MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Patrick B. Collins,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

April 20, 2021

Court of Appeals Case No. 20A-PC-1657

Appeal from the Vanderburgh Superior Court

The Honorable Mary Margaret Lloyd, Judge

Trial Court Cause No. 82D05-1509-PC-4796

Tavitas, Judge.

Case Summary

[1] Patrick Collins appeals from the post-conviction court's ("PC Court") denial of his amended petition for post-conviction relief ("PCR"). Collins has waived appellate review of his ineffective assistance of counsel claim. Waiver notwithstanding, Collins cannot: (1) overcome the presumption that his counsel exercised reasonable professional judgment and rendered adequate legal assistance; or (2) demonstrate that he suffered prejudice from counsel's alleged deficient performance. Thus, we affirm.

Issue

[2] The sole issue on appeal is whether the PC Court clearly erred in finding that Collins did not receive ineffective assistance of counsel.

Facts

[3] The facts as stated in Collins' direct appeal follow:

> During the early morning hours of November 30, 1984, two police officers were patrolling Sunset Park in Evansville, Indiana. Upon investigating a car parked in a parking lot, they found the body of the Right Reverend Harold Keeton slumped over in the front seat. He had been shot three times in the head. Police found his empty wallet in the parking lot.
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> While police were searching for evidence in Keeton's automobile they were advised that he had leased a room at a local hotel. Fingerprints were taken from a plastic cup and a potato chip bag found in the hotel room and from a plastic ice bucket found in Keeton's car.

> Upon hearing publicity of the killing, Dan Paddock told police that during the early morning hours of November 30 he was in Sunset Park and observed an unoccupied 1971 gold-colored vehicle in the parking lot next to the car in which Keeton was found. He told police that parked next to the gold car he saw a recent-model vehicle in which the front passenger seat was in a reclining position. Paddock saw a young, black male reclined in the front passenger seat and a middle-aged white male sitting in the driver's seat.
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> On September 30, 1985, police located a gold-colored car which matched Paddock's description, and he told police that it looked like the same car he saw in Sunset Park. The vehicle was registered in [Collins'] name and he was located by police and fingerprinted.
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> An F.B.I. fingerprint specialist testified that the fingerprints on the potato chip bag and the plastic bucket were made by [Collins]. Also, two inmates of the jail in which [Collins] was incarcerated testified that [Collins] said he shot Keeton. [Collins] described the killing to one inmate and told him that he regretted leaving fingerprints on the potato chip bag and in the car.

Collins v. State, 521 N.E.2d 682, 683-84 (Ind. 1988).

[4] On January 3, 1986, the State charged Collins with murder and felony murder; the State subsequently alleged that Collins was an habitual offender in a separate information, which the State amended on March 6, 1986.[1] A jury found Collins not guilty of felony murder and guilty of murder. During the

[1] The amended habitual offender information is not included in the record on appeal.

habitual offender phase, the trial court admitted evidence of Collins' prior felony convictions for carrying a concealed weapon, an unclassified felony (1980); robbery, a Class C felony (1981); and theft, a Class D felony (1982).[2] The jury found Collins to be an habitual offender. Collins received a fifty-year sentence, enhanced by thirty years for the habitual offender finding.

[5] Glen Grampp ("Attorney Grampp") represented Collins in the pre-trial, jury trial, and direct appeal stages. On direct appeal to our Supreme Court, Collins argued that: (1) insufficient evidence supported his conviction; (2) he was denied a fair and impartial trial when the State charged him alternatively with murder and felony murder; and (3) the trial court abused its discretion in admitting certain evidence, including "[t]wo identification sheets and fingerprint cards . . . [and] other documents to prove [Collins'] prior convictions of theft and robbery." *Id*. at 685.

[6] On April 19, 1988, our Supreme Court affirmed Collins' conviction and found, in pertinent part, that two of Collins' prior felony convictions were established by official documents that were admissible under the business records exception to the rule against hearsay; and that error from the admission of a third document was not reversible error. *Id*. at 682.

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[2] Collins committed the robbery and theft offenses in Indiana. The class designation of the concealed weapon felony conviction, which was entered in Missouri and for which Collins received a two-year sentence, is unknown.

[7] On September 18, 2015, Collins filed a petition for PCR, which he later amended. Collins contended that the trial court committed error with regard to the application of the habitual offender enhancement to his murder sentence. The PC Court conducted a hearing on Collins' amended petition for PCR ("petition for PCR") on October 23, 2019. At the outset, Collins notified the PC Court that the clerk's office no longer possessed the judicial record from Collins' trial and that the record "had to be reconstructed" from records retained by Collins.[3] Tr. Vol. II p. 5. During questioning by the State, Collins testified that his tendered records were true and accurate representations of the original trial court record and transcripts and the appellate record. The PC Court admitted Collins' proposed record into evidence without objection from the State.

[8] Collins was the lone testifying witness; he presented neither testimony from Attorney Grampp at the hearing nor an affidavit. Collins argued that: (1) his prior conviction for theft, a Class D felony (1982), was invalid and could not properly be relied upon to support the habitual offender enhancement, *see id*. at 7; and (2) the jury failed, in its general verdict, to specify which two prior unrelated felonies the jury relied upon to reach the habitual offender finding. *See id*. at 13.

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[3] At the time of Collins' filing of the petition for PCR, Collins had already served the entirety of his executed sentence for the murder conviction and was serving his sentence for the habitual offender finding. Collins challenges only the habitual offender finding herein.

[9] On June 10, 2020, the PC Court entered its order denying Collins' petition for PCR. The PC Court found that Attorney Grampp did not render ineffective assistance of counsel regarding the habitual offender finding. *Id*. The PC Court also found, in pertinent part, as follows:

> 20. Petitioner is the sole source of the trial and appellate records in this matter having testified that he stored the evidence submissions in his [prison] storage space. The Clerk's Office was unable to locate any of its file. Although Petitioner testified that the submitted records are true and accurate copies of the trial and appellate record, Court review of Petitioner's exhibits contradict[s] Petitioner's testimony. For example, Petitioner's Exhibit 2 contains one hundred, forty-six (146) pages of the Evansville Police Department's case file which would not have been a part of the original trial transcript. Furthermore, although the evidence contains a copy of the original information for Count III, none of the exhibits contain the Amended Information for Count III. The Court ascertained which felonies were alleged in the Amended Information for Count III by reviewing the Court's Instructions.
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> 21. The most obvious record missing from the Petitioner's Exhibits would be the actual jury verdict for Count III: Habitual Offender Enhancement. Although Petitioner testified at this [PCR] hearing that the jury verdict failed to make specific findings regarding which prior felonies were proved[,] Petitioner failed to collaborate [sic] his testimony regarding the findings of the jury with the actual jury verdict for Amended Count III which were records solely held in his control. Petitioner further added a new allegation in this Cause while testifying at his Post-Conviction Relief hearing. At that time, he also alleged for the first time in this case that his 1982 Theft conviction in Cause No. 3536 was an "invalid prior." The Court takes Judicial Notice that the Petitioner previously appealed the Trial Court's denial of

> his Post-Conviction Relief request in Cause No. 82C01-0304-PC-5 which is his 1982 Theft conviction (3536). The Trial Court's denial was affirmed by the Court of Appeals on September 13, 2004 in a Not-For-Publication Opinion. *See Collins v. State*, 815 N.E.2d 1063 (Ind. Ct. App. 2004), *trans. denied*; *Collins v. State*, 831 N.E.2d 735 (Ind. 2005).

PC App. Vol. II pp. 72-73 (internal citations omitted). Collins now appeals.

Analysis

[10] Collins challenges the PC Court's denial of his petition for PCR. 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.*

[11] 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.'" *Id.* (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)).

I. Waiver

[12] Although Collins framed the issue in his petition for PCR as a claim of ineffectiveness of counsel, he argued at the PCR hearing that the trial court erred in applying the habitual offender enhancement to his sentence for murder. In "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." *Saylor v. State*, 55 N.E.3d 354, 359 (Ind. Ct. App. 2016) (quoting *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002)). Thus, freestanding claims of error that were available at the time of the initial appeal but not raised on direct appeal are waived for purposes of post-conviction relief. *Id*. at 591.

[13] Additionally, Collins fails to specify whether he is alleging ineffective assistance of trial or appellate counsel; nor does he specify the reasons counsel's performance was deficient or how Collins was prejudiced. Due to this lack of specificity, we further deem this issue waived for failure to make a cogent argument. *See* Ind. Appellate Rule 46(A)(8)(a) (stating "argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning").

II. Ineffective Assistance of Counsel ("IAC")

[14] Waiver notwithstanding, we are unpersuaded that Collins would have prevailed regarding his claim that his counsel rendered IAC by failing to challenge the applicability of the habitual offender enhancement. The gist of Collins' claim is that the class designations of his prior felony convictions rendered him ineligible for the habitual offender enhancement.[4] We cannot agree.

[15] The PC Court found that Collins was specifically excluded from retroactive application of the 1985 and 1993 amendments to the habitual offender statute that were enacted after Collins' offense. If applicable, these ameliorative statutes would have required the trier of fact to consider the respective class designations of Collins' prior unrelated felony convictions to determine whether Collins was an habitual offender. *See* PC App. Vol. II p. 75. Finding that Collins was not eligible for retroactive relief, the PC Court found that Attorney Grampp did not render IAC regarding the habitual offender determination. *Id*.

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[4] As Collins argued in his petition for PCR:

> Because of the presentment of two (2) prior unrelated Class D Felonies and only one (1) unrelated Class C Felony, in support of the habitual offender enhancement . . . , and the fact that the jury returned a general verdict, there is no way the court can determine that the jury determined the Class C Felony was one of the underlying convictions relied upon i[n] returning the verdict of "guilty" as to the habitual offender count. The conviction for the habitual offender count cannot stand, and [Collins] is entitled to a retrial.

PC App. Vol. II p. 49.

[16] To prevail on his IAC claim, Collins 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)). *See Weisheit v. State*, 109 N.E.3d 978, 992 (Ind. 2018) ("The standard for gauging appellate counsel's performance is the same as that for trial counsel."), *reh'g denied, cert. denied*, 139 S. Ct. 2749 (2019).

[17] 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." *Gibson*, 133 N.E.2d at 682 (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.* 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.*

[18] "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. Failure to satisfy either prong will cause the claim to fail. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006).

[19] It is a well-settled general rule that the applicable habitual offender enhancement statute is the one in effect at the time the crimes were committed. *See, e.g.*, *Harris v. State*, 897 N.E.2d 927, 928-29 (Ind. 2008) (citations omitted) ("The sentencing statute in effect at the time a crime is committed governs the sentence for that crime.").

> An exception to the general rule is that when the penalty for a crime is decreased by an ameliorative amendment enacted after the commission of the crime, but before the defendant's sentencing, the defendant may take advantage of the ameliorative provisions. However, *the defendant is not entitled to a sentence reduction where the ameliorative amendment does not become effective until after his sentencing, absent legislative intent for retroactive application.*

Wilburn v. State, 671 N.E.2d 143, 146 (Ind. Ct. App. 1996) (emphasis added); *see Cottingham v. State*, 971 N.E.2d 82, 85 (Ind. 2012).

[20] When Collins committed the murder in 1984, the habitual offender statute provided, in pertinent part, as follows: "a person is an habitual offender if the jury . . . finds that the [S]tate has proved beyond a reasonable doubt that the person had accumulated two [2] prior unrelated felonies." Ind. Code § 35-50-2-8(d) (1984). This is because, prior to 1985, offenders with multiple felony convictions were sentenced as habitual offenders with no distinction made for the class of felony upon which the enhancement was based. *See* Ind. Code § 35-50-2-8 (1984). Stated differently, the class designation of a person's prior unrelated felony convictions was immaterial for purposes of determining whether a person was an habitual offender.

[21] Collins appears to invoke the doctrine of amelioration, albeit indirectly. In 1985, our General Assembly enacted an ameliorative statute that foreclosed the application of the habitual offender enhancement where the underlying conviction and the two prior, unrelated felonies used to enhance the defendant's sentences were all Class D felonies. *See* I.C. § 35-50-2-7.1 (1985). Thus, the 1985 amendment required the trier of fact to consider the class designations of the offender's prior unrelated convictions in reaching an habitual offender finding.

[22] Collins' argument—that "only one (1) of the conviction[s] submitted as proof of his habitual offender enhancement was a Class C felony and two (2) of the convictions submitted as proof . . . were Class D felonies"—fails on various grounds. *See* PC App. Vol. II p. 49. First, this Court has previously found that the 1985 and the 1993 amendments to the habitual offender statute do not have retroactive effect. *Wilburn v. State*, 671 N.E.2d 143, 146 (Ind. Ct. App. 1996) (finding appellant was "not entitled to retroactive application of ameliorative amendments to the habitual offender statute" where the amendments took effect after appellant's sentencing hearing and the legislature evinced no intent to give the amendments retroactive effect). Moreover, the 1985 amendment to the habitual offender statute pertained to persons who were convicted of underlying Class D felonies, where the prior unrelated convictions used to enhance the sentence were also Class D felonies. Collins' underlying

conviction was for murder, which was not a Class D felony; thus, the amendments do not apply to Collins.[5]

[23] Based on the foregoing, the version of the habitual offender statute that applied to Collins' sentence was the version that was in effect in 1984, when Collins committed the murder. Thereunder, the State was required to prove, beyond a reasonable doubt, that Collins had accumulated two prior unrelated felonies. *See* I.C. § 35-50-2-8(d) (1984). The trial court was under no statutory obligation to distinguish between the class of felony upon which the sentencing enhancement was based, s*ee* I.C. § 35-50-2-8; and accordingly, the trial court did not err in applying the habitual offender enhancement to Collins' sentence.

[24] Collins has failed to demonstrate deficient performance by trial counsel and appellate counsel. We find that the evidence, "as a whole," fails to "unmistakably and unerringly point[ ] to a conclusion contrary to" the PC Court's determination that Attorney Grampp did not render IAC. *See Gibson*, 133 N.E.3d at 681 (quoting *Ben-Yisrayl*, 738 N.E.2d at 258). Accordingly, the PC Court's finding that Collins did not receive IAC is not clearly erroneous, and the PC Court did not clearly err in denying Collins' petition for PCR.

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[5] Further, Collins' challenge to the validity of his prior conviction for theft, a Class D felony (1982), is unavailing. As the PC Court found, this Court previously considered Collins' separate petition for PCR as to the theft conviction in an unpublished opinion regarding which our Supreme Court denied transfer. *See Collins v. State*, 815 N.E.2d 1063 (Ind. Ct. App. 2004), *trans. denied*; *Collins v. State*, 831 N.E.2d 735 (Ind. 2005).

Conclusion

[25] The PC Court did not clearly err in denying Collins' petition for PCR. We affirm.

[26] Affirmed.

Najam, J., and Pyle, J., concur.