MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Randy Pitts,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

July 13, 2023

Court of Appeals Case No. 22A-PC-1815

Appeal from the Marion Superior Court

The Honorable Jeffrey L. Marchal, Judge
The Honorable Peggy R. Hart, Magistrate

Trial Court Cause No. 49D31-1801-PC-1198

Memorandum Decision by Judge Bradford
Judges Riley and Weissmann concur.

Bradford, Judge.

Case Summary

[1] In March of 2017, Randy Pitts pled guilty to three counts of Level 1 felony rape, one count of Level 1 felony attempted rape, and one count of Class A misdemeanor carrying a handgun without a license. Pitts subsequently sought post-conviction relief ("PCR"). In his PCR petition, Pitts alleged that (1) the trial court had erred in accepting his guilty plea; (2) he had received ineffective assistance of counsel, and (3) he had not knowingly or voluntarily entered into his guilty plea. Following an evidentiary hearing, the post-conviction court denied Pitts's PCR petition. Pitts does not challenge any of the post-conviction court's findings or conclusions on appeal. Instead, for the first time, he challenges the appropriateness of his sentence, citing Indiana Appellate Rule 7(B). We agree with the State that relevant authority clearly indicates that issues not raised in a PCR petition may not be raised for the first time in a petitioner's appeal from the denial of his PCR petition. We affirm.

Facts and Procedural History

[2] In March of 2017, Pitts pled guilty under Cause Number 49G05-1508-F1-28283 to three counts of Level 1 felony rape, one count of Level 1 felony attempted rape, and one count of Class A misdemeanor carrying a handgun without a license. Pursuant to the terms of Pitts's plea agreement, the State "dismissed the 20 remaining counts which included two other counts of Level 1 felony

rape, four counts of Level 3 felony kidnapping and four counts of Level 3 felony confinement, among others." Appellant's App. Vol. II p. 12 n.1.

[3] On January 11, 2018, Pitts filed a pro-se PCR petition.[1] In this petition, Pitts claimed that the trial court had erred in accepting his guilty plea. With respect to this claim, Pitts alleged that "[a]ll advisement of rights initialed were not covered as promised in [the] plea agreement;" the trial court "didn't determine if [he] was under [the] influence of drugs and alcohol at [the] time [the] plea [was] entered;" the "[f]actual basis before plea agreement did not establish the crime as charged;" and he "[w]as not fully armed with ALL information outlined in the statute." Appellant's App. Vol. II p. 104.

[4] Pitts also claimed that he had received ineffective assistance of trial counsel and that he had not knowingly or voluntarily entered into his guilty plea. With respect to his effectiveness claim, Pitts alleged that "[t]here exists evidence of material facts not previously presented and heard;" he was "[f]orced by [his] attorney to take [the] plea deal [with counsel] stating repeatedly, 'I don't know how to defend you at trial' with no intentions of ever defending [Pitts];" and the "[r]ecord does not articulate factors thoroughly for either mitigation or aggravating sentences." Appellant's App. Vol. II pp. 104–05. With respect to his claim regarding the allegedly unknowing and involuntary nature of his plea

[1] Although the public defender's office appeared on Pitts's behalf for a period of time, as of the date of the October 27, 2021 evidentiary hearing on Pitts's PCR petition, the public defender's office's appearance had been withdrawn and Pitts appeared *pro se*.

agreement, Pitts alleged that "[d]ue to mental [and] psychological state, capacity, [and] condition of [Pitts], he was incapable and unable to appreciate [and] understand full meanings, therefore not the free [and] rational choice of [Pitts and] was not made voluntarily, knowingly, [and] intelligently." Appellant's App. Vol. II p. 105.

[5] The matter proceeded to an evidentiary hearing on October 27, 2021. Pitts's trial counsel, Elizabeth Klees, was called to testify at the evidentiary hearing. Klees had worked for the Marion County Public Defender's Office since November of 2009, and had had experience handling "major felony sex crimes" and "other major felony cases" prior to her representation of Pitts. When asked why she had not objected to the admission of an allegedly incomplete plea agreement at Pitts's guilty plea hearing, Klees testified that she did not "recall there being a missing portion of the plea agreement." PCR Tr. p. 10. Klees further testified that "the strategy to pursue competence as an issue in [Pitts's] case was abandoned for strategic reasons" prior to her representation. PCR Tr. p. 11. When pushed for an explanation as to why a challenge to Pitts's competency was abandoned, Klees testified that

> Based on my interactions with you and your ability to comprehend the things that we talked about. Furthermore, again it was a strategic decision if I recall. There was a letter written to a family member detailing your plan to pretend to be not competent, and we decided that that was not something that we would pursue.

PCR Tr. p. 12. Klees explained that she had hired a psychologist "[f]or mitigation purposes," not for Pitts's "competency to be evaluated." PCR Tr. p. 11. Klees further testified that the defense had "presented mental health issues as a mitigating factor" at sentencing. PCR Tr. p. 12. Klees also enlisted the Public Defender Office's mitigation specialist, Aftan Archer-Cox to complete a "full criminal and social history background" and Archer-Cox's "very lengthy report" was submitted as mitigating evidence. PCR Tr. p. 13. Pitts's claim that he was "seeing a supernatural energy 24/7" was included in both the psychologist's and Archer-Cox's mitigation reports. PCR Tr. p. 14.

[6] With respect to Pitts's PCR claim that he was not aware of all portions of his plea agreement, specifically, potential sex offender probation guidelines, Klees testified that she reviews "[t]he standard terms and conditions for sex offender probation … with every client who takes a plea that will result in the possibility of sex offender probation." PCR Tr. pp. 15–16. Klees further testified that she "distinctly recall[ed] reviewing sex offender probation terms" with Pitts, stating that she does

> that with every client who accepts a plea where there's the possibility they will be put on sex offender probation. However, it is not my practice to have my client sign that because I believe that's probation's role, in making sure that you understand before you sign that document. However, for every client since I've practiced handling cases that involve sex offenses, I have them review the terms of sex offender probation to make sure they know what they're getting into.

PCR Tr. p. 16. Klees also reiterated that the terms of probation were not applicable to Pitts as he was "given an executed sentence" and was not "put on probation." PCR Tr. p. 17.

[7] Klees also testified that she did not believe her representation had been ineffective on the basis that the trial court judge had disagreed with her belief that the relevant mitigators had outweighed the aggravating circumstances at Pitts's sentencing. Klees reiterated that she had explained to Pitts that she "would make the argument that the mitigators outweighed the aggravators, and therefore you should be given a lesser sentence, but that the State would make the opposite argument and that it would be up to the judge to decide." PCR Tr. p. 19.

[8] Klees further testified that it is "a defendant's absolute right to decide" whether to plead guilty and that she "certainly didn't force [Pitts] to accept the plea." PCR Tr. p. 23. Klees indicated that had Pitts decided that he did not wish to plead guilty, she "would have had no choice" but to proceed to trial. PCR Tr. p. 23. When pressed about an alleged statement that Klees "did not know how to defend" Pitts, Klees clarified that

> every single alleged victim showed up for the depositions, they had evidence that tied you to each of the crime scenes, they had searches on your device from your IP address of pornography that matched each of the alleged victim's testimony almost identically. So, yes, I would have said I'm not exactly sure what we would say if we went to a jury trial because I thought that those would be very hard to defend against.

PCR Tr. p. 25. Klees further clarified that she believed that "there was overwhelming evidence that a jury would use to have convicted [Pitts] of [the charged] offenses." PCR Tr. p. 26.

[9] Klees also indicated that Pitts "did not appear to be under the influence of" drugs or alcohol at the time he entered his guilty plea. PCR Tr. p. 23. Klees testified that she had believed that the factual basis entered in connection to Pitts's plea was sufficient, noting that Pitts had "clarified certain things" such as amounts of money present or sexual acts completed with respect to each victim. PCR Tr. p. 24. Pitts did not present any other evidence beyond Klees's testimony during the evidentiary hearing or ask the post-conviction court to take judicial notice of the court's file or any related transcripts.

[10] The post-conviction court issued an order denying Pitts's PCR petition on July 1, 2022. In denying Pitts's challenges to the plea agreement and the trial court's acceptance of the plea agreement, the post-conviction court stated "[f]irstly, petitioner chose not to submit a copy of the plea agreement, the guilty plea and/or sentencing transcripts, or any other documentary evidence to support his claims. Nor did he request, during the hearing, that the Court take judicial notice of its file or said transcripts." Appellant's App. Vol. II p. 17. After noting that *pro-se* litigants are held to the same standards as attorneys, the post-conviction court noted that "[t]his court, therefore, looks to the only evidence – the post-conviction testimony of trial counsel Elizabeth Klees – in assessing the PCR claims." Appellant's App. Vol. II p. 18. The post-conviction court found that

> Regarding Pitts' claims as to the knowing, intelligent, and voluntary nature of his guilty plea, Ms. Klees' testimony shows: that Pitts was in custody at the time of the guilty plea hearing and did not appear to be under the influence of any alcohol or drugs; that Judge Hawkins went over the plea agreement with Pitts in the same manner he does in every guilty plea hearing; that there were no advisements missing from the plea agreement; that the factual basis for each offense to which Pitts pleaded guilty was sufficient; that during the entirety of her interactions with Pitts including the guilty plea hearing, Ms. Klees – having represented thousands of clients and also having an undergraduate minor in psychology – had no concerns regarding Pitts' competency and believed that he was able to understand the proceedings and aid in his own defense; that Ms. Klees specifically advised Pitts that it was his decision whether to accept a plea or go to trial, and she did not force or coerce him to plead guilty.
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> Pitts presented no evidence to contradict trial counsel's post-conviction testimony, or to show that his plea of guilty was anything other than knowing, intelligent, and voluntary. This claim fails.

Appellant's App. Vol. II p. 18. The post-conviction court further found that

> There is no post-conviction evidence to show that trial [counsel] forced Pitts to accept the plea agreement. Further, petitioner has failed to show that trial counsel's sharing of her honest, informed assessment of the strength of the State's evidence constituted deficient performance, and this Court has already decided *supra* that Pitts' decision to plead guilty was voluntary and not coerced. Nor has petitioner shown a reasonable probability of a more favorable outcome in his case had trial counsel's evaluation of the State's evidence, or the manner in which she explained it to Pitts, been different. Hence, no prejudice. This claim fails.
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> Ms. Klees' advisements to Pitts, her work to defend him, her extensive gathering and presentation of mitigating evidence for sentencing, and her overall efforts to obtain the best possible result in this case, were proficient and zealous. Petitioner has shown no deficient performance. Nor has there been a showing of any prejudice here, with no evidence that Pitts would have received a more favorable outcome had trial counsel performed differently with respect to the mitigating and aggravating circumstances and/or the court's evaluation of those circumstances at sentencing.
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> Pitts' claim that he was denied the effective assistance of trial counsel fails.

Appellant's App. Vol. II pp. 20–22.

Discussion and Decision

[11] "Post-conviction procedures do not afford the petitioner with a super-appeal." *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). "Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules." *Id.* A petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on appeal. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001); *Collier v. State*, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999), *trans. denied*.

[12] Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his

claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from the denial of a PCR petition, a petitioner must convince this court that the evidence, taken as a whole, "leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Stevens*, 770 N.E.2d at 745. "In other words, the defendant must convince this Court that there is *no* way within the law that the court below could have reached the decision it did." *Id.* (emphasis in original). "It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law." *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*. "The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses." *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

[13] In challenging the denial of his PCR petition, Pitts contends that his sentence is inappropriate, stating that he "is a young man, struggling with mental health issues who plead [sic] guilty to the offenses without any substantial criminal history." Appellant's Br. p. 5. Notably, however, Pitts did not raise any challenge to his sentence in his PCR petition or even mention his sentence in his PCR petition beyond the following: "[t]he date upon which sentence was imposed and terms of the sentence: March 2nd 2017/105 years total, actual

executed consecutive & concur[r]ent total 97 years."[2] Appellant's App. Vol. II p. 103. Furthermore, while Pitts has submitted the sentencing transcript and documents related to his sentencing to this court on appeal, as is noted above, Pitts did not introduce any documents relating to his sentencing or the sentencing transcript during the evidentiary hearing on his PCR petition.

[14] Indiana Post-Conviction Rule 1(8) provides that "[a]ll grounds for relief available to a petitioner under this rule must be raised in his original petition." As such, "[i]ssues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal." *Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001). Because Pitts did not raise any challenge in his PCR petition, Pitts has therefore waived any challenge to his sentence in the instant appeal.

[15] In what may be interpreted as a potential attempt to circumvent waiver, Pitts cites to the Indiana Supreme Court's decision in *State v. Stidham*, 157 N.E.3d 1185, 1191 (Ind. 2020)[3], for the proposition that "[a] court has the power to

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[2] Pitts's exact sentence is unclear with Pitts stating that his sentence was 105 years with ninety-seven years executed and his appellate brief indicating that his sentence was 101 years.

[3] In *Stidham*, seventeen-year-old Stidham was convicted of murder and several other crimes in 1991 and was sentenced to a total sentence of 138 years. 157 N.E.3d at 1187. The appropriateness of his sentence was affirmed in 1994 on direct appeal. *Id.* More than twenty years later, the Indiana Supreme Court held that the doctrine of res judicata did not bar consideration of a subsequent appropriateness argument "because of two major shifts in the law," *i.e.*, the change in the standard by which appellate courts exercise their authority to review sentences under Article 7, Section 4 of the Indiana Constitution, moving away from the manifestly unreasonable standard and limitations on juvenile sentencing imposed by the United States Supreme Court. *Id.* at 1192. Pitts was not a juvenile at the time he committed the underlying criminal offenses, and he was originally sentenced after the change regarding appropriateness challenges occurred. As such, neither of the two "major shifts in the law" discussed in *Stidham* have any bearing on Pitts's case.

revisit prior decisions of its own or a coordinate court in any circumstance" but noting that "[t]his is to limited to cases of manifest unjustice [sic] and extraordinary circumstances." Appellant's Br. pp. 6–7. Pitts does not develop any argument relating to *Stidham*'s application further or explain how the facts and circumstances of his case are similar to those present in *Stidham*. Pitts's mere citation to *Stidham* is therefore insufficient to circumvent waiver.

[16] The judgment of the post-conviction court is affirmed.

Riley, J., and Weissmann, J., concur.