

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael Sharp,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 16, 2021

Court of Appeals Case No.
21A-CR-1404

Appeal from the Clinton Superior
Court

The Honorable Justin Hunter,
Judge

Trial Court Cause No.
12D01-0811-FA-150

Altice, Judge.

Case Summary

[1] In September 2010, a jury convicted Michael Sharp of Class A felony child molesting and Class C felony child molesting. The trial court sentenced Sharp to an aggregate term of forty years, found him to be a credit restricted felon (CRF) as defined in Ind. Code § 35-41-1-5.5 (the CRF Statute),¹ which became effective on July 1, 2008, and assigned him to Class IV² for purposes of credit time. Following an unsuccessful direct appeal and appeal of the denial of post-conviction relief, Sharp filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Indiana, arguing that application of the CRF Statute to him violated the ex post facto clause of the United State Constitution and that his trial and appellate counsel were ineffective for not raising that argument in state court.³ The District Court

¹ I.C. § 35-41-1-5.5 defined a “credit restricted felon,” in relevant part, as follows:

A person who has been convicted of child molesting involving sexual intercourse or deviate sexual conduct (IC 35-42-4-3(a)), if:

(A) the offense is committed by a person at least twenty-one years of age; and

(B) the victim is less than twelve years of age.

Effective July 1, 2012, this statute was repealed and recodified at Ind. Code § 35-31.5-2-72.

² “A person assigned to Class IV earns one (1) day of credit time for every six (6) days the person is imprisoned for a crime or confined awaiting trial or sentencing.” Ind. Code § 35-50-6-3(d).

³ Article I, § 10 of the United States Constitution provides that “[n]o State shall . . . pass any . . . ex post facto Law.” As this court has explained:

Both the United States Constitution and the Indiana Constitution prohibit ex post facto laws. U.S. CONST. Art. I, § 10; and IND. CONST. Art. 1, § 24. The analysis is the same under both. To fall within the ex post facto prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it.

Upton v. State, 904 N.E.2d 700, 705 (Ind. Ct. App. 2009), *trans. denied* (internal citations and quotations omitted).

granted relief, in part, finding that Sharp had shown that he had received ineffective assistance of appellate counsel, and ordered that the State either grant him a new appeal to raise the ex post facto claim or remove his CRF status. Declining to remove the CRF status, the State filed a notice with this court to advise that, pursuant to the District Court's order, Sharp was entitled to a new appeal.

[2] Sharp raises the following two restated issues:

I. Is a new direct appeal a proper remedy?

II. Does application of the CRF Statute to Sharp violate the ex post facto clause?

[3] Finding no error with the trial court's CRF classification of Sharp at sentencing, we affirm.

Facts & Procedural History

[4] The facts, as previously summarized by this court, are:

C.S. was born in 1996. Between August 2007 and August 2008, when C.S. was ten and eleven years old, he lived with his father and stepmother, but would spend every other weekend with his mother and Sharp, his stepfather. During those every-other-weekend visits, Sharp would come into C.S.'s bedroom at night and both fondle and "suck[]" C.S.'s penis. C.S. would tell Sharp to stop and Sharp would then return to his room. Sharp, however, continued to molest C.S. every other weekend when C.S. was visiting. Sharp told C.S. it was a "secret" and that he (Sharp) would "go to jail" if C.S. told anyone about it. In

October 2008, C.S. disclosed Sharp's molestation to his stepmother.

Sharp v. State, No. 12A05-1702- PC-303, slip op. at 2 (Ind. Ct. App. Oct. 17, 2017), *trans. denied* (*Sharp III*).

[5] In October of 2008, the State charged Sharp with Class A felony child molestation and Class C felony child molestation. Both of the charges alleged that Sharp committed the crimes "between August 1, 2007 and August 31, 2008." *Direct Appeal Appendix Vol. I* at 105. As earlier stated, the CRF Statute went into effect on July 1, 2008.

[6] During trial, the jury received Final Instruction No. 8, which stated:

The Informations state that the crimes were committed during a time frame. If you find that the crimes charged were committed, the State is not required to prove that they were committed on any particular date or dates.

Id. at 184. In September 2010, the jury convicted Sharp, as charged, by general verdicts.

[7] The trial court held a sentencing hearing on October 4, 2010. After identifying aggravating and mitigating circumstances, the trial court sentenced Sharp to forty years executed on the Class A felony and a concurrent six-year sentence on the Class C felony. The trial court also found Sharp to be a CRF. In its written sentencing order, the trial court recognized that it was an ex post facto violation to apply the CRF Statute to crimes occurring prior to its July 1, 2008

effective date, but that because the evidence “demonstrated that [Sharp] committed acts of criminal deviate conduct . . . both prior to and subsequent to July 1, 2008[,]” it was not an ex post facto violation to apply the CRF Statute to him.⁴ *Appellant’s Appendix Vol. 2* at 25.

[8] Sharp appealed and claimed that his convictions violated double jeopardy principles and that the trial court committed sentencing errors, including that his aggregate forty-year sentence was inappropriate “in light of his credit restricted felon status” because that classification effectively raised the time required to be served under the forty-year sentence. *Sharp v. State*, 951 N.E.2d 282, 284 (Ind. Ct. App. 2011), *trans. granted* (*Sharp I*). In affirming the convictions and sentence, the *Sharp I* court noted: “Although [the CRF Statute] went into effect on July 1, 2008, and the charging informations in this case cover a time period both before and after that date, Sharp makes no ex post facto argument on appeal.” *Id.* at 286 n.1. In addressing Sharp’s sentencing claim, the court explained, “Because credit time is set by the legislature and is not a discretionary tool used by the trial court judge, we will not take into account a person’s credit restricted felon status when reviewing a sentence under Appellate Rule 7(B).” *Id.* at 290.

[9] Sharp sought transfer on the sole issue of whether the court of appeals should have considered his CRF status when evaluating his request for sentence review

⁴ We later observed that “[t]he trial court made these findings despite the fact that trial counsel did not object to the court’s designation of Sharp as a CRF.” *Sharp III*, slip op. at 4 n.3.

under App. R. 7(B). Our Supreme Court granted transfer, determining that credit time may be considered by an appellate court when exercising App. R. 7(B) review but that Sharp's sentence was not inappropriate. *Sharp v. State*, 970 N.E.2d 647 (Ind. 2012) (*Sharp II*). Relevant to this appeal, the Court noted:

At oral argument, the defendant asserted an additional claim that his designation as a credit restricted felon under Indiana Code Section 35-41-1-5.5 violates the ex post facto clause of the United States Constitution, U.S. Const. art. I, § 10. The defendant argues that, because the jury did not make a specific finding that any of the acts of molestation occurred after the effective date of the credit restricted felon statute, there was insufficient evidence to support his designation as a credit restricted felon. We need not explore the nature of the ex post facto prohibition, however, because C.S. testified at trial that the defendant "touched my private area," Tr. at 76, "[a]bout every other weekend I was over [at the defendant's house in the two years preceding October 6, 2008]," Tr. at 74, 77. This was sufficient evidence from which a reasonable jury could conclude that the defendant molested C.S. after July 1, 2008, the effective date of the statute.

Id. at 648 n.1 (Footnote 1).

[10] Thereafter, Sharp filed a petition for post-conviction relief, alleging that he received ineffective assistance of trial counsel because counsel (1) misstated the statutory minimum executed sentence for Sharp's Class A felony,⁵ and (2) failed

⁵ At the sentencing hearing, the prosecutor had stated that I.C. § 35-50-2-2(i) "change[d] the minimum executed sentence . . . from twenty to thirty [years]." *Trial Transcript* at 212. Thereafter, counsel for Sharp likewise stated that, due to that statute, the trial court's sentencing discretion was limited to a range of thirty to fifty years for Sharp's Class A felony conviction.

to assert that the trial court's designation of Sharp as a CRF violated ex post facto principles. He alleged that appellate counsel was ineffective for failing to raise those issues on appeal.

[11] On January 17, 2017, the post-conviction court denied Sharp's petition. As is relevant here, the post-conviction court concluded that the State presented evidence "that Sharp had molested [C.S.] . . . both before and after the effective date of the CRT [S]tatute," and "[n]o appellate court has held that when a defendant's crimes straddle the effective date of a statute that establishes credit restrictions that the imposition of a credit restricted status based upon a general verdict gives rise to an ex post facto claim." *Appellant's Appendix* at 54. In reaching its decision, the post-conviction court noted that our Supreme Court in *Sharp II* "rejected [the ex post facto] claim because there was evidence of molestation after the effective date of the CRF [S]tatute." *Id.* at 55. Sharp appealed the denial of his petition for post-conviction relief.

[12] This court, by memorandum decision, determined that Sharp had established that he received ineffective assistance of trial counsel with regard to the allowable minimum executed sentence, which was twenty years rather than thirty years, as trial counsel had erroneously stated during sentencing.⁶ And we remanded for a new sentencing hearing.

⁶ Because the *Sharp III* court concluded that trial counsel rendered ineffective assistance on that issue, it did not address Sharp's argument as it related to appellate counsel's performance in that regard.

[13] However, the *Sharp III* court rejected the claims that trial and appellate counsel were ineffective for failing to assert the argument that his CRF status violated ex post facto provisions. With regard to trial counsel, the *Sharp III* court found that the trial court had addressed that issue sua sponte and concluded that – because the evidence established that Sharp committed at least some deviate conduct after the CRF Statute’s effective date – there was no ex post facto violation. Therefore, the *Sharp III* court concluded that no prejudice had occurred from trial counsel’s failure to address the issue.

[14] With regard to appellate counsel, Sharp’s post-conviction claim was that counsel should have asserted “that ‘the jury’s general verdict made it impossible to say that he had been convicted of a crime committed after the effective date of the CRF statute.’” *Sharp III*, slip op. at 11. The *Sharp III* court found that “Sharp’s general judgment argument” was “simply [] a restatement of the sufficiency of the evidence argument addressed by the Supreme Court [in Footnote 1] and decided against him[,]”⁷ and, thus, Sharp “cannot establish prejudice.” *Id.* at 11-12. The Indiana Supreme Court denied Sharp’s petition to transfer.

⁷ While addressing the Supreme Court’s finding (in Footnote 1) that there was sufficient evidence from which a reasonable jury could conclude that Sharp committed the offenses after the effective date of the CRF Statute, the *Sharp III* court observed, “There were nine weekends between July 1 and August 31, 2008. C.S. testified that he stayed with his mother and Sharp every other weekend and that Sharp had performed deviate sexual conduct on him each time he visited. In addition, a case worker noted that C.S. reported that Sharp had molested him as recently as August 2008.” *Sharp III*, slip op. at 4 n.7.

[15] Thereafter, Sharp filed a petition for writ of habeas corpus in the District Court, arguing that (1) the application of the CRF Statute to him at sentencing violated the United States Constitution’s ex post facto clause, and (2) trial and appellate counsel were ineffective for failing to raise that argument in state court. *See Sharp v. State*, No. 1:10-cv-502-JPH-MJD, unpublished order (S.D. Ind. May 4, 2021) (*Sharp IV*). Sharp’s position was that he was charged with the acts of molestation “on or between August 1, 2007 and August 31, 2008” and that the jury’s general verdict did not specify which act or acts or corresponding dates were the basis for the conviction, and because the CRF Statute went into effect on July 1, 2008, application of that statute to him violated the ex post facto clause.

[16] The *Sharp IV* court declined to address Sharp’s standalone ex post facto claim because he did not raise it on direct appeal. With regard to Sharp’s claim of ineffective assistance of trial counsel, the *Sharp IV* court found that “[g]iven the sentencing court’s express analysis of the ex post facto issue—and without contrary authority from the Supreme Court—it was not unreasonable for the Indiana Court of Appeals to conclude that the sentencing court would have reached the same conclusion even if trial counsel had objected.” *Id.*, slip op. at 9. The *Sharp IV* court thus agreed with the *Sharp III* court that there was no prejudice shown and no ineffective assistance of trial counsel.

[17] With regard to appellate counsel, the *Sharp IV* court reiterated that, under *Strickland*, appellate counsel’s performance is deficient only if he or she “fail[ed] to argue an issue that is both ‘obvious’ and ‘clearly stronger’ than the issues

actually raised[,]” and, with regard to prejudice, a petitioner is not required to show that he would have prevailed had the issue been raised, as “it is enough that the issue ‘had a better than fighting chance at the time.’” *Id.*, slip op. at 12, 15. The *Sharp IV* court concluded that the “unraised ex post facto argument” was an ““obvious” issue because the sentencing court expressly addressed [it] at sentencing” and it was “clearly stronger” than the double jeopardy and sentencing arguments raised on direct appeal. *Id.*, slip op. at 14.

[18] In assessing prejudice, the *Sharp IV* court highlighted the following several factors: (1) in Sharp’s case there was no on-point precedent addressing whether it was an ex post facto violation to apply the CRF statute when the jury’s verdict did not specify whether it was based on acts that occurred before or after the effective date of the CRF statute, (2) the Indiana Court of Appeals had held in *Upton v. State*, 904 N.E.2d 700, 705-06 (Ind. Ct. App. 2009), *trans. denied*, that the CRF Statute could not be constitutionally applied to conduct completed before the statute’s effective date, and (3) the United States Supreme Court “had vacated general verdicts when it was not possible to determine whether they were based on unconstitutional grounds.” *Sharp*, slip op. at 15 (citing *Griffin v. United States*, 502 U.S. 46, 54-56 (1999) (collecting cases that vacated “general-verdict convictions that may have rested on an unconstitutional ground”)). The *Sharp IV* court concluded, therefore, that there was “a reasonable chance” that our appellate court would have found an ex post facto violation on direct appeal if the issue had been raised. *Id.*

- [19] Having found that Sharp had satisfied the *Strickland* test for ineffective assistance of appellate counsel, the *Sharp IV* court granted Sharp’s petition for writ of habeas corpus in part and ordered that the State “must grant [Sharp] a new appeal in which he may raise his ex post facto claim or remove his CRF status.” *Id.*, slip op. at 15-16.
- [20] On July 7, 2021, the State filed a notice with this court stating that it was neither pursuing an appeal from the District Court’s order nor removing Sharp’s CRF status, but that Sharp was entitled to a new direct appeal. This court accepted the State’s notice and issued an order directing the clerk of courts to open an appeal for Sharp, in which “[t]he only issue that can be raised . . . is whether application of Indiana’s Credit Restricted Felon status to Appellant at sentencing violated the Ex Post Facto clause of the United States Constitution.” Sharp timely filed his brief and now appeals.

Discussion & Decision

I. Appropriateness of New Direct Appeal

- [21] Sharp contends that “[a] direct appeal cannot be reinstated” and argues, among other things, that the *Sharp IV* court “lacked jurisdiction to order a new appeal.” *Appellant’s Brief* at 18, 19. He maintains that “the appropriate remedy” is for

this court to order Sharp's CRF status to be removed.⁸ *Id.* at 19. We are unpersuaded for various reasons.

[22] As an initial matter, we observe that Sharp did not appeal the District Court's order that expressly stated that the State must either lift the CRF status or allow a new appeal. We agree with the State that "if [Sharp] believed [the ordered] remedy to be improper, he should have sought relief . . . in the federal courts[,]” and he cannot now collaterally attack the validity of the District Court's order. *Appellee's Brief* at 13; see *Barnett v. State*, 83 N.E.3d 93, 99 (Ind. Ct. App. 2017) (“If Barnett believed that it was error for the District Court to grant a new direct appeal as part of the [habeas corpus] remedy, he should have sought relief in the federal courts” and “[his] attempts to undermine the District Court's order in state court amount to an impermissible collateral attack”), *trans. denied*; *Shaw v. State*, 82 N.E.3d 886, 893 (Ind. Ct. App. 2017) (similarly rejecting defendant's argument that his new direct appeal should be dismissed), *trans. denied*.

[23] Furthermore, this court issued an order on July 7, 2021, authorizing the new appeal and stating that “[t]he only issue that can be raised . . . is whether application of [the CRF Statute] to [Sharp] at sentencing violated the Ex Post Facto clause of the United States Constitution.” Sharp did not seek leave to

⁸ Sharp states that, alternatively, he should be entitled to release. We reject that suggestion, however, because the CRF designation concerns only his credit time, and any error does not affect the validity of his convictions. Indeed, Sharp's counsel at his post-conviction hearing stated that the sought relief with regard to the ex post facto issue was “a removal of the [CRF] status” and “the restoration of the credit time that he's been denied so far.” *PCR Hearing* at 17.

raise any other issue, including appropriateness of appellate review of his ex post facto claim, and thus that issue is not properly before us. Even if his argument is considered, however, it fails.

[24] It is well established on habeas review that the appropriate remedy for ineffective assistance of appellate counsel is to grant a new appeal in which the defendant may litigate his claim. *Shaw v. Wilson*, 721 F.3d 908, 919 (7th Cir. 2013) (stating, upon a finding that defendant received ineffective assistance of appellate counsel, that “the relief to which Shaw is entitled is a new direct appeal”), *cert. denied* (2014); *see also Ramirez v. Tegels*, 963 F.3d 604, 618-19 (7th Cir. 2020) (finding that defendant had received ineffective assistance of appellate counsel and ordering that “[t]he State must . . . either release [defendant] from custody or grant him a new appeal in which he may advance his confrontation claim”).

[25] Notwithstanding this, Sharp asserts that the State “is collaterally estopped from arguing that [] Sharp is entitled to a new appeal” because, in *Sharp III*, “the State prevailed on its argument that [] Sharp could claim neither ineffective assistance of appellate counsel nor a remedy of a new direct appeal” and it “cannot take a divergent tack now.” *Appellant’s Brief* at p. 20, 21. Sharp’s reasoning is misguided. While we determined in *Sharp III* that Sharp had not received ineffective assistance of appellate counsel, that is not the issue before us. We are to decide whether application of the CRF Statute to Sharp resulted

in a violation of the ex post facto clause, which has not been previously litigated as a freestanding claim to any court. We now turn to that task.⁹

II. *Application of CRF Statute to Sharp*

[26] “We have repeatedly held that the retroactive application of the [amended credit-time statutes including the CRF Statute] to offenses that were committed prior to the effective date . . . is an ex post facto violation.” *Sorenson v. State*, 133 N.E.3d 717, 726 (Ind. Ct. App. 2019), *trans. denied*. As we have explained, “the new statute[s] lengthened the period that the defendant was required to spend in prison, constricted the opportunity for early release, and thereby made the punishment for a crime committed before the [their] enactment more onerous than it had been at the time of enactment.” *Gaby v. State*, 949 N.E.2d 870, 883 (Ind. Ct. App. 2011).

[27] Sharp contends that the application of the CRF Statute to him violated the ex post facto clause of the United States Constitution. The gist of Sharp’s argument is that because the jury rendered a general verdict, it would be “speculative” as to whether the jury concluded that some acts occurred after

⁹ To the extent Sharp suggests that we do not have jurisdiction to adjudicate this new appeal, he is incorrect. This Court has subject matter jurisdiction over appeals from state court criminal convictions and sentences, which is the general class of cases to which Sharp’s case belongs. *See* Ind. Const. art. 7, § 6; Ind. Appellate Rule 5; *see also re Adoption of O.R.*, 16 N.E.3d 965, 970-71 (Ind. 2014) (explaining that although a party may forfeit right to appeal by failing to timely file a notice of appeal, appellate court does not lose authority to hear and determine general class of cases to which the party’s case belongs).

July 1, 2008, the effective date of the CRF Statute. *Appellant's Brief* at 23, 26.

We disagree.

- [28] In support of his ex post facto argument, Sharp relies, in part, on Final Instruction 8, which read:

The Informations state that the crimes were committed during a time frame. If you find that the crimes charged were committed, the State is not required to prove that they were committed on any particular date or dates.

Direct Appeal Appendix Vol. I at 184. Sharp argues that the jury was thereby instructed “not to consider when the acts occurred” and “to disregard specific dates” and “thereby placed the determination of when the acts occurred outside the reach of the jury.” *Appellant's Brief* at 23, 24, 25-26. These contentions mischaracterize Final Instruction No. 8. It instructed the jury that the State did not have to establish that a certain act occurred on a specific date. It did not instruct the jury to “disregard” dates entirely.

- [29] Here, C.S. testified that he disclosed Sharp's conduct to his stepmother on October 6, 2008 and that, at that point, Sharp and his mother had been living back in Indiana for “about two years.” *Trial Transcript* at 75. Evidence from multiple witnesses established that C.S. stayed with his mother and Sharp every other weekend. C.S. described that the molestations occurred “[a]bout every other weekend I was over there in that two years” and recalled that it happened

“almost every time” that he was at Sharp’s house.¹⁰ *Id.* at 78. C.S. testified that, even though he told Sharp to stop each time, Sharp would do it again “two weeks later when [C.S. was] back over there.” *Id.* at 77. When C.S. was asked (again) if he recalled for how long the touching had been going on, C.S. testified that it started and continued for “about two years” until he told his stepmother in October 2008. *Id.* at 85.

[30] As we observed in *Sharp III*, there were nine weekends between July 1 and August 31, 2008, and there was no testimony presented that, during this period, C.S. did not exercise the regular visits at Sharp’s residence. Accordingly, the evidence shows that C.S. spent either four or five weekends at Sharp’s house during the charged time period after the CRF statute took effect. Sharp’s theory of defense was that the alleged conduct never occurred, and the jury rejected that version of events, finding him guilty.

[31] Given the evidence presented, as well as the jury’s resolution of the credibility dispute in C.S.’s favor, we find no reasonable possibility that the jury’s verdict did not encompass acts of molestation that occurred after July 1, 2008, and, accordingly, no violation of the ex post facto clause. *See Sorenson*, 133 N.E.3d at 727 (rejecting defendant’s ex post facto claim – which asserted that the State did not show that the charged act occurred specifically between July 1, 2008 and before child victim turned twelve in September 2008 –where victim testified

¹⁰ We reject Sharp’s suggestion that C.S.’s testimony was “at best ambiguous as to when acts occurred.” *Appellant’s Brief* at 26.

that defendant had sodomized her “just about every day” over course of decade and thus State’s evidence showed that “the acts alleged fall within the post-July 1, 2008 statutory scheme for credit time”).

[32] Judgment affirmed.

Bradford, C. J. and Robb, J., concur.