MEMORANDUM DECISION

APPELLANT, PRO SE

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ATTORNEYS FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

Brandon L. Jones,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent.

October 17, 2023

Court of Appeals Case No. 22A-PC-2567

Appeal from the Allen Superior Court

The Honorable Steven O. Godfrey, Judge

Trial Court Cause No. 02D05-2110-PC-48

Memorandum Decision by Judge Pyle

Judges Vaidik and Crone concur.

Pyle, Judge.

Statement of the Case

[1] Brandon L. Jones ("Jones"), pro se, appeals the post-conviction court's denial of his petition for post-conviction relief. Jones argues that the post-conviction court erred by denying his claims of ineffective assistance of trial and appellate counsel. Concluding that Jones 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 Jones.

Facts

[3] The relevant facts of Jones' underlying offenses, as set forth by this Court in Jones' direct appeal, are as follows:

> Around 11:24 a.m. on April 11, 2016, Fort Wayne Police Department Detective George Nicklow was driving northbound on a street when he observed a silver Chrysler Pacifica driving southbound on the same street. The speed limit was thirty miles an hour; Detective Nicklow estimated that the vehicle was traveling at about forty or forty-five miles per hour. The vehicle crossed the center line, forcing the detective to swerve to get out of the way. Detective Nicklow turned his vehicle around and attempted to conduct a traffic stop on the vehicle for leaving its lane. He activated his emergency lights and siren, but the vehicle continued about two blocks before stopping. In the detective's experience, vehicles usually pull over within half a block.

Once the vehicle stopped, Detective Nicklow approached the car with Detective Robert Hollo, who had arrived at the scene. Detective Shannon Hughes also arrived. Two people were inside the car, including Jones, who had been driving, and Brianna Brown, a passenger. Jones appeared nervous; his hands were shaking and he avoided eye contact. Jones could not provide a driver's license or proof of insurance; Detective Nicklow verified through his squad car computer that Jones did not have an Indiana driver's license, and at the same time, he noted that Jones did not have a permit to carry a handgun. The detective then asked Jones to exit the vehicle because neither Jones nor Brown, who also did not have proof of insurance, would be able to legally drive the vehicle away from the scene.

Detective Nicklow decided to conduct a pat-down of Jones. Because of Jones's nervous behavior, the length of time that it took Jones to stop his vehicle, and their location in a high-crime area, Detective Nicklow feared that Jones "possibly had a weapon on him." Suppression Hearing Tr. p. 22. He advised Jones that he would conduct a pat-down for officer safety and instructed him to put his hands on top of his head. As Detective Nicklow began the pat-down, Jones twice moved his hands down toward his waist. Detective Nicklow advised him to not do that or else he would place Jones in handcuffs. When the detective started the pat-down again, Jones moved his hands again, and the detective put him in handcuffs. During the pat-down, Detective Nicklow discovered a semi-automatic handgun inside Jones's left front sweatpants pocket. He asked Jones whether Jones had a permit to carry, and Jones answered that the gun belonged to his brother. Detective Nicklow placed Jones under arrest for carrying a handgun without a license.

As the detective continued the pat-down, he observed a purple Crown Royal bag in Jones's right front sweatpants pocket. Detective Nicklow removed the bag; inside were five plastic baggies that contained cocaine, a small glass vial that contained cocaine, a plastic baggie that contained heroin, and several

> alprazolam pills. The detective also discovered a digital scale and $445.

Jones v. State, No. 02A03-1610-CR-2349, 2017 WL 1047316 *1-2 (Ind. Ct. App. Mar. 20, 2017) (mem.). The State initially charged Jones with: Count 1, Level 2 felony dealing in cocaine; Count 2, Level 4 felony unlawful possession of a firearm by a serious violent felon; Count 3, Level 6 felony possession of a narcotic drug; and Count 4, Class A misdemeanor possession of a controlled substance.

[4] Jones was represented during his trial proceedings by attorney Mitchell Hicks ("Trial Attorney Hicks"). In July 2016, Jones filed a motion to suppress. In his motion, Jones argued that the patdown search violated his Fourth Amendment rights, and he sought to have the trial court suppress all evidence discovered as a result of the patdown.

[5] Thereafter, the trial court held a hearing on Jones' motion. During the suppression hearing, Detective Nicklow testified that he had used his in-car computer to access Indiana BMV records to check on Jones' driving status and had learned that Jones did not have an Indiana driver's license. Jones argued that the trial court should suppress all evidence obtained during the traffic stop because the detective was not concerned for his own safety and did not have reasonable suspicion that Jones was armed and dangerous. The State argued that the detective's seizure of the gun from Jones was proper because the detective had reasonable suspicion to conduct the patdown search of Jones based on the detective's observance of Jones committing a traffic offense in a

high crime area, Jones' act of driving for multiple blocks after the detective had initiated the traffic stop, and Jones' nervous behavior. The State also argued that the detective's seizure of the drugs, scale, and cash was proper because it was based on a search incident to arrest of Jones for carrying a handgun without a license. The trial court agreed with the State and denied Jones' motion to suppress.

[6] At the conclusion of the hearing, the trial court held a pretrial conference. The State informed the trial court that, for purposes of the Level 4 felony unlawful possession of a firearm by a serious violent felon count, Jones' prior conviction was a conviction out of Pennsylvania. The State indicated that it was waiting to receive a certified copy of Jones' prior Pennsylvania conviction and a certified copy of his fingerprints from that arrest. The State told the trial court that if it did not receive the requested certified copies from Pennsylvania in a timely manner, then it would not use the delay as a reason to continue the trial and that it would, instead, "just amend charges accordingly if [it] need[ed] to." (Direct Appeal Tr. Vol. 2 at 50).

[7] A few months later, in August 2016, the State moved to amend the charging information to dismiss the Level 4 felony unlawful possession of a firearm by a serious violent felon count and to add a count for Class A misdemeanor carrying a handgun without a license. The trial court granted the State's motion to amend.

[8] The trial court held a bench trial in August 2016. Pursuant to Jones' request, the trial court incorporated the evidence from the suppression hearing into the evidence at the bench trial. During the trial, Detective Nicklow testified, as he did at the suppression hearing, that he had used his in-car computer to access Indiana BMV records to check on Jones' driving status and had learned that Jones did not have an Indiana driver's license. The detective then added that he had "also [been] advised . . . later . . . [of a] Pennsylvania driver's status [that had been] suspended." (Direct Appeal Tr. Vol. 4 at 18). When the State introduced testimony and evidence regarding the gun and drugs found on Jones' person, Trial Attorney Hicks objected, and the trial court overruled those objections. At the conclusion of the bench trial, the trial court found Jones guilty as charged and sentenced him to an aggregate term of eighteen (18) years with eleven (11) years executed and seven (7) years suspended to probation.

[9] Thereafter, Jones filed a direct appeal and was represented by attorney Stanley L. Campbell ("Appellate Counsel Campbell"). On appeal, Jones argued that the trial court had abused its discretion by admitting the evidence found on Jones during the patdown search. Specifically, Jones argued that the detective's patdown of Jones was "unreasonable because there was no reasonable suspicion that he was armed and dangerous." *Jones*, No. 02A03-1610-CR-2349 at *2.

[10] The State argued two separate theories to support its argument that the trial court had properly admitted the evidence during the bench trial. Initially, the State argued that the existence of reasonable suspicion was not dispositive

because "the search was legal under the search incident to arrest exception to the Fourth Amendment warrant requirement." *Id.* Specifically, the State argued that, at the time of the patdown search, the detective had probable cause to arrest Jones for driving without a license, which was a Class C misdemeanor under INDIANA CODE § 9-24-18-1, and that INDIANA CODE § 35-33-1-1(a)(4) provided that a police officer may arrest an individual when the officer has probable cause to believe that the individual has committed a misdemeanor in the officer's presence. Additionally, the State argued that the patdown search was supported by reasonable suspicion because the totality of the facts and circumstances known to the detective during the traffic stop supported the detective's reasonable suspicion that Jones was armed. In support of its argument, the State pointed to the detective's observance of Jones committing a traffic offense in a high crime area, Jones' act of driving for multiple blocks after the detective had initiated the traffic stop, and Jones' nervous behavior evidenced by his shaking hands and avoidance of eye contact. Additionally, the State noted that the detective's concern for safety was also heightened before he had been able to perform the patdown due to Jones' repeated acts of reaching for his waist in disregard of the detective's instructions for Jones to keep his hands on his head.

[11] This Court agreed with the State's search-incident-to-arrest argument. We explained that "as long as probable cause existed to make the arrest, 'the fact that a suspect was not formally placed under arrest at the time of the search incident thereto will not invalidate the search.'" *Jones*, No. 02A03-1610-CR-

2349 *3 (quoting *VanPelt v. State*, 760 N.E.2d 218, 223 (Ind. Ct. App. 2001), *trans. denied*). We noted that Jones had failed to provide a driver's license to the detective and that the detective had verified through his squad car computer that Jones did not have an Indiana driver's license. This Court explained that "[t]he fact that Jones was driving without a license would have warranted a man of reasonable caution to believe that Jones had committed a misdemeanor and provided probable cause for his arrest." *Jones*, No. 02A03-1610-CR-2349 at *3. We concluded that because the detective had probable cause to arrest Jones for driving without a license, the patdown search was legal. Accordingly, we held that the trial court had not abused its discretion by admitting the evidence during the bench trial, and we affirmed Jones' convictions.

[12] Thereafter, Jones filed a pro se petition for post-conviction relief in October 2021 and an amended pro se petition in March 2022. In his amended petition, Jones raised claims of ineffective assistance of trial and appellate counsel. Jones argued, in relevant part, that his trial counsel had rendered ineffective assistance by failing to object, during the suppression hearing, to the State's argument that the detective's seizure of the drugs, scale, and cash was proper because it was based on a search incident to arrest of Jones for carrying a handgun without a license. In regard to ineffective assistance of appellate counsel, Jones argued that his appellate counsel had rendered ineffective assistance by failing to file a reply brief. Jones asserted that his appellate counsel should have filed the reply brief to challenge the State's appellate argument about the search incident to arrest for driving without a license.

More specifically, he asserted that his appellate counsel should have pointed out to the appellate court that the State had not previously made that argument and that Detective Nicklow had testified during the bench trial that Jones had a suspended license out of Pennsylvania.[1]

[13] The post-conviction court ordered the parties to proceed by affidavit. Jones submitted affidavits from himself and from his appellate attorney. In Jones' affidavit, he reiterated his arguments in his amended post-conviction petition. In Appellate Attorney Campbell's affidavit, he averred that he had thoroughly reviewed the suppression hearing transcript, trial transcript, and other relevant documents before he had filed Jones' direct appeal brief. Additionally, Jones submitted the following exhibits from his direct appeal: Jones' appellate brief; the State's appellate brief; and our Court's memorandum decision affirming his convictions. When the State filed its affidavit, the State submitted Jones' certified BMV driving record as an exhibit to show that it did not include any information about the status of Jones' suspended Pennsylvania driver's status.

[14] Thereafter, in August 2022, the post-conviction court issued an order, denying post-conviction relief to Jones. The post-conviction court determined that Jones had failed to prove his claims of ineffective assistance of trial and appellate counsel.

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[1] Jones also argued that his appellate counsel had rendered ineffective assistance by failing to raise an appellate argument that his trial counsel had rendered ineffective assistance of counsel. He did not specify what ineffective assistance of trial counsel claims that appellate counsel should have raised.

[15] Jones now appeals.

Decision

[16] Jones argues that the post-conviction court erred by denying him post-conviction relief on his claims of ineffective assistance of trial and appellate counsel. We disagree.

[17] At the outset, we note that Jones has chosen to proceed pro se. It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. Thus, pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so. *Id.* "We will not become a party's advocate, nor will we address arguments that are inappropriate, improperly expressed, or too poorly developed to be understood." *Barrett v. State*, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005), *trans. denied*.

[18] "[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).

[19] We first review Jones' argument regarding his claim of ineffective assistance of trial counsel. Specifically, Jones argues his trial counsel rendered ineffective assistance of counsel by failing to object, during the suppression hearing, when the State had argued that the detective's seizure of the drugs, scale, and cash was proper because it was based on a search incident to arrest of Jones for carrying a handgun without a license. More specifically, Jones contends that his trial counsel should have objected and argued that the State had "misrepresented and/or [m]isquoted evidence of a valid search incident to arrest." (Jones' Br. 13).

[20] A claim of ineffective assistance of trial counsel requires a petitioner to show that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh'g denied*), *reh'g denied*, *cert. denied*. "A reasonable probability arises when there is a 'probability sufficient to undermine confidence in the outcome.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). "Failure to satisfy either of the two prongs will cause the claim to fail." *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). "Indeed, most ineffective assistance

of counsel claims can be resolved by a prejudice inquiry alone." *Id.* Therefore, if we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008).

[21] To demonstrate ineffective assistance of trial counsel for failure to object, a petitioner must prove that an objection would have been sustained if made, and he must also show that he was prejudiced by counsel's failure to make an objection. *Kubsch v. State*, 934 N.E.2d 1138, 1150 (Ind. 2010), *reh'g denied*. Here, however, Jones has failed to demonstrate that the objection that he alleges should have been made would have been sustained or that trial counsel otherwise rendered deficient performance. Moreover, Jones has failed to show that there was a reasonable probability that, but for counsel's alleged unprofessional error, the result of the proceeding would have been different. Because Jones has failed to demonstrate that trial counsel rendered ineffective assistance, we affirm the post-conviction court's denial of post-conviction relief on this claim.

[22] Next, we turn to Jones' argument regarding ineffective assistance of appellate counsel. Jones argues that his appellate counsel rendered ineffective assistance by failing to file a reply brief to provide further information or argument on the appellate issue raised on appeal. Specifically, Jones contends that his appellate counsel failed to challenge the State's alternative appellate argument about the search incident to arrest for driving without a license by pointing out to the appellate court that the State had not previously made that argument and that

Detective Nicklow had testified during the bench trial that Jones had a suspended license out of Pennsylvania. We disagree.[2]

[23] We apply the same standard of review to a claim of ineffective assistance of appellate counsel as we do to an ineffective assistance of trial counsel claim. *Garrett v. State*, 992 N.E.2d 710, 719 (Ind. 2013). Thus, a petitioner alleging a claim of ineffective assistance of appellate counsel is required to show that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Davidson*, 763 N.E.2d at 444 (quoting *Strickland*, 466 U.S. at 687). "Failure to satisfy either of the two prongs will cause the claim to fail." *French*, 778 N.E.2d at 824.

[24] Ineffective assistance of appellate counsel claims "'generally fall into three basic categories: (1) denial of access to an appeal[;] (2) waiver of issues[;] and (3) failure to present issues well.'" *Garrett*, 992 N.E.2d at 724 (quoting *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006)). Jones ineffective assistance of appellate counsel claim is based upon category (3), failure to present issues well. "Claims

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[2] Jones also asserts that his appellate counsel "failed to raise [the] dead-bang winner of trial counsel's ineffective counsel[.]" (Jones' Br 9). Aside from this mere assertion, Jones makes no argument, let alone cogent argument, in support of this assertion. Because Jones has failed to provide cogent argument, he has waived review of this argument. *See* Ind. App. Rule 46(A)(8)(a). *See also Griffith v. State*, 59 N.E.3d 947, 958 n.5 (Ind. 2016) (noting that the defendant had waived his arguments by failing to provide cogent argument).

of inadequate presentation of certain issues, when such were not deemed waived in the direct appeal, are the most difficult for [petitioners] to advance and reviewing tribunals to support." *Bieghler v. State*, 690 N.E.2d 188, 195 (Ind. 1997) (emphasis and citation omitted), *reh'g denied*, *cert. denied*. The *Bieghler* Court explained two reasons why this type of ineffective assistance of appellate counsel claim is "almost always unsuccessful[:]"

> First, these claims [of inadequate presentation of issues] essentially require the reviewing tribunal to re-view specific issues it has already adjudicated to determine whether the new record citations, case references, or arguments would have had any marginal effect on their previous decision. Thus, this kind of ineffectiveness claim, as compared to the others mentioned, most implicates concerns of finality, judicial economy, and repose while least affecting assurance of a valid conviction.
>
> Second, an Indiana appellate court is not limited in its review of issues to the facts and cases cited and arguments made by the appellant's counsel. We commonly review relevant portions of the record, perform separate legal research, and often decide cases based on legal arguments and reasoning not advanced by either party. While impressive appellate advocacy can influence the decisions appellate judges make and does make our task easier, a less than top notch performance does not necessarily prevent us from appreciating the full measure of an appellant's claim, or amount to a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 195-196 (cleaned up). "When the issues presented by an attorney are analyzed, researched, discussed, and decided by an appellate court, deference should be afforded both to the attorney's professional ability and the appellate

judges' ability to recognize a meritorious argument." *Id.* at 196 (cleaned up). An ineffective assistance of appellate counsel claim based on counsel's presentation of an appellate issue "must overcome the strongest presumption of adequate assistance." *Id.* " Judicial scrutiny of counsel's performance, already highly deferential, is properly at its highest" and "[r]elief is only appropriate when the appellate court is confident it would have ruled differently." *Id.* (cleaned up).

[25] Here, a panel of this Court reviewed Jones' appellate challenge to the admission of evidence based on Jones' argument that officers had conducted an unlawful patdown during the traffic stop. This Court reviewed the issue and determined that the patdown was lawful because, prior to the patdown, probable cause existed for the arrest of Jones based on driving without a license, making the patdown a search incident to arrest. *See Jones*, No. 02A03-1610-CR-2349 at *3. Jones contends that his appellate counsel failed to argue the appellate issue well because counsel did not file a reply brief to point out that the State had not previously made an argument based on a search incident to arrest for driving without a license and to point out that Detective Nicklow had testified during the bench trial that Jones had a suspended license out of Pennsylvania.

[26] However, we are confident that the panel that decided Jones' direct appeal would not have ruled differently even if appellate counsel had filed a reply brief to indicate that the State had not previously raised this argument or to highlight the detective's trial testimony. Indeed, we are confident that our Court, when conducting appellate review of Jones' trial proceedings, had access to and

reviewed the relevant record that would have revealed that the State's argument had not been previously raised. More importantly, a trial court's ruling on the admission of evidence "will be sustained on any reasonable basis apparent in the record, whether or not relied on by the parties or the trial court." *Washburn v. State*, 121 N.E.3d 657, 661 (Ind. Ct. App. 2019), *trans. denied*. *See also Jeter v. State*, 888 N.E.2d 1257, 1267 (Ind. 2008) (explaining that "[o]n review of a claim challenging the admissibility of evidence, [appellate courts] will uphold a correct legal ruling even where based on incorrect, or absent, legal reasoning below") (cleaned up), *cert denied*.

[27] Additionally, we are confident that our Court, which reviewed the transcript of Jones' bench trial, would have seen and read the detective's testimony that he had "later" been "advised" that Jones had a "Pennsylvania driver's status [that had been] suspended." (Direct Appeal Tr. Vol. 4 at 18). Our Court was "not limited in its review of issues to the facts . . . and arguments made by the appellant's counsel." *Bieghler*, 690 N.E.2d at 195. As explained by the panel that decided Jones' appeal, the appellate record showed that, at the time of the traffic stop, the detective had probable cause to arrest Jones for driving without a license, which rendered the arrest and patdown of Jones legal. *See Jones*, No. 02A03-1610-CR-2349 at *3. Jones has failed to demonstrate that his appellate counsel rendered ineffective assistance of counsel by failing to file a reply brief to point out that Detective Nicklow had testified during the bench trial that Jones had a suspended license out of Pennsylvania. Because Jones has failed to

demonstrate that appellate counsel rendered ineffective assistance, we affirm the post-conviction court's denial of post-conviction relief on this claim.[3]

[28] Affirmed.

Vaidik, J., and Crone, J., concur.

[3] Jones also asserts that his appellate counsel failed to argue the appellate issue well because counsel did not file a reply brief to discuss an incident report. Jones references an incident report that he alleges was written by the detective, but he fails to provide a record citation for that report. Our review of the post-conviction record on appeal and the direct appeal record reveals no such incident report. Accordingly, we will not address Jones' contention regarding the report.