MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

William Skipton,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 4, 2023

Court of Appeals Case No. 22A-PC-2481

Appeal from the Dearborn Superior Court

The Honorable Sally A. McLaughlin, Judge

Trial Court Cause No. 15D02-2004-PC-6

Memorandum Decision by Judge May
Judges Mathias and Bradford concur.

May, Judge.

[1] William Skipton appeals the denial of his petition for post-conviction relief. The parties raise two issues, which we revise and restate as:

> 1. Whether Skipton procedurally defaulted his claim that the trial court imposed an illegal sentence when he did not file a direct appeal of the trial court's sentencing order; and
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> 2. Whether the post-conviction court erred when it rejected Skipton's argument that his trial counsel provided ineffective assistance by failing to adequately argue that consecutive sentences would be illegal.

We affirm.

Facts and Procedural History

[2] On May 15, 2018, Skipton purchased a 9mm handgun. On May 20, 2018, at around 10:00 a.m., Skipton drove his motorcycle to the home of Vivian Cornett, who was the mother of Clarissa Schultz. Cornett informed Skipton that Clarissa was not home. Before he left, Skipton told Cornett that Clarissa had been depressed the past few days and that he had "something that's going to help her through it." (PCR Ex. Vol. 1[1] at 49-50.)

[3] Around 7:00 p.m. on the same day, while stopped at an ATM, Skipton was carrying the 9mm handgun and saw Clarissa pull into a nearby bar. Skipton

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[1] The Record contains a single volume of Exhibits from the PCR court that is labeled "Table of Contents of Exhibits" and that contains both the table of contents and all Exhibits. We refer to the volume herein as "PCR Ex. Vol. 1."

drove to the bar and joined Clarissa. Skipton and Clarissa eventually made their way to a different bar called the Levee Breaker. Michael Jordan, a patron of the Levee Breaker who was familiar with Clarissa, thought Clarissa "appeared to be different than her usual self." (*Id*. at 72.) Jordan overheard Clarissa ask Skipton for his gun, and Jordan told Skipton three times to not give her the gun because she "was not in a good spot." (*Id.*)

[4] Sometime between 11:00 p.m. and 11:15 p.m., Skipton gave Clarissa the gun and box of ammunition. Skipton went to the bathroom and as he came out, he saw Clarissa walk outside. Moments later, a loud pop "sounding like a firecracker" rang from outside and Skipton ran outside. (*Id.*) Skipton then ran back inside and announced Clarissa had shot herself. Jordan and the bartender, Steven Melrose, ran outside and saw Clarissa laying on the sidewalk bleeding from her head. Melrose ran back inside to call 911. As Melrose ran back outside, Skipton said he needed to find the gun and casing. Skipton moved Clarissa's body around as he searched for the gun and casing. After finding the gun and casing, Skipton went into the kitchen of the Levee Breaker and put the gun and casing above a ceiling tile.

[5] First responders arrived on the scene and transported Clarissa to the hospital, where she subsequently died. Police photographed the scene and interviewed witnesses. Skipton was taken to the police station for questioning. Sergeant Stephen Weigel collected evidence at the Levee Breaker. Despite reports that Clarissa shot herself, Sergeant Wiegel searched the premises and could not locate a gun. The interviewing officer at the police station asked Skipton if he

knew where the gun was, and Skipton reported it was up in the ceiling. Eventually, Sergeant Wiegel located the gun.

[6] On June 18, 2018, the State charged Skipton with Level 5 felony assisting suicide,[2] Level 5 felony carrying a handgun without a license,[3] Level 5 felony operating a motor vehicle after forfeiture of license for life,[4] and Level 6 felony obstruction of justice.[5] On August 24, 2018, the State added an allegation that Skipton was a habitual offender.[6] On August 19, 2019, Skipton entered a plea agreement whereby he would pled guilty to Level 5 felony assisting suicide, Level 5 felony carrying a handgun without a license, and Level 5 felony operating a motor vehicle after forfeiture of license for life in exchange for the State dismissing the rest of the charges.

[7] On October 21, 2019, the trial court held a sentencing hearing. The court heard testimony from Detective Weigel, Detective Vance Patton, Cornett, and Skipton. On October 25, 2019, at a hearing for pronouncement of sentence, the trial court requested arguments from the parties about whether Skipton's sentences should run concurrently or consecutively. Skipton's counsel argued his sentences should run concurrently because Skipton's criminal conduct

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[2] Ind. Code § 35-42-1-2.5(b)(1).

[3] Ind. Code § 35-47-2-1.

[4] Ind. Code § 9-30-10-17(a)(1).

[5] Ind. Code § 35-44.1-2-2(a)(3).

[6] Ind. Code § 35-50-2-8(d).

occurred on the same day and happened close in time and proximity. The State argued Skipton's sentences should run consecutively because Skipton's criminal acts were separate and distinct events that occurred hours apart. The trial court decided Skipton's criminal conduct did not arise out of a single episode of criminal conduct, such that his sentences could be ordered served consecutively under Indiana Code section 35-50-1-2.

[8] The trial court identified several aggravators, including Skipton's lengthy criminal history, Skipton's repeated probation violations, and Skipton's demonstration of poor character when he chose to hide evidence to protect himself rather than render aid to Clarissa. The trial court found "no mitigating circumstances to which the Court gives any weight" and concluded the aggravators outweighed the mitigators. (PCR Ex. Vol. 1 at 63.) The trial court sentenced Skipton to six years for each of his three Level 5 felony convictions and ordered them served consecutively for an aggregate sentence of eighteen years. Skipton did not file a direct appeal.

[9] On April 28, 2020, Skipton filed a petition for post-conviction relief. On April 27, 2022, Skipton filed an amended petition for post-conviction relief that contended his consecutive sentences for carrying a handgun without a license and assisting a suicide were illegal under Indiana Code section 35-50-1-2 and his trial counsel was ineffective for not objecting to the illegal sentence at the pronouncement hearing. On August 9, 2022, the post-conviction court held a hearing regarding Skipton's petition. Skipton's trial counsel Gary Sorge testified at the post-conviction hearing and walked through his preparation for

Skipton's sentencing and pronouncement hearings. On September 20, 2022, the post-conviction court denied Skipton's petition for post-conviction relief in an order that contained the following pertinent findings of fact and conclusions of law:

> 6. The evidence presented [indicted] that Skipton told several different versions of his ownership of the gun and when/how Clarissa had obtained the gun. The Court found that Skipton had obtained possession of the gun prior to the date of Clarissa's death and that Skipton was in possession of the gun prior to entering the Levee Breaker Bar at 9:30 p.m. that evening and maintained possession until Skipton was observed handing Clarissa the gun at approximately 11:15 p.m. shortly before Clarissa went outside and fired the gun. Skipton testified at Sentencing that he purchased the gun on May 15, 2018. The Court found Skipton was in possession of the firearm throughout the day of Clarissa's death.
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> 8. Mr. Gary Sorge served as counsel for the defendant and testified to being a licensed attorney since 1977 with extensive legal experience in criminal law over that period of time.
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> 9. Prior to Pronouncement of Sentence, the parties addressed whether the counts should be consecutive. Mr. Sorge addressed the issue and argued that the felony offenses arose from one episode of criminal conduct.
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> 11. The Court made finding that all three counts were not a single "episode" of conduct and therefore that the Court was not

bound to the limitation of consecutive sentences on Level 5 felonies to seven (7) years as outlined in I.C. 35-50-1-2(d)(2).

12. At hearing on August 9, 2022, Mr. Sorge testified he had realized the application of Indiana Code § 35-50-1-2 would be an important issue for Skipton's sentence, but did not recall if he had done specific research on the issue.

Conclusions of Law

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5. I.C. 35-50-1-2 provides, in part, that except for crimes of violence, the total of the consecutive terms of imprisonment…to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct…may not exceed seven (7) years (if the most serious crime for which the defendant is sentenced is a Level 5 felony). *Id*.

6. None of Skipton's convictions in this matter are for crimes of violence as determined by I.C. 35-50-1-2(a).

7. Skipton concedes that the convictions for operating a vehicle with a lifetime suspension is a separate episode of criminal conduct from possession of a handgun without a license and assisting suicide. Evidence was presented that Skipton was first observed operating a vehicle at 10:00 a.m. on the day of the other offenses by the victim's mother at her house which was separate in location, circumstances, and time.

8. The possession of the handgun without a license is an inherently continuing offense, which occurs from the time the defendant comes into possession of the contraband until the time he relinquishes control. *Edwards,* [147 N.E.3d 1019,] citing

Deshazier v. State, 877 N.E.2d 200, 212 (Ind. Ct. App. 2007). The Court of Appeals found in *Edwards* that I.C. 35-50-1-2(b) mandates that a number of crimes which constitute an episode of criminal conduct must be "a connected series of offenses that are closely connected in time, place, and circumstance." *Edwards, supra*.

9. Skipton stated at sentencing that Skipton purchased the gun around May 15, 201[8] (approximately five days prior to the crime of assisting suicide). Skipton was known to carry/possess a gun on several occasions.

10. Skipton testified the victim was his friend; they liked to fire guns while fishing and that when he had an opportunity to purchase the victim a gun he did and implied it was purchased as a gift for the victim to use for firing the gun for "sport". However, he was in possession of the gun. Skipton's testimony was that he first saw the victim the day of her death around 7:00 p.m. when the victim pulled into the "Brickyard" while he was obtaining money from an ATM nearby. Skipton then went into the "Brickyard" where he was with her and they then went to the "Levee Breaker" together around 9:00 p.m. Prior to going to the ATM, Skipton testified he was at a BP gas station. Earlier in the day, Skipton was at the victim's mother's house.

11. The possession of the handgun in this fact situation was possessed at other places and other times in the day prior to going to the "Levee Breaker" with the victim the night of the victim's death and that this is supported in the record sufficiently to support that the possession of the handgun without a license and the assisted suicide did not arise out of one episode of criminal conduct.

> 12. The sentencing of [t]he Court to consecutive sentences of a combined term of over seven years is supported by I.C. 35-50-1-2 and case law.
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> 15. Counsel for Skipton did argue the issue of the crimes being a single episode of conduct. The evidence supports the Court's finding of the offenses not being a single episode of conduct. Therefore, the Petitioner did not sustain his burden in showing that counsel was ineffective.

(App. Vol. 2 at 87-92.)

Discussion and Decision

[10] Skipton appeals the post-conviction court's denial of his petition for post-conviction relief. "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 relief is limited to issues unknown during the original trial or unavailable on direct appeal. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012), *reh'g denied*. The petitioner for postconviction relief bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A post-conviction court must make findings of fact and conclusions of law on every issue presented in the petition. *Ward*, 969 N.E.2d at 51.

[11] On appeal, we accept the post-conviction court's findings of fact unless clearly erroneous but give no deference to its conclusions of law. *Warren v. State*, 146 N.E.3d 972, 977 (Ind. Ct. App. 2020), *trans. denied, cert. denied*, 141 S. Ct. 858 (2020). When a trial court denies a petition for post-conviction relief, the petitioner appeals from a negative judgment, and therefore he must establish the "evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). We will reverse the post-conviction court's decision only if the evidence is without conflict and leads to a conclusion opposite that reached by the post-conviction court. *Warren*, 146 N.E.3d at 977.

1. Legality of Sentence

[12] Skipton first contends that his aggregate sentence was illegal pursuant to Indiana Code section 35-50-1-2, which limits consecutive terms of imprisonment to seven years for nonviolent, Level 5 felonies arising out of an episode of criminal conduct. The State argues Skipton has procedurally defaulted any claim regarding the legality of his sentence because he failed to file a direct appeal. Skipton responds by asserting the State waived its waiver defense when it argued on only the merits of Skipton's claims during the post-conviction proceeding despite pleading waiver in its answer to Skipton's petition, which led the post-conviction court to rule only on the merits.

[13] The result we must reach on this issue is controlled by our Indiana Supreme Court's decision in *Bunch v. State*, which distinguished the concepts of "waiver" and "procedural default." 778 N.E.2d 1285, 1287 (Ind. 2002). *Bunch* explained

that "waiver" occurs when a party before a trial court fails to plead or prove the affirmative defenses listed in Indiana Trial Rule 8(C). *Id*. Procedural default, on the other hand, is a "doctrine of judicial administration whereby appellate courts may sua sponte find an issue foreclosed under a variety of circumstances in which a party has failed to take the necessary steps to preserve the issue." *Id.* Although a party may fail to plead or prove a Rule 8(C) affirmative defense of waiver, that party may still point the appellate court's attention to procedural default. *Id*. at 1289.

[14] Here, the State failed to preserve its claim of waiver during the post-conviction hearing. The record demonstrates that, although the State properly pled waiver in its answer to Skipton's petition, it did not argue waiver during the post-conviction hearing or mention waiver in its proposed findings of fact and conclusions of law. Therefore, we agree with Skipton that the State waived its waiver argument by failing to prove the affirmative defense at the post-conviction hearing. *See id.* at 1289 (State waived waiver defense when it failed to argue issue at post-conviction hearing).

[15] However, that does not mean that we, as an appellate court, must ignore Skipton's procedural default. *See id*. ("Although the State failed to establish an affirmative defense, a court on appeal may nevertheless find that the sentencing issue presented in a second post-conviction petition was forfeited by means of procedural default."). Skipton makes no claim that he was unable to file a direct appeal. Indiana Post-Conviction Rule 1(1)(b) advises that post-conviction relief is not a substitute for a direct appeal, nor is it a super-appeal.

Garret v. State, 992 N.E.2d 710, 718 (Ind. 2013). We may take judicial notice of the failure to present an issue in a direct appeal. *See Bunch*, 778 N.E.2d at 1289 (court may take judicial notice of issues raised on direct appeal). We therefore conclude Skipton procedurally defaulted his claim of illegal sentence by failing to raise it on direct appeal. *See id.* (sentencing issue not raised on direct appeal defaulted for post-conviction proceedings unless presented in ineffectiveness of counsel argument); *Collins v. State*, 817 N.E.2d 230, 232-33 (Ind. 2004) (sentencing error not available via petition for post-conviction relief because defendant did not file direct appeal).

2. Assistance of Trial Counsel

[16] A criminal defendant may raise a claim of ineffective assistance of counsel in a post-conviction relief petition if not raised on direct appeal. *Warren*, 146 N.E.3d at 977. Under the Sixth Amendment of the United States Constitution, a defendant in a criminal prosecution has a right to "the assistance of counsel for his defense." U.S. Const., Am. VI. Counsel's assistance must be effective. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984), *reh'g denied.* There is a strong presumption that counsel provided effective assistance, and thus a defendant must present strong evidence to overcome that presumption. *McCullough v. State*, 973 N.E.2d 62, 74 (Ind. Ct. App. 2012), *trans. denied*. "Isolated poor strategy, inexperience, or bad tactics does not necessarily constitute ineffective assistance." *Id.* When reviewing a defendant's claim of ineffective assistance of counsel,

> we apply the well-established, two-part *Strickland* test. The defendant must prove: (1) counsel rendered deficient performance, meaning counsel's representation fell below an objective standard of reasonableness as gauged by prevailing professional norms; and (2) counsel's deficient performance prejudiced the defendant, i.e., but for counsel's errors the result of the proceeding would have been different.

Bobadilla v. State, 117 N.E.3d 1272, 1280 (Ind. 2019) (internal citation omitted). Failure to prove either prong of the *Strickland* test will cause the claim of ineffective assistance of counsel to fail but "most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *McCollough*, 973 N.E.2d at 75.

[17] Skipton first contends his trial attorney failed to cite the statutory definition of "episode of criminal conduct" found in Indiana Code section 35-50-1-2 when arguing Skipton's sentences should run concurrently. Although it is true that Skipton's trial attorney did not cite Indiana Code section 35-50-1-2 directly, he used language that paralleled the statutory definition of "episode of criminal conduct." During the pronouncement hearing, Skipton's trial attorney argued the following on the issue:

> Your Honor, I just feel that in general this- all of the charges- everything occurred on the same day, uh, all of the matters were linked together centered around this one event and as such being close in time and proximity and all related that they should be run concurrent. With perhaps on the driving, there is some evidence before the Court about that occurring earlier in the day, but with the way things were charged and uh, the way the facts were presented and the driving involved being with her, uh, and

> caring[sic] her around to the places where the ended up being and everything, I feel they should run concurrent.

(PCR Ex. Vol. 1 at 60.)

[18] Furthermore, the trial court was aware of Indiana Code section 35-50-1-2 as it specifically requested arguments on the issue: "We're here for a Pronouncement of Sentence and before the Court pronounces that[,] the issue also before the Court is whether these should be consecutive or concurrent sentences and Court would like to have each party have a little further opportunity to provide argument regarding that." (PCR Ex. Vol. 1 at 60.) After both parties presented argument, the trial court stated:

> The Court has reviewed the issue as laid out in I.C. 35-50-1-2 and it states that an episode of criminal conduct means offenses or a connected series of offenses that are closely related in time, place, and circumstance . . . And the evidence would present that the carrying the handgun without a license was something that occurred throughout the day by, uh, the Defendant. And as such, the Court is finding that these are not an episode of criminal conduct; being that they are not connected series of offenses that are closely related in time, place, and circumstances are separate. And, looking at the totality of the aggravated circumstances is finding that each of these sentences should be consecutive.

(*Id*. at 63-64.) Thus, as the trial court clearly was already aware of the statutory citation, Skipton could not have been prejudiced by his trial counsel's failure to cite the statute.

[19] Skipton further contends that his trial attorney's failure to object to findings made by the trial court constituted ineffective assistance of counsel. Specifically, Skipton argues his trial attorney could have objected to the trial court's finding that Skipton carrying the gun was separate in time from handing the gun to Clarissa at the Levee Breaker. "To succeed on a claim that counsel was ineffective for failure to make an objection, the defendant must demonstrate that if such objection had been made, the trial court would have had no choice but to sustain it." *Little v. State*, 819 N.E.2d 496, 506 (Ind. Ct. App. 2004), *trans. denied.* Here, the trial court determined the evidence demonstrated Skipton carried the gun throughout the day as he went to an ATM and gas station, which was unconnected to the criminal conduct that occurred at the Levee Breaker when Skipton handed the gun to Clarissa while knowing she was depressed. As Skipton's trial counsel had already preserved the issue for appeal with the argument he had made and the trial court had already made its findings, it seems unlikely that additional objection after the findings would have had any impact whatsoever on the trial court's decision. Skipton cannot demonstrate prejudice from this failure to object. *See*, *e.g.*, *Curtis v. State*, 905 N.E.2d 410, 418 (Ind. Ct. App. 2009) (failure to object was not prejudicial when record suggests objection would not have impacted trial court's decision), *trans. denied*.

[20] Skipton also contends his trial counsel's failure to cite case law that applied Indiana Code section 35-50-1-2 prejudiced him. Although best practice would be for trial counsel to support arguments before a trial court with relevant case

law, Skipton cannot demonstrate the result of his proceeding would have been different. This is true especially in light of the fact that the same judge presided over the sentencing hearings and post-conviction court proceedings. *See Hinesley v. State*, 999 N.E.2d 975, 982 (Ind. Ct. App. 2013) (when the same judge who conducted the original trial presides over the post-conviction proceedings, their findings and judgment are entitled to greater-than-usual deference), *reh'g denied, trans. denied.* The post-conviction court reviewed the merits of Skipton's argument on the legality of Skipton's sentence based on the case law Skipton asserts trial counsel should have presented, and the court again concluded that ordering Skipton's sentences served consecutively was legal under Indiana Code section 35-50-1-2. As such, Skipton cannot demonstrate that he was prejudiced by trial counsel's failure to cite case law to support his argument for concurrent sentences.

[21] Because Skipton has not presented the kind of strong evidence required to overcome the "strong presumption that counsel provided effective assistance," *McCullough*, 973 N.E.2d at 74, Skipton has failed to demonstrate the evidence unmistakably and unerringly points to a conclusion contrary to the post-conviction court's determination that his counsel was not ineffective.

Conclusion

[22] Although the State waived its defense of waiver, Skipton forfeited his claim of illegal sentence by failing to raise it on direct appeal. Furthermore, Skipton was not prejudiced when his trial attorney did not cite the relevant statute or case

law at the pronouncement hearing or object after the court made findings, and thus Skipton has not demonstrated the post-conviction court erred when it rejected his allegation of ineffective assistance of trial counsel. Therefore, we affirm the judgment of the post-conviction court.

[23] Affirmed.

Mathias, J., and Bradford, J. concur.