

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.

ATTORNEY FOR APPELLANT:

**JAMES J. AMMEEN, JR.**  
Ammeen & Associates  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

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

**MONIKA PREKOPA TALBOT**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---



ZANE PADGETT, )  
 )  
Appellant-Petitioner, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 49A04-1104-PC-170

---

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Sheila Carlisle, Judge  
Cause No. 49G03-9901-PC-5354

---

**October 24, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Zane Padgett appeals the denial of his petition for post-conviction relief (“PCR petition”), which challenged the sixty-two-year sentence he received following his convictions for Class A felony voluntary manslaughter, Class C felony criminal recklessness, and Class C felony carrying a handgun without a license. We affirm.

## **Issues**

The restated issues before us are:

- I. whether Padgett received ineffective assistance of trial counsel; and
- II. whether he received ineffective assistance of appellate counsel.

## **Facts**

In Padgett’s direct appeal, we described the underlying facts of this case as follows:

[O]n January 9, 1999, Padgett, his girlfriend, Christine Mayhugh (“Mayhugh”), and a few friends went to a bowling alley. Once there, Mayhugh approached another group of people, including William Jones (“the victim”) and his brother, Steve Jones (“Jones”), and began flirting with them. Padgett, who had been looking over at the group, said, “I’m going to solve this, I’m going to go get it.” Despite Mayhugh’s pleas not to “go get it,” Padgett exited the bowling alley and went to his car.

Having heard that Padgett had gone to retrieve a gun, Jones asked him when he returned “why he went out to get a gun.” Padgett replied, “I didn’t go out to get a gun, the gun is out in my car, but I’ll shoot you right in the mouth.” Padgett then reached behind his back, at which point the victim punched Padgett in the face. Padgett fell to one knee, stood

up quickly, charged toward the victim, pulled out a handgun, and shot the victim. The bullet that hit the victim “went through the left side of the chest, through the chest wall . . . through his diaphragm, stomach, duodenum, the liver, and the right kidney,” causing him to bleed to death.

Jones attempted to wrestle the gun from Padgett. At some point, Jones and a woman were also shot and injured. Eventually, the gun ended up in the hands of Mayhugh, who waved it at Jones and another man. Padgett tried to take the gun from her, saying he wanted to “finish him off.” Padgett, Mayhugh, and a friend then fled the bowling alley in Padgett’s car. Padgett “wiped down” the gun and threw it in a trash can. When the friend in the car later asked Padgett “why he hit some guy that just hit him in the jaw once,” Padgett responded, “that’s what they get.” He further said, “[w]henever they want to come back for some more, I’ve got some more lead for them.”

Padgett v. State, No. 49A05-0002-CR-63, slip op. pp. 2-3 (Ind. Ct. App. Aug. 24, 2000).

The State charged Padgett with murder, two counts of Class C felony criminal recklessness, and one count of Class C felony carrying a handgun without a license. Padgett was represented by Andrew Maternowski. On August 25, 1999, a jury found Padgett guilty of voluntary manslaughter as a lesser included offense of murder, one count of Class C felony criminal recklessness, and Class A misdemeanor carrying a handgun without a license; the jury acquitted Padgett of the second criminal recklessness charge. Padgett then admitted that he had a prior felony conviction, which elevated his handgun conviction to a Class C felony.

Padgett’s sentencing was held on November 3, 1999. The presentence report prepared for the hearing indicated that in 1993, Padgett had been adjudicated a juvenile delinquent for committing what would be Class A misdemeanor possession of a handgun

without a license if committed by an adult. This information, however, was incorrect; Padgett's juvenile handgun charge had been dismissed, and he was only found to have committed a curfew violation instead. This misinformation was not brought to the trial court's attention. Padgett had no other delinquency adjudications, and had one 1994 adult conviction for Class C felony possession of cocaine and a violation of probation on that offense.

The trial court issued the following sentencing statement:

The Court finds a number of aggravating factors. First of all, the Defendant has a prior history of criminal conduct. The Court considers just those matters that are contained in the Presentence Report which are reduced to a conviction or a true finding of juvenile delinquency. Also, that prior attempts to rehabilitate the Defendant have been unsuccessful. Also, that the Defendant has been placed on probation in the past and has violated the conditions of his probation in the past. The Court finds the facts of this case particularly aggravating. Number one, it involved the Defendant bringing a weapon to a place that is meant for recreation and fellowship and then opening fire with this weapon, creating multiple victims, that is, killing one individual, shooting two others, and putting many others at risk of injury or death. The Court finds no mitigating factors as to Counts One and Three. As to Part Two of Count Four, the Court finds the Defendant has shown an acceptance of responsibility and entered a plea of guilty to Part Two of Count Four. So the Defendant—that is the only mitigating factor that applies here and it only applies to that particular count for which he has suffered a conviction. You've got a nice family. You drag them all into this. You've got a wonderful mother. It's obvious she loves you very much. But I'm not sentencing her, I'm sentencing you. You say you're the victim of an attack at the bowling alley, you're the victim of racism, you're the victim of bad representation by Mr. Maternowski. You're not a victim, sir. You create victims. You created two victims in this case.

And if you are looking for leniency, you have come to the wrong place.

App. pp. 233-34. The trial court then imposed a fifty-year sentence for voluntary manslaughter, an eight-year sentence for criminal recklessness, and a four-year sentence for carrying a handgun without a license, all to be served consecutively for an aggregate sentence of sixty-two years.

On direct appeal, Padgett was represented by Catherine Morrison. Morrison raised one issue on appeal, namely, whether there was insufficient evidence to rebut Padgett's trial claim of self-defense. This court rejected the argument and affirmed Padgett's convictions. No petitions for rehearing or transfer were filed.

On August 21, 2001, Padgett filed a pro se PCR petition, which was later amended by counsel. The petition alleged that Padgett received ineffective assistance of trial and appellate counsel, solely with respect to his sentence. On December 28, 2010, after conducting a hearing, the PCR court issued an order denying Padgett's petition. He now appeals.

### **Analysis**

Post-conviction proceedings provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007), cert. denied. "In post-conviction proceedings, the defendant bears the burden of proof by a preponderance of the evidence." Id. We review factual findings of a post-conviction court under a "clearly erroneous" standard but do

not defer to any legal conclusions. Id. We will not reweigh the evidence or judge the credibility of the witnesses and will examine only the probative evidence and reasonable inferences therefrom that support the decision of the post-conviction court. Id. Additionally, the PCR court here entered findings of fact and conclusions thereon, as required by Indiana Post-Conviction Rule 1(6). We cannot affirm the judgment on any legal basis, but rather, must determine if the court's findings are sufficient to support the judgment. Lile v. State, 671 N.E.2d 1190, 1192 (Ind. Ct. App. 1996).

We note that Padgett in this appeal attempts to argue directly that the trial court abused its discretion in sentencing him and that his sentence is inappropriate under Indiana Appellate Rule 7(B). Such freestanding claims of error cannot be raised in a PCR proceeding. See Stephenson, 864 N.E.2d at 1029. Rather, post-conviction claims are generally limited to issues demonstrably unavailable at the time of trial or direct appeal, or ineffective assistance of counsel claims. Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). We will address Padgett's arguments regarding his sentence solely within the framework of his ineffective assistance of counsel claims.

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

Padgett asserts that he received ineffective assistance of trial counsel because Maternowski failed to correct the presentence report's erroneous reference to a juvenile delinquency adjudication for carrying a handgun without a license. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his or her counsel's performance was deficient and that the petitioner was prejudiced by the

deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)), cert. denied. An attorney's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Padgett argues that he informed Maternowski of the error before the sentencing hearing; Padgett testified to this effect at the PCR hearing. Maternowski, however, testified that it was his normal practice to review a presentence report with his client before sentencing to determine if there were any errors in it, and that he had no recollection of Padgett informing him that he (Padgett) did not have a juvenile delinquency adjudication for carrying a handgun without a license. Maternowski also testified that he would have conducted further investigation of Padgett's juvenile record if he had been advised of this error, but that he did not investigate that record independently from what the presentence report indicated.

At the sentencing hearing, the trial court asked Padgett personally if he had reviewed the presentence report and he responded that he had. Maternowski then requested that a number of corrections be made to the presentence report, including that the description of the Class C felony carrying a handgun without a license conviction be changed to remove a reference to Padgett having a previous adult conviction for carrying a handgun without a license and to clarify that the basis for the Class C felony enhancement was for a different previous felony conviction.

In its findings and conclusions, the PCR court indicated that it was rejecting Padgett's claim that he had told Maternowski of the erroneous information in the presentence report prior to the sentencing hearing. We note that "[w]hether a witness' testimony at a postconviction hearing is worthy of credit is a factual determination to be made by the trial judge who has the opportunity to see and hear the witness testify." State v. McCraney, 719 N.E.2d 1187, 1191 (Ind. 1999). Additionally, Maternowski did request that a number of corrections be made to the presentence report, and it is reasonable to infer that he would have brought the erroneous reference to a delinquency adjudication to the trial court's attention if he had been made aware of that error.

To the extent Padgett suggests Maternowski should have independently investigated the presentence report's recitation of Padgett's criminal and juvenile history, we reject that claim. We substantially defer to counsel's judgments when reviewing a claim of failure to investigate. Boesch v. State, 778 N.E.2d 1276, 1283 (Ind. 2002).

Counsel has a duty to make reasonable investigations, and that encompasses making reasonable decisions that certain investigations are unnecessary. Id.

We believe it is objectively reasonable for an attorney to rely upon a client's own personal knowledge of his or her criminal history in verifying the accuracy of a presentence report. Here, the evidence most favorable to the PCR court's ruling is that Maternowski was never advised of the presentence report's erroneous listing of a juvenile delinquency adjudication for Padgett, despite Padgett having had the opportunity to review the report and to bring any such error to Maternowski's attention. Under the circumstances, Maternowski was not required to expend the resources necessary to verify the accuracy of every entry in the presentence report. His representation of Padgett fell within reasonable professional norms, and Padgett, therefore, received effective assistance of trial counsel.

## ***II. Ineffective Assistance of Appellate Counsel***

Next, we address Padgett's contention that he received ineffective assistance of appellate counsel when Morrison failed to challenge his sentence in any way on direct appeal. We review claims of ineffective assistance of appellate counsel using the same two-pronged Strickland standard used to evaluate claims of ineffective assistance of trial counsel. Bieghler v. State, 690 N.E.2d 188, 192 (Ind. 1997), cert. denied. We are highly deferential when scrutinizing the performance of appellate counsel and indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Id. at 193 (quoting Strickland, 466 U.S. at 689, 104 S. Ct. at 2065).

Ineffective assistance of appellate counsel claims fall into one of three general categories: “(1) denying access to an appeal, (2) failing to raise issues, and (3) failing to present issues competently.” Timberlake v. State, 753 N.E.2d 591, 604 (Ind. 2001), cert. denied.

Padgett’s sixty-two year sentence fell four years short of the maximum that he could have received in this case. Padgett repeatedly insists that appellate counsel’s failure to challenge his sentence on direct appeal constituted a complete denial of his right to appeal and was not merely a matter of deciding which issues to raise. With all due respect, Padgett is attempting to force a square peg into a round hole by making that argument. A defendant (in Indiana at least) has a right to an appeal; he or she does not have a right to have every issue raised in that appeal that he or she wants to be raised, even if those issues are nonfrivolous. See Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). When represented by counsel, the ultimate decision of what issues to raise is left to the attorney’s professional judgment. See id. at 3314, 463 U.S. at 753-54. By contrast, actions by appellate counsel that completely deny a defendant the right to review are represented by errors such as violating time limits in initiating the appeal, or in not filing necessary documents for the appeal. See Bieghler, 690 N.E.2d at 193. Morrison committed no such errors in Padgett’s appeal. This court fully reviewed the merits of the issue raised by Morrison in Padgett’s direct appeal.

Thus, Padgett’s claim of ineffective assistance of appellate counsel clearly is of the second category, i.e., failure to raise an issue on appeal. See Garcia v. State, 936 N.E.2d 361, 366 (Ind. Ct. App. 2010) (analyzing appellate counsel’s failure to challenge

defendant's sentence on direct appeal under this category), trans. denied. Ineffectiveness is rarely found in such cases. Bieghler, 690 N.E.2d at 193. “[W]hen assessing these types of ineffectiveness claims, reviewing courts should be particularly deferential to counsel’s strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable.” Id. at 194. In assessing counsel’s performance, we look to see whether any unraised issues were significant and obvious upon the face of the record and, if so, whether any such issues were clearly stronger than the issue or issues appellate counsel decided to raise on direct appeal. Id. “For purposes of ineffective assistance of appellate counsel claims, we judge the reasonableness of appellate counsel’s strategic decisions based upon precedent that was available at the time the brief was filed.” Williamson v. State, 798 N.E.2d 450, 454 (Ind. Ct. App. 2003), trans. denied. If this analysis establishes deficient performance on counsel’s part, we then analyze whether the issue or issues that counsel failed to raise clearly would have been more likely to result in reversal or a new trial than the issue or issues that counsel actually raised. Id. The ultimate issue under the prejudice prong is whether, but for counsel’s error or errors, there is a reasonable probability that the outcome of the defendant’s direct appeal would have been different. Id.

First, we address Padgett’s contention that Morrison should have challenged the trial court’s finding of aggravating and mitigating circumstances. Padgett primarily argues that the trial court erred in extensively discussing the particular nature and circumstances of the offenses as an aggravating circumstance and essentially rejected the

jury's decision to convict Padgett of voluntary manslaughter instead of murder by imposing a lengthy sentence upon Padgett. We disagree that this was an obvious issue that appellate counsel should have raised on direct appeal.

Padgett relies upon Hamman v. State, 504 N.E.2d 276 (Ind. 1987), and Gambill v. State, 436 N.E.2d 301 (Ind. 1982). In Hamman, a jury found the defendant guilty of two counts of voluntary manslaughter instead of murder as charged. At sentencing, the trial court expressly stated its belief that the evidence in the case “precludes any possibility of the existence of sudden heat as a mitigating factor reducing murder to voluntary manslaughter,” and proceeded to impose maximum and consecutive sentences for the convictions. Hamman, 504 N.E.2d at 277. Our supreme court revised the sentence, concluding that the enhancement “clearly was the result of improper considerations,” i.e., “the judge’s perceptions concerning the adequacy of the verdicts.” Id. at 278. Similarly, in Gambill, a jury found the defendant guilty of voluntary manslaughter instead of murder, and the trial court stated at sentencing that “the evidence would justify a conviction of murder. I think in fact that was the offense committed.” Gambill, 436 N.E.2d at 304. As in Hamman, our supreme court reduced an enhanced sentence because “[i]t is clear that the trial court enhanced the sentence to compensate for what he believed to be an erroneous verdict.” Id.

Our supreme court later clarified, however, that “[n]either Hamman nor Gambill stand for the proposition that the jury’s finding of guilty on a lesser included offense precludes the trial judge from examining the facts of the case to determine whether or not

he should mitigate, enhance, or impose the presumptive sentence upon appellant.” Kirkley v. State, 527 N.E.2d 1116, 1119 (Ind. 1988). If a trial court does not expressly indicate that it considered a jury verdict to be erroneous, it is not an abuse of discretion for the court to merely identify particular circumstances of an offense as aggravating when sentencing the defendant. See Ellis v. State, 567 N.E.2d 1142, 1144 (Ind. 1991). Here, the trial court did not express any dissatisfaction with the jury’s verdict or otherwise indicate that it believed the jury had erred in convicting Padgett of voluntary manslaughter instead of murder. There also was nothing that prevented the trial court from expounding upon the nature and circumstances of the shooting as an aggravating circumstance. Pursuant to Kirkley and Ellis, it would have been reasonable for Morrison not to challenge the trial court’s sentencing statement as violating Hamman or Gambill.

Padgett also seems to suggest that the trial court abused its discretion in listing as aggravating circumstances that prior attempts at rehabilitation had failed and that he had previously been placed on probation and violated terms of that probation. Padgett asserts that these aggravating circumstances could not properly be considered as separate from his criminal history. As the State points out, our supreme court in 2005, in connection with a case related to Blakely v. Washington, did hold that statements such as “prior attempts at rehabilitation have been unsuccessful” could not be considered aggravating circumstances separate from a defendant’s criminal history. Morgan v. State, 829 N.E.2d 12, 17 (Ind. 2005). However, Padgett does not direct us to any case which so held in 1999 or 2000, at the time of his trial and direct appeal. In fact, in Ford v. State, 718

N.E.2d 1104, 1107 (Ind. 1999), our supreme court seemed to find no error in a trial court's reliance upon prior failed attempts at rehabilitation as an aggravating circumstance separate from the defendant's criminal history.

Moreover, Padgett did in fact violate his probation following his 1994 conviction for possession of cocaine because of marijuana usage and Padgett's failure to complete a court-ordered substance abuse program. That was an act of misconduct on Padgett's part that was separate from the conviction itself, even if Padgett was continued on probation and eventually was satisfactorily discharged from it. Given this, and the state of the law in 1999-2000, we cannot say that Morrison's performance was deficient in not challenging the trial court's reliance on Padgett's criminal history-related aggravating circumstances.

Padgett also asserts again that his sentence should have been challenged on direct appeal because of the erroneous information in the presentence report. There is no indication that Morrison was made aware of any such error and, therefore, she was not ineffective for failing to raise that issue. For similar reasons, we summarily reject Padgett's assertion that Morrison was ineffective for not challenging trial counsel's effectiveness on direct appeal, as the only issue of ineffectiveness Padgett claims should have been raised was with respect to the erroneous presentence report.

Padgett also generally asserts that Morrison should have challenged his sentence as being "manifestly unreasonable." At the time of Padgett's direct appeal, Indiana Appellate Rule 17(B) stated, "The reviewing court will not revise a sentence authorized

by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.” Effective January 1, 2003, the appellate rule governing sentence review was reworded so that it now reads, “The Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B).

Prior to the rule’s amendment, appellate revisions of sentences as “manifestly unreasonable” were very rare. As our supreme court put it, the “manifestly unreasonable” standard was so difficult to meet that it ran the risk of impinging upon a defendant’s right to an appeal under the Indiana Constitution. Serino v. State, 798 N.E.2d 852, 856 (Ind. 2003). The creation of the “inappropriate” sentence review standard represented “modest steps to provide more realistic appeal of sentencing issues.” Id. Our supreme court has also said that when it revised Rule 17(B)/7(B), it changed the rule’s “thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied.” Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). In another case, our supreme court observed that “the barrier for relief under our former Appellate Rule 17(B) was incredibly high and thus relief was seldom granted.” Reed v. State, 856 N.E.2d 1189, 1198 (Ind. 2006). In fact, in Reed our supreme court found appellate counsel was ineffective, in part, for raising a “manifestly unreasonable” sentencing argument at the expense of another sentencing issue that was clearly stronger. Id. at 1198-99.

Here, even though the shooting itself may have been committed under sudden heat, Padgett deliberately went out to his car to retrieve a handgun under circumstances suggesting a confrontation with the Joneses might occur and at a time that Padgett was upset with the Joneses for flirting with his girlfriend. In that respect, this case is similar to Kirkley, where our supreme court held it was proper in sentencing the defendant for a voluntary manslaughter conviction to consider that the defendant had first deliberately armed herself with a gun before knowing that she would encounter the victim, her estranged husband. Kirkley, 527 N.E.2d at 1119. Additionally, the shooting took place in a bowling alley, which should be a place for the general public to enjoy safe entertainment. The shooting ultimately resulted in the death of one person, the injury of two others, and the endangerment of innocent members of the public at the bowling alley. Although Padgett was convicted of criminal recklessness with respect to only one of the injured persons, it was the initial shooting of William Jones that turned what would have been a fist-fight between two men into a “melee,” as Padgett described it, that was dangerous to many other persons.<sup>1</sup> In sum, the nature of the offenses here was egregious.

As for Padgett’s character, even if we disregard his juvenile adjudication for a curfew violation, his criminal record was not spotless, consisting of a prior Class C

---

<sup>1</sup> Padgett also challenges the trial court’s reference in its sentencing statement to his having shot two persons besides William Jones, because he was acquitted of one of the counts of criminal recklessness as to one of those two victims. Although, strictly speaking, the trial court may have erred in making this statement, both shooting injuries were a direct result of Padgett’s having opened fire in the bowling alley. For sentencing purposes, a court may properly consider the injurious consequences of a crime, even if the defendant did not intend those consequences. See McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001).

felony conviction and a violation of his probation for that offense.<sup>2</sup> Given these factors, along with the high degree of deference appellate courts gave to trial court sentencing decisions at the time of Padgett’s direct appeal, we cannot say Morrison made an unreasonable decision in not pursuing a challenge to Padgett’s sentence as “manifestly unreasonable,” even though Padgett did admittedly receive a lengthy sentence close to the maximum that he could have received.

We now address Padgett’s contention that Morrison should have challenged his sentence on the basis of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), which was decided while Padgett’s direct appeal was pending. Apprendi held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362-63. Padgett has not cited, nor has our research revealed, any Indiana case decided before 2004 that even suggested Apprendi might impact Indiana’s then-presumptive sentencing scheme.

In 2004, the Supreme Court decided Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Blakely expanded upon Apprendi by further defining what was meant by a “statutory maximum” sentence, which is “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely, 542 U.S. at 303, 124 S. Ct. at 2537 (2004). After Blakely, the

---

<sup>2</sup> In his brief, Padgett’s refers to his Department of Correction disciplinary record since being incarcerated, which lacks any citations for violent misconduct, as alleged confirmation of his non-violent nature. Such evidence is irrelevant in assessment of what was known about Padgett’s character at the time of his original sentencing and direct appeal.

continued validity of Indiana’s presumptive sentencing scheme began to be questioned, and in 2005 the Indiana Supreme Court definitively resolved the issue and held that Indiana’s presumptive sentencing scheme violated the Sixth Amendment as interpreted by Blakely. Smylie v. State, 823 N.E.2d 679, 683 (Ind. 2005), cert. denied.

Our supreme court did not hold that the presumptive sentencing system violated Apprendi—except to the extent that Blakely further explained Apprendi. Furthermore, the court expressly stated, “a trial lawyer or an appellate lawyer would not be ineffective for proceeding without adding a Blakely claim before Blakely was decided.” Id. at 690. Morrison filed her brief nearly four years before Blakely was decided. Her failure to anticipate that Apprendi would lead to the holding in Blakely, and eventually the holding in Smylie, cannot be considered ineffective assistance. We reached precisely the same conclusion in Walker v. State, 843 N.E.2d 50 (Ind. Ct. App. 2006), trans. denied, cert. denied. There, as here, a defendant contended that he had received ineffective assistance of appellate counsel for failing to argue that his sentence, which was imposed in 2000, violated Apprendi. We rejected that argument. Walker, 843 N.E.2d at 59. The same result obtains here. Morrison did not provide ineffective assistance of appellate counsel.

### **Conclusion**

Padgett has not established that he received ineffective assistance of either trial or appellate counsel in connection with the sentence he received. We affirm the denial of his PCR petition.

Affirmed.

ROBB, C.J., and BAKER, J., concur.