MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Larry C. Johnson,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

November 10, 2022

Court of Appeals Case No. 21A-PC-2480

Appeal from the Vanderburgh Superior Court

The Honorable Robert J. Pigman, Judge

Trial Court Cause No. 82D03-2003-PC-1413

Robb, Judge.

Case Summary and Issues

[1] Larry Johnson was convicted of dealing in a narcotic drug, a Level 2 felony; dealing in a narcotic drug, a Level 5 felony; and maintaining a common nuisance, a Level 6 felony. The trial court sentenced him to twenty-five years and this court affirmed his convictions on direct appeal. Johnson then filed a petition for post-conviction relief that was denied. Johnson now appeals, raising multiple issues for our review which we consolidate and restate as: (1) whether Johnson raised multiple issues which were available to him on direct appeal and are therefore waived; and (2) whether the post-conviction court erred in concluding his appellate counsel was not ineffective. Concluding that Johnson did not receive ineffective assistance of appellate counsel and that Johnson waived the remainder of his claims, we affirm.

Facts and Procedural History

[2] In 2017, police used a criminal informant to purchase .85 grams of heroin from Johnson in his home. After Johnson left his home, police executed a search warrant on the home and discovered 10.73 grams of heroin, three digital scales, and drug paraphernalia. Johnson was then arrested following a traffic stop.

[3] On May 18, 2017, the State charged Johnson with two counts of dealing in a narcotic drug and one count of maintaining a common nuisance. Following a jury trial, Johnson was found guilty as charged. Johnson appealed and this court affirmed his convictions. *Johnson v. State*, No. 18A-CR-1735 (Ind. Ct.

App. Mar. 20, 2019), *trans. denied*. On March 19, 2020, Johnson filed a petition for post-conviction relief. Johnson, in relevant part, argued the following grounds warranted setting aside his convictions:

> a. Prosecutorial misconduct . . . . At the trial, the State knowingly permitted perjured testimony. . . . Appellate counsel failed to raise this issue on appeal.
>
> b. Denial of due process . . . . The jury was improperly instructed in Court's Final Instruction No. 3 regarding the necessary elements which the State was required to prove regarding Count I. Appellate counsel failed to raise this issue on appeal.
>
> c. Violation of prohibition against double jeopardy . . . . Conviction and sentencing on both Counts I and II constitutes double jeopardy. Appellate counsel failed to raise this issue on appeal.

Appellant Appendix, Volume 2 at 24-25. Johnson later amended his petition to include a claim that the State suppressed evidence, namely his cellphone, and that his appellate counsel failed to raise the issue on appeal. *See id.* at 39-40.

[4] Following a hearing, the post-conviction court concluded that Johnson "failed to prove by a preponderance of the evidence the claims in the Petition for Post-Conviction Relief" and denied Johnson's petition. *Id.* at 19. Johnson now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Waiver by Procedural Default

[5] Johnson argues the post-conviction court erred by denying the following claims: (1) prosecutorial misconduct; (2) defective jury instruction; (3) double jeopardy; and (4) evidence suppression.[1] Post-conviction procedures provide petitioners the opportunity to raise issues that were not known at the time of the original trial or were not available on direct appeal. *Lowery v. State*, 640 N.E.2d 1031, 1036 (Ind. 1994), *cert. denied*, 516 U.S. 992 (1995). It has long been held that claims available on direct appeal but not presented are not available for post-conviction review. *Trueblood v. State*, 715 N.E.2d 1242, 1248 (Ind. 1999), *cert. denied*, 531 U.S. 858 (2000). These are applications of the basic principle that post-conviction proceedings do not afford the opportunity for a super-appeal. *Wrinkles v. State*, 749 N.E.2d 1179, 1187 (Ind. 2001), *cert. denied*, 535 U.S. 1019 (2002).

[6] Johnson attempts to raise issues that were available to him on direct appeal. By failing to present these claims on direct appeal he is foreclosed from raising them in the post-conviction proceeding. *Bunch v. State*, 778 N.E.2d 1285, 1289 (Ind. 2002).[2] We conclude these issues are waived.

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[1] Johnson also contends that his appellate counsel failed to raise a double jeopardy claim or challenge jury instruction three as defective. These potential claims will be addressed below when we address ineffective assistance of appellate counsel.

[2] Johnson argues that because the State failed to argue waiver in the post-conviction proceedings, it is precluded from doing so on appeal. However, as our supreme court explained in *Bunch*, there is a difference between waiver as an affirmative defense and waiver by procedural default. 778 N.E.2d at 1287-88. Here, we address waiver by procedural default, which may be raised by this court sua sponte. *Id.* at 1289.

II. Ineffective Assistance of Appellate Counsel

[7] Johnson contends his appellate counsel was ineffective for failing to raise: (1) a double jeopardy claim; and (2) a challenge to final jury instruction number three. The standard for evaluating claims of ineffective assistance of appellate counsel is the same standard as for trial counsel. *Garrett v. State*, 992 N.E.2d 710, 719 (Ind. 2013). To establish any claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel performed deficiently, and the deficiency resulted in prejudice. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

[8] First, the petitioner must show that counsel's performance was deficient. *Garrett,* 992 N.E.2d at 718-19. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Id.* Second, the petitioner must show that the deficient performance prejudiced the defense. *Id.* To establish prejudice, the petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*.

[9] Ineffective assistance of appellate counsel claims fall into three categories: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present

issues competently. *Timberlake v. State*, 753 N.E.2d 591, 604 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002). The second category is applicable to Johnson's claims. To satisfy the first prong of the *Strickland* test when the petitioner claims appellate counsel failed to raise an issue, the petitioner must show that the unraised issue was significant and obvious from the face of the trial record and that the error cannot be explained by any reasonable strategy. *Carter v. State*, 929 N.E.2d 1276, 1278 (Ind. 2010). To establish the prejudice prong, the petitioner must show that the issues appellate counsel failed to raise were clearly more likely to result in reversal or an order for a new trial. *Garrett*, 992 N.E.2d at 724.

A. Double Jeopardy

[10] Johnson contends his appellate counsel was ineffective for failing to raise a double jeopardy argument on appeal. The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense[,]" Ind. Const. art. 1, § 14, preventing the State from proceeding against a person twice for the same criminal offense, *Hopkins v. State*, 759 N.E.2d 633, 639 (Ind. 2001).

[11] Here, Johnson was convicted of dealing in a narcotic drug under Indiana Code section 35-48-4-1(a)(1) as a Level 5 felony and dealing in a narcotic drug under Indiana Code section 35-48-4-1(a)(2) as a Level 2 felony. Pursuant to Indiana Code section 35-48-4-1(a)(1), a person who knowingly delivers a narcotic drug commits dealing in a narcotic drug. Similarly, Indiana Code section 35-48-48-1(a)(2) states that a person who possesses with the intent to deliver a narcotic drug commits dealing in a narcotic drug. Generally, dealing in a narcotic drug

is a Level 5 felony; however, when the amount of the drug involved is at least ten grams the offense is a Level 2 felony. Ind. Code § 35-48-4-1(e) (2016).

[12] Johnson argues that being convicted on these two counts of dealing in a narcotic drug constitutes a clear double jeopardy violation which his appellate counsel should have challenged.[3] *See* Brief of Appellant at 46. However, although both charges were for dealing in a narcotic drug, they were expressed in terms of possession of a narcotic of at least ten grams with intent to deliver and delivering less than a gram of a narcotic drug. "[W]hen a defendant is charged with possession of a drug different from the drug that is delivered, two separate convictions may be entered if the dealing and possession charges are specifically based only on the respective quantities." *Quick v. State*, 660 N.E.2d 598, 601 (Ind. Ct. App. 1996). Johnson's "dealing" conviction was based on the .85 grams of heroin that he dealt to the confidential informant, while his "possession with intent to deliver" conviction was based on the 10.73 grams of heroin found in his home after that transaction.

[13] Under these circumstances, Johnson's offenses of dealing and possessing are sufficiently distinguishable and independent evidence supports each conviction. *See Storey v. State*, 875 N.E.2d 243, 248 (Ind. Ct. App. 2007) (finding

[3] We note that Johnson's direct appeal occurred before *Powell v. State*, 151 N.E.3d 256 (Ind. 2020) and *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020) were decided. We do not engage in an analysis utilizing Indiana's new double jeopardy rules because for purposes of ineffective assistance of appellate counsel claims, we judge the reasonableness of appellate counsel's strategic decisions based upon precedent that was available at the time the brief was filed. *See Bieghler v. State*, 690 N.E.2d 188, 197 n.6 (Ind. 1997).

convictions of possession of finished methamphetamine and manufacturing based on unfinished methamphetamine did not constitute double jeopardy), *trans. denied*. Therefore, we cannot say that Johnson's convictions violate double jeopardy and a petitioner's appellate counsel will not be deemed ineffective for "failing to present meritless claims." *Vaughn v. State*, 559 N.E.2d 610, 615 (Ind. 1990). Accordingly, we hold that appellate counsel's conduct did not fall below reasonable professional norms when counsel failed to make a double jeopardy argument on Johnson's behalf.

B. Jury Instruction

[14] Johnson contends that his appellate counsel was ineffective for failing to challenge jury instruction number three on appeal.[4] Jury instruction three provides:

> The crime of Dealing in a Narcotic Drug as charged in Count 1 is defined by statute as follows:
>
> > A person who knowingly or intentionally possesses with the intent to deliver a narcotic drug, pure or adulterated, classified as a Schedule 1 commits dealing in a narcotic drug, a Level 5 Felony. The offense is a Level 2 Felony if the amount of the drug involved is at least ten (10) grams.

[4] We note that Johnson did not object to the jury instruction at trial. Therefore, on appeal Johnson would have had to show fundamental error. *See Miller v. State*, 188 N.E.3d 871, 874 (Ind. 2022).

> Before you may convict the defendant, the State must have proved each of the following beyond a reasonable doubt:
>
> 1. The Defendant
>
> 2. Knowingly or intentionally
>
> 3. Possessed with intent to deliver
>
> 4. Heroin, pure or adulterated
>
> 5. And the amount of the drug involved was at least ten (10) grams.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the defendant not guilty[.]

Volume of Exhibits, Volume 3 at 66.

[15] Johnson argues that language from Indiana Code section 35-48-4-1(b)(1) is omitted from the jury instruction. Section (b)(1) states that a person may be convicted of dealing under subsection (a)(2) only if "there is evidence in addition to the weight of the drug that the person intended to . . . deliver . . . the drug[.]" Johnson contends that because the jury instruction failed to include this requirement it was defective, and therefore, appellate counsel was ineffective for failing to raise this claim on appeal.

[16] The instruction at issue contains the requirement that Johnson "[p]ossessed with intent to deliver." Ex., Vol. 3 at 66. However, it omits the requirement that

evidence other than the weight of the drug is required. Ind. Code § 35-48-4-1(b)(1). This omission is harmless error. *See Dill v. State*, 741 N.E.2d 1230, 1233 (Ind. 2001) (stating an error in an instruction is harmless when a conviction is "clearly sustained by the evidence and the jury could not properly have found otherwise."). There is ample additional evidence of Johnson's intent to deliver beyond the weight of the drug. In addition to drugs, police found three scales and drug paraphernalia in Johnson's home. Further, Johnson had just conducted a drug deal at his home.

[17] Because any error in omitting subsection (b)(1) language from jury instruction three was harmless, Johnson's counsel was not deficient for failing to raise the issue on appeal. *See Garrett,* 992 N.E.2d at 718-19. Therefore, Johnson did not receive ineffective assistance of appellate counsel.

Conclusion

[18] We conclude that Johnson did not receive ineffective assistance of appellate counsel and that Johnson waived the remainder of his claims. Accordingly, the post-conviction court properly denied relief and we affirm.

[19] Affirmed.

Mathias, J., and Foley, J., concur.