263

**June 5, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant/Petitioner Wendell Iddings appeals from the post-conviction court's denial of his petition for post-conviction relief ("PCR"). Iddings contends that he did not voluntarily waive his right to a jury trial and that he received ineffective assistance of trial counsel. We affirm.

## FACTS AND PROCEDURAL HISTORY

In cause number 06D02-9801-CM-10 ("Cause No. 10"), the State charged Iddings with two counts of Class A misdemeanor battery following a December 24, 1997, incident during which he struck his wife Gail and her son. A bench trial was held on July 14 and July 15, 1999, after which the trial court found Iddings guilty of Class A misdemeanor battery and Class B misdemeanor battery. The trial court sentenced Iddings to one year of incarceration for Class A misdemeanor battery and 180 days for Class B misdemeanor battery, both sentences to be served concurrently.

In cause number 06D02-9712-CM-526 ("Cause No. 526"), the State charged Iddings with Class A misdemeanor battery following a December 17, 1997, incident during which Iddings struck his brother-in-law Harold Frye in the face at least twice, the pair apparently quarrelling over money. Following a bench trial on July 14, 1999, the trial court convicted Iddings as charged and sentenced him to one year of incarceration, with all but ten days suspended.

On March 20, 2008, Iddings filed PCR petitions in Cause Nos. 10 and 526. The post-conviction court held a hearing on both petitions on July 24, 2008. On October 28, 2008, the post-conviction court denied both PCR petitions in full, and Iddings now appeals.

## DISCUSSION

Our standard for reviewing the denial of a PCR petition is well-settled:

> In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court.… Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law.

*Hall v. State*, 849 N.E.2d 466, 468, 469 (Ind. 2006) (internal citations and quotations omitted).

### I. Whether Iddings Voluntarily Waived his Right to Jury Trial

Iddings contends for the first time in this post-conviction proceeding that he did not voluntarily waive his right to jury trials in Cause Nos. 10 and 526 because the trial court never obtained waivers. Iddings, however, has waived this issue for post-conviction consideration because it was available for review on direct appeal but not raised. "If an issue was known and available, but not raised on direct appeal, it is waived." *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001).

### II. Whether Iddings Received Ineffective Assistance of Trial Counsel

We review claims of ineffective assistance of counsel based upon the principles enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> [A] claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. 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." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."

*Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). Because an inability to satisfy either prong of this test is fatal to an ineffective assistance claim, this court need not even evaluate counsel's performance if the petitioner suffered no prejudice from that performance. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999). Iddings contends that his trial counsel Frank Starkey was ineffective for failing to adequately advise him regarding his right to trial by jury in Cause Nos. 10 and 526 and failing to call alleged witness Chastity McClaine to the stand in Cause No. 10.

**A. Jury Trial Advisement**

Iddings contends that Starkey failed to adequately advise him of his right to trial by jury and the potential consequences of waiving that right. Even assuming, *arguendo*, that this is true, Iddings's claim in this regard must fail because he has not alleged, much less established, any prejudice. Quite simply, Iddings points to nothing in the record that even suggests a reasonable probability that the results of his trials would have been different had he been advised of his right to a jury trial, even assuming that he was not. We conclude that Iddings has not established that he received ineffective assistance of trial counsel in this regard.

**B. Failure to Call McClaine**

Iddings contends that Starkey was ineffective for failing to call McClaine, who

allegedly witnessed the events that gave rise to the charges in Cause No. 10, to testify.[1] McClaine testified at the PCR hearing that, if she had been called to the stand, she would have testified that she did not see Iddings strike his wife and her son. Starkey, however, testified that he did not recall ever having been made aware of McClaine, which supports the post-conviction court's finding that Iddings did not tell him of McClaine. Although Iddings testified that he did, in fact, tell Starkey of McClaine and her ability to provide exculpatory testimony, the post-conviction court was under no obligation to credit this testimony. Because Iddings has failed to establish that Starkey was ever told of McClaine's existence and her potentially exculpatory testimony, he has failed to establish that Starkey's performance was deficient for failing to call her as a witness.

Moreover, Iddings has failed to establish a reasonable probability that his trial in Cause No. 10 would have turned out differently had McClaine testified. Gail testified that he grabbed her shirt and struck her son as they sat in her car. Monica Cully testified that she saw Iddings "d[i]ve in through the window" of Gail's car and "start[] hitting" and that she saw him "cock [his] fist back" through the window. Ex. 2 pp. 19, 21-22. Lebanon Police Officer David VanBaale, who responded to the scene, testified that Gail had scratches and abrasions on her face and that her son had "substantial injury to the top of his head." Ex. 2 p. 25. In light of the eyewitness testimony and physical evidence that Iddings did, in fact, batter Gail and her son, Iddings has not established a reasonable probability that McClaine's

[1] This contention of ineffective assistance of trial counsel does not implicate Starkey's performance in Cause No. 526.

testimony to the contrary would have affected the outcome of his trial. Having failed to establish either deficient performance or prejudice, Iddings has failed to establish that he received ineffective assistance of trial counsel in this regard.

The judgment of the post-conviction court is affirmed.

CRONE, J., and BROWN, J., concur.