MEMORANDUM DECISION

APPELLANT PRO SE

Brian R. Hook
Pendleton, Indiana

ATTORNEYS FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

Brian R. Hook,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 26, 2023

Court of Appeals Case No. 23A-PC-876

Appeal from the Wayne Superior Court

The Honorable Gregory A. Horn, Judge

Trial Court Cause Nos. 89D02-1312-FA-34 89D02-2104-PC-5

Memorandum Decision by Judge Brown
Judges Vaidik and Bradford concur.

Brown, Judge.

[1] Brian R. Hook appeals the denial of his petition for post-conviction relief. We affirm.

Facts and Procedural History

[2] On December 5, 2013, the State charged Hook under cause number 89C01-1312-FA-34 ("Cause No. 34") with multiple offenses and alleged he was an habitual offender based upon convictions for operating a motor vehicle while intoxicated as a class D felony under cause number 89D03-1008-FD-121 ("Cause No. 121") in 2011 and operating a motor vehicle in a manner that endangered a person as a class D felony under cause number 89D03-1112-FD-518 ("Cause No. 518") in 2012.[1] On January 9, 2015, the State filed an amended information under Cause No. 34 charging Hook with: Count I, burglary as a class A felony; Count II, aiding, inducing or causing burglary as a class A felony; Count III, aiding, inducing, or causing battery as a class C felony; and Count IV, battery as a class C felony.[2] On May 13, 2014, the State charged Hook under cause number 89C01-1405-FC-50 ("Cause No. 50") with battery resulting in serious bodily injury as a class C felony.

[3] On January 15, 2015, Hook and the State filed a plea agreement under Cause Nos. 34 and 50 as well as cause number 89C01-1312-FD-461 ("Cause No.

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[1] Petitioner's Exhibit 6 contains a presentence investigation report prepared under Cause No. 34 which indicates the offense in Cause No. 121 was charged under Ind. Code § 9-30-5-3(a)(1) and the offense in Cause No. 518 was charged under Ind. Code § 9-30-5-2(a) and (b). Exhibits Volume I at 22-23.

[2] The State alleged all of the offenses were committed on or about December 3, 2013.

461"). Pursuant to the agreement, Hook agreed to plead guilty under Cause No. 34 to battery as a class B felony as a lesser included offense of Count I, the habitual offender allegations pursuant to Ind. Code § 35-50-2-8, and battery as a class A misdemeanor under Cause No. 50 as a lesser included offense. The State agreed to dismiss all remaining counts in Cause Nos. 34 and 461. The plea agreement provided that Hook would be sentenced to twenty years with no time suspended for Count I under Cause No. 34 and that the sentence would be enhanced by an additional twenty years because Hook was an habitual offender. It provided that Hook would be sentenced to a consecutive sentence of one year under Cause No. 50. The plea agreement also stated that Hook waived the rights to "appeal his plea of guilty" and "appeal any sentence imposed by the Court, under any standard of review, including, but not limited to, an abuse of discretion standard and the appropriateness of the sentence under Indiana Appellate Rule 7(B), so long as the Court sentences [Hook] within the terms of the plea agreement." Appellant's Appendix Volume II at 14.

[4] On January 16, 2015, the court entered an order entering a judgment of conviction for burglary as a class B felony under Cause No. 34, finding that Hook admitted to "the allegations set forth in the Information For Habitual Offender," and adjudicating him to be an habitual offender. *Id.* at 53. On February 26, 2015, the court sentenced Hook under Cause No. 34 to twenty years enhanced by twenty years based upon the adjudication of Hook as an habitual offender.

[5] On April 26, 2021, Hook filed a verified petition for post-conviction relief which listed Cause Nos. 34 and 50. On August 5, 2022, Hook filed a request to amend his petition and an amended petition for post-conviction relief alleging that he was deprived of effective assistance of counsel when his counsel failed to properly investigate the habitual offender enhancement, failed to properly advise him of the habitual offender statute and case law, misled him concerning the habitual offender sentence, failed to raise and properly argue that he could not plead guilty to being an habitual offender, and failed to file a notice of appeal "pursuant to the Habitual Offender violations." *Id.* at 73 (emphasis omitted).

[6] On January 24, 2023, the court held an evidentiary hearing at which Hook appeared *pro se*. Hook introduced and the court admitted a declaration in which he asserted that his trial counsel, Attorney Austin Shadle, advised him that, pursuant to *Breaston v. State*, 907 N.E.2d 992 (Ind. 2009), his "Habitual Enhancement would be ran [sic] concurrent to [his] underlining [sic] count of Burglary giving [him] 16 years of actual time to serve rather than a life sentence from which [he] believed without question." Exhibits Volume I at 30. He stated Attorney Shadle did not advise him that *Breaston* was "about sentencing multiple Habitual Offenders Convictions Consecutive to one another." *Id.* He also asserted that Attorney Shadle did not advise him that his prior convictions made him ineligible for the habitual offender enhancement, the two prior unrelated felonies were "traffic violations under Title 9, I.C. § 9-30-10-4, and

they had their own Habitual Offender Enhancements separate from Title 35, 35-50-2-8 Enhancements." *Id.*

[7] Upon questioning by Hook, Attorney Shadle, testified: "I believe in every instance you were charged with the Habitual Offender Enhancement in each one of those and I do remember yes, reviewing the Charging Information, both on my own, both with staff attorneys with the Indiana Public Defender Counsel, as well as with you, yes." Transcript Volume II at 26. When asked if he recalled what the prior felonies "were for the Habitual," he answered: "I think there were three Driving while Intoxicated offenses. I think two of them were unrelated for purposes of underlying offenses. I think – what I'm saying is one of the three, if I remember correctly, did not qualify because it was not unrelated." *Id.* at 26-27. Attorney Shadle stated:

> When somebody is facing quite a lot of years on a felony plus a habitual offender enhancement, we were looking at what your potential risk is so, often times when I'm consulting with the client, when I was consulting with you, I was advising you of what your potential risk was if you were to go to trial on all three cases and lose. What's the maximum number of years that you're facing. And the Breaston case stands for the rule that if you're convicted of multiple habitual offender enhancements, that habitual offender sentences have to run concurrently with each other.

Id. at 29. Attorney Shadle testified that he believed that Hook's prior unrelated offenses qualified Hook to be found to be an habitual offender.

[8] When asked what he remembered when advising him concerning the plea bargain and the habitual offender allegation, Attorney Shadle answered:

> Well, that was a big issue in your case because you were potentially facing thirty years on the Habitual Offender Enhancement and so, my, of course, advice to you was that you would be – is in your note that you're facing potentially ninety-one-year sentence and that your co-defendant had received a seventy-two-year sentence or had been found guilty and convicted for a seventy-two-year sentence. And although, neither of us liked the plea that was offered, that forty years that you could serve forty do twenty and potentially get four years knocked off the twenty, I think, if I remember right, I have sixteen and then I have seventeen over that, that was probably because there was probably another year. Do six months tacked on to that because of the battery, so that seemed like that was saving your life over having to serve a seventy-two-year sentence that [your co-defendant] would end up getting.

Id. at 30-31.

[9] Hook asked: "So, you also didn't advise me that traffic violations have their own habitual statute separate from Title 35?" *Id.* at 31. Attorney Shadle answered: "Well, what I remember advising you is that those underlying offenses for Driving while Intoxicated, that were misdemeanors enhanced to D Felonies because you had prior Driving while Intoxicated offenses, those would qualify as prior, unrelated felonies – ." *Id.* He stated: "I advised you that you did qualify as a habitual offender and if you . . . went to trial, you would be found guilty or that would be true, that you were a habitual offender based upon your underlying offenses." *Id.* at 33. He indicated that he did not file a

notice of appeal because "[t]his was under a plea agreement that you agreed to and were sentenced to" and Hook never asked for an appellate attorney or asked to file an appeal. *Id.* at 34.

[10] On cross-examination, Attorney Shadle testified that, as a matter of practice, he routinely covered the habitual offender enhancement in great detail with each of his clients who were subject to that enhancement. He testified that he determined the timing of the prior felony convictions to ensure they met the statutory requirements and confirmed Hook had two prior unrelated felonies. He indicated that he confirmed with Hook that he had the prior felony convictions. When asked if he told Hook that the habitual offender enhancement would be served concurrently with the underlying crime, he answered: "No, absolutely not." *Id.* at 43. He testified that he told Hook "[t]hat that would be an added on – that Habitual Offender Enhancement would be tacked on or in addition to his underlying sentence on his – the underlying offenses." *Id.* He agreed with the characterization that the *Breaston* case stood for the concept that "if you have a person who has multiple pending cases with multiple habitual offenders attached, those habitual offender enhancements cannot be served consecutively to one another in a different case." *Id.* at 44. The prosecutor asked: "And so, in your opinion, is it possible that Mr. Hook is conflating two different issues in his pleading by attributing you saying that in his case, the Habitual Enhancement could be served concurrently to the underlying offense?" *Id.* Attorney Shadle answered:

> Well, let me answer your – he's conflating – he's conflating that legal principle, but he was – there was no misunderstanding about what he was facing in terms of that habitual – I mean, he – obviously, twenty-year Habitual Enhancement served together with a twenty-year underlying, that wouldn't make any sense. The habitual would just have no consequence at that point . . . .

Id. On March 31, 2023, the court denied Hook's petition.

Discussion

[11] Hook is proceeding *pro se* and is held to the same standard as trained counsel. *See Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. The petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence, and we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

[12] Hook argues that he received ineffective assistance of trial counsel when his counsel failed to properly investigate the habitual offender enhancement and failed to raise the doctrine of amelioration as the "new statute had substantial differences in what prior felonies were qualified to be used against a defendant [AND] the range of sentencing going from 10 to 30 years of imprisonment to 6 to 20 years of imprisonment."[3] Appellant's Brief at 10 (emphasis omitted). He appears to argue that his trial counsel failed to present the idea that general

[3] Bracketed text appears in original.

statutes yield to more specific statutes and "[t]he new statute required that one of the prior unrelated felonies be greater than a Class 'D' felony and or a Level '6' Felony." *Id.* at 11. He argues that his counsel failed to present the idea that his prior offenses fell under Title 9 and were not eligible to be considered for purposes of the habitual offender allegation. He contends his trial counsel failed to properly advise him of the general habitual offender statute and misled him concerning the habitual offender enhancement resulting in his guilty plea being illusory and not entered into knowingly, intelligently, and voluntarily. He argues his counsel failed to raise and properly argue that he could not plead to the habitual offender allegation. He also argues that his trial counsel failed to "file a notice of appeal pursuant to the Habitual Offender violations." *Id.* at 22 (emphasis omitted). He asserts multiple issues should or could have been raised on direct appeal.[4]

[13] To the extent that Hook raises freestanding claims, such arguments are waived. *See Lambert v. State*, 743 N.E.2d 719, 726 (Ind. 2001) (holding post-conviction procedures do not provide a petitioner with an opportunity to present freestanding claims that contend the original trial court committed error), *reh'g denied*, *cert. denied*, 534 U.S. 1136, 122 S. Ct. 1082 (2002). To the extent Hook

[4] Specifically, he asserts that the following issues should or could have been raised on direct appeal: "Whether [he] can plead guilty to the General Habitual by use of Title 9 Felonies that are part of a more Specialized Habitual Offender"; "Whether [he] can plead guilty to the General Habitual by use of felonies that were already enhanced due to a prior felony conviction giving the State an improper double enhancement conviction"; and "Whether [he] is eligible for the new 35-50-2-8 with a more lenient sentence scheme and eligibility requirement holding to the new legislative intent." Appellant's Brief at 23.

does not cite to the record or present cogent argument, his claims are waived. *See Cooper v. State*, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding the defendant's contention was waived because it was supported neither by cogent argument nor citation to authority).

[14] To prevail on an ineffective assistance of counsel claim, a petitioner "must show (1) that his counsel's performance fell short of prevailing professional norms, and (2) that counsel's deficient performance prejudiced his defense." *Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)), *reh'g denied*, *cert. denied*, 141 S. Ct. 553 (2020). A showing of deficient performance under the first of these two prongs requires proof that legal representation lacked an objective standard of reasonableness, effectively depriving the defendant of his Sixth Amendment right to counsel. *Id.* 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.* Ineffective assistance of counsel claims "alleging invalid guilty pleas based on trial counsel's flawed advice turn on the same two-part test outlined in *Strickland*." *Id.* at 697.

[15] At the time Hook committed the offenses under Cause No. 34 in December 2013, Ind. Code § 35-50-2-8 provided:

> (a) Except as otherwise provided in this section, the state may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions.

(b) The state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if:

> (1) the offense is a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction;
>
> (2) the offense is an offense under IC 9-30-10-16 or IC 9-30-10-17;[5] or
>
> (3) all of the following apply:
>
> > (A) The offense is an offense under IC 16-42-19 or IC 35-48-4.
> >
> > (B) The offense is not listed in section 2(b)(4) of this chapter.
> >
> > (C) The total number of unrelated convictions that the person has for:
> >
> > > (i) dealing in or selling a legend drug under IC 16-42-19-27;
> > >
> > > (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);
> > >
> > > (iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
> > >
> > > (iv) dealing in a schedule IV controlled substance (IC 35-48-4-3); and

[5] Ind. Code § 9-30-10-16 governs the offense of operating a motor vehicle while privileges are suspended. Ind. Code § 9-30-10-17 governs the offense of operating a motor vehicle while privileges are forfeited for life.

> (v) dealing in a schedule V controlled substance (IC 35-48-4-4);
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> does not exceed one (1).
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> * * * * *
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> (e) The requirements in subsection (b) do not apply to a prior unrelated felony conviction that is used to support a sentence as a habitual offender. A prior unrelated felony conviction may be used under this section to support a sentence as a habitual offender even if the sentence for the prior unrelated offense was enhanced for any reason, including an enhancement because the person had been convicted of another offense. However, a prior unrelated felony conviction under IC 9-30-10-16, IC 9-30-10-17, IC 9-12-3-1 (repealed), or IC 9-12-3-2 (repealed) may not be used to support a sentence as a habitual offender.
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> * * * * *
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> (h) The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years.

[16] As previously noted, the convictions supporting Hook's habitual offender enhancement were offenses under Ind. Code §§ 9-30-5-2 and 9-30-5-3. Thus, they did not fall under Ind. Code § 35-50-2-8(b)(2), which specifically mentioned Ind. Code §§ 9-30-10-16 and 9-30-10-17.

[17] To the extent Hook relies upon the doctrine of amelioration, generally, "[s]tatutes are to be given prospective effect only, unless the legislature unequivocally and unambiguously intended retrospective effect as well."

Johnson v. State, 36 N.E.3d 1130, 1134 (Ind. Ct. App. 2015) (citing *State v. Pelley*, 828 N.E.2d 915, 919 (Ind. 2005)), *trans. denied*. An exception to this general rule exists for remedial or procedural statutes. *Id.* (citing *Martin v. State*, 774 N.E.2d 43, 44 (Ind. 2002)). Although statutes and rules that are procedural or remedial may be applied retroactively, they are not required to be. *Id.* (citing *Pelley*, 828 N.E.2d at 919-920). Even for procedural or remedial statutes, "retroactive application is the exception, and such laws are normally to be applied prospectively absent strong and compelling reasons." *Id.* (citing *Hurst v. State*, 890 N.E.2d 88, 94-96 (Ind. Ct. App. 2008) (quotation omitted), *trans. denied*).

[18] As for his citation to the 2014 amendment to Ind. Code § 35-50-2-8, we note that, "[e]ffective July 1, 2014, the criminal code was subject to a comprehensive revision pursuant to Pub. L. No. 158-2013 and Pub. L. No. 168-2014." *Jaco v. State*, 49 N.E.3d 171, 172 (Ind. Ct. App. 2015). Pub. L. Nos. 158-2013, § 661 and 168-2014, § 118 amended Ind. Code § 35-50-2-8 effective July 1, 2014, such that Ind. Code § 35-50-2-8 provided:

> (a) The state may seek to have a person sentenced as a habitual offender for a felony by alleging, on one (1) or more pages separate from the rest of the charging instrument, that the person has accumulated the required number of prior unrelated felony convictions in accordance with this section.
>
> (b) A person convicted of murder or of a Level 1 through Level 4 felony is a habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of two (2) prior unrelated felonies; and

(2) at least one (1) of the prior unrelated felonies is not a Level 6 felony or a Class D felony.

(c) A person convicted of a Level 5 felony is a habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of two (2) prior unrelated felonies;

(2) at least one (1) of the prior unrelated felonies is not a Level 6 felony or a Class D felony; and

(3) if the person is alleged to have committed a prior unrelated:

(A) Level 5 felony;

(B) Level 6 felony;

(C) Class C felony; or

(D) Class D felony;

not more than ten (10) years have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) and the time the person committed the current offense.

(d) A person convicted of a Level 6 felony is a habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of three (3) prior unrelated felonies; and

(2) if the person is alleged to have committed a prior unrelated:

(A) Level 5 felony;

(B) Level 6 felony;

(C) Class C felony; or

(D) Class D felony;

not more than ten (10) years have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) and the time the person committed the current offense.

(e) The state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if the current offense is a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction. However, a prior unrelated felony conviction may be used to support a habitual offender determination even if the sentence for the prior unrelated offense was enhanced for any reason, including an enhancement because the person had been convicted of another offense.

* * * * *

(i) The court shall sentence a person found to be a habitual offender to an additional fixed term that is between:

(1) six (6) years and twenty (20) years, for a person convicted of murder or a Level 1 through Level 4 felony; or

(2) two (2) years and six (6) years, for a person convicted of a Level 5 or Level 6 felony.

An additional term imposed under this subsection is nonsuspendible.

(Subsequently amended by Pub. L. No. 238-2015, § 17 (eff. July 1, 2015); Pub. L. No. 12-2017, § 1 (eff. July 1, 2017); and Pub. L. No. 37-2023, § 2 (eff. July 1, 2023)).

[19] Ind. Code § 1-1-5.5-21 is titled "Limited effect of P.L.158-2013 or P.L.168-2014 legislation" and provides:

> (a) A SECTION of P.L.158-2013 or P.L.168-2014 does not affect:
>
> (1) penalties incurred;
>
> (2) crimes committed; or
>
> (3) proceedings begun;
>
> before the effective date of that SECTION of P.L.158-2013 or HEA 1006-20141. Those penalties, crimes, and proceedings continue and shall be imposed and enforced under prior law as if that SECTION of P.L.158-2013 or HEA 1006-20141 had not been enacted.
>
> (b) The general assembly does not intend the doctrine of amelioration (see Vicory v. State, 400 N.E.2d 1380 (Ind. 1980)) to apply to any SECTION of P.L.158-2013 or HEA 1006-20141.[6]

In light of Ind. Code § 1-1-5.5-21, Hook's trial counsel was not ineffective for failing to raise the doctrine of amelioration.

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[6] Ind. Code § 1-1-5.5-21 contained a footnote here which states: "Codified as P.L.168-2014."

[20] To the extent Hook argues that his trial counsel was ineffective for failing to file a notice of appeal so that he could challenge his guilty plea, we disagree. Because Hook pled guilty, he could not challenge the propriety of his convictions on direct appeal. *See Hayes v. State*, 906 N.E.2d 819, 820-821 (Ind. 2009) (observing that the defendant submitted an "open" guilty plea and holding that "he did not (and under *Tumulty v. State*, [666 N.E.2d 394 (Ind. 1996),] could not), appeal his convictions") (footnote omitted); *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004) ("A person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal."); *Tumulty*, 666 N.E.2d at 395 (holding that "[o]ne consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal"). Reversal is not warranted on this basis.

[21] For the foregoing reasons, we affirm the post-conviction court's order.

[22] Affirmed.

Vaidik, J., and Bradford, J., concur.