

MEMORANDUM DECISION

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APPELLANT, PRO SE

Jose Alfredo Ortiz
Westville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

George P. Sherman
Supervising Deputy Attorney
General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jose Alfredo Ortiz,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent.

March 21, 2023

Court of Appeals Case No.
21A-PC-2532

Appeal from the Tippecanoe
Circuit Court

The Honorable Sean M. Persin,
Judge

Trial Court Cause No.
79C01-2105-PC-11

Memorandum Decision by Judge Pyle

Judges Bradford and Kenworthy concur.

Pyle, Judge.

Statement of the Case

- [1] Jose Alfredo Ortiz (“Ortiz”), pro se, appeals the post-conviction court’s denial of his petition for post-conviction relief. Ortiz argues that the post-conviction court erred by denying him post-conviction relief. Concluding that Ortiz 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 trial court erred by denying post-conviction relief to Ortiz.

Facts

- [3] The relevant procedural facts of Ortiz’s underlying case, as set forth by this Court in Ortiz’s previous appeal, are as follows:

In July 2016, the State charged Ortiz with Count 1, Level 2 felony dealing in methamphetamine; Count 2, Level 3 felony possession of methamphetamine; Count 3, Level 6 felony domestic battery; Count 4, Class A misdemeanor invasion of privacy; Counts 5 and 6, Class A misdemeanor resisting law enforcement; and Count 7, Level 5 felony domestic battery. In February 2017, Ortiz entered into a plea agreement and pled guilty to Counts 2, 4, and 7. In exchange, the State agreed to dismiss the remaining four charges as well as a pending probation revocation petition in another cause. The plea agreement provided that sentencing was open to the trial court’s discretion, but it contained a limitation that the aggregate

executed sentence imposed would be between a minimum of twelve years and a maximum of eighteen years. Additionally, as part of his plea agreement, Ortiz waived his right to appeal his sentence, “under any standard of review, including but not limited to, an abuse of discretion standard and the appropriateness of the sentence under Indiana Appellate Rule 7(B),” so long as the trial court sentenced him within the terms set forth in the plea agreement. (App. Vol. 2 at 52).

In March 2017, the trial court held a sentencing hearing and issued a sentencing order, which contained a discussion of relevant aggravating circumstances¹ and mitigating circumstances. The trial court imposed a twelve (12) year sentence for Ortiz’s Level 3 felony possession of methamphetamine conviction, a four (4) year sentence for his Level 5 felony domestic battery conviction, and a one (1) year sentence for his Class A misdemeanor invasion of privacy conviction. The trial court ordered that the two felony convictions would be served consecutively to each other and that the misdemeanor conviction would be served concurrently. Thus, the trial court imposed an aggregate sentence of sixteen (16) years, which was within the terms of the plea agreement.^[2] Accordingly, Ortiz did not file a direct appeal of his sentence.

More than one year later, on October 18, 2018, Ortiz filed a motion to correct erroneous sentence. In this motion, Ortiz

¹ Among the aggravating factors found by the trial court were Ortiz’s criminal history and his recent violation of probation.

² When sentencing Ortiz, the trial court determined that the aggravating circumstances outweighed the mitigating circumstances. Additionally, the trial court imposed a four-year sentence for Ortiz’s Level 5 felony domestic battery conviction and a one-year sentence for his Class A misdemeanor invasion of privacy conviction. However, the trial court’s sentencing order mistakenly inverted the words aggravating and mitigating and stated that mitigating circumstances outweighed the aggravating circumstances. The sentencing order also inverted the names of the domestic battery and invasion of privacy convictions when ordering the four-year sentence for the Level 5 felony conviction and the one-year sentence for the Class A misdemeanor conviction. Shortly thereafter, the trial court issued a “Corrected Sentencing Order” in which it corrected these scrivener’s errors. (Supp. App. Vol. 2 at 60-62).

challenged the trial court's imposition of consecutive sentences, arguing that his possession of methamphetamine and domestic battery offenses were committed simultaneously and should therefore be ordered to be served concurrently. The trial court denied Ortiz's motion to correct erroneous sentence.

Ortiz v. State, No. 18A-CR-2919, 2019 WL 2120665 at *1 (Ind. Ct. App. May 15, 2019) (footnote 1 in original, footnote 2 added).

[4] In Ortiz's appeal from the trial court's denial of his motion to correct erroneous sentence, Ortiz made a different sentencing argument than he did in his motion to correct erroneous sentence. Our Court noted that both of Ortiz's arguments challenged the trial court's decision to impose consecutive sentences and both were an improper attempt to circumvent his waiver of the right to appeal his sentence. Additionally, we noted that his consecutive sentencing issue was not a proper claim for a motion to correct erroneous sentence because it was outside the face of the judgment and required consideration of the sentencing hearing. Accordingly, our Court affirmed the trial court's denial of Ortiz's motion to correct erroneous sentence. *See Ortiz*, No. 18A-CR-2919 at *3.

[5] In May 2021, Ortiz filed a pro se petition for post-conviction relief. He raised four claims relating to his sentencing and one claim of ineffective assistance of trial counsel. Specifically, Ortiz raised the following claims: (1) the trial court violated INDIANA CODE § 35-50-1-2 when it ordered his sentences to be served consecutively; (2) the trial court, when sentencing Ortiz, failed to follow the joinder clause of INDIANA CODE § 35-34-1-10; (3) the trial court improperly enhanced Ortiz's sentence pursuant to the habitual offender statute, INDIANA

CODE § 35-50-2-8; (4) the trial court violated Article 1, Sections 16 and 18 of the Indiana Constitution by imposing a sentence that was disproportionate to Ortiz's offenses; and (5) trial counsel rendered ineffective assistance by putting Ortiz under duress to sign the plea agreement.

[6] In July 2021, the post-conviction court held a hearing on Ortiz's petition. Ortiz did not present testimony from his trial counsel or any other witness. Ortiz testified about the claims raised in his post-conviction petition, including the sentencing claims and ineffective assistance of trial counsel claim. When Ortiz attempted to raise and testify about additional claims, the State objected because Ortiz had not included these claims in his petition and had not filed an amended petition. The claims that Ortiz attempted to argue that were not in his post-conviction petition included some of the following: (1) the trial court failed to abide by the terms of the plea agreement, which was based on Ortiz's assertion that the petition to revoke his probation from his other case had not been dismissed; (2) the arrest warrant and abstract of judgment contained the statutory citation of INDIANA CODE § 35-42-2-1.3(a)(1) for the Level 5 felony domestic battery charge in Count 7 instead of the more specific cite to INDIANA CODE § 35-42-2-1.3(a)(1)(c)(4);³ (3) the trial court issued a corrected sentencing order without Ortiz being present in violation of INDIANA CODE § 35-38-1-15;

³ Subsection (a)(1) of INDIANA CODE § 35-42-2-1.3 provides that a person who knowingly or intentionally touches a family or household member in a rude, insolent, or angry manner commits domestic battery as a Class A misdemeanor, and subsection (c)(4) provides that the domestic battery offense is a Level 5 felony if the person has a previous conviction for a battery offense against the same family or household member.

and (4) appellate counsel rendered ineffective assistance by making an argument on appeal that was different from the argument that Ortiz had made in his pro se motion to correct erroneous sentence. After the State had objected to Ortiz's attempt to raise a previously unasserted claim regarding the dismissal of the probation revocation petition, the State looked up the cause number of Ortiz's probation case, stated that the probation revocation petition had been dismissed in April 2017, and the State asked the post-conviction court to take judicial notice of that probation revocation cause. Also during the hearing, the post-conviction court pulled up Ortiz's charges and showed Ortiz that the State had charged him with domestic battery as a Level 5 felony under INDIANA CODE § 35-42-2-1.3(a)(1)(c)(4). Additionally, Ortiz pled guilty to this Level 5 felony domestic battery charge.

- [7] Thereafter, the post-conviction court issued an order denying Ortiz's petition for post-conviction relief. In its order, however, the post-conviction court agreed with Ortiz's assertion that the abstract of judgment should reference the full statutory citation for the Level 5 felony domestic battery conviction in Count 7, and it stated that it would issue an amended abstract of judgment.⁴

⁴ The post-conviction court also addressed some of Ortiz's other claims that he had failed to raise in his post-conviction petition. For example, the post-conviction court concluded that Ortiz was not entitled to post-conviction relief on his claim alleging that the trial court had failed to comply with the terms of the plea agreement because the record showed that the petition to revoke Ortiz's probation had been dismissed. The post-conviction court also concluded that Ortiz had failed to show that he was entitled to post-conviction relief on his claim regarding the corrected sentencing order. The post-conviction court, citing *Beliles v. State*, 663 N.E.2d 1168 (Ind. Ct. App. 1996), explained the trial court's correction of clerical errors did not implicate the procedures of INDIANA CODE § 35-38-1-15.

[8] Ortiz now appeals.

Decision

[9] Ortiz argues that the post-conviction court erred by denying him post-conviction relief. At the outset, we note that Ortiz 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*.

[10] “[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).

[11] Here, the State charged Ortiz, in Count 7, with Level 5 felony domestic battery under INDIANA CODE § 35-42-2-1.3(a)(1)(c)(4), and Ortiz pled guilty to this Level 5 felony charge. As part of his guilty plea, Ortiz specifically “*waive[d] the right to appeal any sentence imposed by the [trial] [c]ourt, under any standard of review, including but not limited to, an abuse of discretion standard and the appropriateness of the sentence under Indiana Appellate Rule 7(B), so long as the [trial] [c]ourt sentence[d] [Ortiz] within the terms of the plea agreement.*” (Supp. App. Vol. 2 at 37) (emphasis added). *See also Ortiz*, No. 18A-CR-2919 at *1. At Ortiz's sentencing hearing, the trial court accepted Ortiz's plea to the Level 5 felony domestic battery charge and imposed a four (4) year sentence for that Level 5 felony conviction. The trial court also imposed a twelve (12) year sentence for Ortiz's Level 3 felony conviction and a one (1) year sentence for his Class A misdemeanor conviction. Ultimately, the trial court ordered Ortiz to serve an aggregate sentence of sixteen (16) years, which was within the terms of Ortiz's plea agreement. The trial court's original sentencing order contained some scrivener's errors, which the trial court then corrected by issuing a corrected sentencing order. Additionally, the record reveals that, in accordance with Ortiz's plea agreement, Ortiz's remaining charges and the petition to revoke his probation had been dismissed.

[12] In this post-conviction appeal, Ortiz's arguments in his appellate brief are not the model of clarity. Ortiz raises some of the claims that he raised in his post-

conviction petition. For example, Ortiz suggests that the trial court violated the “joinder” statute, INDIANA CODE § 35-34-1-10, by failing to join his charges for trial, and he contends that his trial counsel rendered ineffective assistance by misleading him about his plea agreement. (Ortiz’s Br. 15). Additionally, Ortiz attempts to raise other claims, some relating to sentencing, that he did not include in his post-conviction petition. As to the issues not raised in Ortiz’s post-conviction petition, he attempts to argue that: (1) the trial court failed to abide by the terms of the plea agreement when it failed to dismiss the petition to revoke his probation; (2) his sentence for his Level 5 felony domestic abuse conviction should be vacated because the abstract of judgment did not contain the specific statutory citation; and (3) the trial court erred by not having Ortiz present when it issued the corrected sentencing order.

[13] We conclude that Ortiz has waived all of the claims, whether or not raised in his post-conviction petition, that he attempts to raise on appeal. First, Ortiz has failed to provide cogent argument regarding all his claims and has, therefore waived review of these arguments. *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); *Isom*, 170 N.E.3d at 639, 648, 649, 651, 653 (explaining that a petitioner waives appellate review of arguments by failing to set forth a developed argument).

[14] Moreover, Ortiz has waived the claims that he did not specifically raise in his post-conviction petition. “Issues 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), *reh’g denied*, *cert. denied*. See also Ind. Post-Conviction Rule 1(8) (“All grounds for relief available to a petitioner under this rule must be raised in his original petition.”).

[15] Additionally, he has waived all claims challenging his sentencing, whether in his post-conviction petition or not, because, as part of his plea agreement, Ortiz specifically “*waive[d] the right to appeal any sentence imposed by the [trial] [c]ourt, under any standard of review*, including but not limited to, an abuse of discretion standard and the appropriateness of the sentence under Indiana Appellate Rule 7(B),” so long as the trial court sentenced him within the terms set forth in the plea agreement. (Supp. App. Vol. 2 at 37) (emphasis added). See also *Ortiz*, No. 18A-CR-2919 at *1. The trial court sentenced Ortiz within the terms of the plea agreement, and Ortiz cannot now use a post-conviction proceeding to circumvent the terms of his plea agreement in which he agreed to waive any appeal of his sentence. Accordingly, we affirm the post-conviction court’s denial of Ortiz’s petition for post-conviction relief.⁵

Affirmed.

Bradford, J., and Kenworthy, J., concur.

⁵ Even if Ortiz had not waived his proposed claims, we would nevertheless affirm the post-conviction court’s judgment because Ortiz failed during the post-conviction hearing to meet his burden of establishing that he was entitled to post-conviction relief, and he failed on appeal to establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court’s decision. See *Isom*, 170 N.E.3d at 632.