MEMORANDUM DECISION

APPELLANT PRO SE

CARL DRUCKER II
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ATTORNEYS FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

Carl Drucker II,
Petitioner,

v.

State of Indiana,
Respondent,

September 2, 2021

Court of Appeals Case No. 20A-PC-1318

Appeal from the Bartholomew Circuit Court

The Honorable Kelly S. Benjamin, Judge

Trial Court Cause No. 03C01-1306-PC-3162

Robb, Judge.

Case Summary and Issue

[1] In 2010, Carl Drucker II pleaded guilty to aggravated battery, a Class B felony, and admitted to being an habitual offender. The trial court sentenced him to twenty years for the battery conviction, enhanced by twenty-seven and one-half years for the habitual offender adjudication, for a total sentence of forty-seven and one-half years in the Indiana Department of Correction ("DOC").

[2] In 2013, Drucker began pursuing post-conviction relief. Following the appointment and withdrawal of counsel and multiple amendments to his petition by Drucker acting pro se, the post-conviction court denied Drucker's petition for relief in 2020. Drucker now appeals, raising several issues that we consolidate and restate as whether the post-conviction court clearly erred in denying his petition. Concluding the post-conviction court's denial of Drucker's petition was not clearly erroneous, we affirm.

Facts and Procedural History

[3] In 2009, the State charged Carl Drucker with attempted murder, a Class A felony; battery by means of a deadly weapon, a Class C felony; resisting law enforcement, a Class D felony; and alleged he was an habitual offender because he had accumulated the following four prior unrelated felony convictions:

- Resisting law enforcement: committed on or about September 29, 1997; convicted on January 5, 1998; sentenced on February 9, 1998

- Dealing in stolen property: committed on or about December 26, 2006 to January 3, 2007 in Florida; convicted and sentenced on December 18, 2007

- Destruction of property: committed on or about January 18, 2007 in Virginia; convicted and sentenced on May 9, 2007

- Grand larceny: committed on or about January 18, 2007 in Virginia; convicted and sentenced on May 9, 2007

See Appellant's Appendix, Volume 3 at 2.

[4] On March 15, 2010, Drucker entered a plea of guilty to aggravated battery as a Class B felony[1] and admitted to having been convicted of the four felonies:

> Q [by the State]. Prior to [this offense], did you already have at least two prior unrelated felonies [sic] convictions?
>
> A. Yes.
>
> Q. Specifically, let me direct your attention to February 9th, of 1998, had [you] been convicted of Resisting Law Enforcement as a Class D Felony, which had been committed on September 29th of 1997?
>
> A. Yes.

[1] The State amended Count II from battery by means of a deadly weapon to aggravated battery as part of the plea agreement. *See* Post-Conviction Relief Hearing Transcript, Volume 3 (Exhibits) at 110.

> Q. And again . . . December 18th of 2007, had you, in fact, been sentenced for the felony of Dealing in Stolen Property in Bay County, Florida, which offense had been committed on December 26th, 2006 through January 3rd, 2007?
>
> A. Correct.
>
> Q. And again on May 9th, 2007, we're [sic] you convicted in Montgomery County, Virginia of two separate felonies, one being the Destruction of Property and the other being Grand Larceny, which offenses had been committed on January 18th of 2007?
>
> A. Correct.
>
> * * *
>
> Judge: And how do you plead to being a Habitual Offender under the Amended Information?
>
> [A.] I . . . plead guilty, Your Honor.

Post-Conviction Relief Hearing Transcript ("PCR Tr."), Volume 3 (Exhibits) at 121-23. The trial court sentenced Drucker to forty-seven and one-half years in the DOC. Drucker did not pursue a direct appeal of his sentence.

[5] In 2013, Drucker filed a petition for post-conviction relief. An attorney from the State Public Defender's office was appointed and, upon review of Drucker's

petition, determined he had no meritorious claims.[2] Counsel therefore withdrew. Drucker proceeded pro se, first withdrawing his petition, and then re-filing and amending his petition several times in 2019. A post-conviction hearing was begun on December 5, 2019, but Drucker "had some documents that he was not allowed to bring over that he needed, so [the hearing] was reset for that reason only." PCR Tr., Vol. 2 at 39. Drucker filed a motion to further amend his petition on December 26, 2019, but the motion was denied. The post-conviction hearing concluded on February 27, 2020. As finally adjudicated, Drucker's petition alleged several errors by his trial counsel, the prosecutor, and the trial court, all related to his habitual offender adjudication. The post-conviction court denied Drucker's petition for post-conviction relief, concluding:

> From the trial record at the plea hearing, Drucker's own admission, and the exhibits admitted at the PCR hearing, it is clear that Drucker had two prior unrelated felony convictions. Drucker has failed to prove, by a preponderance of the evidence, that the evidence determining his habitual offender determination was insufficient.

Appellant's App., Vol. 2 at 58. Drucker now appeals.

Discussion and Decision

[2] The public defender did encourage Drucker to file a petition for post-conviction relief as to one of the underlying convictions supporting his habitual offender enhancement, but Drucker failed to do so. *See* PCR Tr., Vol. 3 (Exhibits) at 21.

I. Standard of Review

A. Post-Conviction Relief

[6] "Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal." *Turner v. State*, 974 N.E.2d 575, 581 (Ind. Ct. App. 2012), *trans. denied*. Post-conviction proceedings are civil in nature and the petitioner must therefore establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). On appeal, a petitioner who has been denied post-conviction relief faces a "rigorous standard of review." *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001). The petitioner must convince this court that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002). When reviewing the post-conviction court's order denying relief, the "findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017) (quotation omitted).

B. Pro Se Litigants

[7] As noted above, Drucker proceeded in the post-conviction court pro se, and he proceeds on appeal pro se, as well. Pro se litigants are held to the same standards as licensed attorneys and are afforded no inherent leniency by virtue

of being self-represented. *In re G.P.*, 4 N.E.3d 1158, 1164 (Ind. 2014). Accordingly, pro se litigants are required to follow the same procedural rules as licensed attorneys and "must be prepared to accept the consequences of their failure to do so." *Picket Fence Prop. Co. v. Davis*, 109 N.E.3d 1021, 1029 (Ind. Ct. App. 2018), *trans. denied*. "These consequences include waiver for failure to present cogent argument on appeal." *Basic v. Amouri*, 58 N.E.3d 980, 984 (Ind. Ct. App. 2016).

II. Waived Issues

[8] Drucker's petition for post-conviction relief raised issues solely related to his habitual offender adjudication. After the post-conviction hearing began, Drucker sought to amend his petition to add allegations related to his aggravated battery conviction and most of his issues on appeal relate to this conviction. However, the post-conviction court denied his petition to amend, and therefore issues related to the aggravated battery conviction were never presented to or heard by the post-conviction court. Issues not presented in a petition for post-conviction relief may not be raised for the first time on appeal. *Walker v. State*, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006), *trans. denied*; *see also* Ind. Post-Conviction Rule 1(8) ("All grounds for relief available to a petitioner under this rule must be raised in his original petition."). Because Drucker's

claims related to his aggravated battery conviction were not first presented to the post-conviction court, they are waived.[3]

[9] In addition, Drucker raises an argument on appeal related to the habitual offender adjudication that does not seem to have been raised below: that his trial counsel was ineffective for not advising him of the bifurcated nature of the proceedings when there is a criminal charge and an habitual offender allegation and for not asking him if he wished to waive a jury as to each part. *See* Appellant's Brief at 18-21.[4] Again, because this issue was not raised to the post-conviction court in the petition for relief, the issue is waived.

[10] Finally, to the extent we do not explicitly address a particular issue herein, we deem it too poorly expressed and developed to be understood, and it is waived for failure to present a cogent argument. *See Willet v. State*, 151 N.E.3d 1274, 1277 (Ind. Ct. App. 2020) ("It is well established that failure to present a cogent argument results in waiver on appeal.").

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[3] Drucker does not allege the post-conviction court erred in denying his motion to amend to include these issues.

[4] Citations to the Appellant's Brief are based on the .pdf pagination.

III. Habitual Offender Issues

[11] As for the issues Drucker did properly present below,[5] the evidence as a whole does not lead unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *See Timberlake*, 753 N.E.2d at 597. Drucker's primary allegation is that the predicate offenses the State alleged to support an habitual offender finding did not occur in the proper sequence. He argues his trial counsel was ineffective for not investigating and objecting to the predicate offenses but instead advising him to admit to them; that the State committed prosecutorial misconduct by using these predicate offenses; and that the trial court committed fundamental error by accepting his admission to being an habitual offender without a sufficient factual basis.[6]

[12] In 2009, when Drucker committed the acts charged in his underlying criminal case, Indiana Code section 35-50-2-8(a) provided that a person may be sentenced as an habitual offender for any felony if the person has accumulated two prior unrelated felony convictions. A person has accumulated two prior unrelated felony convictions if:

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[5] Most of these issues do not appear to be addressed by Drucker's appellate brief, but as we prefer to decide cases on their merits whenever possible, *Picket Fence Prop. Co.*, 109 N.E.3d at 1030, we will briefly consider the propriety of the post-conviction court's order.

[6] At the post-conviction hearing, Drucker also claimed that because one of the predicate offenses was more than ten years old, it could not support an habitual offender finding, citing Indiana Evidence Rule 609. *See* PCR Tr., Vol. 2 at 73. But Evidence Rule 609(b) concerns the age of a conviction used to impeach a witness and does not place limits on the age of predicate offenses for an habitual offender determination.

> (1) the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and
>
> (2) the offense for which the state seeks to have the person sentenced as a habitual offender was committed after sentencing for the second prior unrelated felony conviction.

Ind. Code § 35-50-2-8(c) (2005). Proof that "commission/conviction/sentence for each of the offenses occurred seriatim" is required. *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993).

[13] The information alleging Drucker was an habitual offender alleged he had four prior felony convictions. Drucker admitted at the guilty plea hearing that he had accumulated at least two prior felony convictions, and he admitted to having been convicted of each of the four predicate offenses. His argument in the post-conviction relief proceedings was that all four convictions did not occur in the required order. The State conceded at the post-conviction hearing that the three out-of-state convictions overlap but argued that if it proved that Drucker was sentenced for the felony of resisting law enforcement in 1998 – which it did via Drucker's admission – then it only needed to prove that he committed one of the three remaining offenses thereafter and was sentenced prior to committing the instant offense. *See* PCR Tr., Vol. 2 at 88-89. The post-conviction court found that although the State included "surplusage" in the habitual offender information, Drucker had failed to demonstrate that at least two of his prior convictions did not occur in the required order. Appellant's App., Vol. 2 at 58.

[14] In a post-conviction relief proceeding, the petitioner "may not prevail simply by putting the State to its proof as though the case were being tried or appealed in the first instance. Instead, [he] must demonstrate that he was not an habitual offender under the laws of the state." *Weatherford*, 619 N.E.2d at 917-18. Drucker admitted to all of the prior offenses. Pursuant to this admission, the trial court had before it evidence that he committed, was convicted, and was sentenced for resisting law enforcement in 1998 in Indiana prior to committing, being convicted, and being sentenced for any one of the remaining three convictions. And he committed, was convicted, and was sentenced for any and all of the out-of-state crimes before committing the instant offense. Because Drucker cannot demonstrate that he was *not* an habitual offender, he is not entitled to post-conviction relief on his claims of error surrounding this issue.

[15] Finally, Drucker contended that he was sentenced incorrectly because for the habitual offender finding, the trial court sentenced Drucker to the DOC "for a period of 27½ years on top of the 20 years [for aggravated battery], which of course will be served consecutively." PCR Tr., Vol. 3 (Exhibits) at 142. The post-conviction court denied relief on this claim because Drucker did not present any evidence to support it nor is it a claim available under Post-Conviction Rule 1(1)(a). Drucker is correct that being an habitual offender is not a separate crime and an habitual offender finding does not result in a consecutive sentence; instead, it is a status that results in *enhancing* an existing sentence. *See Weekly v. State*, 105 N.E.3d 1133, 1139 (Ind. Ct. App. 2018), *trans. denied*. An habitual offender enhancement must be attached to a single

conviction. *State v. Arnold*, 27 N.E.3d 315, 321 (Ind. Ct. App. 2015), *trans. denied.* However, for two reasons, we agree with the post-conviction court's denial of this claim. One, this was a claim known at the time of Drucker's sentence and could have been raised on direct appeal. Having failed to do so, he has forfeited this claim of error. *State v. Hernandez*, 910 N.E.2d 213, 216 (Ind. 2009) (holding post-conviction petitioner raising a sentencing issue that was clearly available on direct appeal is foreclosed from raising that claim in a post-conviction proceeding). Two, although the nomenclature the trial court used at the sentencing hearing was erroneous, Drucker has not provided any evidence – i.e., the sentencing order or abstract of judgment – that would show the sentence and enhancement were entered incorrectly. Accordingly, he is entitled to no relief on this claim.

Conclusion

[16] The decision of the post-conviction court denying Drucker's petition for post-conviction relief is affirmed.

[17] Affirmed.

Bradford, C.J., and Altice, J., concur.