

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dorian Stephens,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 31, 2022

Court of Appeals Case No.
20A-PC-2411

Appeal from the Elkhart Circuit
Court

The Honorable Michael A.
Christofeno, Judge

Trial Court Cause No.
20C01-1912-PC-59

Altice, Judge.

Case Summary

- [1] Dorian Stephens appeals the denial of his petition for post-conviction relief, claiming that the post-conviction court erred in declining to vacate his habitual offender adjudication “due to insufficient evidence.” *Appellant’s Brief* at 15. Stephens also contends that his request for relief should have been granted because both trial and appellate counsel were ineffective for failing to challenge the habitual offender enhancement.
- [2] We affirm.

Facts and Procedural History

- [3] The facts as reported in Stephens’s direct appeal are as follows:

In March 2011, Undercover Officer 193 (UC 193) with the Elkhart County Sheriff’s Department witnessed Stephens deliver heroin on three separate occasions. On March 10, 2011, UC 193 was in a vehicle owned by a cooperating source. Another cooperating source sat in the vehicle. From the front seat, UC 193 witnessed Stephens deliver heroin to the cooperating source in exchange for money. On March 14, 2011, UC 193 was present to witness an exchange that one of the cooperating sources had arranged with Stephens. Stephens stepped into the vehicle, and while UC 193 was present, provided heroin in exchange for money. On March 21, 2011, UC 193 was again in the backseat of the cooperating source’s vehicle when he witnessed a cooperating source reach through the vehicle’s window to give Stephens money in exchange for heroin.

On April 4, 2011, the State charged Stephens with three counts of dealing in a narcotic and one count of money laundering, and on June 7, 2011, the State amended the charges to add an habitual offender count. Stephens's trial was bifurcated. The jury found him guilty on all four felony counts, and, during the second portion of the trial, the trial court found him to be an habitual offender.

Directly preceding the trial, Stephens made an objection that the State was unable to produce its two cooperating sources as witnesses, stating that the defense had not had an opportunity to depose them. Stephens's attorney stated that he was unsure whether the defense would have called the cooperating sources as witnesses because he was unable to depose them, as the State was unable to produce them despite a subpoena. Arguing that the defense believed the cooperating sources to be material witnesses, the defense objected to proceeding to trial without the sources. The State responded that it was unable, despite its efforts, to locate the sources, and that it believed that it could make its case without them, as it had an undercover police officer who had directly witnessed Stephens deliver narcotics. The State also pointed out that Stephens had been aware of the fact that the cooperating sources were unavailable for months, and yet had not issued a deposition subpoena for them until five days before the trial. The trial court overruled Stephens's objection, and ordered the trial to proceed.

At the sentencing hearing, the trial court orally sentenced Stephens to fifteen years on each of the [C]lass B felony dealing in narcotic counts, to run currently, two years on the [C]lass D felony, to run consecutively to the first three counts, and to twenty years on the habitual offender enhancement, to run consecutively to the other counts for an aggregate term of thirty[-]seven years. However, both the Abstract of Judgment and the written sentence order reflect a different sentence of twenty years for the [C]lass B felonies, to run concurrently, to two years and

six months for the [C]lass D felony, to run consecutively to the first three counts, and to twenty years for the habitual offender enhancement, again to run consecutively to the other counts for an aggregate term of forty-two and a half years.

Stephens v. State, No. 20A05-1304-CR-175, slip op. at 2-4 (Ind. Ct. App. Nov. 25, 2013).

- [4] The State's information charging Stephens with the habitual offender count identified the first predicate offense as follows:

On or about the 22nd day of December, 1995, in the County of Cook, State of Illinois, one DORIAN G. STEPHENS committed the offense of Possession of [a]Controlled Substance with Intent to Deliver[,] a felony under 720 ILCS 570/401(d), and was sentenced for said offense on or about the 27th day of March, 1996, in the Circuit Court of Cook County, Illinois, Cause No. 96CR0216501.

Appendix Vol. II at 59. The State also identified a 2001 Illinois conviction for possession of a controlled substance to support the habitual charge. The State then filed a request for the trial court to take judicial notice of foreign law and attached the Illinois statutes under which Stephens was convicted.

- [5] Stephens waived his right to have the habitual offender enhancement tried to the jury. During the habitual offender phase of the trial, the State introduced certified copies of pretrial release reports and other certified documents that related to both of the Illinois offenses. Stephens did not object to the admission of those

documents. Stephens's trial counsel argued, however, that the 2001 conviction should not be considered because the substance was not identified in the judgment of conviction. Trial counsel maintained that it was possible that Stephens had possessed something that "might not have been a controlled substance." *Transcript Vol. II* at 176. More specifically, Stephens's counsel argued that because the relevant Illinois statute included anabolic steroids and that other factors could have enhanced the offense from a misdemeanor to a felony, that offense could not be used to support the habitual offender enhancement. The trial court rejected that argument and found Stephens to be a habitual offender at the sentencing hearing on March 19, 2013.

[6] On direct appeal, Stephens argued that he was denied due process because the trial court overruled his objection to the commencement of the trial when the State was not able to produce two cooperating sources. Stephens also challenged his sentence because the trial court's written sentencing order contradicted its verbal statement regarding the aggregate sentence that was imposed.

[7] While a panel of this court affirmed Stephens's convictions, the cause was remanded for clarification in light of the verbal and written sentencing contradiction. Following remand, the trial court entered an order on January 22, 2014, that stated:

Pursuant to the Order of the Court of Appeals, the Court now affirmatively states that it was the sentencing judge's intention that:

(1) The Defendant, Dorian Stephens, be sentenced for an aggregate term of thirty-seven (37) years; and

(2) That the fifteen (15) year sentence for Count III be enhanced by an additional twenty (20) years on the Habitual Offender Count.

Appellant's Appendix Vol. II at 11.

- [8] On August 4, 2020, Stephens filed an amended pro se petition for post-conviction relief,¹ claiming that his sentence violated the United States Constitution because it exceeded the maximum sentence authorized by law, in that the trial court improperly relied on non-Indiana felony convictions to support the habitual offender finding determination. Stephens also alleged that his trial counsel was ineffective for failing to object to the State's use of non-Indiana felony convictions to support the habitual offender enhancement, and further claimed that appellate counsel was ineffective for failing to challenge the sentence on that basis.
- [9] At a telephonic status conference on June 18, 2020, the parties waived hearing on Stephens's petition for post-conviction relief and agreed that a decision on

¹ Stephens initially filed a pro se petition for post-conviction relief on October 24, 2014, and counsel was subsequently appointed to represent him. Counsel later filed a motion to withdraw his appearance on October 14, 2015, which the post-conviction court granted.

Stephens's petition would be based on the record and the parties' written briefs and accompanying memoranda.

[10] On December 1, 2020, the post-conviction court denied Stephens's request for relief, and entered the following findings of fact and conclusions of law:

39. In his Amended Petition for Post Conviction Relief, Petitioner avers that his sentence was in violation of the United States Constitution and exceeds the maximum authorized by law or is otherwise erroneous. Particularly, Petitioner contends that his habitual offender enhancement is excessively harsh and unreasonable. Petitioner also contends that he received ineffective assistance of both trial and appellate counsel. Petitioner avers his trial counsel was ineffective for failing to object to the use of non-Indiana felony convictions as used in the habitual offender sentence enhancement. Petitioner avers trial counsel was also ineffective for failing to present a motion for modification of sentence within 365 days of the sentence to allow for the Court to correct or remedy the error. Petitioner further asserts that appellate counsel was ineffective for failing to raise the issue of whether or not the sentence was appropriate insofar as the habitual offender enhancement given was premised on non-Indiana felony convictions which caused the sentence to be more harsh than necessary.

40. Here, on direct appeal, Petitioner raised the appropriateness and correctness of his sentence. The Court found in favor of Petitioner and remanded the case back to the trial court to clarify its total aggregate sentence of forty-two and one-half (42 1/2) years. The Court further found that the trial court erred when it imposed a separate consecutive twenty (20) year term on the habitual offender enhancement and did not identify which felony it was enhancing. Therefore, the direct appeal resulted in Petitioner's sentence being amended to a total aggregate sentence of thirty-seven (37) years. Thus, Petitioner is precluded from

bringing a freestanding claim of error with respect to his sentence on petition for post-conviction relief. *Reed v. State*, 866 N.E.2d 767, 768 (Ind. 2007) (holding that only issues not known at the time of the original trial or issues not available on direct appeal may be properly raised through post-conviction proceedings).

41. Notwithstanding the foregoing, Petitioner again challenges his sentence by framing that issue as one of ineffective assistance of counsel. . . .

42. If not raised on direct appeal, a claim of ineffective assistance of counsel is properly presented in a post conviction proceeding. . . .

43. Petitioner argues that his trial counsel was ineffective for not objecting to the manner in which non-Indiana based felonies were used to support the habitual offender enhancement and how that enhancement was applied. Likewise, Petitioner argues that his appellate counsel was ineffective for failing to raise that issue on direct appeal. Petitioner further opines that his habitual offender enhancement was excessive based on these errors and changes in the law, which should apply to modify his sentence.

44. Prior to July 1, 2014, Indiana's habitual offender statute provided:

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.

Ind. Code § 35-50-2-8(h) (2013).

That statute now states:

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

six (6) years and twenty (20) years, for a person convicted of murder or a Level 1 through Level 4 felony; or two (2) years and six (6) years, for a person convicted of a Level 5 or Level 6 felony.

Ind. Code § 35-50-2-8(h) (2017).

Had Petitioner committed his offenses after July 1, 2014, his Dealing in Cocaine or Narcotic Drug offenses would be Level 3 felonies.

45. When the legislature enacted the new criminal code, it did so with a general savings statute which provided that the revisions to the criminal code do not affect (1) penalties incurred; (2) crimes committed; or (3) proceedings begun before those revisions took effect. Those penalties, crimes, and proceedings continue and shall be imposed and enforced under prior law. Ind. Code § 1-1-5.5-21(a) (2014). Further, the savings clause specifies that the general assembly does not intend the doctrine of amelioration to apply. Ind. Code § 1-1-5.5-21(b).

46. In the instant case, Petitioner contends that he should have benefitted from the reduced enhancement provided for in the new habitual offender statute. However, a habitual offender finding is an enhancement of the sentence for the underlying crime to which it is attached. *Bauer v. State*, 875 N.E.2d 744, 747 (Ind. Ct. App. 2007). It is well settled that the sentencing statutes in effect at the time a defendant committed the offense govern the defendant's sentence. *Marley v. State*, 17 N.E.3d 335, 340 (Ind.

Ct. App. 2014). Felony convictions in foreign jurisdictions are included within the scope of the habitual offender statutory scheme under Ind. Code § 35-50-2-1, which provided that a felony conviction includes a conviction in any jurisdiction in which a person might have been imprisoned for more than one year. *See also, Lampitok v. State*, 817 N.E2d 630, 643-44 (Ind. 2005). The sentencing enhancement imposed by the Court comported with the law at the time Petitioner was sentenced.

47. Because counsel had no reason to object to the enhancement of Petitioner's sentence based on the law in effect at the time Petitioner committed his crimes and was sentenced, counsel cannot be said to have been ineffective for not so objecting. The same is true with respect to appellate counsel, who raised the obvious issue with respect to Petitioner's sentence and was successful in doing so resulting in Petitioner's sentence being corrected on remand. Therefore, Petitioner's ineffective assistance of counsel claims fail.

48. In the instant case, the trial court did not err when it enhanced Petitioner's sentence pursuant to the habitual offender statute in effect prior to July 1, 2014. Ind. Code § 35-50-2-8(h) (2013). Petitioner's status as a habitual offender is attached to the date he committed the underlying crimes, which was between March 10 and March 29, 2011, well before the effective date of the revisions to the criminal code. The matter of the habitual offender finding not constituting a separate crime, therefore, not resulting in a separate sentence, was addressed by the Indiana Court of Appeals on Petitioner's direct appeal. The habitual offender enhancement can only be imposed upon one felony conviction and the trial court chose which felony-sentence to enhance on remand. Accordingly, any sentencing error was corrected.

Petitioner's Amended Petition for Post Conviction Relief is hereby denied.

[11] Stephens now appeals.

Discussion and Decision

I. Standard of Review

[12] Post-conviction proceedings are civil in nature and the petitioner must therefore prove his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). “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*.

[13] 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). To prevail, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite of that reached by the post-conviction court. *Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006). When reviewing the post-conviction court’s order denying relief, we will not defer to its legal conclusions; however, 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). The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

II. Habitual Offender Challenge

[14] Stephens argues that the post-conviction court erred in determining that he was precluded from challenging the sufficiency of the habitual offender enhancement. More specifically, Stephens claims that he did not raise a “free standing claim of error” at the post-conviction level regarding the sentence. *Appellant’s Brief* at 10. Thus, Stephens maintains that he is entitled to post-conviction relief on this basis.

[15] In addressing Stephens’s contention, we note that “complaints that something went awry at trial are generally cognizable only when they show a deprivation of the right to effective counsel or *issues demonstrably unavailable at the time of trial or direct appeal.*” *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002) (emphasis added). If an issue was known and available but not raised on appeal, it is forfeited on post-conviction review. *State v. Holmes*, 728 N.E.2d 164, 168 (Ind. 2000).

[16] While Stephens claims that the habitual offender adjudication was improper, the evidence that the State used to establish the underlying convictions was known to him at the time of his direct appeal. As Stephens did not raise the issue on direct appeal, the claim is waived. *Holmes*, 728 N.E.2d at 168. And while Stephens attempts to avoid waiver by claiming fundamental error, our Supreme Court—as noted above in *Sanders*—has limited the application of fundamental error in the context of post-conviction proceedings. Thus, review of Stephens’s challenge to the sufficiency of the evidence used to adjudicate him as a habitual offender is not available to him in the post-conviction setting.

III. Ineffective Assistance of Counsel

[17] The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel and mandates “that the right to counsel is the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel’s performance was deficient and that he was prejudiced by the deficient performance. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* The petitioner is prejudiced if 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. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. *French*, 778 N.E.2d at 824.

[18] When we consider a claim of ineffective assistance of counsel, we apply a “strong presumption . . . that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Morgan v. State*, 755 N.E.2d 1070, 1073 (Ind. 2001). Counsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption. *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002).

[19] We also note that counsel has wide latitude in selecting trial strategy and tactics, which we afford great deference. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). Isolated poor strategy or bad tactics do not necessarily amount to ineffective assistance of counsel. *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998). The

standard for ineffective assistance of counsel is the same for both trial and appellate counsel. *Garrett v. State*, 992 N.E.2d 710, 719 (Ind. 2013).

[20] Stephens claims that his trial counsel was ineffective for failing to object to the imposition of the enhanced sentence under the habitual offender statute, I.C. § 35-50-2-8. More specifically, Stephens argues that had trial counsel properly objected, the sentence would have been shorter pursuant to the statute that became effective after July 1, 2014. Stephens also claims that his appellate counsel was ineffective for failing to raise this issue on direct appeal.

[21] As the post-conviction court observed, the habitual offender statute prior to July 1, 2014, provided that:

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.

Ind. Code § 35-50-2-8(h). The statute was amended and presently provides that

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

six (6) years and twenty (20) years, for a person convicted of murder or a Level 1 through Level 4 felony; or two (2) years and six (6) years, for a person convicted of a Level 5 or Level 6 felony.

I.C. § 35-50-2-8(h) (2017).

[22] In construing the applicability of these statutes to the circumstances here, we note that the sentencing statutes in effect at the time he committed the offense govern Stephens's sentence, and felony convictions in foreign jurisdictions are included within the scope of the habitual offender statutory scheme under I.C. § 35-50-2-1. *Marley v. State*, 17 N.E.3d 335, 340 (Ind. Ct. App. 2014), *trans. denied*; *Lampitok v. State*, 817 N.E.2d 630, 643-44 (Ind. Ct. App. 2005), *trans. denied*.

[23] We agree with the post-conviction court's conclusion that the twenty-year habitual offender enhancement on Stephens's 2013 conviction for dealing in narcotics under Count III was proper, as that enhancement comported with the law at the time of sentencing. *See* I.C. § 35-50-2-8(h). Even more compelling, trial counsel was not expected to have foreseen a change in the law that did not become effective until after Stephens had committed the criminal acts and was tried and sentenced for those offenses. *Robinson v. State*, 175 N.E.3d 859, 868 (Ind. Ct. App. 2021), *trans. denied*. Therefore, even had counsel objected on this basis, the objection would not have been sustained. As a result, Stephens's claim that his trial counsel was ineffective fails.

[24] For the same reasons, appellate counsel cannot be said to have been ineffective for not raising this issue on direct appeal. *See, e.g., Lambert v. State*, 743 N.E.2d 719, 747 (Ind. 2001) (recognizing that because trial counsel was not ineffective for failing to present mental health evidence that the petitioner introduced at the post-conviction hearing, appellate counsel was similarly not ineffective for failing to argue that the defendant's sentence was "unreliable" on this ground). And, as an

aside, Stephens's appellate counsel *did* challenge an obvious sentencing issue and prevailed on that issue as this court discussed in Stephens's direct appeal.

[25] For all these reasons, we conclude that Stephens's petition for post-conviction relief was properly denied.

[26] Judgment affirmed.

Bailey, J. and Mathias, J., concur.