MEMORANDUM DECISION

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IN THE

COURT OF APPEALS OF INDIANA

Paul Veal,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

June 27, 2023

Court of Appeals Case No. 22A-PC-2379

Appeal from the Marion Superior Court

The Honorable Grant W. Hawkins, Judge

Trial Court Cause No. 49D31-1703-PC-11985

Memorandum Decision by Chief Judge Altice
Judges Riley and Pyle concur.

Altice, Chief Judge.

Case Summary

[1] Paul Veal appeals from the post-conviction court's denial of his petition for post-conviction relief. Veal presents three issues for our review:

> 1. Was trial counsel ineffective for failing to object to testimony from the victim's family about their sentencing recommendations during the sentencing hearing?
>
> 2. Was appellate counsel ineffective for failing to
>
> > A. challenge Veal's sentence as manifestly unreasonable?
> >
> > B. challenge the admission of the victim's family's sentencing recommendations?
>
> 3. Is Veal's sentence disproportionate?

[2] We affirm.

Facts & Procedural History

[3] Our Supreme Court set out the facts in Veal's direct appeal as follows:

> Late on the night of May 15, 1998, Veal, armed with a handgun, went alone to the apartment of Candace Tyler. By his own account, he first shot Tyler in the face, then raped her and finally killed her with a shot to the back of the head in order to prevent her from identifying him. At some point, he also shot and killed Tyler's dog.

Veal v. State, 784 N.E.2d 490, 492 (Ind. 2003). Veal was twenty years old when he murdered nineteen-year-old Tyler.

[4] Veal pleaded guilty to murder, rape, criminal confinement, and animal cruelty, and in exchange, the State agreed to withdraw its petition for the death penalty. The plea agreement contained the following sentencing provision:

> At the time of the taking of the guilty plea and again at the time of [Veal]'s sentencing, the State reserves the right to question witnesses and comment on any evidence presented upon which the Court may rely to determine the sentence to be imposed; to present testimony or statements from the victim(s) or victim representative(s); and at the time of sentencing will make the following recommendation as to the sentence to be imposed: the State will file an amended petition for a sentence for Life Without Parole. The State agrees that at sentencing herein, the parties are free to present evidence in support of, and argue, a sentence in a range from a minimum eighty-five (85) years to a sentence of life without parole. The State will argue for life without parole.

Appellant's Appendix Vol. II at 92.

[5] Following a two-day sentencing hearing, the trial court sentenced Veal to life without parole (LWOP) on the murder charge and maximum sentences of one year on the cruelty to an animal charge, fifty years for rape, and twenty years for criminal confinement, all to run consecutively. Veal appealed his sentence to the Indiana Supreme Court. *Veal v. State*, 784 N.E.2d 490 (Ind. 2003). On direct appeal, Veal challenged his sentence on the grounds that the trial court erred in considering victim impact evidence and improperly found statutory mitigating circumstances to be aggravating. The Supreme Court affirmed Veal's sentence.

[6] Veal filed his petition for post-conviction relief on March 31, 2017. He amended his petition on January 2, 2019. The post-conviction court granted Veal's petition in part and denied it in part on September 12, 2022. Specifically, the court found that trial and appellate counsel were ineffective for failing to challenge Veal's sentence on the basis that the plea agreement did not permit his sentences for rape, criminal confinement, and cruelty to an animal to be served consecutively to his sentence for murder. The post-conviction court directed the trial court to issue "an amended abstract of judgment to reflect that the aggregate consecutive sentences for rape, criminal confinement, and cruelty to animals are unchanged except that they are ordered to be served concurrently with the [LWOP] sentence for murder." *PCR Appendix* at 69. In all other respects, the post-conviction court denied Veal's petition. Veal now appeals. Additional facts will be provided as needed.

Discussion & Decision

Standard of Review

[7] Post-conviction proceedings are civil proceedings in which a petitioner may present limited collateral challenges to a conviction and sentence. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). The petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id*.

[8] On appeal from the denial of post-conviction relief, the petitioner "faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-

conviction court." *Jent v. State*, 120 N.E.3d 290, 92-93 (Ind. Ct. App. 2019), *trans. denied*. We accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. *Id*. The petitioner must convince us that there is "no way within the law that the court below could have reached the decision it did." *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018) (quoting *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002)), *reh'g denied* (2019), *cert. denied*, 139 S. Ct. 2749 (2019)); *see also Garrett v. State*, 992 N.E.2d 710, 718 (Ind. 2013) ("To prevail from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.").

1. Ineffective Assistance of Trial Counsel

[9] 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.

[10] 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).

[11] Veal argues that the post-conviction court erred in concluding that trial counsel was not ineffective for failing to object "to the victim's family giving their sentencing recommendations" during the sentencing hearing.[1] *Appellant's Brief* at 18. Specifically, he maintains that counsel should have objected to testimony from the victim's family that he should be sentenced to LWOP.[2]

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[1] Veal refers to the hearing as a "penalty phase" hearing. *Appellant's Brief* at 18. In its decision on direct appeal, our Supreme Court referred to the hearing as a "sentencing hearing." *Veal*, 784 N.E.2d at 493.

[2] Wilma Reed-Strozier, Tyler's aunt, testified:

> I have never wanted the death penalty for anybody. I always thought that killing someone for killing someone else was exactly the same thing. Being a murderer. But I don't think my family wants vengeance or revenge – we want justice. And if justice means that Paul Veal should sit in jail for the rest of his natural life – then I think that is justice. I think that Candace begged for mercy – and he showed her none. I think by the same token, he should get no mercy. No mercy.

Transcript Vol. I at 93. Paul Walker, Tyler's stepfather, testified:

> If the best he can get is life without parole – we'll take that. I've always been supportive of the death penalty prior to this. If you do things like that to somebody, you deserve to have it done to you. . . . You deserve to have the same thing done to you. We – there has to be a message

[12] We note before Veal's sentencing hearing, the State filed a memorandum of law in support of introducing victim-impact testimony and specifically noted that such testimony would include recommendations as to an appropriate sentence. At the start of the sentencing hearing, Veal's trial counsel, citing *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994),[3] objected to "any such evidence." *Transcript Vol. I* at 38. The trial court overruled the objection "for the purpose of this hearing," but noted that "[i]f we were in a trial situation, I think it would be different."[4] *Id*. at 39.

[13] We first observe that contrary to his argument, Veal's trial counsel did object to the victim-impact testimony. Indeed, on direct appeal, our Supreme Court noted Veal's objection at the sentencing hearing to the testimony of Tyler's maternal aunt, stepfather, and mother about "the niece and daughter they had lost, the effect of the crime on them, *and their own recommendations regarding*

> sent to people that would do this. . . . I feel like now that I'm letting [Candace] down. [I]f the best we can get for him is life with no parole, then we'll take that.

Id. at 100. When asked for her sentencing recommendation, Jeanette Walker, Tyler's mother, testified:

> He should get life. He should get life. He should never ever walk the streets again. He should not be allowed to see anything but the sky. He shouldn't be able to do this to another person – to another family – to another community. Life with no parole.

Id. at 107.

[3] In *Bivins*, the Supreme Court held that to be admissible in a death penalty case, victim impact evidence "must be relevant to an issue properly before the jury or court." 642 N.E.2d at 956. In other words, "the admissibility of victim impact evidence . . . hinges upon its relevance to the death penalty statute's aggravating and mitigating circumstances." *Id*. at 957.

[4] The Supreme Court agreed with the trial court's assessment that such testimony "would have been inadmissible at the penalty phase of an LWOP trial because the testimony of Tyler's family related solely to the consequences of this crime and was irrelevant to the sole charged aggravator." *Veal*, 784 N.E.2d at 493.

Veal's sentence." *Veal*, 784 N.E.2d at 492-93 (emphasis supplied). The Court continued:

> However, this testimony was offered in a sentencing hearing, in which Veal was sentenced for both the murder and the other counts. Although the family's opinions are not statutory aggravating factors under [Ind. Code] section 35-38-1-7.1(b), they are permissible under subsection (a)(6) as to those counts. I.C. § 35-38-1-7.1(b) and (a)(6) (2002); *Loveless v. State*, 642 N.E.2d 974, 978 (Ind. 1994) (expressly approving victim impact testimony from the victim's family). There is a presumption that a court in any proceeding that is tried before the bench rather than before a jury "renders its decision solely on the basis of relevant and probative evidence." *Coleman v. State*, 558 N.E.2d 1059, 1062 (Ind. 1990). The same is true of a sentencing hearing.

Id. The Court also noted that in the sentencing order, the trial court relied only on statutory factors in determining eligibility for LWOP, specifically finding that Veal murdered the victim while committing or attempting to commit rape. *See* Ind. Code § 35-50-2-9(b)(1)(F) (an intentional killing in the course of a felony, i.e., rape, is an aggravating circumstance supporting imposition of LWOP). The Court found "no indication in the order that the trial court considered the victim impact testimony in making its determination on this point." *Id*. Thus, to the extent Veal's argument is based on *Bivins*, our Supreme Court rejected such argument on direct review.

[14] Veal also suggests that his trial counsel should have relied on the Eighth Amendment as part of his objection to the victim impact testimony and directs us to *Booth v. Maryland*, 482 U.S. 496 (1987), in which the United States

Supreme Court held that the Eighth Amendment prohibited a capital sentencing jury from considering victim impact evidence. We find Veal's reliance on *Booth* unavailing.

[15] First, the holding in *Booth* applied to a proceeding where a jury was deciding between life and death. Here, Veal was sentenced by a judge. Second, by the time of Veal's sentencing hearing, *Booth* had been expressly overruled in part. *See Payne v. Tennessee*, 501 U.S. 808 (1991) (holding that the Eighth Amendment did not prohibit a capital sentencing jury from considering victim impact evidence during a capital sentencing hearing). In any event, at his sentencing hearing, Veal was no longer facing the death penalty as he had pled guilty to murder, rape, criminal confinement, and cruelty to an animal and agreed to be sentenced by the judge within a range of eighty-five years to LWOP. Veal has failed to establish that had trial counsel relied on the Eighth Amendment as part of the objection to victim impact testimony such objection would have been successful. *See Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001) (holding that trial counsel's performance is not deficient where he does not raise an objection that would not have been successful).

[16] Citing I.C. § 35-50-2-9(e), Veal suggests that the "proper procedure" would have been to allow the victim's family to speak after the trial court made its decision whether to impose LWOP. *Appellant's Brief* at 20. That statute provides that victim impact statements may be presented "[a]fter a court pronounces sentence" of either the death penalty or LWOP. However, it expressly applies to "defendants sentenced after June 30, 2002." Veal was

sentenced in September of 2000. At that time, victims had a "right to be heard at any proceeding involving sentencing." Ind. Code § 35-40-5-5. While victim impact statements could not be used as aggravating or mitigating circumstances, they were "acceptable considerations" to assist the trial court in "determining what sentence to impose for a crime." *Edgecomb v. State*, 673 N.E.2d 1185, 1199 (Ind. 1996) (citing I.C. § 35-38-7-7.1(a)). We will not deem counsel to have provided ineffective assistance for failing to anticipate a change in the law. *See Overstreet v. State*, 877 N.E.2d 144, 161-62 (Ind. 2007) (citing *Harrison v. State*, 707 N.E.2d 767, 776 (Ind. 1999)).

[17] Veal has not demonstrated that his trial counsel rendered ineffective assistance during the sentencing hearing.

2. Ineffective Assistance of Appellate Counsel

[18] Veal argues that his appellate counsel was ineffective for failing to challenge the admission of sentencing recommendations from the victim's family under the Eighth Amendment. He also argus that appellate counsel was ineffective for failing to challenge his sentence as manifestly unreasonable on direct appeal.

[19] We review claims of ineffective assistance of appellate counsel under the same standard as claims of ineffective assistance of trial counsel. *Allen v. State*, 749 N.E.2d 1158, 1166 (Ind. 2001). Indiana courts recognize three categories of alleged appellate-counsel ineffectiveness: denying access to appeal, failing to raise an issue on appeal, and failing to present an issue completely and effectively. *Bieghler v. State*, 690 N.E.2d 188, 193-195 (Ind. 1997). Ineffective

assistance is rarely found when the issue is failure to raise a claim on direct appeal. *Id*. at 194. This is because "the decision on what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Id*. (quoting *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993)).

[20] With regard to his claim that appellate counsel should have raised the Eighth Amendment issue on direct appeal, we rely on our discussion above that there is no merit to a claim that the Eighth Amendment prohibited admission of the victim's sentencing recommendations in an LWOP case decided by a judge. For those same reasons, appellate counsel was not ineffective for failing to present that issue on direct appeal.

[21] We now turn to Veal's claim that appellate counsel was ineffective for not challenging his sentence as manifestly unreasonable. Veal's appellate counsel challenged his sentence in two regards on direct appeal. First, appellate counsel argued that the victim impact testimony was improperly admitted. The Supreme Court agreed that such would not have been admissible during a penalty-phase hearing before a jury but found no error with its admission in this case because the testimony was presented during a sentencing hearing before a judge. The Court applied the presumption that trial courts know and follow the law and also noted there was no indication the trial court improperly relied on the victim impact evidence in deciding to impose LWOP.

[22] As to his sentence on the non-LWOP counts, appellate counsel argued that the trial court improperly found statutory mitigating circumstances to be

aggravating. The Supreme Court agreed, finding that three of the aggravators considered by the trial court were not proper. Nevertheless, the Supreme Court concluded that Veal's sentence was supported by the record. And, although not explicitly argued, the Supreme Court stated that "[g]iven the facts of this case, we do not find the sentence manifestly unreasonable." *Veal*, 784 N.E.2d at 495.

[23] The fact that Veal was sentenced within the range set out in his plea agreement, the Court's resolution of Veal's appellate claims, and its final statement finding Veal's sentence was not manifestly unreasonable convinces us that, even if appellate counsel had challenged Veal's sentence as manifestly unreasonable, such argument would not have been successful. Veal has not shown that he was prejudiced, and thus his claim of ineffective assistance of appellate counsel fails.

3. Proportionality

[24] In his petition for post-conviction relief, Veal presented a free-standing claim that his LWOP sentence violates the Eighth Amendment to the United States Constitution and Article 1, Section 16 of the Indiana Constitution "because it is disproportionate due to his youth and circumstances at the time of the offense." *Appellant's Brief* at 40.

[25] The purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. *Taylor v. State*, 840 N.E.2d 324, 330 (Ind. 2006). A defendant in a post-conviction proceeding may raise an issue for the first time in his petition "only when

asserting either (1) deprivation of the Sixth Amendment right to effective assistance of counsel, or (2) an issue demonstrably unavailable to the petitioner at the time of his or her trial and direct appeal." *Lindsey v. State*, 888 N.E.2d 319, 325 (Ind. Ct. App. 2008), *trans. denied.* When an issue is known and available but not raised on direct appeal, it is waived for post-conviction proceedings. *Taylor*, 840 N.E.2d at 330.

[26] Veal does not dispute that his proportionality claim was known and available on direct appeal.[5] To avoid waiver, he claims that Post-Conviction Rule 1(1)(a) gives him the right to bring this claim. This rule provides that a person who has been convicted of, or sentenced for, a crime may seek post-conviction relief with a claim that "the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state." Veal's expansive reading of P-C.R. 1(1)(a) ignores P-C.R. 1(1)(b), which provides that a post-conviction proceeding "is not a substitute for a direct appeal." The post-conviction court properly determined that Veal waived his claim under the Eighth Amendment.

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[5] In support of his argument Veal cites to more recent case law, which we find to be distinguishable. For example, in *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that mandatory life sentences for juveniles violated the Eighth Amendment. Miller was fourteen years old when he committed murder. *Miller* does not dictate that Veal's LWOP sentence violates the Eighth Amendment. In *Montgomery v. Louisiana*, 577 U.S. 190, 195 (2016), the Supreme Court addressed a sentencing scheme that mandated life without parole for juvenile homicide offenders. The Court explained that "a lifetime in prison is disproportionate for all but the rarest of children, those whose crime reflect 'irreparable corruption.'" *Id*. Montgomery was seventeen years old when he killed a deputy sheriff. Veal was twenty years old and thus not a juvenile when he raped and murdered Tyler.

[27] Judgment affirmed.

Riley, J. and Pyle, J., concur.