

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tory Dominique Ward,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 27, 2023

Court of Appeals Case No.
22A-PC-2872

Appeal from the Vanderburgh
Superior Court

The Honorable Robert J. Pigman,
Judge

Trial Court Cause No.
82D03-2008-PC-3313

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

- [1] Tory Ward appeals the trial court’s partial denial of his petition for post-conviction relief. Ward raises one issue for our review, namely, whether the court erred when it denied his petition in part. We affirm.

Facts and Procedural History

- [2] In Ward’s direct appeal, this Court stated the facts and procedural history as follows:

Around May 27, 2015, Jordan Best met Ward and between that date and the day of the arrest, June 13, 2015, the two sold methamphetamine together. On June 8, 2015, Best and Ward left for Texas along with Erin Lance, another dealer for Ward. Best was told that they were going to Texas to get more methamphetamine to sell because their supply had run out. Lance was given a similar reason for going to Texas in that they were going to network and “check out some prices and basically just trying to bring stuff back.” The three of them stayed with Ward’s family while in Texas. At one point, Ward returned to his family’s house with an ounce of MDMA¹ and “Molly”² for him, Best, and Lance to try.

¹ “3,4-methylenedioxy-methamphetamine (MDMA) is a synthetic drug that alters mood and perception (awareness of surrounding objects and conditions).” It is more commonly called Ecstasy or Molly. DrugFacts—MDMA (Ecstasy/Molly), DRUGFACTS, <https://www.drugabuse.gov/publications/drugfacts/mdma-ecstasy-molly> (last visited Nov. 1, 2016).

² “Molly, experts say, contains all [or pure] MDMA in a crystalline powder contained in a capsule.” What is Molly? Why is it Dangerous?, NBC NEWS, <http://www.nbcnews.com/health/health-news/what-molly-why-it-dangerous-n311291> (last visited Nov. 3, 2016).

On June 13, 2015, the trio left Texas and stopped at Ward's sister's house before returning to Evansville. When Ward got back in the car from his sister's house he had four ounces of "Molly." As the trio approached Evansville, they were stopped by police. At this point, Ward threw the "Molly" on Lance's lap and "demanded her to take it." Lance hid the drugs in her pants, but when a female police officer approached to search her, Lance gave the police the drugs. Additionally, there was a K-9 officer that indicated the presence of drugs in the vehicle. After the stop, Best and Ward were taken to the Vanderburgh County jail. At the jail, Ward was searched by Corrections Officer Jeremy Elliot. During the search, Elliot found a bag "between [Ward's] buttocks" that contained about twenty-six grams of a white crystal substance.

Rebecca Nickless, a Forensic Scientist with the Indiana State Police Lab, analyzed the drugs involved in this case. She found that the bag of drugs retrieved from Ward's person, labeled as State's Exhibit #1, contained ethylone and had a net weight of 23.38 grams. State's Exhibits #2 and #3, the drugs found on Lance, were analyzed as well. State's Exhibit #2 was ethylone and had a net weight of 111.37 grams. Finally, State's Exhibit #3 contained pills made from methamphetamine and weighed over 10 grams which was more than is required under law to meet the statutory elements.³

Ward v. State, No. 82A01-1512-CR-2280, 2016 WL 6805617, at *1 (Ind. Ct. App. Nov. 17, 2016) (mem.) (citations to the record omitted, footnotes in original).

³ There was a variance in the weight of the drugs when weighed, at least 10.16 grams and possibly as much as 10.68 grams. This variance was attributed to uncertainty in the balance of the scale.

- [3] The State charged Ward with dealing in methamphetamine, as a Level 2 felony,⁴ and dealing in a schedule 1 controlled substance, ethylone, as a Level 2 felony.⁵ *Id.* Following a jury trial, the jury found Ward guilty of both charges.⁶ The trial court then sentenced Ward to concurrent terms of twenty-six years for each offense, to be served in the Department of Correction. *Id.* at *2.
- [4] On direct appeal, Ward contended that the State had failed to present sufficient evidence to support his convictions. Specifically, he asserted that the State had “failed to prove that he had actual or constructive possession of the drugs that were found on Lance’s person.” *Id.* In regard to his conviction for Level 2 felony dealing in a controlled substance, ethylone, he argued that the State had failed to “prove that the chemicals present in that item were prohibited on schedule 1 of the controlled substances.” *Id.* at *3. We disagreed on both issues and affirmed his convictions. *See id.*
- [5] On August 3, 2020, Ward, pro se, filed a petition for post-conviction relief. In that petition, he asserted that he had newly discovered evidence; that Indiana Code Section 35-48-4-2, the statute under which he was charged for Count 2, was unconstitutionally vague; that there existed a material variance between the charging information and the evidence presented at trial; that the court had

⁴ Ind. Code § 35-48-4-1.1 (2016).

⁵ I.C. § 35-48-4-2.

⁶ The State also charged Ward with trafficking with an inmate, as a Level 5 felony, but the jury acquitted him of that charge.

abused its discretion when it instructed the jury; and that there was insufficient evidence to support his convictions. *See* Appellant’s App. Vol. 2 at 23-24. The State entered a general denial and filed a motion to proceed by affidavit. The court granted that motion.

[6] Thereafter, on February 18, 2021, Ward filed an amended petition for post-conviction relief. In his amended motion, Ward asserted that he had newly discovered evidence, that Indiana Code Section 35-48-4-2 was unconstitutionally vague, that his sentence was disproportionate to the crime committed, and that his convictions violated the prohibition against double jeopardy.

[7] Ward, while represented by counsel, then submitted his proposed findings of fact and conclusions thereon. In his proposed findings, Ward reframed the issues as: 1) whether Indiana Code Sections 35-48-2-4 and 35-48-4-2 were unconstitutionally vague for using “the term ‘synthetic drug’ ambiguously and inconsistently”; 2) whether his sentence under Count 2 was “disproportionate with the penalty for dealing in a synthetic drug”; 3) whether the State failed to disclose “exculpatory evidence,” namely, Best’s suspended sentence at a treatment facility; and 4) whether his convictions violated double jeopardy. *Id.* at 138. Regarding the first issue, Ward asserted that the statutes were vague because the statute under which he was charged for Count 2, Indiana Code Section 35-48-4-2, specifically lists a synthetic drug as an exception to the offense. *See id.* at 144. He then asserted that ethylone is defined as a synthetic drug in Indiana Code Section 35-31.5-2-321 such that he should have been

charged with dealing in a synthetic drug, as a Level 6 felony, under Indiana Code Section 35-48-4-10.5 instead of dealing in a controlled substance. *See id.* at 146.

[8] Regarding his second issue, Ward asserted that, had he been charged under Indiana Code Section 35-48-4-10.5, the maximum sentence he would have faced was two and one-half years, as opposed to the twenty-six-year sentence he actually received. Thus, he asserted that he improperly “faced a maximum penalty 12 times as severe as he would have had he been charged under” the proper statute. *Id.* at 147. Regarding the newly discovered evidence claim, Ward contended that the State had failed to disclose Best’s plea agreement and the fact that Best was being considered for an alternate placement, which Ward contends would have “properly impeached” Best. *Id.* at 148. And he asserted that his convictions violated double jeopardy principles because he had only “engaged in a single action.” *Id.* at 151.

[9] The State responded and agreed with Ward regarding his first issue. Specifically, the State agreed that, for Count 2, Ward should have been charged with dealing in a synthetic drug as opposed to dealing in a schedule I controlled substance. *See id.* at 217. The State denied the remainder of Ward’s claims. On June 16, 2022, the post-conviction court partially granted Ward’s petition by vacating his Level 2 felony conviction under Count 2 and entering a conviction for dealing in a synthetic drug, as a Level 6 felony, instead. The court then found that Ward’s second issue regarding the proportionality of his sentence on Count 2 was moot since that conviction had been vacated, that

Ward had failed to show that the State suppressed any evidence, and that the double jeopardy issue was also moot based on the court's resolution of Ward's first issue. As such, the court denied Ward's remaining three claims. This appeal ensued.

Discussion and Decision

- [10] Ward appeals the court's partial denial of his petition for post-conviction relief. Petitions for post-conviction relief constitute civil proceedings wherein defendants may bring "limited collateral challenges to a conviction and sentence." *State v. Hamilton*, 197 N.E.3d 356, 362 (Ind. Ct. App. 2022), *trans. denied*. Grounds for relief are limited in scope to issues unknown at trial or unavailable on direct appeal. *Id.* An issue available on direct appeal but not raised is waived, and an issue litigated adversely to the defendant is res judicata. *Id.* The petitioner has the burden of proving claims by a preponderance of the evidence. *Id.*
- [11] When a petitioner appeals from the denial of post-conviction relief, they "stand in the position of one appealing from a negative judgment." *Williams v. State*, 160 N.E.3d 563, 576 (Ind. Ct. App. 2020), *trans. denied*. Thus, to prevail on appeal, the petitioner "must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court." *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). In other words, reversal is warranted only when there is a definite and firm conviction that the post-conviction court clearly erred. *Id.* Under this "clearly erroneous"

standard, we cannot reweigh the evidence nor judge witness credibility, and we will only consider “probative evidence and reasonable inferences” supporting the post-conviction court’s ruling. *Reeves v. State*, 173 N.E.3d 1134, 1140 (Ind. Ct. App. 2021), *trans. denied*.

[12] On appeal, Ward first contends that his convictions violate the prohibition against double jeopardy. Specifically, he asserts that, while he was charged under Indiana Code Section 35-48-4-1.1 for dealing in methamphetamine, methamphetamine is defined as a schedule II drug under Indiana Code Section 35-48-2-6(d)(2) and that, as a result, he could have been charged with dealing in a schedule I, II, or III controlled substance under Indiana Code Section 35-48-4-2. And he asserts that that is the same statute under which he was charged in Count 2, such that the two offenses are “inherently included” in each other and constitute double jeopardy. Appellant’s Br. at 12.

[13] However, we note that Ward has presented no authority to demonstrate that the State was required to charge him with dealing in a schedule I, II, or III controlled substance as opposed to dealing in methamphetamine. In any event, Ward disregards the fact that the post-conviction court specifically vacated Ward’s conviction for dealing in a schedule I controlled substance under Indiana Code Section 35-48-4-2 and instead entered judgment of conviction against him for dealing in a synthetic drug under Indiana Code Section 35-48-4-10.5. And Ward makes no argument on appeal that his convictions for dealing in methamphetamine and his new conviction for dealing in a synthetic drug

violate the prohibition against double jeopardy.⁷ Ward has therefore failed to meet his burden on appeal with respect to this issue.

[14] Ward also contends that the court erred when it denied his petition for post-conviction relief because there was a fatal variance between the charging information for Count 1 dealing in methamphetamine and the evidence that was presented at trial, because the statute prohibiting dealing in methamphetamine was unconstitutionally vague as applied to him, and because his sentence for dealing in methamphetamine was unconstitutionally disproportionate to the actual offense. However, all three of those issues were available to Ward at the time of his direct appeal.

[15] It is well settled that the purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. *Taylor v. State*, 840 N.E.2d 324, 330 (Ind. 2006). And when an issue is known and available but not raised on direct appeal, it is waived. *Id.* Because Ward's assertions regarding the fatal variance, the constitutionality of the statute, and the proportionality of his sentence were known and available to him but not raised on direct appeal, he has waived it.

Conclusion

⁷ Even if Ward had made that argument, he would not have succeeded. Our included-offense statute would not be implicated because dealing in methamphetamine is not established by proof of dealing in a synthetic drug, or vice versa. *See* I.C. § 35-31.5-2-168(1).

[16] Ward has not met his burden to demonstrate that the post-conviction court erred with regard to his double jeopardy claim. And Ward has waived review of any of the remaining issues for failing to raise them in his direct appeal. We therefore affirm the post-conviction court's denial of Ward's petition for post-conviction relief.

[17] Affirmed.

Tavitas, J., and Kenworthy, J., concur.