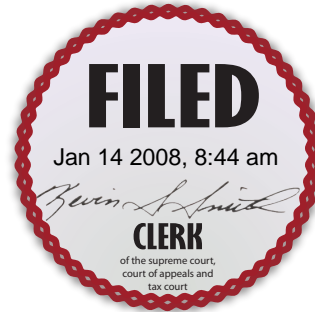


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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STANLEY RUTH,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 49A02-0604-PC-353

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APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Robert R. Altice, Jr., Judge

The Honorable Amy J. Barbar, Magistrate

Cause No. 49G02-9611-PC-182557

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**January 14, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

Stanley Ruth, pro se, appeals the post-conviction court's denial of his request for post-conviction relief, filed after he was convicted by a jury of two counts of Criminal Deviate Conduct, as Class B felonies; Rape, as a Class A felony; and Criminal Deviate Conduct, as a Class A felony. Ruth presents the following issues for review:

1. Whether Ruth's trial counsel was ineffective for failing to challenge the use of aggravating factors used in sentencing.
2. Whether Ruth's appellate counsel was ineffective for failing to assert on appeal that Ruth's sentence was improperly enhanced.
3. Whether the trial court improperly enhanced Ruth's sentence.
4. Whether the post-conviction court erred when it did not address, in the Findings of Fact and Conclusions of Law Denying Post-Conviction Relief, the issues raised in Ruth's previously filed petition for post-conviction relief.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On December 30, 1995, Carla Laster left her nine-year-old daughter, J.M., and J.M.'s two younger brothers at home while Laster worked the night shift at Meijer's. Ruth had lived with Laster and her children until August 1995. He was not happy about the separation and lived close to Laster in December 1995. In the early morning hours of December 31, 1995, Ruth entered Laster's home, while Laster was at work. The facts set out in our prior opinion on Ruth's direct appeal describe Ruth's conduct after entering the home:

[T]he nine-year-old victim, J.M., was sleeping in her bed when Ruth entered her bedroom. Ruth picked J.M. up off her bed, put his hand over her mouth, and placed her in the floor of the hallway. In the hallway, Ruth

removed J.M.'s underwear and placed his penis into her vagina. Ruth then told J.M. to go to the living room. There, Ruth placed a pillow over J.M.'s face and laid on top of her. Ruth proceeded to put his finger or his penis in J.M.'s vagina. After the second assault, Ruth told J.M. to go back to bed, and threatened that if she called for help, he would kill her.

Ruth v. State, 706 N.E.2d 257, 258 (Ind. Ct. App. 1999). On November 22, 1996, the State charged Ruth with Child Molesting, as a Class B felony; Child Molesting, as a Class C felony; Burglary, as a Class A felony; three counts of Criminal Deviate Conduct, as Class B felonies; Rape, as a Class A felony; and Criminal Deviate Conduct, as a Class A felony.

On November 19, 1997, the court held a jury trial, at which Ruth was represented by appointed counsel, and the jury found Ruth guilty of two counts of criminal deviate conduct, as Class B felonies; rape, as a Class A felony; and criminal deviate conduct, as a Class A felony. On December 23, 1997, the trial court sentenced Ruth to ten years for each count of criminal deviate conduct, as Class B felonies; fifty years for rape; and thirty years for criminal deviate conduct, as a Class A felony. The court found as aggravating factors: the likelihood that Ruth would commit another crime, the nature and circumstances of the crime committed, the likelihood that the crime was planned, that the victim was under twelve years old, that Ruth was the victim's stepfather, and that Ruth took out on the victim his anger and frustration over his marriage. The trial court found Ruth's lack of criminal history as a mitigating factor, then found that the aggravators outweighed the mitigators. As a result, the trial court ordered the sentences to be served consecutive to each other, for an aggregate sentence of 100 years.

Ruth pursued a direct appeal, alleging that the evidence was insufficient to support his convictions, and this court affirmed. Ruth, 706 N.E.2d at 259. On June 16, 2003, Ruth filed a petition for post-conviction relief, and on September 27, 2004, he moved to withdraw that petition. The court granted Ruth's motion. On January 31, 2005, Ruth filed a motion to correct erroneous sentence ("Motion"), alleging that the trial court had used improper aggravating factors when imposing sentence and that trial and appellate counsel were ineffective for failing to object or raise that as an issue.<sup>1</sup> The court initially denied the Motion. But on March 2, 2005, the post-conviction court informed Ruth that it would reinstate the Motion and treat it as a petition for post-conviction relief. On March 21, 2005, Ruth confirmed to the court that he wished to proceed by treating the Motion as a petition for post-conviction relief.

On November 16, 2005, the post-conviction court held a hearing on Ruth's Motion, treating the Motion as a petition for post-conviction relief. Ruth appeared pro se at the hearing and requested the State to submit into evidence Ruth's record of proceedings, which the State did. Neither Ruth nor the State offered any other evidence. After taking the matter under advisement, the court entered its Findings of Fact and Conclusions of Law Denying Post-Conviction Relief ("Post-Conviction Order"). Ruth now appeals.

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<sup>1</sup> Ruth has not included in the appendices a copy of the Motion. The trial court's order on that Motion states generally the allegations in the Motion and that the Motion was filed by Ruth's counsel. Ruth does not contest those facts.

## DISCUSSION AND DECISION

### Standard of Review

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); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. 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. 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. Id. (citations omitted). In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. Id.

### Issue One: Ineffective Assistance of Trial Counsel

Ruth contends that his trial counsel was ineffective. A defendant claiming ineffective assistance of trial counsel must satisfy two components. Clancy v. State, 829 N.E.2d 203, 212 (Ind. Ct. App. 2005), trans. denied. “First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the ‘counsel’ guaranteed by the Sixth Amendment.” Id. (quoting McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002) (citing Strickland v. Washington, 466 U.S. 668 (1984))). Second, the defendant must show prejudice: a reasonable probability that, but for counsel's errors,

the result of the proceeding would have been different. Id. Further, we afford great deference to counsel's discretion to choose strategy and tactics, and strongly presume that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. Id. Where trial counsel's performance at issue can be explained by reasonable trial strategy, that performance is not ineffective. See id. The failure to establish either prong will cause the claim to fail. Vermillion v. State, 719 N.E.2d 1201, 1208 (Ind. 1999).

Ruth asserts three reasons that his trial counsel was ineffective. In particular, he alleges that trial counsel failed to object to "sentencing errors" in the trial court's use of improper aggravators when imposing sentence, Appellant's Brief at 10; did not adequately perform pre-trial investigation or preparation; and did not consult with Ruth. We address each contention in turn.

Ruth first argues that his trial counsel was ineffective for failing to object to the trial court's use of certain aggravators to enhance Ruth's sentence. But he does not specify which aggravators were improper. Thus, Ruth waived the issue for review because he did not support his assertion with cogent reasoning or supporting citations to the record.<sup>2</sup> See Ind. Appellate Rule 46(A)(8)(a).

Ruth also contends that his trial counsel was ineffective because he did not adequately investigate Ruth's case or prepare for trial and did not consult with Ruth regarding the representation. But, on the first claim, Ruth also states that trial counsel

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<sup>2</sup> Although Ruth waived the issue of trial counsel's effective assistance here, that issue is addressed on the merits under Issue Two, regarding Ruth's claim that appellate counsel was ineffective for failing to assert on direct appeal an ineffective assistance of trial counsel claim on the same grounds.

“was ineffective because he was hindered by the Court[,] Police and Prosecutor, when it came to investigating and preparing for trial.” Appellant’s Brief at 12. Such a statement belies his claim of ineffective assistance of counsel arising from pre-trial investigation and preparation. And, in any event, Ruth does not present a cogent argument supporting either claim, nor does he analyze the issues presented by applying the law to facts of this case. Thus, again, he has waived those issues for review. App. R. 46(A)(8)(a).<sup>3</sup>

### **Issue Two: Ineffective Assistance of Appellate Counsel**

Ruth next contends that his appellate counsel was ineffective for failing to challenge on direct appeal the aggravators used to enhance his sentence. In particular, Ruth maintains that his appellate counsel should have asserted on direct appeal that the trial court improperly used the following aggravators to enhance Ruth’s sentence: Ruth’s need for commitment in a penal facility; that the imposition of a reduced sentence would depreciate the seriousness of the crime; and the impact of the crime on the victim. We cannot agree.<sup>4</sup>

In sentencing Ruth, the trial court stated as follows:

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<sup>3</sup> In his brief, Ruth also asserts, without analysis, that the “State suppressed and excluded evidence that was in [Ruth’s] favor[;]” Ruth was “denied the opportunity to present a defense on the medical evidence, and the result of the testing of the medical evidence, a Constitution[al] right . . . [;]” Ruth was “not allowed to proper[ly] impeach any of the State’s witnesses, about the involvement of this crime[;]” trial counsel was ineffective for failing to “demand[] that the [S]tate turn over exculpatory evidence that precluded [Ruth] from being properly represented[;]” and trial counsel did not “prepar[e] for the sentencing hearing[.]” Appellant’s Brief at 12-13. For the reasons stated above, those issues are likewise waived. See App. R. 46(A)(8)(a).

<sup>4</sup> We find it curious that, while arguing that his appellate counsel was ineffective, Ruth contends that “[a]ppellate counsel was not available to Ruth[] on direct appeal.” Appellant’s Brief at 5. We presume that Ruth means that appellate counsel did not consult with him. But Ruth has waived that argument because he failed to support it with cogent reasoning and citation to supporting authorities and the record. See App. R. 46(A)(8)(a).

Under Indiana law when a Court sentences an individual there are several things that the Court has to consider. The first is the risk that the person will commit another crime. Your attorney did note, Mr. Ruth, that you did not have any prior criminal history and that is true. However, it appears as though based on the evidence presented today and presented at trial, that there is a history of violence and anger especially when you've been drinking. And so those combinations in you I think create a likelihood that you'll commit another crime. The nature and circumstances of the crime committed. We could sit here and talk three months about the nature and circumstances of the crime committed. Suffice to say, it's the most horrible crime that one can imagine. Injury to a child so severe all of the doctors were themselves shocked by the nature and severity of the injury. . . . To add to the fact that she was nine years old, she was your stepdaughter, and as you pointed out yourself, you raised her as your own. The other circumstances that I want to point out related to the commission of the crime are that you and your wife were estranged at the time. You were apparently upset about that. There were some other facts that came out at trial, including your borrowing, I guess to be kind, of your wife's vehicle that night which could support an inference that you had a plan to only have her car be at that scene of the crime so that neighbors wouldn't suspect any other vehicle being there or be able to report any other vehicle being there. And so like I said, it does support the likelihood of a plan. Then I have to consider your prior criminal record, which we've talked about. There's none. Your character. Your character is complex. You obviously were employed, served your country. For a period of time served your family. But then when things weren't going your way, and the testimony was that you were upset with your wife because she was giving too much attention to your children and that was part of the reasons for the separation, that that caused you to be angry. And then the last thing I'm suppose[d] to consider is your condition, and I'm not really sure there's anything more than what I've said. Then the law requires me to look at statutory aggravating circumstances that may apply in this case. One is that I have to consider is that the victim of the crime was less than twelve years old, and that certainly applies in this case. The law also allows me to consider non-statutory aggravators, and I find two. One is that you were the victim's stepfather and the other is that you took out your anger and frustrations over your marital problems on an innocent child. . . .

Transcript at 1148-50. In other words, as the post-conviction court correctly noted, the trial court relied on the following aggravators when imposing sentence: the likelihood that Ruth would commit another crime, the nature and circumstances of the crime



committed, the likelihood that the crime committed was planned, that the victim was under twelve years old, that Ruth's was the victim's stepfather, and that Ruth took out his anger and frustration over the marriage on the victim.

Ruth asserts that his appellate counsel was ineffective for failing to challenge on direct appeal the trial court's use of the following aggravators: Ruth's need for commitment in a penal facility; that the imposition of a reduced sentence would depreciate the seriousness of the crime; and the impact of the crime on the victim. But our review of the sentencing statement shows that the trial court did not find any of those aggravators. Thus, Ruth's counsel was not ineffective for failing to object to the use of those aggravators to enhance Ruth's sentence.<sup>5</sup>

### **Issue Three: Sentence Enhancement**

Ruth next contends that the trial court improperly enhanced his sentence. In particular, he asserts that his trial and appellate counsel did not have "knowledge of existing laws," apparently meaning laws regarding the use of aggravators in sentencing. He also argues incorrectly that "the only aggravators that could be used to aggravate Ruth's sentence was a prior felony conviction and he had none or brushes with the law at the time of his sentence." Appellant's Brief at 16. But because the alleged sentencing

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<sup>5</sup> In support of his contention that appellate counsel was ineffective, Ruth stated: "Ruth invites this Court to review the sentencing hearing transcript that has been requested to be transmitted, and there they [sic] will find that appellate counsel was deficient in his performance and the deficiency resulted in prejudice[]." Appellant's Brief at 5-6. As noted above, Appellate Rule 46(A)(8) requires an appellate argument to be supported by "cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on appeal relied on . . . ." Ruth bears the burden of citing to particular pages of the record in support of his argument. Thus, we cannot accept Ruth's invitation to search the record for evidence supporting his contentions.

errors were known but not raised on direct appeal, they are waived. See Williams v. State, 808 N.E.2d 652, 659 (Ind. 2004).

Waiver notwithstanding, we cannot agree with either of Ruth's arguments. Overall, his arguments are difficult to follow. In support he cites to an abundance of cases regarding the right to due process in criminal trial proceedings and the burden of proving the elements of crimes beyond a reasonable doubt. Those cases do not support his contention that he was improperly sentenced. Further, the trial court did not find that Ruth had any criminal history, nor did it use that as an aggravator in support of an enhanced sentence. Indeed, the trial court found Ruth's lack of criminal history to be a mitigator. And Ruth does not point to any law or any parts of the record to show how his sentence was otherwise improperly enhanced. In sum, Ruth does not support his contention with cogent reasoning or citation to supporting law or citations to the record on appeal. As such, Ruth has waived for review his claim that the trial court improperly enhanced his sentence. See App. R. 46(A)(8)(a).

#### **Issue Four: Prior Petition for Post-Conviction Relief**

Finally, Ruth contends that the post-conviction court erred because it did not address in the Post-Conviction Order the claims raised in Ruth's first petition for post-conviction relief. We cannot agree.

As noted above, the Post-Conviction Order addressed the claims Ruth raised in his Motion to Correct Erroneous Sentence, which the post-conviction court treated as a petition for post-conviction relief. Before filing the Motion, Ruth had withdrawn his previously filed petition for post-conviction relief. He does not cite any place in the

record to show that he asked the court to reinstate or consider the claims raised in that first petition, nor does he assert that he did so. Indeed, at the post-conviction hearing, the trial court confirmed with Ruth that the hearing was proceeding on his claim, filed January 31, 2005, that “the trial court used improper aggravators to enhance and to run [Ruth’s] sentences consecutive[.]” Transcript at 4. Thus, Ruth’s contention that the post-conviction court should have addressed the claims raised in his prior petition for post-conviction relief is without merit.

Affirmed.

BAILEY, J., and CRONE, J., concur.