MEMORANDUM DECISION

APPELLANT PRO SE

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ATTORNEYS FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

Angus J. Toney,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 21, 2023

Court of Appeals Case No. 22A-PC-3118

Appeal from the Wayne Superior Court

The Honorable Charles K. Todd, Jr., Judge

Trial Court Cause No. 89D01-1301-PC-3

Memorandum Decision by Judge Riley
Judges Bailey and Tavitas concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Angus J. Toney (Toney), appeals the post-conviction court's denial of his petition for post-conviction relief.

[2] We affirm.

ISSUES

[3] Toney presents this court with two issues, which we restate as:

(1) Whether the post-conviction court's conclusion that Toney received the effective assistance of Trial Counsel, who failed to object to the State's cross-examination of Toney at sentencing, was clearly erroneous; and

(2) Whether the post-conviction court's determination that Toney received the effective assistance of Appellate Counsel, who did not file a petition for transfer, was clearly erroneous.

FACTS AND PROCEDURAL HISTORY

[4] The facts pertaining to Toney's underlying convictions as determined by this court on direct appeal are as follows:

> On the evening of July 19, 2010, Toney and his accomplice, Chris Gregory ("Gregory"), entered into the home of G.R. while wearing bandanas over their faces. Once inside the home, Toney approached G.R., who was with her son C.R. Toney ordered C.R. to the floor and put his foot on the back of the boy's head. Toney put his knife to C.R.'s throat and told G.R. to "shut up" as he demanded her purse, money, and drugs. When she realized that she was still holding her mobile phone, G.R. attempted to dial 911. When Toney saw this, he grabbed G.R.'s

> hand, twisted the phone out of her hand, and threw the phone across the room. G.R. later testified that this caused her pain. G.R.'s other son heard his mother screaming and came downstairs with a baseball bat. He struck Toney in the head with the bat, causing Toney to bleed. Toney left and sought treatment at the hospital. Drops of Toney's blood were found at G.R.'s house. DNA evidence obtained from this blood was later determined to match Toney.

Toney v. State, 961 N.E.2d 57, 58 (Ind. Ct. App. 2012). On August 25, 2010, the State filed an Information, charging Toney with Class A felony burglary resulting in bodily injury and Class B felony robbery.

[5] Trial Counsel was appointed for Toney. On June 29, 2011, Toney pleaded guilty to Class B felony burglary and to Class B felony robbery but elected to proceed to a bench trial on the issue of whether the burglary resulted in bodily injury sufficient to elevate the offense to a Class A felony. After Toney established a factual basis for his plea, the trial court held a bench trial on the sole issue of bodily injury to G.R. The State's theory of the case was that when Toney grabbed and twisted her hand, G.R. experienced physical pain sufficient to qualify as 'bodily injury'. G.R. testified that she suffered from a bone degenerating form of cancer and that she experienced pain above and beyond what that condition caused her when Toney grabbed her cellphone from her hand. At the conclusion of the evidence, the trial court found Toney guilty of Class A felony burglary resulting in bodily injury.

[6] On August 1, 2011, the trial court held Toney's sentencing hearing. At the beginning of the hearing, Toney was sworn in, and he confirmed the accuracy

of his presentence investigation report. After Toney's sister provided testimony and was cross-examined by the State, Toney's counsel informed the court that Toney wished to allocute. The trial court inquired if Toney would be testifying or if he would make his allocution, and Trial Counsel confirmed that Toney would allocate. Toney then read a statement in which he discussed his remorse, his battle with drugs and alcohol, and his involvement in his three children's lives. While Toney was reading his statement, the following colloquy took place between the trial court and Trial Counsel:

> Court: [Trial Counsel], is this still allocution? It doesn't sound like it.
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> Trial Counsel: Okay, I'm sorry.
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> Court: And the only reason why I'm saying that, the big difference is he can be cross-examined on some things. . . . 'Cause allocution is just saying I'm sorry.
>
> Trial Counsel: And I have no issue . . . if the State wishes to cross-examine my client on these issues, but he wanted to make a statement to the [c]ourt.
>
> Court: And I . . . want him to say everything he wants, I just don't want to get into a catch bag where he's called it one thing and it may actually . . . be different.
>
> Trial Counsel: - fine if the State has anything that he wants to bring up with my client, that's fine.

(Trial Transcript Vol. I, pp. 82-83). Toney finished his statement, providing additional details about his interaction with his children, his work history when not incarcerated, and his goals for the future. The prosecutor then cross-examined Toney about the fact that he was on parole when he committed the

instant offense; the child support arrearage he had accumulated; the current living arrangements for his children; his long-term substance abuse; and the fact that he had used money to buy drugs when he could have paid child support.

[7] After hearing the arguments of the parties, the trial court found "the elephant in the room", Toney's criminal record, consisting of a juvenile adjudication for child molesting, eight adult misdemeanor convictions, including one committed while on parole and one committed while incarcerated for the present offenses, two felony convictions, six incarcerations, and two probation revocations, as an aggravating circumstance to which it attached "significant weight." (Trial Tr. Vol. I, pp. 104, 107). The trial court also found the facts that Toney was on parole when he committed new offenses, G.R. was a frail victim, and that G.R. was attempting to summon aid when Toney took her cellphone from her forcibly as additional aggravating circumstances. The trial court found Toney's remorse to be mitigating but discounted its importance due to Toney being more concerned with obtaining his share of the proceeds of the offenses than with his remorse immediately following the offenses and because of the brutality of the offenses. The trial court discounted the mitigating weight of Toney's drug and alcohol use due to his failure to take advantage of prior opportunities for treatment. The trial court accorded little weight to Toney's proffered mitigator of undue hardship to his dependents, due to the fact that even a minimum sentence in the instant case would mean his children would be almost adults by the time of his release and because Toney's pattern of incarcerations had meant that he had been largely absent from his children's

lives. The trial court also found Toney's guilty plea to be a mitigating factor. The trial court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Toney to forty years for the Class A felony burglary and to sixteen years for the Class B felony robbery, to be served concurrently. At the conclusion of the hearing, Toney indicated that he wished to appeal, and Appellate Counsel was appointed.

[8] On direct appeal, Toney raised one issue, namely, a challenge to the evidence supporting his conviction. Toney's argument was based on his interpretation of Indiana Code section 35-41-1-4 (2004) which defined 'bodily injury' as "any impairment of physical condition, including physical pain." Toney argued that his brief touch of G.R. that was used to elevate the burglary to a Class A felony did not qualify as bodily injury because requiring just a mere sensation of pain would read the term "impairment' out of the statute. On February 9, 2012, this court issued its opinion affirming Toney's conviction, holding that the statutory definition of bodily injury unambiguously required only a demonstration of physical pain and that it contained no requirement that the pain be of any particular severity or duration. *Toney*, 961 N.E.2d at 59. Another panel of this court rejected Toney's construction of the statute, concluding that "[b]y listing 'physical pain,' the statute itself includes physical pain–of any degree–in the definition of physical condition." *Id.*

[9] On February 9, 2012, Appellate Counsel sent Toney a letter, along with a copy of this court's decision affirming his conviction. In the letter, Appellate Counsel informed Toney of his options, including that he could seek transfer of

his case to the Indiana Supreme Court pursuant to Indiana Appellate Rule 56. Appellate Counsel advised Toney that he could not assist Toney, Toney had a thirty-day deadline to act, and that any action taken after the expiration of that deadline would not be addressed by the court. In the letter, Appellate Counsel stated

> [j]ust so you are aware, I am appointed as appellate legal counsel for the direct appeal of your case and I am appointed by the Wayne County Courts and paid by Wayne County, Indiana. I am not appointed to assist you with any further proceedings beyond the direct appeal. . . . With this letter, my representation and abilities to assist you in this case are now concluded.

(Trial Exh. Vol. I, pp. 4-5). No petition for transfer of this court's February 9, 2012, decision was filed.

[10] On January 18, 2013, Toney filed a petition for post-conviction relief, which he amended on July 14, 2022. Toney contended that Trial Counsel rendered ineffective assistance when she failed to object to the State's cross-examination of him at sentencing and that Appellate Counsel was ineffective for failing to seek transfer of his case to the Indiana Supreme Court.[1] On August 17, 2022, the post-conviction court held a hearing on Toney's petition. Trial Counsel testified that she did not have a strategic reason for failing to object to the State cross-examining Toney at sentencing. Appellate Counsel related that he

[1] Toney raised a third post-conviction claim pertaining to Trial Counsel's failure to procure G.R.'s medical records for trial, but he concedes on appeal that the claim was without merit.

receives a flat fee for his services and that the fee only covers the filing of an appellant's brief and a wrap up letter after the direct appeal is decided but does not include anything related to subsequent filings in the Indiana Supreme Court. Toney testified that he received a copy of the adverse direct appeal opinion and Appellate Counsel's letter, but he did not testify that he had failed to understand its contents or that he did not receive notice of the adverse direct appeal opinion in time to seek transfer.

[11] On December 1, 2022, the post-conviction court entered its Order denying relief. The post-conviction court entered the following relevant findings:

> 18. [Appellate Counsel] testified about his role . . . , including his normal practice of sending a letter and copy of the appellate court decision to a client on the day it is received. The letter . . . sets forth the procedure for [Toney] to seek transfer of his case to the Indiana Supreme Court. The letter also informed [Toney] that [Appellate Counsel's] role was only to represent him on direct appeal to the Indiana [Court of Appeals]. Further, there is no evidence presented that [Toney] attempted to notify [Appellate Counsel] of any desire to seek transfer or to advise the [c]ourt of the same. Additionally, there is no evidence that [Toney] sought transfer or attempted to seek transfer to the Indiana Supreme Court.
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> 25. As to [Toney's] first contention that [T]rial [C]ounsel was ineffective for failing to object when the State was permitted to cross-examine [Toney] during allocution, . . . [Toney] has failed to show that counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms and importantly that counsel's

> performance prejudiced [Toney] to a degree that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.
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> 26. It is noteworthy that [Toney] presented no evidence as to whether other information to be considered by the [c]ourt did or did not contain any of the information contained in the question and answer exchange between the State and [Toney].
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> * * * *
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> 29. As to [Toney's] third contention regarding ineffective [A]ppellate [C]ounsel for failing to seek transfer to the Indiana Supreme Court, the burden is the same. . . . [Appellate Counsel] testified that he sent a copy of the appellate decision and a letter to [Toney], with the letter actually being sent on the date the decision was rendered. Said letter details the deadline and process for seeking transfer. . . . The [c]ourt does not find [A]ppellate [C]ounsel's performance deficient.

(Appellant's App. Vol. II, pp. 65-67). The post-conviction court also concluded that Toney had failed to establish that he had been prejudiced as a result of Appellate Counsel's performance because he had failed to demonstrate a reasonable probability that transfer would have been granted had it been sought.

[12] Toney now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[13] Toney appeals following the post-conviction court's denial of his petition for post-conviction relief. Petitions for post-conviction relief are civil proceedings in which a petitioner may present limited collateral challenges to a criminal conviction and sentence. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018). In such a proceeding, the petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id*. When a petitioner appeals from the denial of his petition for post-conviction relief, he stands in the position of one appealing from a negative judgment. *Hollowell v. State*, 19 N.E.3d 263, 269 (Ind. 2014). To prevail on appeal from the denial of post-conviction relief, 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." *Id.* In addition, where a post-conviction court enters findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to its legal conclusions, but we will reverse its findings and judgment only upon a showing of clear error, meaning error which leaves us with a definite and firm conviction that a mistake has been made. *Id*.

II. *Trial Counsel*

[14] Toney argues that Trial Counsel's performance at his sentencing hearing was ineffective. We evaluate ineffective assistance of trial counsel claims under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, a defendant must show that 1) his counsel's

performance was deficient based on prevailing professional norms; and 2) that the deficient performance prejudiced the defense. *Weisheit,* 109 N.E.3d at 983 (citing *Strickland*, 466 U.S. at 687). To establish that counsel's performance was deficient, a petitioner must show that counsel's actions were unreasonable under prevailing professional norms. *Id*. In evaluating this element on appeal, we afford considerable deference to counsel's choice of tactics and strategy. *Id*. In order to demonstrate sufficient prejudice, the defendant must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id*. A defendant's failure to satisfy either the 'performance' or the 'prejudice' prong of a *Strickland* analysis will cause an ineffective assistance of counsel claim to fail. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006).

[15] Toney's specific claim of Trial Counsel ineffectiveness is that counsel failed to object when the State was allowed to cross-examine him during his allocution. The "right of allocution" is the opportunity provided to criminal defendants to offer a statement on their own behalf prior to sentencing. *Biddinger v. State*, 868 N.E.2d 407, 410 (Ind. 2007). This right is codified at Indiana Code section 35-38-1-5(a), which provides in relevant part that "[t]he defendant may also make a statement personally in the defendant's own behalf[.]" The purpose of allocution is to provide the trial court with the opportunity to consider "the facts and circumstances relevant to the sentencing of the defendant in the case before it" and for the defendant "to articulate reasons as to why judgment

should not be imposed at that time." *Ross v. State*, 676 N.E.2d 339, 343-44 (Ind. 1996). Allocution is not evidence, and a defendant is not subject to cross-examination upon his or her statement. *Biddinger*, 868 N.E.2d at 413.

[16] In *Ross*, the defendant, who had murdered his ex-wife, exercised his right to allocution at sentencing by reading a prepared statement into the record about his family and his personal history. *Ross*, 676 N.E.2d at 342. After several minutes, the trial court interrupted Ross and admonished him that the purpose of his allocution was to inform the trial court of "anything that he would like to tell me in his own behalf" and not to detail his entire family history. *Id*. After a break, Ross' counsel objected to the limitation on Ross' allocution and had the remainder of Ross' written statement entered into the record. The trial court repeated its admonishment to Ross, who then completed his oral statement in which he touched upon, among other topics, his lack of criminal record, his children and his remorse for the pain they were experiencing, his pain, his character, how he would miss his victim and his children if sent to prison, his remorse for violating a restraining order his ex-wife held against him, and why he thought it was important for the trial court to examine his life before the murder. *Id*. After the trial court sentenced Ross to sixty years, he appealed, arguing that the trial court had erred in restricting his allocution. *Id*. Our highest court disagreed, holding that, while a trial court should exercise caution about restricting allocution, in Ross' case "[t]he court was acting within its discretion when it stopped Ross and told him to direct his statement toward the proper purpose." *Id*. at 344. The *Ross* court also observed that there are

boundaries to the scope of permissible allocution and that it is not an opportunity for the defendant to deliver a diatribe against the judge, the court, or the judicial system or to speak on philosophical, religious, or political issues. *Id*.

[17] Here, although Toney never delivered an impermissible diatribe or spoke about abstract issues, at times his allocution strayed from the topics of the facts and circumstances of his case and any reason why judgment should have been withheld in his case. Therefore, in light of *Ross*, the trial court could have, within its discretion, directed Toney to guide his statement towards its proper purpose. *See id*. However, Toney, through his counsel, had signaled before Toney began speaking that he intended to make his personal statement and not to testify, and we discern nothing in Toney's statement which altered that purpose or that somehow transformed his statement into testimony that would have been subject to cross-examination.[2] At the post-conviction hearing, Trial Counsel was unable to enunciate any tactical reason for her failure to object to the State's cross-examination. Therefore, we conclude that if Trial Counsel had properly objected to the State being allowed to cross-examine Toney, that objection would have been sustained, and, therefore, that Trial Counsel's

[2] The trial court did not express any concern that Toney was in danger of incriminating himself during his allocution.

failure to object constituted deficient performance.[3] *See Isom v. State*, 170 N.E.3d 623, 642-43 (Ind. 2021) (holding that in order to prove deficient performance for failing to object, a petitioner must show that the trial court would have sustained counsel's objection).

[18] However, in order to obtain a reversal of the trial court's sentencing order, Toney must also demonstrate that he was prejudiced by Trial Counsel's deficient performance. *Weisheit,* 109 N.E.3d at 983. Toney's claim of prejudice on this issue is that "the State was able to create rebuttal evidence for the trial court to consider during [his] sentencing." (Appellant's Br. p. 13). On appeal, Toney does not even attempt to meet his burden to demonstrate that there was a reasonable probability that the trial court's sentencing order would have been different had the State not been allowed to cross-examine him. *See Weisheit,* 109 N.E.3d at 983. Indeed, a comparison of the State's cross-examination and the trial court's sentencing statement confirms that when finding and weighing the aggravating and mitigating circumstances the trial court did not rely on any fact contained in the State's cross-examination of Toney that was not already before the trial court in Toney's presentence investigation report. Therefore, although we have found Trial Counsel's performance to be deficient, we affirm the post-conviction court's denial of relief on this issue because Toney has failed to establish that the post-conviction court's findings of fact or its conclusion that

[3] Given our conclusion, we do not address Toney's argument that Trial Counsel's performance was deficient because any evidence produced during the State's cross-examination was inadmissible under Indiana Evidence Rule 410.

Toney had failed to demonstrate that he was prejudiced by Trial Counsel's performance were clearly erroneous. *Hollowell*, 19 N.E.3d at 269; *see also Taylor*, 840 N.E.2d at 331 (failure to demonstrate prejudice is fatal to a claim of post-conviction relief).

III. *Appellate Counsel*

[19] Toney next contends that Appellate Counsel was ineffective for failing to seek transfer of his case to the Indiana Supreme Court. We also evaluate ineffective assistance of appellate counsel claims under the two-part test articulated in *Strickland*. *Hollowell*, 19 N.E.3d at 269. To prevail on such a claim, a petitioner must show that 1) his counsel's performance was deficient based on prevailing professional norms; and 2) that the deficient performance prejudiced the defense. *Weisheit*, 109 N.E.3d at 983 (citing *Strickland*, 466 U.S. at 687).

[20] As to the performance prong of our inquiry, we do not reach any substantive analysis of Appellate Counsel's failure to file a petition for transfer because we conclude that Appellate Counsel had no duty to do so in this case. Appellate Counsel was contractually obligated to pursue a direct appeal of Toney's criminal convictions and sentencing, which Appellate Counsel did. The scope of Appellate Counsel's representation did not encompass the filing of a petition for transfer, something of which he informed Toney in a timely manner through his February 9, 2012, letter forwarding the adverse direct appeal decision, along with information about the applicable appellate rules and deadlines for filing. There is no evidence that Toney failed to receive the letter in time to seek transfer or that he failed to understand the information contained in Appellate

Counsel's letter. Toney did not seek to file a pro se petition for transfer, nor did he inform the trial court of his desire to seek transfer. On appeal, Toney offers no binding legal precedent indicating that an appellate counsel whose scope of representation does not include the filing of a petition for transfer renders deficient performance for failing to seek transfer, and we are aware of none.

[21] In addition, Toney has failed to demonstrate that he was prejudiced by Appellate Counsel's failure to seek transfer by showing that "but for his counsel's unprofessional errors, the result of the proceeding would have been different." *Weisheit,* 109 N.E.3d at 983. In this context, Toney was obligated to establish that, had Appellate Counsel sought transfer, it would have been granted. Toney's only effort to do so is to argue that two years after his conviction for Class A felony burglary resulting in bodily injury, our Legislature revised the offense to a Level 3 felony. However, any reclassification of the felony level of the offense did not alter the statutory definition of 'bodily injury' to bring it in line with Toney's proffered construction. We must also reject Toney's claim that he was prejudiced by Appellate Counsel's failure to seek transfer because his failure to exhaust all state court remedies resulted in the waiver of his right to request federal habeas corpus relief on his 'bodily injury' claim. Toney may yet seek transfer from this court's affirmance of the post-conviction court's denial of relief, thus placing the 'bodily injury' issue before the Indiana Supreme Court for purposes of federal habeas corpus exhaustion requirements. *See Clemons v. State*, 967 N.E.2d 514, 521-22 (Ind. Ct. App. 2012) (on appeal from the denial of post-conviction relief, rejecting Clemons' similar

claim of prejudice that his appellate counsel's failure to seek transfer resulted in his loss of the opportunity to seek habeas corpus relief), *trans. denied*, *cert. denied*. Accordingly, Toney has failed to demonstrate that the post-conviction court's rejection of his ineffective assistance of Appellate Counsel claims was clearly erroneous. *Hollowell*, 19 N.E.3d at 269.

CONCLUSION

[22] Based on the foregoing, we hold that the post-conviction court's denial of Toney's claims of ineffective assistance of Trial Counsel and Appellate Counsel was not clearly erroneous.

[23] Affirmed.

[24] Bailey, J. and Tavitas, J. concur