MEMORANDUM DECISION

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

Christopher Moto,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

March 4, 2022

Court of Appeals Case No. 21A-PC-1198

Appeal from the Madison Circuit Court

The Honorable Mark K. Dudley, Judge

Trial Court Cause Nos.
48C06-2004-PC-20
48C06-2004-PC-21
48C06-2004-PC-22
48C06-2004-PC-23

Tavitas, Judge.

Case Summary

[1] Christopher Moto, pro se, appeals the post-conviction court's ("PC Court") denial of his four petitions for post-conviction relief ("PCR"). Moto argues that the PC Court erred by denying his sentencing claim, in addressing Moto's requests for admissions, and by rejecting his ineffective assistance of counsel claims. Finding that the PC Court did not err, we affirm.

Issues

[2] Moto raises two issues, which we revise and restate as:

I. Whether Moto's sentencing claim is a cognizable freestanding claim.

II. Whether the PC Court properly addressed Moto's requests for admissions.

III. Whether Moto received ineffective assistance of trial counsel.

Facts

[3] On February 24, 2011, the State charged Moto with sexual misconduct with a minor, a Class B felony, and sexual misconduct with a minor, a Class C felony, under Cause Number 48D01-1102-FB-275 ("FB-275"). Moto entered into a plea agreement, which provided that Moto would plead guilty as charged and that the trial court would determine Moto's sentence "with a cap of six (6) years on executed time." Appellant's App. Vol. II p. 177. On the Class B felony, the trial court sentenced Moto to twelve years in the

Department of Correction ("DOC") with six years executed and six years suspended to probation. On the Class C felony, the trial court sentenced Moto to a concurrent sentence of six years in the DOC with four years executed and two years suspended to probation. The trial court then ordered Moto to serve four years of the executed portion of his sentence in the DOC and two years on home detention. Moto was released from the DOC in October 2013.

[4] In February 2017, officers discovered that one of Moto's roommates was a felon and that one of Moto's other roommates overdosed. Moto was informed that he would probably be charged with maintaining a common nuisance, which would be a violation of his probation. The next day, Moto failed to report for a required drug screen and absconded. Over the next several months, Moto failed to report to probation, failed to secure a permit to travel outside of Indiana, failed to keep probation informed of his address, and failed to register as a sex offender. On April 29, 2017, Moto was charged with burglary in Arizona and ultimately pleaded guilty to trespass.

[5] As a result of these incidents, the State alleged that Moto violated his probation in FB-275. Moto admitted to violating his probation; the trial court revoked four years of Moto's probation and ordered him to serve the four years on home detention.

[6] Additionally, on May 3, 2017, the State charged Moto with failure to register as a sex offender, a Level 6 felony, under Cause Number 48C06-1705-F6-1129 ("F6-1129"). In January 2018, Moto pleaded guilty to failure to register as a

sex offender and was sentenced to two years suspended to probation, to be served consecutively to his sentence in FB-275.

[7] On May 31, 2018, Moto was in a work release facility, and he was released to go to school but never returned to the facility. On June 21, 2018, the State charged Moto with failure to register as a sex offender, a Level 6 felony, under Cause Number 48C06-1806-F6-1624 ("F6-1624"), and failure to return to lawful detention, a Level 6 felony, under Cause Number 48C06-1806-F6-1625 ("F6-1625"). Additionally, the State alleged that Moto violated his probation under both FB-275 and F6-1129.

[8] In August 2018, Moto entered into a plea agreement regarding FB-275, F6-1129, F6-1624, and F6-1625, which required Moto to plead guilty as charged in F6-1624 and F6-1625 and admit to violating his probation in FB-275 and F6-1129. Moto agreed to consecutive one-year executed sentences in both F6-1624 and F6-1625 and agreed that the balance of his sentences in FB-275 and F6-1129 would be executed and served consecutively to the other sentences. Pursuant to the plea agreement, the trial court sentenced Moto to consecutive sentences of four years in FB-275; two years in F6-1129; one year in F6-1624; and one year in F6-1625, for an aggregate sentence of eight years in the DOC.

[9] In April 2020, Moto filed petitions for PCR in each of the matters discussed. Moto served a request for admissions in both FB-275 and F6-1129, but the

State did not respond.[1] In November 2020, Moto filed an amended petition for PCR regarding FB-275. In December 2020 and January 2021, the PC Court held hearings on Moto's petitions. Moto presented argument and his own testimony but did not present any other evidence. The State requested the PC Court to take judicial notice of the records of the four cases and did not present further evidence.

[10] On June 3, 2021, the PC Court rejected Moto's argument that the requests for admissions were deemed admitted and required a finding in Moto's favor. The PC Court also entered findings of fact and conclusions of law denying Moto's petitions for PCR. Moto now appeals.

Analysis

[11] Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *reh'g denied, cert. denied*, 141 S. Ct. 553 (2020); Ind. Post-Conviction Rule 1(1)(b). "The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal." *Gibson*, 133 N.E.3d at 681. "Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are res judicata." *Id.* The

[1] The State asserted that it did not receive the requests for admission.

petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id.;* P.-C.R. 1(5).

[12] When, as here, the petitioner "appeals from a negative judgment denying post-conviction relief, he 'must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision.'" *Gibson*, 133 N.E.3d at 681 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied*, 534 U.S. 1164, 122 S. Ct. 1178 (2002)). When reviewing the PC court's order denying relief, we will "not defer to the post-conviction court's legal conclusions," and the "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." *Bobadilla v. State*, 117 N.E.3d 1272, 1279 (Ind. 2019). When a petitioner "fails to meet this 'rigorous standard of review,' we will affirm the post-conviction court's denial of relief." *Gibson*, 133 N.E.3d at 681 (quoting *DeWitt v. State*, 755 N.E.2d 167, 169-70 (Ind. 2001)).

[13] Moto proceeds pro se, and we, therefore, reiterate that "a pro se litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented." *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). "This means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so." *Picket Fence Prop. Co. v. Davis*, 109 N.E.3d 1021, 1029 (Ind. Ct. App. 2018) (citing *Basic v. Amouri*, 58 N.E.3d 980, 983-84 (Ind. Ct. App. 2016)), *trans. denied*. Although we prefer to decide cases on their merits,

arguments are waived where an appellant's noncompliance with the rules of appellate procedure is so substantial it impedes our appellate consideration of the errors. *Id.*

[14] We first address Moto's argument that he has met his burden because the State failed to present any evidence or argument on its affirmative defenses. Moto misinterprets his burden.[2] Moto bore the burden of establishing his claims by a preponderance of the evidence. *Gibson*, 133 N.E.3d at 681. The State's failure to present evidence on its affirmative defenses does not mean that Moto is automatically successful on his petitions for PCR. Rather, Moto still had the burden of establishing that he was entitled to relief. With this in mind, we will address Moto's other claims.

I. Freestanding Sentencing Claim

[15] Moto argues that the trial court abused its discretion in sentencing Moto in FB-275. According to Moto, his total sentence should have been capped at six years pursuant to the plea agreement. Moto, thus, argues that his sentence in FB-275 exceeded the sentence allowable under the plea agreement.

[16] Moto's sentencing claim is not cognizable on post-conviction review. *Myers v. State*, 33 N.E.3d 1077, 1115 (Ind. Ct. App. 2015), *trans. denied*.

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[2] The State properly notes that "the post-conviction court did not deny Moto's requested relief based on any of the defenses raised by the State in its response, including laches. The post-conviction court denied Moto's relief because he failed to meet his burden in establishing that he was entitled to relief." Appellee's Br. p. 13, n.3.

> "Post-conviction procedures do not provide a petitioner with an opportunity to present freestanding claims that contend the original trial court committed error." *Wrinkles v. State*, 749 N.E.2d 1179, 1187 n.3 (Ind. 2001) [, *cert. denied*, 535 U.S. 1019, 122 S. Ct. 1620 (2002)]. Rather, "'[i]n post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.'" *Bunch v. State*, 778 N.E.2d 1285, 1289-90 (Ind. 2002) (quoting *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002)). "An available grounds for relief not raised at trial or on direct appeal is not available as a grounds for collateral attack." *Canaan v. State*, 683 N.E.2d 227, 235 (Ind. 1997) [, *cert. denied*, 524 U.S. 906, 118 S. Ct. 2064 (1998)].

Id. at 1115-16 (emphasis added). Moto's sentencing claim was known and available to Moto on direct appeal. Accordingly, this is a freestanding claim of trial error, which is not cognizable in a PCR proceeding.[3]

II. Requests for Admissions

[17] Moto argues that, because the State failed to respond to his requests for admissions, the "facts . . . are conclusively established by operation of law." Appellant's Br. p. 16. In a post-conviction proceeding, "[a]ll rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are

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[3] Waiver notwithstanding, the State correctly notes that Moto misinterprets the term "executed." We have held that "a person is serving the executed portion of his sentence when he is committed to the Department of Correction." *Shaffer v. State*, 755 N.E.2d 1193, 1195 (Ind. Ct. App. 2001). The plea agreement contained "a cap of six (6) years on executed time." Appellant's App. Vol. II p. 177. The trial court sentenced Moto to twelve years with six years executed and six years suspended to probation. The trial court then ordered Moto to serve four years of the executed portion of his sentence in the DOC and two years on home detention. The trial court's sentence did not exceed the sentence allowed by the plea agreement.

available to the parties . . . ." Ind. Post-Conviction Rule 1(5). "Trial and post-conviction courts are accorded broad discretion in ruling on discovery matters, and we will affirm their determinations absent a showing of clear error and resulting prejudice." *Pannell v. State*, 36 N.E.3d 477, 493 (Ind. Ct. App. 2015), *trans. denied*. Post-conviction relief proceedings are a quasi-civil remedy for the presentation of errors unknown or unavailable at the time of trial or direct appeal. *Id.* A second opportunity to discover the same evidence that was, or could have been, discovered prior to the original criminal trial will typically be precluded. *Id.*

[18] Indiana Trial Rule 36 provides:

> (A) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(B) set forth in the request, including the genuineness of any documents described in the request . . . . The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.
>
> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than thirty [30] days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney.

* * * * *

> (B) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

[19] The PC Court rejected Moto's assertion that the failure to respond to the requests for admissions entitled him to relief on his petitions for PCR. The PC Court found:

> Moto argues that the deemed admitted requests require a finding in his favor. The court disagrees. The purpose of a request for admission is to establish a fact. *F.W. Means & Co. v. Carstens*, 428 N.E.2d 251 (Ind. App. 1981). Admissions cannot alter an already established fact merely because the opposing party fails to respond. Here the operative facts are contained in the court files as well as facts admitted to by Moto in court while under oath. Moto cannot retract his prior sworn admissions now via an unanswered request for admissions. Moto agrees with the chronology of the cases, his lack of appeal of the sentences and revocations, his requirement to register as a sex offender, his absconding from Work Release, his commission of a crime in Arizona, his illegal possession of Suboxone, a controlled substance, and that he lived with a known felon while under probation supervision. Moto does dispute whether he could have been sentenced to Failure to Register in [F6-]1624, but this is based on a legal analysis, not due to a disputed fact. A legal analysis was available at the time of sentencing.

Appellant's App. Vol. II pp. 37-38.

[20] Although the State received and responded to Moto's interrogatories, the State repeatedly informed the trial court that it did not receive Moto's requests for admissions with respect to FB-275 and F6-1129. It is unclear from the record whether Moto properly "served" the State pursuant to Indiana Trial Rule 5. Without proper service, the State was not obligated to respond to the requests for admission, and the matters would not be admitted.

[21] The PC Court, however, did not address the service issues raised by the State. Rather, the PC Court effectively withdrew the admissions because the admissions conflicted with Moto's testimony, provided under oath at various hearings on these matters.[4] We note that "[a]n important purpose of [Rule 36] is to more quickly and efficiently reach a resolution based on the actual facts." *Costello v. Zavodnik*, 55 N.E.3d 348, 353 (Ind. Ct. App. 2016). Rule 36(B), which allows the withdrawal of admissions, operates to eliminate "undeserved windfalls" and the "blatant abuse" of Rule 36; Rule 36 is not "intended to provide a windfall to litigants" or to be used as a "gotcha device" or "a trap to prevent the presentation of the truth in a full hearing." *See id.* (citations and quotations omitted). Moto is attempting to blatantly abuse Rule 36 to enter admissions that would conflict with his prior testimony and, in Moto's view,

[4] We note that Rule 36(B) requires a motion. Here, the State repeatedly informed the PC Court that it did not receive the requests for admissions, and the PC Court took the matter under advisement and addressed the issue in its order on Moto's petitions for PCR. Accordingly, the PC Court did not find the matters admitted, and the State was not given the opportunity to file a motion for withdrawal.

require post-conviction relief on his convictions and probation revocations. Under these circumstances, the PC Court properly withdrew the admissions. *See, e.g., id.* (holding that the seller of a $75.00 printer was entitled to withdraw his admissions to damages of more than $30,000.00); *cf. E. Point Bus. Park, LLC v. Priv. Real Est. Holdings, LLC*, 49 N.E.3d 589, 600 (Ind. Ct. App. 2015) (noting that, in the summary judgment context, "Indiana courts have long held that a party who has been examined at length during a deposition cannot create a genuine issue of material fact simply by submitting an affidavit contradicting his own prior testimony").

III. Ineffective Assistance of Counsel Claim

[22] Moto argues that his trial counsel rendered ineffective assistance of counsel. To prevail on his ineffective assistance of counsel claims, Moto must show that: (1) his counsel's performance fell short of prevailing professional norms; and (2) his counsel's deficient performance prejudiced his defense. *Gibson*, 133 N.E.3d at 682 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

[23] A showing of deficient performance "requires proof that legal representation lacked 'an objective standard of reasonableness,' effectively depriving the defendant of his Sixth Amendment right to counsel." *Id.* (quoting *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *cert. denied*, 555 U.S. 972, 129 S. Ct. 458 (2008)). We strongly presume that counsel exercised "reasonable professional judgment" and "rendered adequate legal assistance." *Id.* Defense counsel enjoys "considerable discretion" in developing legal strategies for a client. *Id.*

This "discretion demands deferential judicial review." *Id.* Finally, counsel's "[i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.*

[24] "To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *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. In the context of a guilty plea, for the prejudice component, the petitioner must demonstrate a "reasonable probability that he would have rejected the guilty plea and insisted on going to trial instead." *Bobadilla*, 117 N.E.3d at 1284. In making this showing, the petitioner "cannot simply say that [he] would have gone to trial," he instead "must establish rational reasons supporting why [he] would have made that decision." *Id.* 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.*

[25] In FB-275, F6-1129, F6-1624, and F6-1625, Moto argues that his trial counsel misadvised him regarding pleading guilty and admitting to probation violations.[5] We "strongly presume that counsel provided adequate assistance

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[5] In FB-275, Moto argues that his trial counsel was ineffective because she: (1) failed to advise him that the "trial court could impose up to fourteen years of probation in addition to the six-year cap on executed time, thereby exposing him to the potential for twenty years of incarceration in addition to up to fourteen years of

and exercised reasonable professional judgment in all significant decisions." *Humphrey v. State*, 73 N.E.3d 677, 684 (Ind. 2017) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. 2052). "Where trial counsel is not presented in support, the post-conviction court may infer that trial counsel would not have corroborated appellant's allegations." *Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989).

[26] Although Moto bore the burden of proving that his counsel's performance was deficient, he presented no evidence at the PCR hearing other than his own self-serving testimony and failed to procure the testimony of trial counsel. Because Moto failed to establish: (1) a record regarding counsel's preparation and strategy; (2) the advice given to Moto; and (3) the prevailing professional norms, Moto did not meet his burden of establishing that trial counsel's performance was deficient. *See, e.g., Tapia v. State*, 753 N.E.2d 581, 587 (Ind. 2001) ("Despite the fact that he bore the burden of proof, Tapia presented no evidence to support his post-conviction claims. He called no witness[es] during

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probation"; (2) misadvised Moto regarding the impact of his plea agreement; (3) misadvised Moto regarding a mandatory minimum sentence of six years under Indiana Code Section 35-50-2-2; and misadvised Moto regarding his eligibility for direct placement in community corrections. Appellant's Br. p. 17.

Moto argues that his trial counsel in F6-1129 was ineffective for "improperly advis[ing] him to plead guilty [to] failing to register as a sex offender while traveling outside the state of Indiana." Appellant's Br. p. 21. Moto contends that his principal address did not change and that he was merely vacationing out of Indiana. Thus, Moto argues that he should not have been advised to plead guilty to the charge of failure to register as a sex offender.

Moto argues that his trial counsel in F6-1624 and F6-1625 were ineffective for "improperly advis[ing] him to plead guilty [to] failing to register as a sex or violent offender and failing to return to lawful detention . . . ." Appellant's Br. p. 22. Moto argues that the dates alleged in the charging informations were erroneous and, as such, he could not have been convicted.

the hearing on his petition."). Accordingly, the PC Court did not clearly err by denying Moto's ineffective assistance of trial counsel claims.

Conclusion

[27] Moto's freestanding sentencing claim is not cognizable in a PCR proceeding. The PC Court did not clearly err when addressing Moto's requests for admissions or by denying Moto's ineffective assistance of counsel claims. We affirm.

[28] Affirmed.

Bradford, C.J., and Crone, J., concur.