MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Terry L. Slusser,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent.

July 31, 2023

Court of Appeals Case No. 22A-PC-642

Appeal from the Madison Superior Court

The Honorable Mark K. Dudley, Judge

Trial Court Cause No. 48C06-2104-PC-6

Memorandum Decision by Judge Pyle

Judges Bradford and Kenworthy concur.

Pyle, Judge.

Statement of the Case

[1] Terry L. Slusser ("Slusser") appeals the post-conviction court's denial of his petition for post-conviction relief. Slusser argues that the post-conviction court erred by denying him post-conviction relief. Concluding that Slusser has failed to meet his burden of showing that the post-conviction court erred, we affirm the post-conviction court's judgment.

[2] We affirm.

Issue

> Whether the post-conviction court erred by denying post-conviction relief to Slusser.

Facts[1]

[3] In November 2010, the State charged Slusser with three counts of Class B felony sexual misconduct with a minor. The charges alleged that, between July 2, 2010 and September 24, 2010, Slusser, who was over the age of twenty-one, had committed an act of sexual misconduct with a minor with his stepdaughter ("his stepdaughter"), who was at least fourteen years old but less than sixteen

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[1] We note that Slusser's Statement of Facts section contains argument. We direct Slusser's attention to Indiana Appellate Rule 46(A)(6), which provides that an Appellant's Statement of Facts shall set forth the relevant facts in a narrative form and in accordance with the appropriate standard of review. *See also Basic v. Amouri*, 58 N.E.3d 980, 984 (Ind. Ct. App. 2016) (explaining that a "statement of facts section [that] includes argument . . . [is] in violation of Appellate Rule 46(A)(6)"), *reh'g denied*; *Parks v. Madison Cnty.*, 783 N.E.2d 711, 718 (Ind. Ct. App. 2002) (providing that a "statement of facts . . . is not to be argumentative"), *reh'g denied*, *trans. denied*.

years old. The first count of Class B felony sexual misconduct with a minor was based on the allegation that Slusser had engaged in sexual intercourse with his stepdaughter, and the second and third counts were based on the allegation that Slusser had engaged in deviate sexual conduct with his stepdaughter.

[4] In March 2011, Slusser entered into a plea agreement and agreed to plead guilty as charged in exchange for the State's agreement that his sentence would have a "cap of 22 years executed[.]" (App. Vol. 2 at 42).[2] Slusser's plea agreement also contained the two following provisions regarding Slusser's waiver of constitutional rights and waiver of his right to appeal his sentence:

> (5) [Slusser] understands that the State and Federal Constitutions guarantee all criminal defendants certain rights, among them being the right to a public trial by jury, to a speedy trial, to be free from self-incrimination, to confront and cross-examine the State's witnesses, the right to have compulsory process for obtaining witnesses in his/her favor, the right to present evidence on one's own behalf and to be presumed innocent until proven guilty beyond a reasonable doubt, and to require the State to prove guilt beyond a reasonable doubt. [Slusser] further understands that the entry of a guilty plea pursuant to this agreement waives those rights and constitutes an admission of the truth of all facts alleged in the information or indictment count to which a plea of guilty has been entered and that the guilty plea amounts to a conviction.
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> (6) [Slusser] hereby waives the right to appeal any sentence imposed by the Court, including the right to seek appellate

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[2] At the time that Slusser entered his plea agreement, a person who committed a Class B felony faced a sentence "between six (6) and twenty (20) years, with the advisory sentence being ten (10) years. IND. CODE § 35-50-2-5(a).

> review of the sentence pursuant to Indiana Appellate Rule 7(B), so long as the Court sentences [Slusser] within the terms of this plea agreement. It is further agreed that the sentence recommended and/or imposed is the appropriate sentence to be served pursuant to this agreement and [Slusser] hereby waives any future request to modify the sentence under I.C. [§] 35-38-1-17.

(App. Vol. 2 at 43).

[5] During Slusser's guilty plea hearing, the trial court played an advisement-of-rights video that contained "important constitutional and legal rights[.]" (Ex. Vol. at 7). After the video had played, the trial court confirmed that Slusser had understood the rights that had been explained in the video and that he would be giving up those rights by pleading guilty. The trial court also reviewed Slusser's plea agreement with him and confirmed that Slusser understood that he was "pleading guilty to three (3) different counts of . . . sexual misconduct with a minor, as [Class] B felonies[.]" (Ex. Vol. at 8). Additionally, the trial court confirmed that Slusser understood that his plea agreement contained a sentencing recommendation of a "cap of twenty-two (22) years executed." (Ex. Vol. at 8). Slusser also confirmed that he had reviewed his plea agreement with his counsel, had understood all the terms, and had signed the agreement.

[6] The State set forth the factual basis for Slusser's three counts and stated that thirty-nine-year-old Slusser had admitted to the police that, between July 2, 2010 and September 24, 2010, he had had "vaginal sexual intercourse" with his stepdaughter "approximately four (4) times[,]" had "performed digital penetration on her approximately two (2) to three (3) times[,]" and had

"received oral sex" from her "approximately five (5) times." (Ex. Vol. at 12). The State also stated that Slusser's stepdaughter, who was at least fourteen years old but less than sixteen years old, had given a recorded statement, "indicating that she [had] lost her virginity to her stepfather[.]" (Ex. Vol. at 12). In her statement, Slusser's stepdaughter also "report[ed] that she had [had] sexual intercourse with [Slusser] on five (5) different occasions and [that] he had fingered her and [she had] given him oral sex on five (5) times as well." (Ex. Vol. at 12). Thereafter, Slusser's counsel noted that the charging "information, . . . as in most . . . cases of this nature[,] list[ed] a . . . period of time during which these events [had] occurred" and stated that Slusser was "conceding" that Slusser's offenses had "occurred on three (3) separate dates." (Ex. Vol. at 12-13). The State offered to "go into more details[,]" but the trial court stated that it was not necessary based on Slusser's concession. (Ex. Vol. at 13). Thereafter, Slusser acknowledged that he had engaged in the acts of sexual misconduct in various locations, including in his house and car. Slusser admitted that the factual basis as set forth by the State and his counsel was true, and he pled guilty to the three counts of sexual misconduct with a minor.

[7] For each of Slusser's convictions, the trial court imposed a ten (10) year sentence, with six (6) years executed and four (4) years suspended, and the trial court ordered these sentences to be served consecutively. Thus, the trial court imposed an aggregate sentence of thirty (30) years, with eighteen (18) years executed at the Indiana Department of Correction ("DOC") and twelve (12)

years suspended. In regard to Slusser's suspended sentence, the trial court placed Slusser on probation for ten (10) years.

[8] In 2019, Slusser finished serving his executed sentence and was released from the DOC to begin his probationary period. In December 2020, Slusser filed a motion to correct erroneous sentence under INDIANA CODE § 35-38-1-15. He alleged that his convictions violated double jeopardy under the Indiana Supreme Court's new double jeopardy analysis and asserted that such a double jeopardy violation precluded the trial court's imposition of consecutive sentences. Additionally, Slusser argued that the trial court's sentencing order had exceeded the terms of his plea agreement. The trial court held a hearing and then denied Slusser's motion in February 2021. Slusser did not appeal the trial court's order.

[9] In April 2021, Slusser filed a petition for post-conviction relief. He did not raise any claims of ineffective assistance of counsel. Instead, he raised the following freestanding claims challenging his sentence, convictions, and validity of his guilty plea: (1) his sentence was "contrary to the plea agreement" because the plea agreement had provided that he could receive only an aggregate sentence of twenty-two years; (2) his convictions violated double jeopardy under the Indiana Supreme Court's new double jeopardy analysis; and (3) his guilty plea "was not made knowingly and intelligently" because the trial court had not

properly advised him of his *Boykin*[3] rights prior to the entry of his guilty plea. (App. Vol. 2 at 17).

[10] The post-conviction court held a hearing in February 2022. During the hearing, Slusser did not present testimony from any witnesses. Slusser argued that: (1) his sentence was contrary to the plea agreement; (2) his three convictions violated double jeopardy and were improper based on the continuous crime doctrine; and (3) his guilty plea had not been knowingly or voluntarily entered.

[11] After Slusser's counsel finished presenting his argument, the State pointed out that Slusser had presented no evidence in support of his post-conviction petition. The State also pointed out that Slusser was presenting only argument and that Slusser's arguments were based on documents in the case file in Slusser's underlying cause, 48D01-1011-FB-720. The State informed the post-conviction court that it had copies of the relevant pleadings, plea agreement, orders, transcript of the guilty plea hearing, and transcript of the advisement-of-rights video that had been played for Slusser as part of the guilty plea hearing. The State indicated that it could either provide "each of these individually" or that it would ask the post-conviction court to "take judicial notice of the contents of its files." (Tr. 21).

[12] Slusser's counsel then interrupted the State and told the post-conviction court that he had "forgot[ten]" to ask the court to take judicial notice of Slusser's

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[3] *Boykin v. Alabama*, 395 U.S. 238 (Ind. 1969).

underlying cause. (Tr. 21). Slusser then made a motion to reopen the record, asked the post-conviction court to take judicial notice of Slusser's underlying cause, and introduced the transcript from his guilty plea hearing as an exhibit. The post-conviction court granted Slusser' motion to reopen the record over the State's objection. The post-conviction court also confirmed that it would take judicial notice of the underlying cause.

[13] During the post-conviction hearing, the State argued that, because Slusser had pleaded guilty, he had "very narrow parameters" of what he could raise to the court for post-conviction relief. (Tr. 25). The State also argued that Slusser had waived any of his freestanding post-conviction claims that he could have raised on direct appeal. Additionally, the State argued that Slusser's claim regarding an improper advisement of rights should fail because the transcript showed that Slusser had been advised of "all . . . constitutional protections[.]" (Tr. 26). Thereafter, the post-conviction court issued an order denying Slusser's petition for post-conviction relief.

[14] Slusser now appeals.

Decision

[15] Slusser argues that the post-conviction court erred by denying him post-conviction relief. Specifically, he contends that: (1) his sentence was contrary to the plea agreement; (2) his three convictions violated double jeopardy and were improper based on the continuous crime doctrine; and (3) his guilty plea had not been knowingly or voluntarily entered.

[16] “[P]ost-conviction proceedings do not grant a petitioner a “super-appeal” but are limited to those issues available under the Indiana Post-Conviction Rules.” *Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010), *trans. denied*. “In post-conviction proceedings, the petitioner bears the burden of establishing his claims by a preponderance of the evidence.” *Isom v. State*, 170 N.E.3d 623, 632 (Ind. 2021), *reh’g denied*. “Where, as here, the petitioner is appealing from a negative judgment denying post-conviction relief, he must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court’s decision. *Id.* (cleaned up). Furthermore, because neither party presented testimony at the evidentiary hearing, and the post-conviction court ruled on a paper record, we review the post-conviction court’s findings *de novo*. *Lee v. State*, 892 N.E.2d 1231, 1236-37 (Ind. 2008).

[17] We first address Slusser’s argument that the trial court erroneously imposed a sentence that was contrary to the plea agreement. He raises this as a freestanding claim and not in relation to a claim of ineffective assistance of counsel. Slusser contends that the trial court’s imposition of an aggregate thirty-year sentence was not within the terms of his plea agreement because the terms of his agreement “limited the aggregate sentence to a term of twenty-two (22) years[.]” (Slusser’s Br. 13).

[18] The State contends that Slusser has waived this freestanding claim challenging the duration of his sentence because the claim was “known and available to him at the time he could have filed a direct appeal.” (State’s Br. 31). We agree with the State.

[19] "Postconviction procedures do not afford a petitioner with a super-appeal, and not all issues are available." *Timberlake v. State*, 753 N.E.2d 591, 598 (Ind. 2001), *reh'g denied*, *cert. denied*. "The post-conviction procedures do not provide a petitioner with a[n] . . . opportunity to consider freestanding claims that the original trial court committed error." *Lambert v. State*, 743 N.E.2d 719, 726 (Ind. 2001), *reh'g denied*, *cert. denied*. "Rather, [i]n post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." *Myers v. State*, 33 N.E.3d 1077, 1115 (Ind. Ct. App. 2015) (cleaned up), *reh'g denied*, *trans. denied*. "As a general rule, . . . most free-standing claims of error are not available in a postconviction proceeding because of the doctrine[] of waiver[.]" *Timberlake*, 753 N.E.2d at 597-98. "If an issue was known and available, but not raised on direct appeal, it is waived." *Id.* at 597.

[20] Here, Slusser entered into a plea agreement in which he agreed to plead guilty to three counts of sexual misconduct with a minor in exchange for a sentence with a "cap of 22 years executed[.]" (App. Vol. 2 at 42). Slusser's plea agreement also provided, in relevant part, that Slusser "waive[d] the right to appeal any sentence imposed by the [trial] [c]ourt . . . so long as the [trial] [c]ourt sentence[d] [Slusser] within the terms of this plea agreement." (App. Vol. 2 at 43). Thus, Slusser agreed to forego a sentencing challenge on direct appeal only if the trial court had sentenced him within the terms of his plea

agreement. The trial court sentenced Slusser to an aggregate thirty-year sentence, with eighteen years executed and twelve years suspended.

[21] At the time Slusser was sentenced, he knew the sentence that the trial court had imposed, but he did not appeal it. Although Slusser's plea agreement contains an appellate-rights waiver provision, it also contains an exception to that waiver. Specifically, Slusser could have raised an appellate sentencing challenge if the trial court had failed to sentence him within the terms of his plea agreement. That is exactly the argument that he is currently raising in this post-conviction proceeding – a freestanding claim to argue that the trial court did not sentence him within the terms of his plea agreement. Because this issue was known and available, but not raised on direct appeal, it is waived. *See Timberlake*, 753 N.E.2d at 597.[4] Because the issue was not available for post-conviction relief, the post-conviction court did not err by denying relief on this claim.

[22] We next turn to Slusser's argument that his three convictions violated double jeopardy and were improper based on the continuous crime doctrine. Again, he raises this as a freestanding claim and not in relation to a claim of ineffective assistance of counsel. This claim was also not available for post-conviction relief because Slusser waived his right to challenge his convictions on double

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[4] Waiver notwithstanding, Slusser failed to show that the trial court's imposition of an aggregate thirty-year sentence, with eighteen years executed and twelve years suspended was outside the terms of the plea agreement, which allowed the trial court to impose a sentence with a cap of twenty-two years executed.

jeopardy grounds when he entered his plea agreement and pled guilty. "As a general rule, . . . a defendant with adequate counsel who pleads guilty to achieve favorable outcomes gives up a plethora of substantive claims and procedural rights, including the right to collaterally challenge convictions upon double jeopardy grounds." *Mays v. State,* 790 N.E.2d 1019, 1022 (Ind. Ct. App. 2003) (citing *Mapp v. State,* 770 N.E.2d 332, 334-35 (Ind. 2002)). When reaffirming this rule, our supreme court further explained that "there is no exception under Indiana law even for 'facially duplicative' charges." *Mapp*, 770 N.E.2d at 334.

[23] Here, Slusser has not demonstrated that he did not have the assistance of adequate counsel or that he did not achieve a favorable outcome as a result of the plea agreement.[5] Therefore, by pleading guilty, Slusser waived his right to directly challenge his convictions as violative of double jeopardy. Because the issue was not available for post-conviction relief, the post-conviction court did not err by denying relief on this claim.[6]

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[5] For the three Class B felony convictions, Slusser faced a potential maximum sentence of sixty years. *See* I.C. § 35-50-2-5(a). His plea agreement, however, provided a sentence with a cap of twenty-two years executed.

[6] Slusser also argues that his three convictions were improper based on the continuous crime doctrine, which is "a species of common law double jeopardy, the application of which is limited to situations where a defendant has been charged multiple times with the same continuous offense." *Keith v. State*, 127 N.E.3d 1221, 1230 (Ind. Ct. App. 2019) (citing *Hines v. State*, 30 N.E.3d 1216, 1219 (Ind. 2015)). "The continuous crime doctrine does not seek to reconcile the double jeopardy implications of two distinct chargeable crimes; rather, it defines those instances where a defendant's conduct amounts only to a single chargeable crime." *Hines*, 30 N.E.3d at 1219 (cleaned up). Slusser, by pleading guilty, has also waived his right to directly challenge his convictions on this basis.

[24] Lastly, we address Slusser's claim that his guilty plea had not been knowingly or voluntarily entered. Specifically, he contends that the trial court failed to properly advise him of his *Boykin* rights prior to his entry of his guilty plea.

[25] "In considering the voluntariness of a guilty plea we start with the standard that the record of the guilty plea proceeding must demonstrate that the defendant was advised of his constitutional rights and knowingly and voluntarily waived them." *Ponce v. State*, 9 N.E.3d 1265, 1270 (Ind. 2014) (cleaned up). "*Boykin* requires that a trial court accepting a guilty plea must be satisfied that an accused is aware of his right against self-incrimination, his right to trial by jury, and his right to confront his accusers." *Id.* (cleaned up). "The failure to advise a criminal defendant of his constitutional rights in accordance with *Boykin* prior to accepting a guilty plea will result in reversal of the conviction." *Id.* "Accordingly, a [petitioner] who demonstrates that the trial court failed to properly give a *Boykin* advisement during the guilty plea hearing has met his threshold burden for obtaining post-conviction relief." *Id.*

[26] However, even if a petitioner is able to meet that threshold burden, he is not "automatically entitled to post-conviction relief." *Id.* at 1272. Instead, the burden then shifts to the State, and the State may "obviate the necessity of vacating the plea" by showing that "the petitioner nonetheless knew that he was waiving such rights." Id. at 1273. For example, "where the record of the guilty plea hearing itself does not establish that a defendant was properly advised of and waived his rights, evidence outside of that record may be used to establish a defendant's understanding." *Id.* *See also Youngblood v. State*, 542 N.E.2d 188,

189 (Ind. 1989) (affirming the denial of post-conviction relief where no *Boykin* advisement had been given at the plea hearing but where trial counsel testified at the post-conviction hearing that they had explained these rights to defendant prior to the plea), *reh'g denied*.

[27] Slusser presented limited evidence on this claim during the post-conviction hearing. Initially, during the hearing, Slusser made only argument. Upon the State pointing out Slusser's complete lack of evidence to support his post-conviction petition, Slusser asked the post-conviction court to take judicial notice of his underlying cause. The court and the parties discussed various pleadings within that cause as well as the transcript of the guilty plea hearing and transcript of the advisement-of-rights video that had been played for Slusser as part of the guilty plea hearing. The post-conviction court agreed to take judicial notice of the underlying cause. Slusser introduced the transcript from his guilty plea hearing as an exhibit, but he did not introduce the transcript of the advisement-of- rights video. Thus, Slusser failed to present evidence to the post-conviction court to show the complete rights advisement he had received prior to the entry of his guilty plea.[7]

[28] Nevertheless, in its order denying post-conviction relief, the post-conviction court noted that when Slusser had appeared for his guilty plea hearing, the "rights advisement video [had been] played earlier in the hearing" and that

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[7] Moreover, we note that the advisement-of-rights transcript is not included in the record on appeal.

Slusser had informed the trial court that "he understood he was waiving his constitutional and legal rights by entering into his plea agreement." (App. Vol. 2 at 12-13). The post-conviction court also explained that "[i]n addition to the rights advisement video, [Slusser's] plea agreement in paragraph 5 also recite[d] that Slusser understood that he was waiving his right to a jury trial[,] right of confrontation[,] and [right to] requir[e] the State to prove his guilty beyond a reasonable doubt." (App. Vol. 2 at 13).

[29] Indeed, on appeal, Slusser does not contend that he was never advised of his *Boykin* rights. Instead, he seems to suggest that the timing and delivery method of those rights rendered his guilty plea involuntary. Slusser acknowledges that he was advised of those rights "prior to the guilty plea hearing . . . itself" and that the trial court "noted" those rights with Slusser "during the guilty plea proceeding." (Slusser's Br. 15). He contends, however, that "[t]he record itself reflects that those advisements were not given during the guilty plea hearing while the [trial] [c]ourt was addressing Slusser." (Slusser's Br. 15). Because Slusser acknowledges he received a relevant advisement of his rights and the record on appeal shows that he waived those rights before pleading guilty, we conclude that Slusser has failed to meet his burden of showing that his guilty plea had not been knowingly or voluntarily entered. Accordingly, we affirm the post-conviction court's denial of post-conviction relief to Slusser.

[30] Affirmed.

Bradford, J., and Kenworthy, J., concur.