MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Stephen R. Harvey, Jr.,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 20, 2022

Court of Appeals Case No.
22A-PC-1481

Appeal from the
Allen Superior Court

The Honorable
Frances C. Gull, Judge

Trial Court Case No.
02D04-1308-PC-202

Friedlander, Senior Judge.

[1] Stephen Harvey appeals the post-conviction court's denial of relief, claiming that his trial counsel's assistance was ineffective due to counsel's failure to investigate and present certain mitigating evidence at his sentencing hearing. Concluding there is no reasonable probability that, but for the alleged error, Harvey would have received a different sentence, we affirm the determination of the post-conviction court.

[2] In July 2003, Harvey participated in an armed robbery of a toy store and its employees as well as confinement of the employees. Two years later Harvey pleaded guilty to Class B felony robbery and Class B felony criminal confinement and admitted to being an habitual offender. After Harvey's plea was entered, his trial counsel withdrew, and new counsel was appointed for sentencing.

[3] The trial court sentenced Harvey to twenty years for robbery enhanced by twenty years for the habitual offender determination and ten years for confinement. The court ordered the terms to be served consecutively for an aggregate sentence of fifty years. Thereafter, Harvey filed several pro se motions challenging the validity of his sentence, each of which was denied by the trial court. Two of those denials were brought to this Court and upheld. *See Harvey v. State*, No. 02A04-1201-CR-43, 2012 WL 2574741 (Ind. Ct. App. July 3, 2012), *trans. denied*; *Harvey v. State*, No. 02A03-1302-CR-44, 2013 WL 4860102 (Ind. Ct. App. Sept. 12, 2013). Harvey then filed a pro se petition for post-conviction relief, which was later amended. Following a hearing, the court denied Harvey's petition. Harvey now appeals.

[4] On appeal from the denial of post-conviction relief, the petitioner is in the position of appealing from a negative judgment and thus faces the rigorous burden of showing that the evidence, as a whole, leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Harris v. State*, 762 N.E.2d 163 (Ind. Ct. App. 2002), *trans. denied*. A post-conviction court's findings 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, and no deference is accorded to conclusions of law. *Kistler v. State*, 936 N.E.2d 1258 (Ind. Ct. App. 2010), *trans. denied* (2011). The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Witt v. State*, 938 N.E.2d 1193 (Ind. Ct. App. 2010), *trans. denied* (2011).

[5] Harvey alleges ineffective assistance of his sentencing counsel. To prevail on a claim of ineffective assistance of counsel, a defendant is required to establish both (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defendant. *Johnson v. State*, 948 N.E.2d 331 (Ind. 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687-96, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To satisfy the first element, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's errors were so serious that the defendant was denied the counsel guaranteed by the Sixth Amendment. *Bethea v. State*, 983 N.E.2d 1134 (Ind. 2013). In order to satisfy the second element of prejudice, the defendant must show there is a reasonable probability that, but for counsel's

errors, the result of the proceeding would have been different. *Id.* There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *Harris*, 762 N.E.2d 163. The defendant has the burden of overcoming this presumption. *Id.*

[6] Failure to satisfy either element of the two-part test will cause the defendant's claim to fail. *Henley v. State*, 881 N.E.2d 639 (Ind. 2008). Accordingly, if we can easily dismiss an ineffective assistance claim based upon the prejudice element, we may do so without addressing whether counsel's performance was deficient. *Id*. "Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *Id.*

[7] At Harvey's sentencing hearing, defense counsel began by asking Harvey: "[I]s there anything regarding your sentencing that I have failed to do or still remain open to do to your knowledge?" Ex. 2, p. 37 (Tr. Sent. Hrg.). Harvey responded, "No." *Id.* Counsel then advanced the mitigators of acceptance of responsibility by pleading guilty, difficult childhood, and assistance to authorities, and Harvey presented an extensive allocution to the court. Before declaring Harvey's sentence, Judge Gull stated that she accepted his plea and his attempts to cooperate as mitigating circumstances. She also accepted his difficult childhood as a mitigator but gave it less weight. Judge Gull found Harvey's criminal history to be an aggravating circumstance that outweighed the mitigating factors, specifically noting the fact that he was out on bond for

charges of robbery, confinement, and carrying a handgun without a license when these offenses were committed.

[8] At the hearing on Harvey's post-conviction petition, defense counsel introduced the affidavit of Frances Touhey, Harvey's former teacher, with some of Harvey's school records attached. Touhey reported that Harvey was in her special education classes from 1983 to 1987 and that his full scale IQ was 71, which is considered low borderline. Ex. 5, p. 130. She also reported that it was determined that his behavior had the largest impact on his ability to be successful in school rather than his level of intellectual functioning. *Id.* Touhey further stated:

> One would not be able to tell from talking with Mr. Harvey that he was low borderline because he would try to fit in. I suspect in addition to low borderline intellectual functioning, he also possib[ly] suffered from Attention Deficit Hyperactivity Disorder. I recall being aware of various symptoms consistent with this diagnosis. As is consistent with this disorder, Mr. Harvey was also very articulate. . . . He was also a follower. His low I.Q. made him vulnerable to other people's influences.

Id. at 131.

[9] Additionally, counsel questioned Harvey's trial counsel as to her use of such information at sentencing had she remained Harvey's attorney. Trial counsel testified that, "based upon the knowledge that there was a learning disability," "had I had that information, I probably would have done more than just present that information to the sentencing judge . . . I would have gone to look

for witnesses, you know, maybe more records." Tr. p. 10. Further, Harvey introduced the affidavit of his sentencing counsel, which stated that counsel had not contacted the school corporation, had not seen the Touhey affidavit or the attached school records before, and could provide no reason that he would not have presented such documents at sentencing if he had been aware of them.

[10] In addition to sentencing Harvey, Judge Gull also heard Harvey's post-conviction petition. In her findings of fact and conclusions of law, Judge Gull summarized her finding of mitigators and aggravators at sentencing. She also noted that, although the State had alleged that Harvey was the ringleader and planner of these offenses and others, she rejected that aggravator as well as the State's request for a seventy-year sentence. Finally, in denying Harvey's request for relief, Judge Gull referenced Touhey's report of Harvey's low IQ and alleged vulnerability and stated:

> Certainly the Court did not think him intellectually disabled, and his extensive allocution nowhere suggests that he was a mere follower in committing the crimes or was too unintelligent to initiate and plan them.
>
> . . . .
>
> The evidence of Petitioner's poor performance in IQ testing and in school, 16 to 20 years before he committed the offenses in this case, has no tendency to establish that he lacked the intelligence or initiative to be at least an equal participant in those offenses.

Appellant's App. Vol II, p. 106 (Conclusions of Law ¶¶ 4, 5).

[11] We are not persuaded that the trial court would have imposed a different sentence had the evidence of Harvey's IQ been proffered as a mitigator. Simply because Harvey offered it does not mean the court would have given it significant weight or any weight at all. *See Page v. State*, 878 N.E.2d 404 (Ind. Ct. App. 2007) (stating that finding of mitigating circumstances is within discretion of court such that court is not obligated to accept defendant's arguments as to what constitutes mitigating factor), *trans. denied* (2008). First, Touhey's observations were from 1983-1987 when Harvey was between the ages of eight and twelve, and he committed these offenses in 2003 when he was twenty-eight years old. Second, Harvey presented no evidence of how his level of intellectual functioning affected his ability to control his behavior or impair his ability to function. Third, he failed to present evidence establishing a nexus between the offenses and his intellect or vulnerability. Simply put, Harvey presented no evidence that his intellect level had any nexus to his offenses or culpability.

[12] Further, Harvey's behavior and statements in court suggest the opposite of limited intellect. Indeed, during Harvey's extensive allocution at sentencing, Judge Gull commented that Harvey "has always been quite eloquent and articulate and intelligent in his comments to the court and his discussions with the court throughout the course of the proceedings." Ex. 2, p. 92 (Tr. Sent. Hrg.). The judge recalled and quoted these comments in her order on Harvey's post-conviction petition. *See* Appellant's App. Vol II, p. 103 (Findings of Fact ¶

7). Thus, the weight attributable to this mitigator, if any, would have been extremely low under the circumstances.

[13] Moreover, as the sentencing judge as well as the post-conviction judge, Judge Gull was in the best position to assess Harvey's claim. Accordingly, her findings and judgment are entitled to greater than usual deference by this Court. *See McCullough v. State*, 973 N.E.2d 62 (Ind. Ct. App. 2012) (noting that because same judge presided at both original trial and post-conviction hearing, judge was uniquely situated to assess counsel's performance and post-conviction judgment should be entitled to greater than normal deference), *trans. denied* (2013). Here, Judge Gull specifically concluded:

> Ms. Touhey's evidence, if presented, would not have resulted in a finding that Petitioner's role in the crimes was a mitigating factor. Still less would this evidence have tended to establish that Petitioner's criminal history amounted to "finding himself involved in crimes directed by others[,]" in the absence of actual evidence that any other person directed any crime of which Petitioner was convicted.
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> . . . .
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> The Court would have given no significant mitigating weight to such evidence had it been presented, and there is no reasonable probability that Petitioner would have received a shorter sentence in that event.

Appellant's App. Vol II, p. 106 (Conclusions of Law ¶¶ 4, 5).

[14] Harvey has a significant criminal history, including his admission to being an habitual offender, that the court determined to be an aggravating circumstance

that outweighed several mitigators. Additionally, there is no evidence showing a connection between his intellectual functioning and his offenses. Under these facts and circumstances, Harvey has not established that he was prejudiced. *Cf. McCarty v. State*, 802 N.E.2d 959 (Ind. Ct. App. 2004) (holding counsel provided ineffective assistance by failing to investigate and present numerous potentially mitigating circumstances at sentencing, including defendant's mental retardation), *trans. denied*.

[15] Harvey failed to demonstrate that, but for counsel's alleged error, he would have received a more lenient sentence. Accordingly, the post-conviction court did not clearly err in denying his petition for post-conviction relief.

[16] Judgment affirmed.

Riley, J., and May, J., concur.