

MEMORANDUM DECISION

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APPELLANT PRO SE

Jason C. Burkett
New Castle Correctional Facility
New Castle, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General
Jodi Kathryn Stein
Supervising Deputy Attorney
General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jason C. Burkett,
Appellant-Petitioner,

v.

State of Indiana,
Appellees-Respondent

August 29, 2022

Court of Appeals Case No.
22A-PC-469

Appeal from the Cass Circuit
Court

The Honorable Stephen R. Kitts II,
Judge

Trial Court Cause No.
09C01-1903-PC-4

Crone, Judge.

Case Summary

- [1] Jason C. Burkett, pro se, appeals the denial of his successive petition for post-conviction relief (PCR). We affirm.

Facts and Procedural History

- [2] In 2005, following a jury trial, Burkett was found guilty of two counts of class B felony rape, class B felony criminal deviate conduct, class D felony sexual battery, and class D felony confinement. The trial court imposed a forty-year aggregate sentence. On direct appeal, Burkett argued that the trial court should have granted his motion to sever each of his charges, and he further argued that he received ineffective assistance of trial counsel. This Court affirmed his convictions and sentence. *Burkett v. State*, No. 09A02-0410-CR-883, slip op. at 2-5 (Ind. Ct. App. Mar. 28, 2005).
- [3] Thereafter, Burkett filed his first PCR petition, which was denied. He appealed to this Court and then requested leave to terminate his appeal and return to the post-conviction court to present new evidence. We granted Burkett's request and dismissed the appeal without prejudice to his right to appeal any subsequent adverse PCR ruling. *Burkett v. State*, No. 09A04-1105-PC-231 (Ind. Ct. App. Aug. 26, 2011).
- [4] The post-conviction court granted Burkett's PCR petition in part, finding that he was entitled to relief on two of his claims. The State appealed. A panel of this Court reversed the grant of post-conviction relief and remanded for

consideration of Burkett's remaining claims. *State v. Burkett*, No. 09A02-1205-PC-356, 2013 WL 150257, at *7 (Ind. Ct. App. Jan. 15, 2013), *trans. denied*.

[5] On remand, the PCR court considered Burkett's remaining claims and denied relief. Burkett appealed, claiming only that his trial counsel was ineffective for failing to challenge the sufficiency of the evidence supporting his conviction for criminal deviate conduct. *Burkett v. State*, No. 09A02-1404-PC-233, 2015 WL 575996, at *2 (Ind. Ct. App. Feb. 11, 2015). He made no claim that the PCR court had failed to consider any claims raised by him or that his post-conviction counsel was ineffective. This Court affirmed the denial of the PCR petition. *Id.* Burkett filed a motion for remand alleging that all of his claims had not been addressed by the PCR court. Appellant's App. Vol. 4 at 24. We denied that motion.

[6] In June 2015, Burkett filed a motion for judgment on post-conviction issues not previously addressed in which he alleged that not all issues raised by him in his PCR action were addressed on remand. The PCR court denied the motion as untimely and barred by res judicata. Burkett again appealed. This Court granted the State's motion to dismiss and dismissed that appeal with prejudice. *See* Docket No. 09A02-1508-CR-1298. Our supreme court subsequently denied Burkett's request for transfer. *Burkett v. State*, 59 N.E.3d 252, 2016 WL 5375693, (Ind. Sept. 22, 2016).

[7] In 2017, Burkett filed a request for permission to file a successive PCR petition to challenge the adequacy of the PCR proceedings as well as to again challenge

the effectiveness of his post-conviction counsel following remand. *See* Docket No. 09A02-1703-SP-558. This Court denied permission to file a successive PCR petition on either of those claims. *Id.*

[8] In February 2019, Burkett again filed a request for permission to file a successive PCR petition. *See* Docket No. 19A-SP-361. However, this time his request alleged that the Indiana Department of Correction (DOC) wrongfully denied him credit time following his completion of an approved vocational program. Appellant’s App. Vol. 2 at 16. Based upon that request, this Court granted him permission to file a successive PCR petition. Burkett filed that successive petition in the post-conviction court on March 19, 2019. Burkett subsequently filed three “amendments” to his petition again attempting to raise issues regarding the adequacy of the prior PCR proceedings and the ineffectiveness of his post-conviction counsel.

[9] In June 2020, the successive PCR court issued an order denying Burkett’s petition for relief but only with regard to the issues raised in his third amendment to his successive petition. *Id.* at 149-52. The successive PCR court did not rule on the credit time issue or some of the issues raised in Burkett’s other amendments to his petition. Burkett appealed to this Court but subsequently requested that we remand the case to the successive PCR court for an evidentiary hearing and findings on the unaddressed issues raised in his successive PCR petition. *See* Docket No. 20A-PC-1570. We granted Burkett’s motion, dismissed the appeal without prejudice, and remanded the matter to the successive PCR court “for further proceedings.” *Id.*

[10] On remand, Burkett filed a motion for partial summary judgment and requested a hearing on the same. The successive PCR court denied the motion without a hearing. In June 2021, Burkett filed a petition for a writ of mandamus with this Court. *Burkett v. State*, No. 20A-PC-1570, 2021 WL 5996272, at *2 (Ind. Ct. App. Dec. 20, 2021). We denied the petition for lack of final judgment but remanded the matter to the successive PCR court with instructions that it issue a final ruling—either summarily or following a hearing—on Burkett’s successive PCR petition regarding credit time and his remaining “purported” amendments thereto. *Id.* We specifically noted:

It appears from our review of the record that most, if not all, the claims Burkett raised in his “amendments” to his successive PCR petition have either already been finally adjudicated and determined adversely to him or were ascertainable and available to him, but not raised, at the time of his trial, direct appeal, or prior PCR action. Of course, where the claims were already finally adjudicated adversely to Burkett, those claims are *res judicata* and may be summarily denied on that ground; and where the claims were previously ascertainable and available to Burkett but not raised, those claims are waived and may be summarily denied on that ground.

Id. at *3 n.4 (citations omitted).

[11] On remand, the successive PCR court issued a final order summarily denying Burkett relief on his purported amendments to his successive PCR petition, concluding that the claims raised have already been litigated or are procedurally defaulted. Appellant’s Supp. App. Vol. 6 at 81. As to the original issue raised in his successive petition regarding credit time, the successive PCR court found

that Burkett received the proper credit time from the DOC for completion of his vocational program and denied relief on that issue. This appeal followed.

Discussion and Decision

- [12] Burkett appeals from the denial of his successive PCR petition, which is a negative judgment. *Bautista v. State*, 163 N.E.3d 892, 896 (Ind. Ct. App. 2021). Thus, 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.* (quoting *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013)). In other words, Burkett must convince this Court that there is no way within the law that the court below could have reached the decision it did. *Id.*
- [13] “Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence.” *Id.* (quoting *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *cert. denied* (2020)). Generally, one convicted of a crime in an Indiana state court can seek collateral review of that conviction and sentence in a post-conviction proceeding only once. *See Baird v. State*, 831 N.E.2d 109, 114 (Ind. 2005), *cert. denied* (2005); Ind. Post-Conviction Rule 1. To proceed with each “successive” post-conviction claim, petitioners need court permission, which will be granted if they establish a “reasonable possibility” of entitlement to post-conviction relief. Ind. Post-Conviction Rule 1(12)(a), -(b).
- [14] The sole issue raised in Burkett’s successive PCR petition was his allegation that he had not received proper credit time toward his sentence from the DOC

based on his completion of a vocational program. This Court granted Burkett permission to proceed on his successive PCR petition based upon this allegation, and this allegation alone. On appeal, Burkett claims that the successive PCR court improperly found that he had already litigated or procedurally defaulted all the issues raised in his purported amendments to his successive PCR petition. Specifically, Burkett maintains that the “crux” of the purported amendments “center[s] around the ineffectiveness of post-conviction counsel,” which was an issue that was unavailable in prior proceedings, so it could not have been procedurally defaulted. Appellant’s Br. at 27. Burkett further claims that the successive PCR court erroneously failed to hold an evidentiary hearing to address this issue.

[15] However, as noted above, we did not grant Burkett permission to file a successive PCR petition with regard to this claim, as this claim was never raised in his successive petition, nor did Burkett make, or attempt to make, a showing to this Court of a “reasonable possibility” of entitlement to post-conviction relief on this issue. By permitting successive post-conviction petitions only when the petitioner makes some showing of merit, this appellate screening function reduces the burden on trial courts. *Shaw v. State*, 130 N.E.3d 91, 92 (Ind. 2019). Burkett’s attempt to circumvent our appellate screening by simply

filing subsequent “amendments” to his successive PCR petition in order to raise new claims is not well taken and will not be permitted.¹

[16] In short, the only claim that was properly screened and authorized by this Court for consideration by the successive PCR court, as required by Post-Conviction Rule 1(12)(b), was Burkett’s claim that the DOC denied him educational credit time. The successive PCR court denied that claim on the merits, concluding that “the records from the [DOC] establish that, in fact, they have granted [Burkett] the credit time in question, having shortened his projected release date.” Appellant’s Supp. App. Vol. 6 at 81. Burkett does not challenge this conclusion in this appeal. Accordingly, we affirm the denial of his successive PCR petition.

[17] Affirmed.

Vaidik, J., and Altice, J., concur.

¹ Indeed, his purported amendments include the precise claims he made in 2017 when we denied his first request for permission to file a successive PCR petition. We presumably denied that request because proper successive PCR petitions contain claims that by their nature could not have been raised in earlier proceedings. *Matheny v. State*, 834 N.E.2d 658, 662 (Ind. 2005). Claims that could have been but were not raised in earlier proceedings and that were not otherwise properly preserved are procedurally defaulted and waived. *Id.* That is to say, “we do not authorize the filing of successive petitions [that raise] forfeited claims.” *Id.* We disagree with Burkett’s assertion that the effectiveness of his post-conviction counsel is an issue that was unavailable in prior proceedings. Indeed, he has raised this issue in prior lower court proceedings and then failed to pursue that claim on appeal of those rulings. Therefore, in addition to it not being authorized by this Court for successive PCR relief, the issue has been procedurally defaulted.