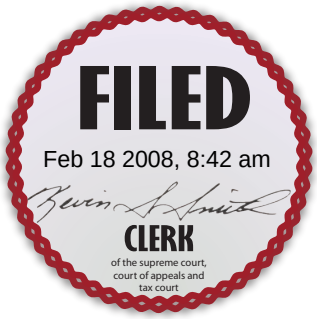

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IN THE
COURT OF APPEALS OF INDIANA

JIMMIE L. JONES,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0709-PC-785
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause Nos. 49G20-0007-PC-124461

February 18, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Jimmie L. Jones appeals the denial of his petition for post-conviction relief. Jones argues that the post-conviction court should have concluded that he received the ineffective assistance of appellate counsel when, in his direct appeal, his attorney failed to make an argument regarding the trial court's denial of Jones's request to proceed pro se. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

On July 20, 2000, the State charges Jones with class A felony dealing in cocaine and class B felony possession of cocaine. Sometime before September 28, 2000, Jones filed a pro se motion requesting to proceed pro se based on his trial attorney's alleged failures to prepare an adequate defense. The trial court held a hearing on Jones's motion on September 28, 2000, and denied the request on the same date. Neither the parties nor the trial court were able to locate the transcript of the September 28, 2000, hearing. Jones's jury trial was held on February 26, 2001, and the jury found him guilty as charged.

Jones appealed his convictions, and his sole argument on appeal was that the dual convictions violated the constitutional prohibition against double jeopardy. Jones v. State, No. 49A02-0106-CR-432 (Ind. Ct. App. Apr. 17, 2002). A panel of this court agreed, so it reversed and remanded with instructions to enter a new sentencing order and judgment of conviction only on the dealing in cocaine conviction. Id., slip op. p. 4.

On August 4, 2003, Jones filed a pro se petition for post-conviction relief, and on February 26, 2007, counsel for Jones amended his petition. Jones's sole argument was that his appellate attorney was ineffective for failing to raise the trial court's denial of his

request to proceed pro se as an argument in his direct appeal. Following a hearing, the post-conviction court denied Jones's petition on August 3, 2007, finding, among other things, as follows:

> . . . The tape of the September 28, 2000, hearing is not available, and thus there is not a transcript of the proceedings. Neither the trial attorney nor the Deputy Prosecutor for the case have any independent recollection of the September 28, 2000, pretrial hearing. . . .
>
> On the issue of a lack of a transcript for the pretrial hearing on September 28, 2000, the Court finds the case of Hall v. State, 849 N.E.2d 466 (Ind. 2006), instructive. In Hall, which was about alleged failure to advise Boykin rights, the Indiana Supreme Court stated: "The fact that the record of a guilty plea hearing can neither be found nor reconstructed does not of itself require granting post-conviction relief." Id. at 470. As the Indiana Supreme Court further stated in Hall, "A petitioner cannot obtain post-conviction relief on the ground of the lack of Boykin advisements simply by proving that the guilty plea record is lost and cannot be reconstructed. Rather, as with any claim, the petitioner has the burden of demonstrating by a preponderance of evidence that he is entitled to post-conviction relief." Id. at 473.

Appellant's App. p. 100. Jones now appeals.

DISCUSSION AND DECISION

As we consider Jones's argument that his petition for post-conviction relief should have been granted, we note that 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).

Notwithstanding the fact that his appellate attorney successfully appealed Jones's convictions by getting one of the convictions vacated on double jeopardy grounds, Jones contends that his attorney was ineffective for failing to argue on appeal that the trial court had erroneously denied Jones's request to proceed pro se. When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (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. 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. If a claim of ineffective assistance can be

disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

Claims of ineffective assistance of appellate counsel are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). These claims generally fall into three categories: (1) denying access to the appeal, (2) waiver of issues, and (3) failure to present issues well. Id. at 193-95. The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Id. at 193. Thus, to show that counsel was deficient for failing to raise an issue on direct appeal, i.e., waiving the issue, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000), cert. denied, 534 U.S. 1164 (2002).

A defendant has the right to represent himself pursuant to the Sixth Amendment to the United States Constitution. Stroud v. State, 809 N.E.2d 274, 279 (Ind. 2004) (citing Faretta v. California, 422 U.S. 806, 821 (1975)). The decision to proceed pro se must be made knowingly and intelligently, Faretta, 422 U.S. at 807, and a defendant must first clearly and unequivocally assert his right to represent himself before claiming that such a right has been denied, Broadus v. State, 487 N.E.2d 1298, 1304 (Ind. 1986). After a defendant makes a clear and unequivocal request to proceed without counsel, the trial court should conduct a hearing to determine the defendant's competency to proceed without counsel and to establish a record of the defendant's waiver of his right to counsel. Dobbins v. State, 721 N.E.2d 867, 872 (Ind. 1999).

Here, Jones sent a letter to the trial court that reads, in pertinent part, as follows:

> At this time I move to proceed pro[] se . . . . I would cite Faretta vs. California 95 S. Ct. 2525 (1975) that gives me the right to proceed pro[] se[.]
>
> . . . Counsel was appoint[ed] . . . [and] has not file[d] any motions[,] has taken no deposition[s] on [sic] any of the State['s] witness[es] listed in the information due to counsel[']s lack of communication . . . . I move to go pro[] se in order to prepare a Defense[.] I understand the perils and dangers of going pro[] se[.] In [sic] being force[d] too [sic] [.]

Def. Ex. D. We find that this letter constitutes a clear and unequivocal request to proceed without counsel such that the trial court was obligated to hold a hearing regarding Jones's request.

Indeed, the trial court did hold such a hearing. There is no transcript of the hearing, however, and neither Jones's trial attorney nor the deputy prosecutor have an independent recollection of what occurred at that hearing. At the hearing on Jones's petition for post-conviction relief, Jones testified very briefly about his limited recollection of the trial court's hearing on his request to proceed pro se:

> Q. Now the record indicates that there was a hearing held on that request [to proceed pro se] on September 28th of 2000. Do you remember some of that hearing?
>
> A. A little bit of it.
>
> Q. Generally what happened at that hearing?
>
> A. You know, he was trying to talk me out of it.

PCR Tr. p. 21. That is the entirety of the evidence presented by Jones regarding the substance of the hearing on his motion to proceed pro se. At the close of the hearing, the trial court denied Jones's request to proceed pro se.

The fact that the record of the hearing can neither be found nor reconstructed does not, in and of itself, require granting post-conviction relief. Hall v. State, 849 N.E.2d 466, 470 (Ind. 2006). In Hall, the post-conviction petitioner alleged that he had not been advised of his Boykin[1] rights before pleading guilty but was unable to find or reconstruct a record of his guilty plea hearing. Id. at 468. The Hall court held that the absence of a record was not enough to warrant post-conviction relief:

> The fact that the record of a guilty plea hearing can neither be found nor reconstructed does not of itself require granting post-conviction relief. Rather, as with any claim made in a petition for post-conviction relief, a claim that the petitioner's conviction was obtained in violation of federal or state constitutional safeguards must be proven by a preponderance of the evidence. And of course the law of this jurisdiction has long imposed on petitioners seeking post-conviction relief the burden of establishing their grounds for relief.

Id at 470 (citations omitted). The court concluded that to establish his right to post-conviction relief, Hall was required to prove that he was not informed of his rights to silence, to trial by jury, and to confront witnesses, thus rendering his guilty plea unknowingly and involuntarily made. In the end, the court found that Hall's post-conviction testimony, which included Hall's statement that "'he had some recollection of the guilty plea hearing'" but included "'nothing about any advisement or lack of advisement of rights'" was insufficient to meet his burden of proof. Id. at 472.

[1] Boykin v. Alabama, 395 U.S. 238 (1969). "Boykin requires that the record must show, or there must be an allegation and evidence which show, that the defendant was informed of, and waived, three specific federal constitutional rights: the privilege against compulsory self-incrimination, right to trial by jury, and the right to confront one's accusers." Hall, 849 N.E.2d at 469.

Jones argues that Hall is inapposite to this case because in Hall, the post-conviction petitioner was attempting to prove a negative—that he did not receive a proper advisement before pleading guilty. Here, in contrast, Jones argues that he "is not alleging a missing advisement. He is alleging his unequivocal assertion of his right to self-representation was improperly denied." Appellant's Br. p. 8. We find this to be a distinction without a difference. As noted above, upon making an unequivocal request to proceed pro se—as Jones did here—a defendant must still establish to the trial court's satisfaction that he is competent to proceed without counsel and sufficiently understands all of the risks inherent in defending himself without the assistance of an attorney. Here, the trial court held a hearing and determined, for an unknown reason, that the appropriate course of action was to deny Jones's request. Jones bears the burden of proving by a preponderance of the evidence that the trial court erroneously refused to permit Jones to proceed pro se. Jones, however, has been unable to locate a transcript of the hearing or recreate the substance of the hearing. We find that the rule established in Hall—that a missing record is insufficient on its own to warrant post-conviction relief and a petitioner must prove that he is entitled to such relief by a preponderance of the evidence—likewise applies to Jones's situation.

Here, the only evidence Jones offered regarding the substance of the hearing on his motion to proceed pro se was his own testimony. We find that Jones's limited recollection—that the trial court tried to talk him out of proceeding pro se—does not establish that the trial court erred by denying the request. Trial court proceedings are clothed with a presumption of regularity, Brown v. State, 683 N.E.2d 600, 604 (Ind. Ct.

App. 1997), and Jones has failed to overcome that presumption. Because Jones has failed to prove that the trial court erroneously denied his request to proceed pro se, he has also failed to prove that he suffered prejudice as a result of his appellate attorney's failure to raise the issue in his direct appeal. Consequently, we find that Jones has not established that he received the ineffective assistance of appellate counsel.

The judgment of the post-conviction court is affirmed.

DARDEN, J., and BRADFORD, J., concur.