MEMORANDUM DECISION

APPELLANT PRO SE

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ATTORNEYS FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

Shane E. Durham,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 4, 2023

Court of Appeals Case No. 23A-PC-760

Appeal from the Fayette Superior Court

The Honorable Daniel L. Pflum, Senior Judge

Trial Court Cause No. 21D01-2204-PC-305

Memorandum Decision by Judge Tavitas
Judges Pyle and Foley concur.

Tavitas, Judge.

Case Summary

[1] The State charged Shane Durham with several offenses, including unlawful possession of a firearm by a serious violent felon, a Level 4 felony. The State alleged that Durham was a serious violent felon based on a prior conviction for robbery in Ohio. Durham pleaded guilty to all charges. Durham then petitioned for post-conviction relief and argued that trial counsel was ineffective by failing to argue that his Ohio robbery conviction could not support a finding that Durham was a serious violent felon. The post-conviction court ("PC Court") rejected that argument and denied post-conviction relief. Durham appeals and argues that the PC Court clearly erred by rejecting his ineffective assistance of counsel claim. We disagree and affirm.

Issue

[2] Durham raises one issue on appeal, which we restate as whether the PC Court clearly erred by denying Durham's ineffective assistance of counsel claim.

Facts

[3] This appeal stems from a plea agreement that Durham entered into in 2019. In 2018, the State charged Durham with four counts: Count I: unlawful possession of a firearm by a serious violent felon, a Level 4 felony; Count II: possession of methamphetamine, a Level 6 felony; Count III: operating a vehicle with a Schedule I or II controlled substance or its metabolite in the body, a Class A misdemeanor; and Count IV: possession of marijuana, a Class B misdemeanor. The State also alleged that Durham was an habitual offender.

[4] Regarding the charge of unlawful possession of a firearm by a serious violent felon, at the time of Durham's offenses, Indiana Code Section 35-47-4-5 provided in relevant part as follows:

> (a) As used in this section, "serious violent felon" means a person who has been convicted of:
>
> (1) committing a serious violent felony in:
>
> (A) Indiana; or
>
> (B) any other jurisdiction in which the elements of the crime for which the conviction was entered are **substantially similar** to the elements of a serious violent felony[.]
>
> * * * * *
>
> (b) As used in this section, "serious violent felony" means:
>
> * * * * *
>
> (13) robbery (IC 35-42-5-1);
>
> * * * * *

> (c) A serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Level 4 felony.[1]

(Emphasis added).

[5] The State alleged that Durham was a serious violent felon based on a prior conviction for robbery in Ohio under Ohio Revised Code Annotated Section 2911.02. We juxtapose this statute with its Indiana counterpart, Indiana Code Section 35-42-5-1, in relevant part below:

R.C. 2911.02	**I.C. 35-42-5-1**
(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control; (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another; (3) Use or threaten the immediate use of force against another. (B) Whoever violates this section is guilty of robbery. . . .	(a) Except as provided in subsection (b), a person who knowingly or intentionally takes property from another person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear; commits robbery, a Level 5 felony. However, the offense is a Level 3 felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant, and a Level 2 felony if it results in serious bodily injury to any person other than a defendant. * * * * *

[1] The serious violent felon statute has since been amended and no longer distinguishes between offenses committed in Indiana and those committed in other jurisdictions.

[6] Attorney Geoffrey Wesling was appointed to represent Durham. On November 20, 2019, Durham and the State entered into a plea agreement wherein Durham agreed to plead guilty to all four counts and the habitual offender enhancement and serve: twelve years suspended to probation on Count I, which was enhanced by ten additional years executed on work release based on the habitual offender enhancement; two years on Count II; and 180 days each on Counts III and IV. Counts I and II were to be served consecutively, and Count III and IV were to be served concurrently with the other counts.

[7] The trial court held a hearing on the guilty plea later that day. Durham indicated that he read the plea agreement, discussed it with Attorney Wesling, and that signing the plea agreement was his free and voluntary act. Durham did not raise any concerns regarding the plea agreement, and the trial court accepted the plea agreement. On December 20, 2019, the trial court sentenced Durham pursuant to the terms of the plea agreement.

[8] On April 27, 2022, Durham petitioned for post-conviction relief. Durham argued that Attorney Wesling was ineffective by failing to argue that, based on the "fleeing" language in the Ohio robbery statute, that statute was not substantially similar to Indiana's robbery statute. As a result, Durham contended that his Ohio robbery conviction could not support a finding that Durham was a serious violent felon.

[9] The PC Court held hearings on Durham's petition on November 10, 2022, and January 20, 2023. At the hearing, Durham proffered a letter he allegedly sent to Attorney Wesling before entering into the plea agreement in which Durham "tried to raise the issue" of whether his Ohio robbery conviction could support a finding that he was a serious violent felon.[2] Tr. Vol. II p. 62. Durham, however, did not call Attorney Wesling to testify at the post-conviction hearings, and Durham did not testify himself. The State proffered a jail phone conversation, also from before the plea agreement hearing, in which Durham told his father that he did not believe his Ohio robbery conviction rendered him a serious violent felon and that he would raise the issue with Attorney Wesling.

[10] On March 13, 2023, the PC Court issued findings of fact and conclusions of law. The PC Court found the following:

> C. The Petitioner argues that by adding the element of fleeing the Ohio robbery statute is not substantially similar to and is broader than Indiana's robbery statute.
>
> D. Using the criteria set out in *State v. Hancock*, 65 [N.E.3d] 585 (Ind. 2016), the fleeing provision of the Ohio robbery statute does not make it substantially non similar to [the] Indiana robbery statute, as the fleeing has to occur after committing theft while [] threaten[ing] the immediate use of force against another.

[2] The photo-copied letter included in the record is difficult to discern.

> E. The Petitioner was aware of this issue at the time he pled guilty . . . .

Appellant's App. Vol. II p. 119. The PC Court concluded that Durham had not carried his burden of proof on his ineffective assistance of counsel claim. Accordingly, the PC Court denied Durham's petition for post-conviction relief. Durham now appeals.[3]

Discussion and Decision

[11] Durham argues that the PC Court clearly erred by denying his ineffective assistance of counsel claim. We are not persuaded.

I. Standard of Review

[12] 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*, 141 S. Ct. 553 (2020); 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.3d at 681. "Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are res judicata." *Id.* The

[3] Durham proceeds in this matter pro se. We reiterate that "'a pro se litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented.'" *Stark v. State*, 204 N.E.3d 957, 963 (Ind. Ct. App. 2023) (quoting *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014)).

petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id.;* P.-C.R. 1(5).

[13] 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.3d at 681 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)). When reviewing the PC court's order denying relief, we will "not defer to the post-conviction court's legal conclusions," and the "findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Bobadilla v. State*, 117 N.E.3d 1272, 1279 (Ind. 2019). When a petitioner "fails to meet this rigorous standard of review, we will affirm the post-conviction court's denial of relief." *Gibson*, 133 N.E.3d at 681 (internal quotation omitted).

[14] Durham argues that trial counsel was ineffective. To prevail on an ineffective assistance of counsel claim, the petitioner must show both that: (1) counsel's performance fell short of prevailing professional norms; and (2) the petitioner suffered prejudice as a result. *Gibson*, 133 N.E.3d at 682 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984))).

[15] A showing of deficient performance "requires proof that legal representation lacked 'an objective standard of reasonableness,' effectively depriving the defendant of his Sixth Amendment right to counsel." *Id.* (quoting *Overstreet v.*

State, 877 N.E.2d 144, 152 (Ind. 2007)). We strongly presume that counsel exercised "reasonable professional judgment" and "rendered adequate legal assistance." *Id.* Defense counsel enjoys "considerable discretion" in developing legal strategies for a client. *Id.*

[16] As for the prejudice component, in the context of a guilty plea, the petitioner must demonstrate a "reasonable probability that he would have rejected the guilty plea and insisted on going to trial instead." *Bobadilla*, 117 N.E.3d at 1284. In making this showing, the petitioner must identify "special circumstances" existing at the time of the plea agreement that support "rational reasons" for why he would have made that decision. *Id.*

II. The PC Court did not clearly err

[17] We conclude that Durham has not demonstrated that he was prejudiced by trial counsel's alleged errors, and thus we need not decide whether trial counsel's performance was deficient. Durham argues that trial counsel was ineffective by failing to argue that Durham's Ohio robbery conviction could not support a finding that Durham was a serious violent felon. Durham, however, pleaded guilty to the convictions he now challenges, despite his claimed concerns. His argument is misplaced under the applicable legal standard.

[18] The relevant inquiry is whether, but for trial counsel's alleged errors, Durham would have rejected the plea agreement and insisted on going to trial, and whether Durham can identify rational reasons that would support that decision. *Id*. Here, Durham offered no evidence—testimonial or otherwise—that he

would have rejected the plea agreement. On the contrary, Durham's letter to trial counsel and phone call to his father indicate that Durham was well aware of the issue and was concerned about whether his Ohio robbery conviction could support a finding that he was a serious violent felon. Durham, however, chose to plead guilty to that offense. Durham also offered no testimony from trial counsel regarding Durham's legal representation and decision to plead guilty. The PC Court noted the absence of this testimony. Furthermore, because Durham failed to offer testimony from his counsel, the PC Court was permitted to "infer that counsel would not have corroborated [Durham's] allegations." *See Culvahouse v. State*, 819 N.E.2d 857, 863 (Ind. Ct. App. 2004) (citing *Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989)), *trans. denied*.

[19] Nothing suggests that Durhan would have rejected the plea agreement and insisted on going to trial. Thus, we cannot conclude that Durham was prejudiced based on the record before us. Accordingly, the PC Court did not clearly err by denying Durham's ineffective assistance of counsel claim and denying post-conviction relief.[4]

[4] Because we conclude that Durham has not demonstrated that he was prejudiced by trial counsel's alleged errors, we do not decide whether the relevant Ohio and Indiana robbery statutes are substantially similar.

Conclusion

[20] Durham has not demonstrated that he was prejudiced by trial counsel's alleged errors. The PC Court, thus, did not clearly err by denying Durham's petition for post-conviction relief. Accordingly, we affirm.

[21] Affirmed.

Pyle, J., and Foley, J., concur.