MEMORANDUM DECISION

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IN THE

COURT OF APPEALS OF INDIANA

Sixto Cotto,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

January 13, 2023

Court of Appeals Case No. 22A-PC-2034

Appeal from the Spencer Circuit Court

The Honorable Jonathan A. Dartt, Judge

Trial Court Cause No. 74C01-1910-PC-339

Crone, Judge.

Case Summary

[1] Sixto Cotto appeals the denial of his petition for post-conviction relief. We affirm.

Facts and Procedural History

[2] The underlying facts as recited by this Court on direct appeal follow:

> Cotto and Nicholas Polen ("Polen") worked at Kimball International ("the Kimball plant") in Santa Claus, Indiana. In December 2016, Polen, who was on probation from a manufacturing methamphetamine conviction, had a positive drug screen for methamphetamine. Polen told his probation officer that he had gotten the methamphetamine from Cotto, and he offered to work with the police as a confidential informant. Thereafter, Spencer County Sheriff Deputy Kelli Reinke ("Deputy Reinke") spoke with Polen about making a controlled buy of methamphetamine from Cotto.
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> In February 2017, Polen and Cotto made arrangements to meet at Stones Motel in Dale, Indiana ("the motel") where Polen could purchase an "eight-ball" of methamphetamine from Cotto for $ 250.00. They also planned for Cotto to "front" another eight-ball of methamphetamine.
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> On February 16, 2017, Deputy Reinke met with Polen at a barn near the motel. Deputy Reinke searched Polen's vehicle and person to ensure that he had no controlled substances. Deputy Reinke also installed a video recording device and an audio recording device in Polen's truck. Polen and Deputy Reinke then drove toward the motel. Polen parked at the motel, while Deputy Reinke parked in a nearby parking lot where she observed the scene at the motel with binoculars and was able to see and recognize Cotto. At the motel, Cotto walked up to Polen's truck

and handed Polen a cigarette carton that contained a baggie with one eight-ball of methamphetamine. Polen left and drove to the meeting point with Deputy Reinke, who then searched Polen's truck and person. Polen gave Deputy Reinke the cigarette carton containing the baggie of methamphetamine, which weighed 3.26 grams.

Thereafter, Deputy Reinke and Polen made plans for a second controlled buy, and Polen arranged to purchase a second eight-ball of methamphetamine from Cotto on February 23, 2017. However, the transaction did not occur because of a supply issue.

On February 24, 2017, Cotto and Polen were working the late shift at the Kimball factory. Cotto walked up to Polen and handed him an eight-ball of methamphetamine that was wrapped in plastic and a paper towel. Cotto did not ask Polen for any payment. Around 1:00 a.m., Polen texted Deputy Reinke to tell her that Cotto had given him some methamphetamine. Later that morning, Polen met Deputy Reinke at the probation office, and he gave her the methamphetamine that he had received from Cotto. The methamphetamine weighed 3.19 grams.

On February 27, 2017, Deputy Reinke obtained an arrest warrant for Cotto. That same day, Deputy Reinke and other deputies went to a country road leading to the entrance of the Kimball factory to wait for Cotto as he arrived for work. When they stopped Cotto, he parked his car in the roadway. The "registration plates" on Cotto's car were registered to a different vehicle. The deputies impounded Cotto's vehicle "due to it being in the roadway" and because of the improper plate. Deputy Reinke served the arrest warrant, patted down Cotto, and found $ 766.00 in Cotto's pocket. The deputies placed Cotto in a police car and ran a canine officer around his vehicle, and the canine alerted on the driver's side door. The deputies searched Cotto's vehicle and seized a cell phone, a trac phone, an iPod, two prescription bottles, four capsules, a backpack with a laptop

> inside, and two composition notebooks containing names and phone numbers. Deputy Reinke later obtained a search warrant for [] Cotto's cell phone, and the police obtained some text messages from his phone.

Cotto v. State, No. 74A04-1711-CR-2608, slip op. at *1-2, 2019 WL 1143191 (Ind. Ct. App. Mar. 13, 2019) (citations and footnote omitted), *trans. denied*.

[3] The State originally charged Cotto with one count of level 5 felony dealing in methamphetamine and one count of level 6 felony possession of methamphetamine based on the February 16th incident. The State later filed a motion, which the trial court granted, to join a second count of level 5 felony dealing in methamphetamine for the February 24th incident that had been filed under a separate cause number. A jury trial was held in June 2017. The jury found Cotto guilty as charged. During sentencing, Cotto argued that his convictions constituted a single episode of criminal conduct and therefore could not support consecutive sentences pursuant to Indiana Code Section 35-50-1-2. The trial court rejected Cotto's argument, concluding, in part, that there were two distinct drug transactions, occurring eight days apart, in different locations under different circumstances. The court emphasized that one dealing transaction was a controlled buy initiated and supervised by law enforcement during which money was exchanged for drugs, and the other was an unsupervised transaction initiated wholly by Cotto during which drugs were fronted by Cotto directly to the informant without any money being paid. The trial court sentenced Cotto to consecutive six-year sentences for each of the

level 5 felonies. The trial court then vacated the level 6 felony possession conviction on double jeopardy grounds.

[4] Cotto filed a direct appeal raising three issues: (1) whether the trial court abused its discretion by admitting certain evidence at trial; (2) whether his two level 5 felony dealing in methamphetamine convictions violated the continuous crime doctrine; and (3) whether the State presented sufficient evidence to support his convictions. Another panel of this Court issued a memorandum decision affirming Cotto's convictions in March 2019. *See id.*

[5] Cotto filed a petition for post-conviction relief in October 2019 and an amended petition in August 2021. Cotto's sole claim is that he was denied the effective assistance of appellate counsel. Following a hearing, the trial court issued its findings of fact and conclusions of law denying Cotto's petition for relief. This appeal ensued.

Discussion and Decision

[6] "Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence." *Bautista v. State*, 163 N.E.3d 892, 896 (Ind. Ct. App. 2021) (quoting *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *cert. denied* (2020)). "A defendant who files a petition for post-conviction relief 'bears the burden of establishing grounds for relief by a preponderance of the evidence.'" *Id*. (quoting Ind. Post-Conviction Rule 1(5)). "Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment[.]" *Id*. "Thus, the

defendant 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, 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*. (quoting *Wilkes*, 984 N.E.2d at 1240). "We review the post-conviction court's factual findings for clear error, but do not defer to its conclusions of law." *Wilkes*, 984 N.E.2d at 1240.

[7] Cotto claims that he was denied the effective assistance of appellate counsel. "The standard of review for a claim of ineffective assistance of appellate counsel is the same as that for trial counsel." *Massey v. State*, 955 N.E.2d 247, 257 (Ind. Ct. App. 2011). "The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). "First, the defendant must show that counsel's performance was deficient." *Id*. "This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment." *Id*. (citations omitted). "There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the

defendant to overcome that presumption." *Peaver v. State*, 937 N.E.2d 896, 900 (Ind. Ct. App. 2010), *trans. denied* (2011).

[8] "Second, the defendant must show that the deficient performance prejudiced the defense." *Perez*, 748 N.E.2d at 854. "To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the [appellate] proceeding would have been different." *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Although the two parts of the *Strickland* test are separate [inquiries], a claim may be disposed of on either prong." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006).

[9] We will dispose of Cotto's claim on the deficient performance prong. Cotto specifically contends that his appellate counsel performed deficiently in failing to raise a sentencing issue and argue that consecutive sentencing resulted in an inappropriate sentence under *Beno v. State*, 581 N.E.2d 922 (Ind. 1991), and its progeny. "There are three different grounds for claims of ineffective assistance of appellate counsel: (1) counsel's actions denied the defendant access to appeal; (2) counsel failed to raise issues on direct appeal resulting in waiver of those issues; and (3) counsel failed to present issues well." *Massey*, 955 N.E.2d at 258. "Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal." *Id*. (quoting *Reed v. State*, 856 N.E.2d 1189, 1196 (Ind. 2006)). "This is so because the choice of what issues to raise on appeal is one of the most important strategic decisions appellate counsel makes." *Id*. "To establish deficient

performance for failing to raise an issue, the petitioner must show that the unraised issue was significant and obvious on the face of the record and that it was clearly stronger than the issues raised." *Id*.

[10] Here, Cotto has failed to show that the unraised *Beno* issue was significant and obvious on the face of the record and that it was clearly stronger than the issues raised. In *Beno*, our supreme court held that it was "manifestly unreasonable" (currently inappropriate)[1] to impose consecutive sentences for multiple drug-dealing convictions where the convictions were based upon nearly identical State-sponsored controlled buys. 581 N.E.2d at 924. Similarly, in *Gregory v. State*, 644 N.E.2d 543, 544 (Ind. 1994), the court concluded that "[c]onsecutive sentences are not appropriate when the State sponsors a series of virtually identical offenses." However, in *Jones v. State*, 807 N.E.2d 58 (Ind. Ct. App. 2004), *trans. denied*, the defendant was charged with dealing crack cocaine in several controlled buys but was also charged for dealing outside of the context of a controlled buy, a transaction that predated the controlled buys. At sentencing, the trial court ordered the defendant to serve the sentence for the dealing that occurred outside the context of a controlled buy consecutive to the sentences for the other counts. *Id*. at 62. This Court rejected the defendant's challenge to consecutive sentences under *Beno* and *Gregory*. *Id*. at 69-70.

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[1] Prior to January 1, 2003, an appellate court needed to find that a trial court's sentence was "manifestly unreasonable" before it could revise the sentence. *Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006). Effective January 1, 2003, the appellate rules were amended to authorize an appellate court to revise a sentence if it finds "after due consideration of the trial court's decision" that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." *Id*. (quoting Ind. Appellate Rule 7(B)).

Specifically, we reasoned that consecutive sentencing was not inappropriate because one of the convictions related to a dealing transaction that occurred before any controlled buy had taken place and was thus not "virtually identical" to the other counts. *Id.*[2]

[11] Cotto's circumstances are distinguishable from those presented in *Beno* and *Gregory*, and much more similar to those presented in *Jones*. As in *Jones*, one of Cotto's dealing transactions occurred outside the context of a State-sponsored controlled buy and thus was not "virtually identical" to the other count. Indeed, during sentencing, the trial court emphasized that it perceived no *Beno* consecutive sentencing issue because the second dealing transaction occurred eight days after the first and was not initiated, supervised, or financially sponsored by the State. Appellate counsel explained during post-conviction proceedings that, based upon his independent assessment of the record, he agreed with the trial court that the second dealing transaction was neither State-sponsored nor virtually identical to the first transaction, and thus a *Beno* inappropriateness claim likely would not have been successful on appeal. Rather, appellate counsel selected issues he felt were more likely to succeed, including a suppression issue, a double jeopardy claim, and a sufficiency of the

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[2] In *Williams v. State*, 891 N.E.2d 621, 635 (Ind. Ct. App. 2008), we extended the holdings of *Beno* and *Gregory* "to convictions arising from evidence gathered as a direct result of the State-sponsored criminal activity." In that case, the prosecution charged the defendant with additional counts based on evidence obtained as a result of a residential search warrant that was obtained pursuant to evidence obtained from controlled buys. *Id*. at 634-35. Contrary to Cotto's assertions, this particular extension of the holdings in *Beno* and *Gregory* has no application under the facts presented here.

evidence argument. As noted above, the choice of what issues to raise on appeal is one of the most important strategic decisions appellate counsel makes, and Cotto has the burden to overcome the strong presumption that counsel rendered effective assistance in this regard. Under the circumstances presented, Cotto has not met his burden to establish, by a preponderance of the evidence, that the unraised *Beno* sentencing claim was significant and obvious on the face of the record or was clearly stronger than the issues raised. Accordingly, Cotto has failed to demonstrate that his appellate counsel's representation fell below an objective standard of reasonableness. The denial of his petition for post-conviction relief is affirmed.

[12] Affirmed.

May, J., and Weissmann, J., concur.