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**IN THE
COURT OF APPEALS OF INDIANA**

GORDON NORTHRUP, JR.,)

Appellant-Petitioner,)

vs.)

No. 79A02-1103-PC-272

STATE OF INDIANA,)

Appellee-Respondent.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy J. Williams, Judge
Cause No. 79D01-9908-CF-76

October 14, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Gordon Northrup (Northrup), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUES

Northrup raises ten issues for our review, three of which we find dispositive and restate as:

- (1) Whether his trial counsel provided ineffective assistance of counsel;
- (2) Whether his appellate counsel provided ineffective assistance of counsel; and,
- (3) Whether Northrup's guilty plea was knowing and voluntary.

FACTS AND PROCEDURAL HISTORY

We reviewed the factual and procedural background in the second of three prior appeals in this case:

Northrup attempted to molest ten-year-old S.B. in March of 1999 when he pressed his penis against her vagina. On August 5, 1999, the State charged him with Class A felony attempted child molesting, Class B felony attempted child molesting, and two counts of Class C felony child molesting. On February 25, 2000, Northrup pled guilty to Class B felony attempted child molesting and to being an habitual offender. On March 22, 2000, the trial court sentenced Northrup to eighteen years executed with a thirty-year enhancement for being an habitual offender, for a total sentence of forty-eight years. [...] Northrup filed a belated appeal on May 19, 2006. He contended that the trial court erred by considering aggravators that were not found by a jury as required by [*Blakely v. Washington*], 542 U.S. 296 (2004). We agreed to some extent and held:

In sum, with respect to Northrup's sentencing claims, we have found that the trial court erred upon [*Blakely*] grounds in considering as an

aggravator the fact that Northrup knew he had a sexually transmitted disease and understood the risk of infecting the victim. We have also determined that the trial court should not have attributed additional aggravating weight to the factors of “failure to rehabilitate” and “need for correctional treatment of penal facility,” both of which were derivative of the separate aggravator of Northrup's criminal history. Further, while we cannot say that the victim's age of ten may not be considered as a separate aggravator, this finding should be supported by specific facts and reasons indicating why such age contributed to a particularly egregious form of attempted child molesting. Accordingly, we instruct the trial court upon remand to resentence Northrup in a manner not inconsistent with this opinion.

[*Northrup v. State*], No. 79A02–0605–CR–413, slip op. at 6 (Ind. Ct. App. May 24, 2007). The trial court held a re-sentencing hearing on January 17, 2008. The trial court found two aggravators: Northrup's criminal history, including the fact that he was on probation at the time of the offense, and the fact that the victim recommended an aggravated sentence. After finding these two aggravators, the trial court again sentenced Northrup to forty-eight years.

Northrup v. State, No. 79A04–0803–CR–173, slip op. at 2-3 (Ind. Ct. App. June 18, 2008), *trans. denied*.

Northrup appealed his resentencing on his second appeal. We affirmed his sentence, finding that the trial court did not abuse its discretion in resentencing him. Even though a victim’s recommendation of an enhanced sentence was an invalid aggravator, we found Northrup's criminal history was a serious enough aggravator to support the enhanced sentence. *Id.* at 4-6.

In Northrup’s third appeal, we found that the trial court properly denied Northrup’s motion for modification of his sentence since the trial court lacked authority to modify his sentence under Ind. Code § 35-38-1-17(b). *Northrup v. State*, No. 79A02-0605-CR-19, slip op. at 2 (Ind. Ct. App. September 17, 2010).

On May 26, 2009, Northrup filed a petition for post-conviction relief. On October 14, 2010, the post-conviction court held a hearing on Northrup's petition. On February 11, 2011, the post-conviction court denied post-conviction relief, issuing the following findings of fact and conclusions of law:

22. [Northrup] presented testimony from [his trial counsel] at the hearing. [Northrup] first complained [his trial counsel] permitted the State to amend the charging information to delete the element, "a person of twenty-one years of age or older" without consulting [Northrup] or permitting a continuance to better prepare a defense.

23. [Trial counsel] testified [Northrup] was originally charged with child molesting as a [C]lass A felony and the habitual offender enhancement. He negotiated a favorable plea agreement reducing the child molesting to a [C]lass B felony. [Trial counsel] testified this amendment benefited [Northrup] and this amendment is what the defense "bargained for and it decreased the number of years that [Northrup] was exposed to." In response to this testimony, [Northrup] stated he agreed.

24. [Northrup] next questioned [trial counsel] about [trial counsel] discussing the "mens rea" necessary for the crime of attempted child molesting. [Trial counsel] testified "[the fact that] the act that [Northrup was] accused of doing [and then trial counsel thought] that [Northrup] admitted [to] placing [Northrup's] penis on this [girl's] vagina and that would have come up in the context [of] the intention of arousing sexual desires and so forth[,] and to argue that it wasn't a sexual act [trial counsel] thought would be engaging in—in a foolish argument . . . by just the nature of the actions that [Northrup] took with regard to the charge [trial counsel thought would] satisfy the element of intent and what [Northrup's] intentions were when [Northrup] did that act."

25. [Trial counsel] admitted he did not have a specific conversation with [Northrup] about "mens rea" as he cannot ever remember in thirty-one years where he had a discussion with a criminal client about "mens rea." [Trial counsel] did testify he discussed intent with [Northrup].

26. [Trial counsel] further testified that he did not know "how it could reasonably [be] argued that [Northrup] had some other intention in view of the act [Northrup] committed." [Trial counsel] said it was clear that [Northrup's] specific intent was to arouse his own or the girl's sexual desires by the act

[Northrup] committed of placing his penis on the girl's vagina.

27. The unofficial transcript of the guilty plea hearing of February 25, 2000, showed [Northrup] was fully advised of all of his rights. [Northrup] acknowledged he understood all his rights, the amendment to Count 2 reducing the charge from a [C]lass A felony to a [C]lass B felony, the nature of the charges, the possible range of penalties, that a plea of guilty is an admission to the truth of the charges and that he understood the terms of the plea agreement, and that he was satisfied with his attorney.

28. The unofficial transcript of the guilty plea hearing of February 25, 2000 showed [Northrup] was placed under oath and provide[d] an adequate and proper factual basis for his guilty plea to Amended Count 2 including admitting he knowingly or intentionally pressed his penis against the vagina of the child under age 14 in an attempt to perform or submit to sexual intercourse and this action constituted a substantial step towards the commission of the crime of child molesting. Under cross examination, [Northrup] further acknowledged the child was actually 10 years old at the time of his crime and again acknowledged that he admitted that everything in the charge is true. Finally, he again verified to the court that his testimony and that he had nothing further to add.

29. The unofficial transcript of the guilty plea hearing of February 25, 2000 showed the court found [Northrup] understood the nature of the charge[] against him to which he pled guilty, that his plea and his admission were each freely and voluntarily made and there was a factual basis for the plea of guilty and his admission.

30. [Northrup] presented no further testimony or evidence on this issue of ineffective assistance of [his trial counsel].

31. [Northrup] presented testimony from [Northrup's appellate counsel] at the hearing. Regarding the first [b]elated [a]ppeal, [Northrup] complained [his appellate counsel] did not object when the State did not timely file their brief. This court interjected and confirmed that [appellate counsel's] [b]elated [a]ppeal was successful in that the [c]ourt of [a]ppeals remanded the [Northrup's] case resentencing.

32. [Appellate counsel] further testified he did not remember anything about the [S]tate filing a late brief and even if a brief had been late, the issue would be moot because the appeal was successful. [Northrup] then agreed this made sense to him.

33. [Northrup] then complained that for the appeal of the resentencing, [appellate counsel] did not raise all the issues in the appeal [Northrup] requested be raised, filing one issue on this second appeal. [Appellate counsel] testified he believed the strongest argument was not to argue the appropriateness of the sentence considering [Northrup's] "bad record" but rather to argue an improper consideration of certain aggravators and failure to consider certain mitigators.

34. [Appellate counsel] testified the Court of Appeals receives many briefs from him and he always raises [Ind. Appellate Rule] 7(B) issues and the appropriateness of the sentence but in [Northrup's] case, he did not feel this was likely to [be] a successful argument given [Northrup's] lengthy criminal history. Further, [appellate counsel] testified even if [App. R.] 7(B) is not raised, the [c]ourt of [a]ppeals has the authority to review the appropriateness of the sentence on its own initiative.

35. [Northrup] next complained that at the resentencing hearing on January 17, 2008, [appellate counsel] did not advise him of his right to allocution. [Appellate counsel] responded that he remembered [Northrup] wanted to bring up something to the judge but [appellate counsel] thought this was a horrible idea that could hurt [Northrup]. [Appellate counsel] said he does not put a person on the stand to testify unless there is a purpose that would be helpful in persuading the court of something helpful. [Appellate counsel] also testified that after the hearing, [Northrup] wrote him a letter saying [Northrup] was glad [appellate counsel] did not take that approach at the resentencing hearing.

36. Further, [appellate counsel] testified [Northrup] did submit to the court at the resentencing hearing a large, [spiral bound] notebook documenting his many accomplishments and classes completed during his incarceration that the court reviewed some or all of the notebook and commented favorably upon those accomplishments. For this reason, [appellate counsel] specifically did not want [Northrup] testifying as the State would then have an opportunity to cross-examine [Northrup] which could lessen impact of the positive comments.

37. [Northrup] presented no further testimony or evidence of the issue of ineffective assistance of [his appellate counsel].

38. [Northrup] then requested and the court agreed to consider the remaining arguments presented in the Petition and the Amended Petition.

39. [Northrup] presented no additional evidence on the remaining issue of prosecutorial misconduct complaining again about (1) amending the charges from a [C]lass A to a [C]lass B felony, (2) the detective and the child’s mother making sentencing recommendations contrary to the terms of the plea agreement.

40. [Northrup] presented no additional evidence on the remaining issue of judicial misconduct complaining again about (1) permitting the prosecutor to amend the charges from a [C]lass A felony to a [C]lass B felony, (2) permitting the detective to make sentencing recommendations contrary to the terms of the plea agreement, (3) failing to issue an amended abstract, (4) failing to inform [Northrup] of his right allocution at the resentencing hearing, (5) failing to resentence the defendant while the defendant was present in the courtroom, (6) considering the victim’s recommendation as a sentencing aggravator, (7) improperly considering the habitual offender enhancement, (8) failing to advise [Northrup] that his plea of guilty to the pending charges also was a waiver of his right to a jury trial on the habitual offender enhancement.

(Appellant’s Br. pp. 29-31) (internal references omitted).

Northrup now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

We first review the applicable standard of review for post-conviction relief. The preponderance of evidence standard applies when determining whether the petitioner has established his claims to post-conviction relief. Ind. Post-Conviction Rule 1, § 5; *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied*, 534 U.S. 1164 (2002). When appealing factual issues in a denial of post-conviction relief, the post-conviction petitioner must show that the evidence “as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.” *Id.*

II. Free-Standing Claims of Error

Issues known and available, but not raised on appeal, are waived. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002). “The purpose of post-conviction relief is not to provide a substitute for direct appeal, but to provide a means for raising issues not known or available to the defendant at the time of the original appeal.” *Strowmatt v. State*, 779 N.E.2d 971, 975 (Ind. Ct. App. 2002). Northrup has appealed three times thus far. The first appeal challenged his sentencing, the second appeal challenged his resentencing, and the third appeal challenged the trial court’s denial of his motion for modification of the sentence imposed after resentencing.

In his petition for post-conviction relief, Northrup raises certain free-standing claims of error arising from his conviction and sentencing. Northrup contends that (1) the State improperly amended the Information from a Class A felony of child molestation to a Class B felony for the same crime;¹ and (2) the State breached its plea agreement with Northrup by eliciting victim testimony which recommended an increase in Northrup’s sentence. We view his first argument as a direct attack on his conviction, which would have been available to Northrup on direct appeal. *Timberlake*, 753 N.E.2d at 597-8. Even if we did not find this contention waived, we note that post-conviction court found amendment of the Information to be to the benefit of Northrup. As to his argument regarding the State’s breach of the plea agreement by eliciting victim and arresting officer testimony at his sentencing hearing, this

¹ As evidenced by the post-conviction court’s findings of fact and conclusions of law, Northrup sought to ascribe errors regarding the amended information to the trial court, the State, and his trial counsel. (Appellant’s Br. pp. 29, 31). However, Northrup’s brief restricts argument to the trial court’s failure to advise Northrup of a right to a continuance based on the amended information. Because appeal is limited to those issues raised in his brief, we do not review Northrup’s claims on the basis of prosecutorial misconduct or ineffective assistance of counsel.

argument was available and could have been raised in Northrup's first appeal. *Id.* We also deem it waived.

Northrup also raises the following free-standing claims of error with respect to his resentencing. Northrup contends that (1) the trial court improperly considered aggravators while disregarding mitigators; (2) the trial court failed to properly express its reasoning for the sentence imposed; (3) the trial court resentenced Northrup without Northrup present; and, (4) the trial court failed to advise Northrup of his right of allocution at the resentencing hearing. We note that Northrup challenged his resentencing at his first appeal, but did not raise claims two through four. We therefore find these contentions waived because the trial's court use of aggravators was decided against Northrup in his second appeal, and while all other claims were available to Northrup either at his second or third appeal, they were not raised.

III. *Ineffective Assistance of Trial Counsel*

Northrup contends that his trial counsel was ineffective. Ineffective assistance of counsel claims are subject to the two prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). The petitioner must establish counsel's deficient performance and prejudice resulting therefrom. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). Counsel's performance (1) must fall below an objective standard of reasonableness in light of professional norms, and (2) but for counsel's failure to meet such norms, the results of the proceedings would have been different. *Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *trans. denied*. Given different approaches by criminal defense attorneys regarding

effective representation, counsel's decisions regarding the strategy and tactics chosen are afforded deference, resulting in the strong presumption that counsel rendered adequate assistance and used professional judgment. *Timberlake*, 753 N.E.2d at 603. If an ineffectiveness claim may be disposed on grounds of insufficient prejudice, that course should be followed. *Id.* Where ineffective assistance of counsel is alleged in the context of a guilty plea, our supreme court has created two further categories for consideration: whether the ineffective assistance claim concerns (1) "an utilized defense or failure to mitigate a penalty," or (2) "an improper advisement of penal consequences." *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001).

Northrup insists that his trial counsel failed to "properly explore and prosecute the defense of lack of evidence/lack of specific intent" required to support a conviction for attempted child molesting. (Appellant's Br. p. 11). Thus, Northrup's claim falls into the first category. Northrup must therefore show the "probability of success of the omitted defense at trial" or that "utilization of the opportunity to mitigate a penalty would produce a better result." *Willoughby v. State*, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003), *trans. denied*.

We need not proceed to the foregoing analysis, however, because the record contradicts Northrup's assertion that he was not offered advice on the specific intent necessary for a charge of child molesting. Trial counsel testified that he discussed intent with Northrup, and in particular, how intent can be inferred from one's actions. Northrup offered no evidence to contradict trial counsel's testimony. To the extent Northrup argues that his trial counsel did not advise him of specific intent under the attempt statute, we find this

argument circular because Northrup received advice regarding the intent required to prove child molesting. Accordingly, we cannot say that his trial counsel provided ineffective assistance by failing to inform Northrup of the specific intent required to prove the crime of attempted child molesting.

IV. *Ineffective Assistance of Appellate Counsel*

Northrup contends that his appellate counsel was ineffective by failing (1) to argue that the State filed its brief four months late in Northrup's first direct appeal, and (2) to raise all issues in Northrup's second direct appeal. The standard of review for claims of ineffective assistance of appellate counsel is the same as for trial counsel's ineffective assistance. *Fisher v. State*, 810 N.E.2d 674, 676 (Ind. 2004). Indiana law recognizes three basic categories for claims of appellate counsel's ineffectiveness: "(1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." *Id.* at 677 (citing *Biehgler v. State*, 690 N.E.2d 188, 193-95 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998)). Here, Northrup'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. Our supreme court has provided the analysis to evaluate the effectiveness of appellate counsel's performance in this context: (1) the significance and obviousness of the unraised issue, and (2) the strength of raised issues as compared to the unraised issues. *Reed*, 856 N.E.2d at 1195. If analysis results in a finding of deficient performance, then the court considers whether the issues not raised "would have been clearly more likely to result in reversal or an order for a new trial"

and “the totality of an appellate attorney’s performance to determine whether the client received constitutionally adequate assistance.” *Id.* No deficient performance will be found where appellate counsel’s election of issues presented was reasonable in light of the facts of the case. *Id.* Finally, we note that appellate advocacy is not ineffective for failure to present a meritless claim. *Stowers v. State*, 657 N.E.2d 194, 200 (Ind. Ct. App. 1995), *trans. denied*.

Northrup contends his appellate counsel was ineffective because he failed to raise issues that Northrup considered essential in his first and second appeal. In Northrup’s first appeal, appellate counsel failed to file a motion to strike the State’s belatedly filed brief, despite Northrup’s written requests urging his appellate counsel to do so. During Northrup’s post-conviction hearing, appellate counsel testified that he did not recall the timeliness of the State’s filing. Appellate counsel further testified that while he received Northrup’s correspondence, he did not respond to Northrup’s letters because he found the letters to be lengthy and complex. Arguably, according to Northrup, appellate counsel’s failure to file a motion to strike the State’s belated brief represented deficient performance.

However, Northrup cannot demonstrate that but for appellate counsel’s arguably defective performance there was a reasonable probability that the result of the proceeding would have been different. *See Reed*, 856 N.E.2d at 1195. We note that Northrup’s first appeal was ultimately successful; his case was reversed and remanded for resentencing. Northrup contends that if the State’s brief was stricken, Northrup might well have received “a dismissal by procedural default on the [S]tate’s behalf.” (Appellant’s Br. p. 17). Since Northrup’s first appeal only contested his sentence, even if the State’s brief was stricken, the

best result possible would have been a remand for resentencing, i.e., the relief sought by Northrup and awarded by this court. Accordingly, we cannot say that appellate counsel's failure to file a motion to strike the State's brief rendered his assistance ineffective.

Northrup's second contention concerns appellate counsel's failure to raise an appropriateness argument under App.R. 7(b) in Northrup's second appeal. Similar to the circumstances surrounding appellate counsel's actions in Northrup's first appeal, Northrup wrote to appellate counsel several times urging him to raise an appropriateness argument regarding Northrup's resentencing. Appellate counsel testified that he considered appropriateness to be a catch-all argument, and that given Northrup's criminal history, an appropriateness argument was not strong. Rather, appellate counsel believed that appellate review of the trial court's use of sentencing aggravators and mitigators to be Northrup's strongest argument. In contrast, Northrup points to appellate counsel's appropriateness argument in Northrup's first appeal. Northrup contends that if appellate counsel believed it to be appropriate then, it should have had merit in the second appeal. Otherwise, the appropriateness argument should not have been raised in Northrup's first appeal.

Upon review of our opinion in Northrup's first appeal, we note that we reversed and remanded based on the trial court's consideration of aggravators, and not on the basis of appropriateness. *See Northrup*, No. 79A02-0605-CR-413, slip op. at 13-14. In fact, we did not address the appropriateness argument. *Id.* slip op. at 14. We cannot say that appellate counsel's election to reject an argument unaddressed on Northrup's first appeal was ineffective. Rather, his decision to focus on sentencing aggravators appears to be a strategic

choice.

Additionally, we cannot say that there is a reasonable probability of a different outcome based on appellate counsel's election. Our opinion in Northrup's second appeal justifies appellate counsel's reluctance to raise the appropriateness issue again. There, we found that although the victim's recommendation could not be a valid aggravator, Northrup's serious criminal history sufficed as an aggravator to support his sentence. *See Northrup*, 79D01-9908-CF-76, slip op. at 4-6. It would seem then, as echoed by appellate counsel's testimony, that a requested appellate review of Northrup's criminal history would have had negative results. We therefore find that appellate counsel's selection of the issue to raise in Northrup's second appeal was not ineffective assistance of counsel.

V. *Guilty Plea*

Northrup also argues that his guilty plea was not knowingly, voluntarily, and intelligently made because the trial court did not inform Northrup that he was waiving his right to a jury trial on the habitual offender charge. When reviewing a guilty plea, we look at all evidence that was before the post-conviction court. *Baker v. State*, 768 N.E.2d 477, 479 (Ind. Ct. App. 2002). We will not reverse if the evidence supports the post-conviction court's finding that the defendant entered his guilty plea knowingly, voluntarily, and intelligently. *Id.*

The trial court may not accept a guilty plea without considering whether it was given voluntarily. Ind. Code §35-35-1-2, 35-35-1-3. The trial court must undertake certain inquiries to ensure that the defendant's plea is voluntary. *Id.* It is difficult to mount a

collateral attack against a guilty plea made in connection with the trial court's observance of these steps. *State v. Moore*, 678 N.E.2d 1258, 1265 (Ind. 1997), *cert. denied*, 523 U.S. 1079 (1998). However, evidence of, among other things, a defendant being misled by the trial court raises a colorable claim that the guilty plea was not voluntary. *Id.* at 1266.

Northrup contends that “[n]owhere in the record does the court specifically state or unambiguously advise Northrup that pleading guilty to the underlying offense also waived his right to a jury trial on the habitual offender allegation.” (Appellant’s Br. p. 14). We disagree. The colloquy between the trial court and Northrup at the sentencing hearing shows that Northrup was advised of his rights, and in particular, his right to a jury trial on the habitual offender charge.

[TRIAL COURT]: Is it your intention to withdraw your former plea of not guilty as to Count Two [attempted child molesting] and the denial as set forth in Count Five [habitual offender]?

[NORTHTRUP]: Yes.

[TRIAL COURT]: Sir, you are advised you have the right to a public and speedy trial before this [court] or by jury, do you understand that?

[NORTHTRUP]: Yes.

* * *

[TRIAL COURT]: Do you understand by pleading guilty you are admitting you are giving up all these rights?

[NORTHTRUP]: Yes, I do.

[TRIAL COURT]: Do you understand if you were to have a trial and you were found guilty or to be an habitual offender that you would have the right to appeal your conviction or adjudication to the [s]upreme [c]ourt or the [c]ourt of [a]ppeals as the case might be?

[NORTHROP]: Yes.

* * *

[TRIAL COURT]: Do you understand by pleading guilty or admitting the Court will proceed with [judgments] of conviction and you will be sentenced without a trial?

[NORTHROP]: Yes, sir.

Northrup provided no evidence to contradict the post-conviction court's finding. Under these facts and circumstances, we conclude that the post-conviction court properly determined that Northrup's guilty plea was knowingly and voluntarily made.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err when it found that Northrup did not receive ineffective assistance of trial and appellate counsel and that Northrup's guilty plea was knowing, intelligent, and voluntary.

AFFIRMED.

NAJAM, J. and MAY, J. concur