MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Demajio J. Ellis,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

November 30, 2021

Court of Appeals Case No. 20A-PC-2019

Appeal from the St. Joseph Superior Court

The Honorable Jeffrey L. Sanford, Judge

Trial Court Cause No. 71D03-2002-PC-4

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Demajio Ellis (Ellis), appeals the denial of his petition for post-conviction relief.

[2] We affirm.

ISSUE

[3] Ellis presents one issue on appeal, which we restate as: Whether Ellis received ineffective assistance of Appellate Counsel.

FACTS AND PROCEDURAL HISTORY

[4] The relevant facts, as set forth in this court's opinion issued in Ellis' direct appeal following a remand, are as follows:

> In November 2010, Chad Nickerson, Jerry Atwood, and Jason Kleinrichert went to a McDonald's in South Bend one afternoon. At that time, Atwood and Kleinrichert were both fifteen or sixteen years old. Ellis and Shawn Alexander entered the restaurant, approached the group, and asked them to buy a can of spray paint from Family Dollar; the group refused. Ellis and Alexander also asked Atwood if he could obtain a gun for them; Atwood replied that he could not. The group then left McDonald's, spent some more time together at different places, and split up around 7:30 p.m., when Atwood and Kleinrichert began walking to Kleinrichert's house together.
>
> As Atwood and Kleinrichert were walking, Ellis and Alexander approached them, asking for a cigarette or money for a cigarette. Ellis and Alexander then wanted to see Atwood's hoodie, so he took it off so that Alexander could try it on. Alexander reached

into the pocket of the hoodie and found a knife, asking Atwood, "Oh, you gonna pull a knife on us?" Atwood said no.

Ellis and Alexander then forced Atwood and Kleinrichert to go with them to an abandoned house. Inside, Ellis and Alexander told the two teenagers to kneel and take their shirts off. Then, they took them to a nearby alley. Alexander walked behind Atwood, grabbed him by the throat, and choked him to the point of unconsciousness. Atwood later regained consciousness and saw Ellis and Alexander fighting Kleinrichert. Atwood started swinging his fists and mistakenly hit Kleinrichert, who fell face first into a metal electric box. Atwood was then choked to the point of losing consciousness again; when he regained consciousness, he began kicking Ellis. Someone kicked Atwood in the face, and Ellis stomped on Atwood's face, causing him to lose consciousness yet again. While Atwood was unconscious, someone cut his throat and Kleinrichert's throat. When Atwood woke up, he saw Kleinrichert and no one else. Kleinrichert told Atwood that Alexander had slashed Kleinrichert's throat[,] and that Ellis had cut Atwood. Kleinrichert and Atwood were both bleeding and surprised to be alive. Their hoodies and their knives were gone.

Kleinrichert and Atwood then ran to Nickerson's house. Nickerson opened the door and saw that the necks of both teenagers were cut and bleeding and their shirts were covered in blood. Atwood told Nickerson that the two men the group had encountered at McDonald's were the attackers. Nickerson called 911. Police responded, finding Atwood and Kleinrichert terrified, hyperventilating, and bleeding. They were immediately transported to the hospital because of the life-threatening injuries.

Ellis v. State, No. 18A-CR-1646, slip op. *2 (Ind. Ct. App. Apr. 25, 2019) (*Ellis II*) (internal citations omitted).

[5] On November 9, 2010, the State filed an Information, charging Ellis with two Counts of attempted murder and two Counts of attempted robbery, all as Class A felonies. On May 11, 2011, Ellis pleaded guilty. In 2013, Ellis pursued post-conviction relief, arguing that he did not enter a reliable guilty plea and that his plea should be vacated as a matter of law. We, however, denied Ellis's post-conviction petition. *See Ellis v. State*, No. 71A05-1511-PC-1845 (Ind. Ct. App. Mar. 15, 2016) (*Ellis I*). Following a successful petition to transfer, in 2017, our supreme court, however, found that Ellis was entitled to post-conviction relief because he had maintained his innocence at the same time he pleaded guilty, and it therefore reversed the post-conviction court judgment and remanded the cause for further proceedings. *See Ellis v. State*, 67 N.E.3d 643, 645 (Ind. 2017) (*Ellis III*).

[6] Between June 4 and 5, 2018, Ellis's jury trial was held. By that time, Alexander had pleaded guilty to the attempted murder and attempted robbery of Atwood and Kleinrichert. Ellis represented himself at his jury trial. Atwood testified reluctantly, and Kleinrichert did not testify. The State proceeded against Ellis under two separate theories: Ellis as the principal and Ellis as an accomplice to Alexander. The trial court instructed the jury on attempted murder under both theories. At the close of the evidence, the jury found Ellis guilty as charged. On July 5, 2018, the trial court sentenced Ellis to a total of 100 years with 60 years suspended. Ellis subsequently appealed, arguing that the trial court committed fundamental error when it allowed the State to call his accomplice, Alexander, as a witness and that the evidence was insufficient to support the

attempted murder convictions. Finding no fundamental error and sufficient evidence, we affirmed his convictions. *See Ellis II*, No. 18A-CR-1646, slip op. at 2.

[7] On February 10, 2020, Ellis filed a *pro se* petition for post-conviction relief arguing, in part, that he was denied effective assistance of Appellate Counsel because he was not informed about the outcome in *Ellis* II and Appellate Counsel did not file a petition for transfer. On April 22, 2020, ahead of the evidentiary hearing, Appellate Counsel filed an affidavit stating that he had sent Ellis a letter informing him of the adverse decision in *Ellis II*, that he did not think he could file a petition to transfer in good faith, and that Ellis had thirty days to file a petition for transfer. Appellate Counsel then attached the letter to his affidavit. The parties agreed that the affidavit would serve in lieu of Appellate Counsel's testimony. On September 11, 2020, the post-conviction court conducted a hearing. On October 7, 2020, the post-conviction court entered findings of fact and conclusions of law denying Ellis's petition for post-conviction relief.

[8] Ellis now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[9] Ellis appeals the post-conviction court's order denying post-conviction relief on his claims of ineffective assistance of Appellate Counsel. At the outset, we note that Ellis has chosen to proceed *pro se* and that his appellate brief is not a model

of clarity. 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] Our standard of review in post-conviction proceedings is well-settled:

> We observe that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court.

Shepherd v. State, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010) (internal citations omitted), *trans. denied*. Additionally, "[w]e will not reweigh the evidence or judge the credibility of the witnesses; we examine only the probative evidence

and reasonable inferences that support the decision of the post-conviction court." *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007), *reh'g denied*, *cert. denied*.

II. *Ineffective Assistance of Appellate Counsel*

[11] We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Williams v. State*, 724 N.E.2d 1070, 1078 (Ind. 2000), *reh'g denied, cert. denied*. A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh'g denied*), *reh'g denied, cert. denied*. "A reasonable probability arises when there is a 'probability sufficient to undermine confidence in the outcome.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). "Failure to satisfy either of the two prongs will cause the claim to fail." *Gulzar v. State*, 971 N.E.2d 1258, 1261 (Ind. Ct. App. 2012) (citing *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002)), *trans. denied*. However, "[i]f we can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient." *Baer v. State*, 942 N.E.2d 80, 91 (Ind. 2011). "Indeed, most ineffective assistance of counsel

claims can be resolved by a prejudice inquiry alone." *French*, 778 N.E.2d at 824.

[12] In order to succeed on an ineffective assistance of counsel claim, "a petitioner must overcome the 'strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *State v. Greene*, 16 N.E.3d 416, 419 (Ind. 2014) (quoting *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002), *reh'g denied, cert. denied*). "A defendant alleging the ineffective assistance of appellate counsel on direct appeal bears a rigorous burden." *Conner v. State*, 711 N.E.2d 1238, 1252 (Ind. 1999), *reh'g denied, cert. denied*. "Because the decision regarding what issues to raise and what arguments to make is 'one of the most important strategic decisions to be made by appellate counsel,' ineffectiveness is very rarely found." *Id*. (quoting *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind.1997), *reh'g denied, cert. denied*).

[13] Ineffective assistance of appellate counsel claims "'generally fall into three basic categories: (1) denial of access to an appeal, (2) waiver of issues, and (3) failure to present issues well.'" *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013) (quoting *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006)). The deficient performance Ellis alleges is Appellate Counsel's failure to timely inform him of the outcome in *Ellis II* which affirmed his convictions, and Counsel's failure to pursue a transfer to our supreme court.

[14] As noted, ahead of the post-conviction hearing, Appellate Counsel filed an affidavit stating that he had sent Ellis a letter informing him of the adverse decision in *Ellis II*, that he did not think he could file a petition for transfer in good faith, and that Ellis had thirty days to file a petition for transfer. He then attached his letter to his affidavit. The parties agreed that the affidavit would serve in lieu of Appellate Counsel's testimony. At the post-conviction hearing, Ellis called the mailroom supervisor at the Pendleton Correctional Facility where he is currently incarcerated. The supervisor testified that all legal mail received at the facility is logged and that Ellis did not receive mail from Appellate Counsel. Further, an exhibit was entered supporting her testimony. While the record shows that Ellis never received Appellate Counsel's letter, Ellis made no showing that the failure of the letter to reach him was attributable to Appellate Counsel.

[15] Here, we cannot conclude that Appellate Counsel's performance fell outside the range of acceptable performance for not seeking transfer in *Ellis II*. As pointed out by the post-conviction court, Appellate Counsel took steps to notify Ellis about the adverse decision in *Ellis II*, and Appellate Counsel further informed Ellis that he would not be seeking transfer. The letter from Appellate Counsel was dated the day after this court's opinion was issued in *Ellis II*. *See Stephenson*, 864 N.E.2d at 1028 ("We will not reweigh the evidence or judge the credibility of the witnesses; we examine only the probative evidence and reasonable inferences that support the decision of the post-conviction court.").

[16] In *Yerden*, a direct appeal, our supreme court considered a claim that interlocutory appellate counsel was ineffective for having failed to make a particular argument, to show how prejudice would result by newly passed rules of evidence, and to seek transfer to the supreme court. *Yerden v. State*, 682 N.E.2d 1283, 1286 (Ind. 1997). Applying the *Strickland* test, the court noted that the defendant had "literally provided no argument, much less any cogent argument, explaining how the lawyer who took the interlocutory appeal performed below prevailing norms." *Id*. Only then did the court note in dictum that a "healthy majority of lawyers who lose before the Indiana Court of Appeals, for example, elect not to seek transfer. On the face of it, without any explanation, a lawyer who does not petition for transfer has simply performed according to the statistical norm." *Id*. As a result, Yerden's claim of ineffective assistance failed. *Id*.

[17] In other words, not seeking transfer falls squarely within the accepted range of reasonable professional assistance and a lawyer who declines to seek transfer falls within the statistical norm. *Id*. Ellis has made no special showing which would take his case outside of *Yerden*. Additionally, Ellis failed to present any evidence to show that, had a petition for transfer been filed, there was a reasonable probability the supreme court would have granted it. Because Ellis has failed to show that Appellate Counsel's performance fell outside the range of acceptable performance, he has failed to meet his burden of showing that the post-conviction court erred by denying relief on his claims.

CONCLUSION

[18] Based on the foregoing, we conclude that Ellis has failed to establish that Appellate Counsel acted deficiently or that he was prejudiced by the alleged deficiency. We therefore conclude he did not receive ineffective assistance of counsel and affirm the post-conviction court's denial of his petition for post-conviction relief.

[19] Affirmed.

[20] Najam, J. and Brown, J. concur