



Appellant-petitioner Donald J. Klinzman appeals the denial of his petition for post-conviction relief. Klinzman contends that the post-conviction court erroneously concluded that he did not receive ineffective assistance of counsel, raising four alleged instances of ineffective assistance of trial and appellate counsel. Finding no error, we affirm.

### FACTS

The underlying facts, as stated by this Court in Klinzman's direct appeal, are as follows:

After Klinzman separated from his wife in May 2002, he moved in with Letitia Joy Lunderman, with whom he frequently used crack cocaine. [Fn2: The relationship between Lunderman and Klinzman appears not to have been romantic, but based almost entirely on drug usage.] Klinzman, however, wanted to reconcile with his wife and bought over \$700 in jewelry to give to her. On June 22, 2002, Klinzman discovered that the jewelry was missing and accused Lunderman of stealing it. During a heated argument when Klinzman was high on crack, he began to physically attack Lunderman. He struck her multiple times in the head with a telephone and attempted to strangle her. He also put duct tape over her mouth and tied her hands together with an electrical cord. After beating Lunderman, Klinzman took a shower, changed his clothes, and threw his blood stained clothes into the dumpster. Klinzman then went to his wife's residence to spend the night.

The State charged Klinzman with murder and criminal confinement. During a bench trial held on March 10, 2003, Klinzman admitted he inflicted the injuries that resulted in Lunderman's death but claimed he lacked the requisite mens rea for murder, and alternatively that he acted under the influence of sudden heat. The trial court disagreed with the mens rea requirement but agreed with the sudden heat argument and accordingly found Klinzman guilty of voluntary manslaughter with a deadly weapon, a class A felony, as well as class D felony criminal confinement. After being sentenced to forty-five years of incarceration, Klinzman [] appeal[ed].

Klinzman v. State, No. 49A04-0305-CR-229, slip op. at 2-3 (Ind. Ct. App. December 30, 2003.)

On direct appeal, Klinzman raised the following two issues: 1) whether his conviction was supported by sufficient evidence; and 2) whether his forty-five year sentence was appropriate. Id. at 2. This Court affirmed, and our Supreme Court later denied transfer. Klinzman v State, 812 N.E.2d 798 (Ind. 2004).

On November 12, 2004, Klinzman, pro se, filed a petition for post-conviction relief but withdrew it on April 23, 2008. On July 8, 2008, Klinzman filed a pro se petition for post-conviction relief arguing: 1) his jury trial waiver was not knowing, intelligent, and voluntary; 2) ineffective assistance of trial counsel; 3) his sentence violates Apprendi v. New Jersey, 530 U.S. 466, (2000), and Blakely v. Washington, 542 U.S. 296 (2004); 4) personal conflict of interest of trial counsel; and 5) ineffective assistance of appellate counsel.

On August 18, 2008, the post-conviction court dismissed the third allegation. On June 17, 2009, the post-conviction court held an evidentiary hearing at which both Klinzman and trial counsel Gary Colasessano testified. On February 10, 2010, the post-conviction court denied Klinzman's petition.<sup>1</sup> Klinzman now appeals.

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<sup>1</sup> Pages 24-40 of Appellant's Brief are the post-conviction court's findings of fact and conclusions of law. Klinzman did not include his petition for post conviction relief in his appendix as required under Indiana Appellate Rules 2(E) and 50. The State did not request an order instructing Kilnzman to file an appendix in compliance with the rules.

## DISCUSSION AND DECISION

### I. Standard of Review

#### A. Post-Conviction Proceedings

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); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

In general, freestanding claims of error are not available in a post-conviction proceeding because of the doctrines of waiver and res judicata. Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001). If an issue was known and available but not raised on direct appeal, it is waived by procedural default. Bunch v. State, 778 N.E.2d 1285, 1289 (Ind. 2002). Similarly, if an issue was raised on appeal, but decided adversely, it is res judicata. Timberlake, 753 N.E.2d at 597. And a claim of ineffective assistance of

counsel is properly presented in a post-conviction proceeding if it was not raised on direct appeal. Id.

### B. Ineffective Assistance of Counsel

When evaluating Klinzman's claims of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668, 674 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687- 88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. at 687. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The two prongs announced in Strickland are independent inquiries, and a claim may be disposed of on either prong. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). However, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Strickland, 466 U.S. at 697.

We also note that counsel is afforded wide discretion in determining strategy and tactics, and, therefore, courts will accord these decisions deference. Timberlake, 753

N.E.2d at 603. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. Isolated omissions or errors, poor strategy, or bad tactics do not necessarily render representation ineffective. Stevens v. State, 770 N.E.2d 739, 747 (Ind. 2002). We will not lightly speculate as to what may or may not have been an advantageous trial strategy as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998). When a claim of ineffective assistance of counsel is based on the failure to object, the defendant also must show that a proper objection would have been sustained. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002).

## II. Klinzman's Claims

### A. Waiver of Jury Trial

Before proceeding to the merits of Klinzman's waiver of jury trial claim, we note that the post-conviction court determined that this claim of error was barred on the grounds of procedural default and that Klinzman did not assert a claim of deprivation of the right to effective counsel. Appellant's Br. p. 31-32. However, it is apparent that Klinzman has sufficiently framed his arguments in terms of ineffective assistance of counsel. Thus, because Klinzman did not raise these specific issues on direct appeal and has not presented them as freestanding claims of error, we will address the issues on the merits. See Timberlake, 753 N.E.2d at 597 (holding that a claim of ineffective assistance

of counsel is properly presented in a post-conviction proceeding if it was not presented on direct appeal).

Klinzman contends that his waiver of jury trial was not entered knowingly, intelligently, and voluntarily as a result of ineffective assistance of counsel. Appellant's Br. p. 31. More particularly, he claims that his purported waiver was a product of coercion of counsel and the State because he had to forego his right to a jury trial in order to obtain a continuance. Second, he argues that counsel did not fully and adequately advise him of his rights and of the ramifications of electing to take a bench trial.

Our review of the record shows that Klinzman's perceived coercion is a consequence of his own making. From the outset, Klinzman told counsel that he was not at the crime scene, and counsel moved for a speedy trial on the basis that the trial would commence before the State was able to analyze the DNA evidence from the crime scene. Appellant's Br. p 16. Shortly before trial, the State completed its DNA analysis, which was contrary to Klinzman's assertions that he was not present at the crime scene. Id. at 28. As a result, Klinzman's counsel moved for a continuance in order to prepare a new defense. Tr. p. 8-9, 12. The trial court denied the continuance because Klinzman moved for a speedy jury trial, but it would grant a continuance if Klinzman agreed to a bench trial. Id. at 8-10. Klinzman does not dispute that he signed a jury waiver form or that the trial court made an entry on the chronological case summary that he knowingly and intelligently waived his right to a jury trial. Appellant's App. p. 235; Appellant's Br. p. 6.

In its order, the post-conviction court found that both of Klinzman's trial attorneys, Gary Colasessano and Daniel Moore, talked in detail with Klinzman about the jury trial waiver. Appellant's Br. p. 28. Colasessano advised Klinzman that, given the State's evidence and the gruesomeness of the crime scene photos, waiving a jury trial was in Klinzman's best interests. Id. Colasessano knew that Judge Hawkins had seen a significant number of crime scene photos and determined that the Judge would be more impartial than a jury. Id. Klinzman admitted that he signed the jury waiver form after having conferred with his trial counsel. Id. at 29. We find that this is adequate strategic reasoning for recommending the waiver of a jury trial, and, therefore, does not amount to ineffective assistance of counsel. See Coleman v. State, 694 N.E.2d 269, 276 (Ind. 1998) (concluding that defense attorney's advice that defendant waive jury trial was not ineffective assistance, where attorney informed defendant that he thought defendant had better chance being tried by particular trial judge than by jury).

#### B. Failure to Object

Klinzman contends that the post-conviction court erred when it found that his trial attorneys were not ineffective for failing to object to alleged hearsay and extremely prejudicial facts. His only discernible specific complaint is that his trial counsel failed to object to the prosecutor's repeated reference to the victim as both "bludgeoned and strangled." Appellant's Br. p. 19. He argues that these were prejudicial facts not in evidence. Id.

At the outset, we note that Klinzman has failed to cite to the record where these alleged errors occurred. Moreover, contrary to Klinzman's assertions, the post-conviction court found that trial counsel presented a zealous defense within the objective standards of reasonable performance based upon prevailing professional norms. Appellant's Br. p. 33. Furthermore, it found that—and we agree—Klinzman failed to show that he was prejudiced by any of the alleged errors in light of the strength of the State's case and the fact that he admitted to his actions in his sudden heat defense before the trial court. *Id.* at 34; Klinzman, slip op. at 2-3. In short, Klinzman fails to show how the result of the proceeding would have been different if counsel would have objected to the alleged errors. Without any evidence to the contrary, we cannot conclude that the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Therefore, Klinzman's claims fail, and we will not reverse its judgment on this basis.

### C. Ineffective Assistance of Appellate Counsel

Klinzman argues that the post-conviction court erred when it found that his appellate counsel was not ineffective. Specifically, Klinzman contends that his appellate counsel on direct appeal was ineffective for failing to raise the issue that the trial court unconstitutionally enhanced his sentence absent a jury determination of the relevant aggravating factors. Appellant's Br. p. 15, 21. Klinzman relies on Apprendi, 530 U.S. at 466, and Blakely, 542 U.S. at 296, to support his claim that the trial court

unconstitutionally sentenced him beyond the presumptive term, and, thus, appellate counsel was ineffective for not raising the issue on direct appeal.

As our Supreme Court stated in Smylie, ““an appellate lawyer would not be ineffective proceeding without adding a Blakely claim before Blakely was decided.”” Walker v. State, 843 N.E.2d 50, 56 (Ind. Ct. App 2006) (quoting Smylie v. State, 823 N.E.2d 679, 690 (Ind. 2005)). Blakely claims only apply retroactively to cases pending on direct review or not yet final at the time that the Blakely decision was announced. Smylie, 823 N.E.2d at 687. Here, Klinzman’s case was final on March 11, 2004, when our Supreme Court denied Klinzman’s petition for transfer after our ruling affirming the trial court’s judgment on direct appeal. Klinzman v State, 812 N.E.2d 798 (Ind. 2004). Three months later, the U.S. Supreme Court handed down Blakely on June 24, 2004. Blakely, 542 U.S. at 296. Klinzman’s appeal was final before Blakely was decided, and, thus, the post-conviction court properly found that Klinzman’s appellate counsel was not ineffective.

#### D. Conflict of Interest of All Counsel

Finally, Klinzman contends that both trial and appellate counsel were ineffective because of various conflicts of interest. First, he alleges that trial counsel Colesassano had a conflict of interest because Colesassano had an aunt who was kidnapped and murdered. Appellant’s Br. p. 18-19. Next, he alleges that trial counsel Moore had a conflict of interest because he was a practicing attorney and pro-tempore judge in the same building. Appellant’s Br. p. 19. Lastly, he alleges that appellate counsel Greg

Bowes “was too involved with his political career to spend any time on [his] case.” Appellant’s Br. p 22.

Ineffective assistance of counsel can occur where counsel is burdened by a conflict of interest, in which case, special rules apply. Johnson v. State, 948 N.E.2d 331, 344 (Ind. 2011). An actual conflict of interest is one that requires the defense attorney to advance his own interests to the detriment of his client and “by its nature, is so threatening [as] to justify a presumption that the adequacy of representation was affected.” Bronaugh v. State, 942 N.E.2d 826, 830 (Ind. Ct. App. 2011) (quoting U.S. v. Ziegenhagen, 890 F.2d 937, 939-40 (7th Cir. 1989)).

We agree with the post-conviction court that Klinzman has failed to allege a single actual conflict of interest for either his trial or appellate counsel. The activities complained about are not by their nature so threatening as to justify a presumption that the adequacy of representation was affected. Furthermore, the post-conviction court noted that Colasessano’s position and experience as a pro-tempore judge was an asset to his trial defense, and Moore was not close enough with his aunt to be affected by her murder. Appellant’s Br. p. 36. With regard to Bowes, the post-conviction court found, and we agree, that Klinzman has failed to produce any evidence that would establish a conflict of interest. Id. Again, without any evidence to the contrary, we cannot conclude that the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Therefore, we find that the post-conviction court properly denied Klinzman’s petition for post-conviction relief.

The judgment of the post-conviction court is affirmed.

KIRSCH, J., and BROWN, J., concur.