MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Brandon M. Newell,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 2, 2024

Court of Appeals Case No.
23A-PC-1927

Appeal from the Grant Superior Court

The Honorable Jeffrey D. Todd, Judge

Trial Court Cause No.
27D01-1810-PC-15

Memorandum Decision by Judge Mathias
Judges Tavitas and Weissmann concur.

Mathias, Judge.

[1] Brandon M. Newell appeals the post-conviction court's partial denial of his petition for post-conviction relief. Newell raises a single issue for our review, which we restate as whether the post-conviction court's conclusion that Newell received effective assistance of appellate counsel is clearly erroneous. We affirm.

Facts and Procedural History

[2] In Newell's direct appeal, we stated the facts underlying his convictions as follows:

> On September 24, 2016, Jesus Martinez was on his front porch with his two-year-old son when a person, later identified as Newell, approached him and asked him for a cigarette. After he provided Newell with a cigarette, Martinez turned around and saw that Newell "ha[d] my son and a pistol." Transcript, Volume 2 at 54. Newell told Martinez to go in the house and said "he was gonna kill me and my son" if Martinez did not comply. *Id.* at 58. After they entered the house, Newell struck Martinez in the head with the pistol and took his cell phone and wallet. Newell again threatened to kill Martinez and his son if Martinez did not give him more money. Eventually, Newell threw Martinez's son back to him, threatened to kill him if he called the police, took Martinez's bike off the front porch, and rode off. Martinez chased Newell in his car and Newell subsequently abandoned the bicycle and ran off on foot. Martinez saw a Chrysler 300 speed down the street, stop, and pick up Newell. Martinez chased this vehicle until Newell got out and ran behind a house. Martinez then returned home and eventually contacted police. Martinez later identified Newell from a photo array assembled by police.

> The State charged Newell with burglary, armed robbery, criminal confinement, unlawful possession of a firearm by a serious violent felon, intimidation, and battery by means of a deadly weapon. The State also alleged Newell was an habitual offender. A jury found him guilty of all charges and also found him to be an habitual offender. . . .

Newell v. State, No. 27A04-1708-CR-1850, 97 N.E.3d 316, at *1-2 (Ind. Ct. App. Mar. 28, 2018) (mem.). On appeal, Newell's appellate counsel raised only the issue of whether Newell's sentence was inappropriate for our review. We affirmed.

[3] Thereafter, Newell filed his petition for post-conviction relief, which he later amended. In his amended petition, he argued, in relevant part,[1] that his appellate counsel had given him ineffective assistance by not challenging the sufficiency of the evidence supporting Newell's habitual offender adjudication. After an evidentiary hearing, the post-conviction court found and concluded as follows:

> neither trial counsel nor appellate counsel performed deficiently by failing to challenge the sufficiency of the habitual offender evidence presented at trial. The State was required to show that Newell had been twice convicted and twice sentenced for felonies, that the commission of the second offense was subsequent to his having been sentenced upon the first, and that the commission of the [instant] offense . . . was subsequent to his

[1] Newell also argued that his trial counsel and appellate counsel had rendered constitutionally deficient performance by failing to challenge the trial court's entry of consecutive habitual offender enhancements, and, on this point, the post-conviction court agreed with Newell and revised his sentence.

> having been sentenced upon the second conviction. Ideally, the State should have presented direct evidence in the form of official court records, rather than relying upon circumstantial evidence, to prove that [Newell's second conviction, a] Grant County robbery took place after Newell committed, was convicted, and was sentenced in [his first conviction, a] Miami County robbery. . . . Newell testified during the habitual offender phase that he committed the Grant County robbery after he "came home from doing eight and a half for the bank robbery." [This was] a direct reference to his earlier felony conviction in Miami County. This admission coupled with the State's evidence showing that he was convicted and sentenced in both cases[] constitute[s] sufficient circumstantial evidence [to support the habitual offender adjudication].

Appellant's App. Vol. 2, pp. 119-20 (citation omitted). Accordingly, the post-conviction court denied Newell's petition for relief on this issue, and this appeal ensued.

Standard of Review

[4] Newell appeals the post-conviction court's partial denial of his petition for post-conviction relief. As our Supreme Court has made clear:

> "The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence." *Campbell v. State*, 19 N.E.3d 271, 273-74 (Ind. 2014). "When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Id.* at 274. In order to prevail on an appeal from the denial of post-conviction relief, a petitioner must show that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993). Further, the post-

> conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "[a] post-conviction court's 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." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (internal quotation omitted).

Humphrey v. State, 73 N.E.3d 677, 681-82 (Ind. 2017).

Discussion and Decision

[5] Newell argues that he was denied effective assistance of appellate counsel when his counsel did not challenge the sufficiency of the evidence underlying Newell's habitual offender adjudication.

> When evaluating an ineffective assistance of counsel claim, we apply the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009). To satisfy the first prong, "the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002) (citing *Strickland*, 466 U.S. at 687-88). To satisfy the second prong, "the defendant must show prejudice: a reasonable probability (i.e.[,] a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id.* (citing *Strickland*, 466 U.S. at 694).

Id. Failure to satisfy either of the two prongs will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002).

[6] Further, "ineffective assistance of appellate counsel claims generally fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." *Hollowell v. State*, 19 N.E.3d 263, 270 (Ind. 2014). As our Supreme Court has explained:

> To show that counsel was ineffective for failing to raise an issue on appeal thus resulting in waiver for collateral review, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Ben-Yisrayl*, 738 N.E.2d at 261. To evaluate the performance prong when counsel waived issues upon appeal, we apply the following test: (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Timberlake v. State*, 753 N.E.2d 591, 605-06 (Ind. 2001) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). If the analysis under this test demonstrates deficient performance, then we examine whether, "the issues which . . . appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." *Bieghler[v. State]*, 690 N.E.2d [188,] 194 [(Ind. 1997)] (citation omitted)

Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006).

[7] Here, Newell asserts that his appellate counsel ineffectively waived appellate review of the sufficiency of the evidence underlying his habitual offender adjudication. At the time Newell committed his underlying offenses, Indiana Code Section 35-50-2-8(b) (2016) stated that, to prove he was a habitual offender, the State was required to show beyond a reasonable doubt that he had been convicted of two prior unrelated felonies, neither of which was a Level 6 felony or a Class D felony. Two prior felonies were "unrelated" only if:

> (1) the second prior unrelated felony conviction was committed after commission of and sentencing for the first prior unrelated felony conviction; [and]
>
> (2) the offense for which the state seeks to have the person sentenced as a habitual offender was committed after commission of and sentencing for the second prior unrelated felony conviction . . . .

I.C. § 35-50-2-8(f) (2016).

[8] At Newell's trial on the habitual offender allegation, the State admitted into evidence records that showed that Newell had two prior convictions. The first set of records showed that, in May 2002, Newell pleaded guilty to and was sentenced for Class B felony armed robbery in Miami County. Appellant's App. Vol. 2, p. 148. The second set of records showed that, in March 2011—nearly nine years later—Newell pleaded guilty to and was sentenced for Class C felony robbery in Grant County. *Id.* at 165. Newell also testified in his own defense against the habitual offender allegation. In his testimony, when asked to describe the circumstances of the second offense in Grant County, Newell stated that he had committed that offense shortly after he had "c[o]me home from doin[g] the eight and a half for the bank robbery," that is, Newell's Miami County conviction. Trial Tr. Vol. 3, pp. 236-37.

[9] Newell asserts that, because the Grant County records themselves do not identify a date in which he committed that offense, the evidence failed to show that his Grant County offense "was committed after" his commission of and sentencing for the Miami County offense. *See* I.C. § 35-50-2-8(f) (2016).

Accordingly, Newell continues, the evidence was not sufficient to support his habitual offender adjudication, and this issue was significant and a clearly stronger issue for appellate counsel to raise on direct appeal than the sentencing issue that was raised.

[10] But Newell is mistaken. While it might be best practice for the State to prove the date on which an offense is committed by way of official documents, the law does not require the State meet its burden of proof in that specific manner. What the law required was for the evidence to show that Newell's second offense was committed after his commission of and sentencing for the first offense, and that readily happened here. There is no dispute that Newell had committed and was sentenced for the Miami County offense by May 2002. Newell admitted to the jury that he served about eight and one-half years for that offense and *then* committed the Grant County offense, for which he was sentenced in March 2011.

[11] Accordingly, had Newell's appellate counsel raised the sufficiency of the evidence underlying his habitual offender adjudication on direct appeal, that issue would have lost. This issue therefore was neither a "significant" issue nor a "clearly stronger" issue than the sentencing issue his counsel did raise, nor would raising this issue have mattered to the outcome of Newell's direct appeal. *See Reed*, 856 N.E.2d at 1195. We therefore affirm the post-conviction court's denial of Newell's petition on this issue.

[12] Affirmed.

Tavitas, J., and Weissmann, J., concur.

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