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IN THE
COURT OF APPEALS OF INDIANA

Christopher Bell,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

July 20, 2021

Court of Appeals Case No. 20A-PC-2295

Appeal from the Vanderburgh Superior Court

The Honorable Robert J. Pigman, Judge

Trial Court Cause No. 82D03-1601-PC-310

Tavitas, Judge.

Case Summary

[1] After Christopher Bell was convicted of murder, a felony, and conspiracy to commit robbery, a Class A felony, the trial court adjudicated him as an habitual offender upon Bell's admission to his prior convictions. Bell was unsuccessful on his direct appeal. Subsequently, Bell filed a petition for post-conviction relief ("PCR"), wherein he argued: (1) the trial court failed to properly advise him of his right to jury determination of his habitual offender status and to obtain his

personal waiver thereof; and (2) appellate counsel rendered ineffective assistance of appellate counsel ("IAAC") by failing to raise the jury waiver issue on appeal. The post-conviction court ("PC Court") denied Bell's petition for PCR.

[2] Our review of the record as a whole has undermined our confidence in the outcome of Bell's direct appeal. The trial court's omissions resulted in structural and fundamental error. Further, had appellate counsel asserted the jury waiver issue, Bell would have prevailed in challenging the habitual offender proceedings on direct appeal. Bell has, thus, demonstrated that he suffered prejudicial error. For these reasons, we conclude that the PC Court clearly erred in denying Bell's petition for PCR; accordingly, we vacate the trial court's habitual offender determination and reverse and remand for a new trial on the habitual offender information.

Issue

[3] Bell raises one issue on appeal, which we restate as whether the PC Court clearly erred in finding that Bell's appellate counsel did not render IAAC in failing to raise a jury waiver issue on direct appeal.

Facts

[4] The underlying crimes were committed on September 17, 2012. On direct appeal, this Court recited the pertinent facts as follows:

> The State charged Bell with murder and Class A felony conspiracy to commit robbery, which was elevated to a Class A

> felony because of serious bodily injury.[1] The State also alleged that Bell was a[n] habitual offender[2]. . . .
>
> Bell's jury trial was held two months later [from] May [28-30,] 2013 [in Vanderburgh County].
>
> * * * * *
>
> The jury found Bell guilty as charged.

Bell v. State, No. 82A04-1309-CR-478, slip. op. at 3 (Ind. Ct. App. May 23, 2014) (internal citation and footnotes omitted) (emphasis added).

[5] The case transcript on direct appeal reveals that, after the jury returned its verdicts in the felony phase and the habitual offender phase began, the following colloquy ensued before Bell entered his stipulation:

> THE COURT: Everybody be seated. Mr. Bell as you're aware there's another count that's been filed that alleges that you're an habitual offender, essentially that means you have two (2) prior unrelated felony convictions, that being Criminal Recklessness in the Vanderburgh Circuit Court, a conviction and sentence on April the 8th of 2009 in Cause No. 1288 and a conviction for Possession of a Handgun on September 2[,] 2010 in the

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[1] The State also charged Bell's accomplice, Ted "T.J." Mueller, with murder, a felony, and conspiracy to commit robbery, a Class A felony. In March 2013, Mueller was convicted, following a jury trial; however, the sentencing court entered judgment of conviction on the conspiracy offense as a Class C felony.

[2] The State alleged that Bell was an habitual offender based on his prior convictions for criminal recklessness, a Class D felony (2009); and unlawful possession of a handgun, a Class C felony (2010).

Vanderburgh Circuit Court in Case No. 349. Do you understand that petition sir?

[BELL]: Yes[,] I do.

THE COURT: Alright. Your counsel has advised me that she's discussed this with you and *you are wanting to admit that th*[*e*] *petition is true* is that correct?

[BELL]: Yes.

THE COURT: Alright is that a voluntary decision on your part?

[DEFENSE COUNSEL]: Is that . . . are you doing that on your own free will?

[BELL]: I'm doing it on my own free will.

THE COURT: Okay nobody's forcing you to do that?

[BELL]: No.

THE COURT: Alright you understand you have a right to a hearing like, not exactly a trial, but they would have to prove these [convictions] beyond doubt, they'd have to you'd have a chance to question any witnesses they had just like the trial we've had, do you understand that?

[BELL]: Yes sir.

> THE COURT: Okay and knowing all that *you want to go ahead and admit that these Criminal Recklessness and Possession of a Handgun, you're the same person that was convicted of those offenses?*
>
> [BELL]: Yes sir.
>
> THE COURT: Alright. Okay we need a sentencing date . . . .
>
> * * * * *
>
> THE COURT: Okay show final disposition of the matter then will be set for June 28th at 10:00 a.m., the Court will order a Pre-Sentence investigation and we'll proceed at that time . . . .

Prior Case Tr. Vol. II pp. 117-119 (emphasis added).

[6] At Bell's sentencing hearing:

> [T]he trial court found that double-jeopardy concerns prevented it from entering judgment on the conviction for conspiracy to commit robbery as a Class A felony . . . ; therefore, the court reduced the conviction to a Class C felony. The court then sentenced Bell to sixty years for murder, *enhanced by thirty years for being* a[*n*] *habitual offender*. The court also sentenced Bell to a concurrent term of six years for Class C felony conspiracy to commit robbery, for an aggregate sentence of ninety years.

Id. (emphasis added).

[7] Attorney Scott Barnhart ("appellate counsel") represented Bell on appeal and alleged the trial court gave an erroneous accomplice liability instruction and violated Indiana's prohibition against double jeopardy. On May 23, 2014, this

Court affirmed Bell's convictions. *Bell v. State*, No. 82A04-1309-CR-478, slip. op. at 6. Our Supreme Court subsequently denied transfer. *Bell v. State*, 18 N.E.3d 1004 (Ind. 2014).

[8] On January 14, 2016, Bell, pro se, filed a petition for PCR, which he subsequently amended twice, by counsel. In his second amended petition for PCR, Bell argued that: (1) by admitting to his prior convictions with respect to the habitual offender count, without personally waiving his right to a jury, he entered an involuntary guilty plea to the habitual offender information; and (2) appellate counsel rendered IAAC by failing to allege fundamental error therefrom.

[9] In lieu of an evidentiary hearing on the petition for PCR, the parties proceeded by e-filing exhibits and proposed findings of fact and conclusions of law. On November 16, 2020, the PC Court entered its findings of fact, conclusions of law, and judgment denying Bell's petition for PCR. The PC Court found, in pertinent part, that: (1) Bell stipulated to his prior convictions in a bench trial and did not enter a guilty plea;[3] (2) "[b]ecause [Bell]'s admission[ ] to his prior convictions was a stipulation of facts, the [trial c]ourt was not required to first advise him of *Boykin*[4] rights and obtain his waiver of those rights, including

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[3] Bell does not dispute that he stipulated to his prior convictions in a bench trial.

[4] *See Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969) (holding that trial courts must inform a defendant, who is pleading guilty, that he/she is waiving the right to trial by jury, right to confront his/her accusers, and the privilege against compulsory self-incrimination).

the right to a jury trial"; and (3) appellate counsel did not render IAAC. PCR App. Vol. II p. 96. Bell now appeals.

Analysis

A. Standard of Review

[10] Bell challenges the PC Court's denial of his petition for PCR. Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *reh'g denied, cert. denied*; Ind. Post-Conviction Rule 1(1)(b). "The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal." *Gibson*, 133 N.E.2d at 681. "Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are res judicata." *Id.* The petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id.;* P.-C.R. 1(5).

[11] When, as here, the petitioner "appeals 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.'" *Gibson*, 133 N.E.2d at 681 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)). We generally review the post-conviction court's factual findings for clear error, neither reweighing the evidence nor judging the credibility of witnesses. *Hinesley v. State*, 999 N.E.2d 975, 981 (Ind. Ct. App. 2013), *trans. denied.* Here, the PC Court made its ruling on a paper record and, thus, we are reviewing the same information that was available to the PC

Court. In such cases, this Court owes no deference to the PC Court's findings. *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005), *trans. denied.* We, therefore, review the denial of Bell's petition for PCR *de novo. Id*.

B. IAAC

[12] Bell argues that fundamental error occurred when the trial court accepted his stipulation to his prior felony convictions without first: (1) advising him of his right to a jury determination of his habitual offender status; and (2) obtaining his personal waiver thereof. He also asserts that appellate counsel rendered IAAC by failing to allege fundamental error therefrom. *See* Bell's Br. p. 10 ("Without an advisement, Bell never had the opportunity to waive the right [to a jury trial] and thus never did[.]").

[13] Regarding Bell's claim that he received IAAC, the standard for evaluating claims of IAAC is the same standard as for trial counsel. *Garrett v. State*, 992 N.E.2d 710, 719 (Ind. 2013). A petitioner must demonstrate that counsel performed deficiently and that the deficiency resulted in prejudice. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). As our Supreme Court has previously opined:

> In analyzing whether counsel's performance was deficient, the Court first asks whether, "'considering all the circumstances,' counsel's actions were 'reasonable [ ] under prevailing professional norms.'" Counsel is afforded considerable discretion in choosing strategy and tactics, and judicial scrutiny of counsel's performance is highly deferential.

> To demonstrate prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."
>
> There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Counsel is afforded considerable discretion in choosing strategy and tactics and these decisions are entitled to deferential review. Furthermore, isolated mistakes, poor strategy, inexperience and instances of bad judgment do not necessarily render representation ineffective.

Weisheit v. State, 109 N.E.3d 978, 983-84 (Ind. 2018) (citations omitted).

[14] IAAC claims generally fall into three categories: (1) denying access to an appeal; (2) failing to raise issues, resulting in waiver; and (3) failing to present issues competently. *Timberlake v. State*, 753 N.E.2d 591, 604 (Ind. 2001). Bell's claims fall into the waiver of issues category. There is the "strongest presumption" of effective appellate advocacy in the face of allegations of failure to raise a claim. *Ben-Yisrayl*, 738 N.E.2d at 260-61.

> When a petitioner claims the denial of effective assistance of appellate counsel because counsel did not raise issues the petitioner argues should have been raised, reviewing courts should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable. But this does not end our analysis. Even if we determine that counsel's choice of issues was not reasonable, a petitioner must demonstrate a reasonable

> probability that the outcome of the direct appeal would have been different [ ] to prevail.

Bethea v. State, 983 N.E.2d 1134, 1139 (Ind. 2013) (quotations omitted).

[15] The PC Court found, in pertinent part, that: (1) because Bell merely stipulated to his prior convictions in a bench trial and did not enter a guilty plea,[5] "the [trial c]ourt was not required to first advise [Bell] of *Boykin* rights and obtain his waiver of those rights, including the right to a jury trial"; and (2) appellate counsel, thus, did not render IAAC by his failure to raise the jury waiver issue on direct appeal. PCR App. Vol. II p. 96. We disagree on both counts.

[16] > The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article 1, Section 13 of the Indiana Constitution likewise provides that "[i]n all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury . . . ." The United States and Indiana Constitutions guarantee the right to trial by jury, *and that right applies to habitual offender proceedings*.
>
> A defendant is presumed not to waive his jury trial right unless he affirmatively acts to do so. It is fundamental error to deny a defendant a jury trial unless there is evidence of a knowing, voluntary, and intelligent waiver of the right. The defendant must express his personal desire to waive a jury trial and such a personal desire must be apparent from the court's record,

[5] Bell does not dispute that he stipulated to his prior convictions in a bench trial.

> whether in the form of a written waiver or a colloquy in open court . . . .

Pryor v. State, 949 N.E.2d 366, 370-71 (Ind. Ct. App. 2011) (emphasis added), (internal citations and quotations omitted). "This waiver must be made part of the record 'so that the question of an effective waiver can be reviewed even though no objection was made at trial.'" *Kellems v. State*, 849 N.E.2d 1110, 1112 (Ind. 2006).

[17] Our Supreme Court has long held that the failure to secure a proper waiver of a defendant's jury-trial right is fundamental error. *Perkins v. State*, 541 N.E.2d 927, 929 (Ind. 1989). Fundamental error is "a blatant violation of basic and elementary principles, undeniable harm or potential for harm, and prejudice that makes a fair trial impossible." *Harris v. State*, 76 N.E.3d 137, 140 (Ind. 2017).

[18] Moreover, the Supreme Court of the United States has long held that the denial of a jury trial, without a valid waiver, is structural error under the Sixth Amendment, *see Sullivan v. Louisiana*, 508 U.S. 275, 279-82, 113 S. Ct. 2078, 2081-83 (1993); and the Court's holding in *Blakely v. Washington*, 542 U.S. 296 (2004), extended the Sixth Amendment jury-trial right to any fact-finding hearing that might increase a defendant's sentence, *i.e.*, an habitual offender enhancement.

[19] > "[There is] a limited class of fundamental constitutional errors that def[ies] analysis by harmless error standards," thus requiring automatic reversal without the need to show prejudice. These

> errors, known as "structural errors," affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246 [ ] (1991).
>
> Some structural errors, such as the deprivation of counsel or defective reasonable-doubt instructions, always result in prejudicial harm to the defendant. *Weaver v. Massachusetts*, --- U.S. ---, 137 S. Ct. 1899, 1908 [ ] (2017) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 [ ] (1963); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078 [ ] (1993)). However, a structural error need "not lead to fundamental unfairness in every case." Structural error may arise when it threatens an interest *other than* protecting the defendant against wrongful conviction. Structural error also results if "the precise effect of the violation cannot be ascertained[.]"

Durden v. State, 99 N.E.3d 645, 653 (Ind. 2018) (internal citations and footnote omitted).

[20] *Perkins*, which was decided in 1989, is particularly instructive here. In that case, after our Supreme Court affirmed Perkins' felony convictions, he unsuccessfully petitioned for PCR. On appeal, our Supreme Court found that the trial record "contain[ed] no reference to an advi[sement] of the right to trial by jury or to any action on the part of the appellant or his counsel [ ] waiving that right or consenting to a bench trial." 541 N.E.2d at 928. Finding no support for the PC Court's findings that: (1) the trial court advised Perkins of his jury trial right; and (2) Perkins affirmatively waived his right thereto, the *Perkins* Court observed:

> . . . a successful waiver of jury trial cannot be made by the accused without the assent of the government and the judge. It is the duty of courts to assume in a criminal case that the defendant will want a trial by jury and require any waiver of jury trial to be a knowing and voluntary choice of the defendant himself, personally expressed by him *viva voce* or in writing, and memorialized on the court's record. A knowing, voluntary and intelligent waiver of the right cannot be inferred from a record of trial court events which does not evidence such personal choice. Submission to a bench trial with counsel at one's side cannot be deemed a waiver.

Id. (internal citations omitted). Finding that Perkins carried his burden of proof "*as a matter of governing constitutional law*[,]" our Supreme Court reversed the denial of PCR and remanded with instructions to conduct a new trial. *See id*. (emphasis added).

[21] Likewise, in *Kellems*, 849 N.E.2d 1110, 1114 (Ind. 2006), after Kellems was convicted in a bench trial, our Supreme Court affirmed. On rehearing, Kellems re-asserted various unaddressed issues from his direct appeal, including his claim that he was entitled to a new trial based on the trial court's failure to obtain his personal waiver of his right to a jury trial. Our Supreme Court agreed, reversing and remanding for a new trial. Specifically, the Court found: "[t]he trial court did not secure a waiver from Kellems personally. Its failure to do so—and to ensure that the waiver was reflected in the record—necessitates granting Kellems a new trial." *Id*.; *see id.* at 1113 (quoting *Patton v. State*, 495 N.E.2d 534, 535 (Ind. 1986): "There is no showing that the trial court elicited a

personal waiver either in writing or in open court of appellant's right to a trial by jury. We have no choice but to reverse . . . .").

[22] There is no disputing, here, that the colloquy between Bell and the trial court, following the jury's verdict and prior to the "hearing" on the habitual offender allegation, was not a constitutionally sufficient waiver of Bell's jury trial rights. It is axiomatic that the "limited class of fundamental constitutional errors" that defies harmless error analysis necessarily includes the denial of the right to a trial by jury. *See Durden*, 99 N.E.3d at 653. Based upon the above-cited authority, we find that—to the extent that the PC Court disposed of Bell's claims via harmless error analysis—the PC Court's decision is contrary to law. We conclude that the trial court failed to advise Bell of his right to a jury trial regarding the habitual offender finding and Bell's personal expression of his desire to forgo a jury trial is not apparent from the trial record.

[23] Moreover, we reject the State's position that "[c]ases available at the time of the direct appeal did not address fundamental error in this context, did not require a personal waiver, and indicated that sufficient waiver could be [ ] inferred from the circumstances." State's Br. p. 13. The foregoing discussion calls the State's position into question. *See Perkins*, 541 N.E.2d at 928 (reversing, in 1989, the denial of PCR for lack of proper jury trial waiver "*as a matter of governing constitutional law*[,]" where the record "contain[ed] no reference to an advi[sement] of the right to trial by jury or to any action on the part of the appellant or his counsel [ ] waiving that right or consenting to a bench trial").

[24] Bell has carried his burden. We find that the trial court committed a fundamental constitutional error that caused Bell to suffer prejudicial harm and would have merited automatic reversal on direct appeal. Had appellate counsel raised the invalid jury-trial waiver on direct appeal, this Court would have been obliged to reverse; and neither the State nor this Court could have disposed of the issue on direct appeal via a harmless error analysis. Thus, under *Strickland*'s prejudice prong, the outcome of Bell's direct appeal would have been different had the jury-waiver issue been raised.[6] *Id.* (quoting *Taylor v. State*, 840 N.E.2d 324, 338 (Ind. 2006)). We, therefore, find that "'the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the [PC Court]'s decision.'" *Gibson*, 133 N.E.2d at 681 (quoting *Ben-Yisrayl*, 738 N.E.2d at 258). Accordingly, we reverse and remand with instructions to vacate the habitual offender adjudication and to conduct a new trial on the habitual offender information.

Conclusion

[25] The PC Court clearly erred in denying Bell's petition for PCR. We reverse and remand with instructions to vacate the trial court's habitual offender adjudication and to conduct a new trial on the habitual offender information.

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[6] In so doing, we consciously resist the urge—borne of pragmatism—to prioritize the fact that the new trial on the habitual offender information will likely, if not certainly, result in a renewed finding that Bell is an habitual offender. Be that as it may, our hands are tied by the trial court's inexcusable failure to properly instruct Bell regarding his bedrock jury-waiver right, which our Supreme Court has aptly termed "[a] fundamental linchpin of our system of criminal justice." *See Kellems*, 849 N.E.2d at 1112.

[26] Reversed and remanded with instructions.

Najam, J., and Pyle, J., concur.