

No. _____

ANTHONY WHEELER,
Petitioner,

v.

RON NEAL,
Superintendent, Indiana State Prison
Respondent.

PETITIONER'S APPENDIX

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 7, 2019
Decided June 25, 2019

Before

FRANK H. EASTERBROOK, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

No. 18-3167

ANTHONY M. WHEELER,
Petitioner-Appellant,

v.

RON NEAL,
Respondent-Appellee.

Appeal from the United States District
Court for the Northern District of Indiana,
South Bend Division.

No. 3:12-cv-00238-PPS

Philip P. Simon,
Judge.

O R D E R

Anthony Wheeler has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. Wheeler's IFP motion is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ANTHONY MORRIS WHEELER,

Petitioner,

v.

CAUSE NO. 3:12CV238-PPS

WARDEN,

Respondent.

OPINION AND ORDER

Anthony Morris Wheeler, a prisoner without a lawyer, has filed a motion under Fed. R. Civ. P. 59(e) to reconsider the July 11, 2018 order denying his petition for habeas relief. "A court may grant a Rule 59(e) motion to alter or amend the judgment if the movant presents newly discovered evidence that was not available at the time of trial or if the movant points to evidence in the record that clearly establishes a manifest error of law or fact." *Matter of Prince*, 85 F.3d 314 (7th Cir. 1996); *Deutsch v. Burlington N. R.R. Co.*, 983 F.2d 741 (7th Cir. 1993).

In the habeas petition, Wheeler argued that the trial court violated his right to due process by improperly relying on inaccurate information to enhance his sentence, and that his trial counsel was ineffective for failing to investigate the inaccurate information and challenge it at the sentencing hearing. ECF 38. Specifically, he argued that the sentencing court should not have considered its finding that Wheeler committed an attempted rape while he was on bond awaiting trial on September 11,

1988. After reviewing the State court record, I denied these claims because Wheeler had not shown that the State court's decisions on these claims were unreasonable. ECF 52.

In the instant motion, Wheeler argues that my order denying the habeas petition relies on the same inaccurate information as the sentencing court and ignores the evidence that exonerated him of the attempted rape. However, the order shows that I considered the exculpatory evidence presented by Wheeler, including the timing of the dismissal of the attempted rape charge, the victim's reluctance to participate in trial, and the victim's initial description of the perpetrator. ECF 52 at 5-8. The sentencing court knew of this evidence as well but found that Wheeler committed the attempted rape after the prosecution informed it of the victim's identification of Wheeler in a photographic array and his proximity to the scene of the crime. *Id.*

Wheeler maintains that the attempted rape finding is erroneous, but, on habeas review, federal courts must credit State court findings unless they are rebutted with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Wheeler counters that the prosecution did not prove that he committed the attempted rape with clear and convincing evidence, but this argument misses the mark. At sentencing, the prosecution was not constitutionally required to prove by clear and convincing evidence that Wheeler committed the attempted rape. See *United States v. Watts*, 519 U.S. 148, 156-57 (1997). Instead, the applicable standard was preponderance of the evidence. *Id.* at 156. And on this federal habeas review, it is the petitioner who bears the clear and convincing evidence burden of proof. Though Wheeler raises valid concerns about the strength of the evidence supporting the attempted rape finding,

these concerns simply fall short of the clear and convincing evidence necessary to prevail on his habeas claims.

Additionally, Wheeler argues that he is entitled to an evidentiary hearing to prove that he did not commit the attempted rape. "Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams v. Taylor*, 529 U.S. 420, 437 (2000). "If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011). Because the State court decided Wheeler's claims on the merits, the scope of habeas review is limited to the evidence in the State court record. As a result, an evidentiary hearing would be futile, and the request is denied.

Wheeler also argues that the State court erred by determining that his sentence would have been the same even without consideration of the attempted rape. On habeas review, Wheeler must show that this determination is unreasonable, 28 U.S.C. § 2254(d)(1). However, his contention that a lesser sentence was available is insufficient, particularly in light of the other aggravating factors noted by the sentencing court, including the nature of the offense and the need for rehabilitation in a correctional setting. Wheeler has not shown, for example, that the sentencing court increased his sentence by a certain number of years based solely on the attempted rape finding or that individuals who have been convicted in Indiana courts of similar crimes typically receive lesser sentences. At bottom, Wheeler has provided an insufficient basis to

conclude that the State court unreasonably determined that he would have received the same sentence even without the attempted rape.

Relatedly, Wheeler argues that, even if he would have received the same sentence, procedural due process requires a new sentencing hearing with only accurate information. Again, Wheeler misunderstands the deferential nature of federal habeas review. Even assuming the attempted rape finding was inaccurate, Wheeler would be entitled to habeas relief only if he could demonstrate that the trial court's reliance on the misinformation had a substantial and injurious effect on his sentence, *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008), or, in the context of his ineffective assistance of counsel claim, if he could demonstrate that the State courts made an unreasonable determination by finding that correcting the misinformation would have not resulted in a lesser sentence, *McNary v. Lemke*, 708 F.3d 905, 914 (7th Cir. 2013). He has not done so, and, as such, he is not entitled to a new sentencing hearing or any other remedy available on habeas review.

ACCORDINGLY:

Because petitioner Anthony Morris Wheeler has not provided new evidence or shown a manifest error or law or fact as required by Fed. R. Civ. P. 59(e), his motion for reconsideration (ECF 55) is DENIED.

SO ORDERED on September 10, 2018.

/s/ Philip P. Simon

JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
for the
Northern District of Indiana

ANTHONY MORRIS WHEELER
Petitioner

v.

Civil Action No. 3:12cv238

SUPERINTENDENT, Indiana State Prison (termmed 12/1/17)
WARDEN, Indiana State Prison

Respondent

JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one*):

the plaintiff _____
recover from the defendant _____ the amount of _____
dollars \$ _____, which includes prejudgment interest at the rate of _____% plus post-judgment
interest at the rate of _____% along with costs.

the plaintiff recover nothing, the action is dismissed on the merits, and the defendant _____
recover costs from the plaintiff _____.

X Other: The habeas corpus petition is DENIED; a certificate of appealability is DENIED
pursuant to Section 2254 Habeas Corpus Rule 11; DENIES leave to appeal in forma pauperis
pursuant to 28 U.S.C. § 1915(a)(3); and judgment is entered in favor of the Respondent and
against the Petitioner.

This action was (*check one*):

tried to a jury with Judge _____ presiding, and the jury has
rendered a verdict.

tried by Judge _____ without a jury and the above decision was
reached.

X decided by Judge Philip P. Simon

DATE: 7/12/18

ROBERT TRGOVICH, CLERK OF COURT

by s/Monica Clawson
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ANTHONY MORRIS WHEELER,

Petitioner,

v.

CAUSE NO. 3:12CV238-PPS

WARDEN,

Respondent.

OPINION AND ORDER

Anthony Morris Wheeler, a prisoner without a lawyer, filed a habeas corpus petition to challenge his Indiana sentence for rape, criminal deviate conduct, criminal confinement, and burglary under Cause No. 49G04-8807-CF-78324. Following a jury trial, on May 12, 1989, the Marion Superior Court sentenced Wheeler to ninety years of incarceration.

FACTUAL BACKGROUND

In deciding this habeas petition, I must presume the facts set forth by the State courts are correct unless they are rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Here's the evidence according to the Court of Appeals of Indiana:

[O]n June 22, 1988, the victim, S.M.A., was approached by Wheeler when she stopped to use the phone on her way home from work. Wheeler asked her for a cigarette. She gave him one and lit it for him and then went home.

S.M.A. had intended to lay out in the sun in her backyard when she got home. Upon arriving home, she placed some pillows in her back yard. She went back inside to change into her bathing suit but did not lock the back door. As she came out of the bathroom, she encountered Wheeler in the hallway. Wheeler had rope wrapped around both hands and was holding a knife. He grabbed S.M.A. by the neck and threw her back into the bathroom into the bathtub causing her to strike her head on the bathtub. Wheeler then forced her to commit an act of fellatio upon him. Next, he turned her around, pulled her bathing suit off, leaned her over the bathtub

and raped her from behind. He ordered her to remain there for a few minutes as he was going to leave.

S.M.A. did not report the above incident to the police. She stayed away from her home for approximately three weeks. Upon S.M.A.'s request, her landlord secured her windows by placing nails into the sills.

On July 21, 1988, Wheeler broke into S.M.A.'s house late at night through a window and attacked S.M.A. as she lay there sleeping on the couch in the living room with her son. Wheeler threatened her with a knife and told her he would cut her throat if she made any noise that might wake up her boyfriend who was sleeping in the bedroom. He also threatened to kill her boyfriend if she should wake him up. Wheeler grabbed S.M.A. by the hair and forced her to commit an act of fellatio upon him. He then forced her to the floor and made her get down on all fours and raped her from behind. Wheeler then led S.M.A. by the arm into the kitchen and later had her walk him to the front door. S.M.A. did not resist because she feared further violence.

Before leaving, Wheeler asked S.M.A. if he could return. She agreed to allow Wheeler to return the following Monday night after 8:00 p.m. She called the police the morning after the second attack. The police were present and arrested Wheeler when he arrived at S.M.A.'s home the following Monday night.

Wheeler v. State, No. 49A02-8907-CR-332, slip op. at *2-3. (Ind.Ct.App. Mar. 14, 1991);
see also *Wheeler v. State*, No. 49A02-1101-PC-22, slip op. at *1-8 (Ind.Ct.App. Sept. 2, 2011, reh'g denied, trans. denied).

On August 1, 1988, the State charged Wheeler with two counts of burglary as class B felonies (Counts I and V); two counts of criminal deviate conduct as class A felonies (Counts II and VI); two counts of rape as Class A felonies (Counts II and VII); two counts of confinement as class B felonies. (Counts IV and VIII). Counts I through IV stemmed from the incident on July 21, 1988, and Counts V through VIII stemmed from

the incident that occurred on June 22, 1988. Following a two-day jury trial that commenced on April 17, 1989, Wheeler was found guilty as charged.

The trial court sentenced Wheeler to an aggregate term of ninety years—thirty-five years for each class A felony conviction and ten years for each class B felony conviction, with the sentences for the felony convictions resulting from each attack to run consecutively to each other and the two sets of four convictions (each set representing one attack) to run concurrently. *Wheeler v. State*, 60 N.E.3d 1144 (Ind. Ct. App. 2016); ECF 44-7 at 2-5.

In the amended petition, Wheeler argues that he is entitled to habeas relief, asserting that the trial court violated his right to due process by improperly relying on inaccurate information to enhance his sentence; that the trial court violated his right to a jury trial by improperly enhancing his sentence based on a fact that had not been submitted to a jury; and that his trial counsel was ineffective for failing to investigate the inaccurate information and challenging it at the sentencing hearing. Though the respondent argues that the jury finding claim and the ineffective assistance of counsel claim are procedurally deficient, I will consider each of Wheeler's three claims.¹

STANDARD OF REVIEW

"Federal habeas review . . . exists as a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015) (quotations and citation omitted).

¹ Federal courts may consider claims for habeas relief under certain circumstances even if such claims are procedurally barred. 28 U.S.C. § 2254(b)(2).

The demanding standard for federal habeas corpus relief from a state conviction is found in 28 U.S.C. § 2254(d):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court has commented on the high hurdle established by the statutory standard:

[This] standard is intentionally difficult to meet. We have explained that clearly established Federal law for purposes of §2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions. And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice. To satisfy this high bar, a habeas petitioner is required to show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Woods, 135 S. Ct. at 1376 (quotation marks and citations omitted). Criminal defendants are entitled to a fair trial but not a perfect one. *Rose v. Clark*, 478 U.S. 570, 579 (1986). To warrant relief, a state court's decision must be more than incorrect or erroneous; it must be objectively unreasonable. *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision."

Harrington v. Richter, 562 U.S. 86, 101 (2011) (quotation marks omitted).

DISCUSSION

Inaccurate Sentencing Information

Wheeler argues that the Indiana appellate court made an unreasonable determination that the trial court did not violate his right to due process by improperly relying on inaccurate information to enhance his sentence. Specifically, Wheeler argues that in sentencing him for the attacks on S.M.A., the trial court should not have considered the attempted rape he committed while on bond. Notably, Wheeler does not challenge his convictions, but focuses on the trial court's enhancement of his sentence for Class A felonies by five years each and the decision that he serve some of the sentences consecutively.

"A defendant who requests re-sentencing due to the use of inaccurate information at the original sentencing must show both that information before the sentencing court was inaccurate and that the sentencing court relied on the inaccurate information in the sentencing." *Lechner v. Frank*, 341 F.3d 635, 639 (7th Cir. 2003). "A sentencing court demonstrates actual reliance on misinformation when the court gives explicit attention to it, founds its sentence at least in part on it, or gives specific consideration to the information before imposing sentence." *Id.* Additionally, for federal habeas relief, the reliance on the misinformation must have had "a substantial and injurious effect" on the sentence. *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008).

At a bond revocation hearing, the prosecution argued for revocation on the basis that Wheeler faced new charges in a separate case, Cause No. 49G06-8809-CF-102000, for a rape attempt that occurred on September 11, 1988. PCR App. 131. Four days later,

Wheeler, who matched the general description of the attacker, was found in the vicinity where the attempted rape had occurred. *Id.* at 128-29. He was arrested but released because he did not have the described height or hairstyle of the attacker. *Id.* at 134-36. However, the victim of this attempt later identified Wheeler as the attacker from a photographic array. *Id.* at 128-29. The trial court declined to revoke bond. *Id.* at 142.

Following trial, the jury convicted Wheeler as charged. ECF 44-1 at 4-5. At the sentencing hearing, the prosecution argued that the sentence should account for the September 11 attempt, explaining that the charges had been dismissed only after Wheeler's convictions in the underlying case, to avoid unnecessary use of prosecutorial resources and to spare the September 11 victim from the ordeal of trial. PCR App. 165-66. The prosecution also conceded that the victim failed to appear to two depositions and expressed reluctance to participate in a trial. *Id.* at 161-63. The prosecution argued that the sentence should also account for the need for rehabilitation and the seriousness of the crimes for which Wheeler was convicted, requesting a sentence of one hundred forty years of incarceration. *Id.* at 164-70.

The trial court issued the following ruling:

I don't think I can ignore the fact that again, while the defendant was out on this particular matter, the 9/11/88 offense was committed. And as the Pre-Sentence Investigation Report indicates, the aggravating circumstances certainly outweigh the mitigating in this particular matter. The aggravating especially being as outlined in the Pre-Sentence Investigation Report, namely, that the defendant is in need of correctional rehabilitative treatment that can best be provided by his commitment to a penal facility; imposition of a reduced sentence would depreciate the seriousness of the offense; and by reason of those matters of aggravation, the Court at this time, Mr. Wheeler, will sentence you to the custody of

the Indiana Department of Corrections on Count One for a period of ten years; Count Two, for a period of thirty-five years; Count Three, for a period of thirty-five years; Count 4, for a period of ten years; Count Five for a period of ten years; Count Six, for a period of thirty-five years; Count Seven, for a period of thirty-five years; and Count Eight, for a period of ten years. I will make Counts One, Two, Three, and Four run consecutive; Counts Five, Six, Seven, and Eight to run concurrent with their respective counterparts, Counts One, Two, Three, and Four.

Id. at 171-72.

On June 4, 2012, Wheeler filed a petition to expunge arrest records related to the September 11 attempted rape in Cause No. 49G06-8809-CF-102000. ECF 38-1 at 14. At the expungement hearing, Wheeler presented an electronic docket sheet to show that the prosecution dismissed charges on the September 11 incident on March 15, 1989 -- five weeks prior to the jury verdict in the underlying case. ECF 50-1 at 86-90. At the hearing, the prosecution suggested that the dismissal may have been filed in anticipation of a conviction. *Id.* at 5. On February 13, 2013, the Marion Superior Court entered an order expunging the arrest records of Wheeler in connection with the September 11 attempted rape charges. ECF 38-1 at 14.

On April 22, 2013, Wheeler filed a successive petition for post-conviction relief, arguing that the trial court's sentence relied on an aggravating factor based on erroneous information -- the September 11 attempted rape -- and that he received ineffective assistance of counsel because his counsel allowed the trial court to rely on the September 11 attempted rape at the sentencing stage. ECF 44-2. At the evidentiary hearing, the prosecution did not have an independent recollection of the dismissal but

noted that the electronic docket system frequently produced errors. SPCR Tr. 31. The post-conviction relief court denied the successive petition. ECF 40-1 at 19.

On appeal, the Court of Appeals of Indiana noted that, at sentencing, the parties and the trial court were aware of the reasons for dismissing the charges for the September 11 incident. ECF 44-7 at 13-14. The appellate court explained that expungement of arrest records would not have prohibited the trial court from considering the September 11 attempted rape during sentencing as uncharged misconduct. *Id.* at 14. The appellate court found no error with respect to the rulings on the due process claim and the ineffective assistance of trial counsel claim. *Id.* at 14-16. The appellate court reasoned that, considering the nature of the offense and the limited effect of the expungement order, "Wheeler's sentence would have likely been the same with or without the mention of his conduct on September 11, 1988." *Id.*

After reviewing the record, I cannot conclude that the State court's determination on the due process claim was objectively unreasonable. Wheeler's claims presume that the expungement order establishes that he did not commit the September 11 attempted rape. Though I understand Wheeler's argument that the expungement court necessarily made this finding considering the operative statute, Ind. Code. § 35-38-5-1, the expungement order did not explain the court's specific reasoning and did not include findings of fact. ECF 38-1 at 14. And no matter the import of the expungement determination in 2013, it was not available to the sentencing court in 1989.

Moreover, even if the expungement order included a finding that Wheeler did not commit the September 11 attempted rape, what effect would this have on the

sentencing court's finding in a separate case that Wheeler committed the September 11 attempted rape? Wheeler essentially suggests that issue preclusion flows backward from the 2013 expungement order to prevent the sentencing court, in a separate case over 10 years earlier, from finding or considering that Wheeler committed the September 11 attempted rape. However, Wheeler did not argue issue preclusion in State court. And in any event, the appellate court stated that the expungement order had no effect on the sentencing decision. ECF 44-7 at 14. ("Wheeler's conduct on September 11, 1988, could be a valid aggravating factor with or without expungement of that arrest record."). I am thus left with the sentencing court's finding that Wheeler committed the September 11 attempted rape. Because Wheeler has not submitted clear and convincing evidence to the contrary, I must accept this finding as true.

Nevertheless, even if the September 11 attempt did not occur, the State court also found that Wheeler's sentence would likely remain the same under these circumstances. ECF 44-7 at 14. At the time Wheeler was sentenced, under Indiana law, sentences for Class A felonies ranged from twenty years to fifty years with a standard term of thirty years, and Class B felonies ranged from six years to twenty years with a standard term of ten years. *Bazile v. State*, 540 N.E.2d 49, 50 (Ind. 1989) (DeBruler, J., concurring and dissenting). "[T]he trial court has the discretion to determine whether a sentence will be enhanced or mitigated due to aggravating or mitigating factors as well as determining whether sentences will be served consecutively or concurrently." *Concepcion v. State*, 567 N.E.2d 784, 790-91 (Ind. 1991). "[T]he nature of the crimes and the manner in which the crimes were committed may be considered as aggravating circumstances." *Id.* at 791.

“The decision to enhance the presumptive sentence or to impose consecutive sentences may be based upon the same aggravating circumstances.” *Lockard v. State*, 600 N.E.2d 985, 987 (Ind. Ct. App. 1992).

In addition to the September 11 attempted rape, the sentencing court also found that Wheeler’s need for rehabilitation in a correctional setting and the nature of the offense were aggravating factors. PCR App. 171-72. Wheeler does not object to these findings, and the nature of the offense finding was supported by evidence that he raped the same victim at knifepoint in her residence on two separate occasions, once in the presence of her young child, and threatened to kill the victim and her boyfriend. Trial Tr. 255-499. The sentencing court was also aware of the deficiencies of the evidence supporting the September 11 attempted rape. PCR App. 130-174.

To challenge the State court’s finding that Wheeler’s sentence would likely remain the same even if the September 11 attempted rape was not considered, Wheeler cites *Fugate v. State*, 516 N.E.2d 75 (Ind. Ct. App. 1987). In that case, the trial court sentenced a criminal defendant to the maximum sentences for burglary and theft, a total of twelve years, after finding that the defendant also committed arson -- the same offense for which he had been acquitted by a jury. *Id.* at 77-78. The appellate court held that the trial court should not have relied on the arson finding to sentence the defendant, because, under Indiana law,² “past acquittals may not be used to enhance

² By contrast, the Supreme Court of the United States has held that “a jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.” *United States v. Watts*, 519 U.S. 148, 157 (1997).

the presumptive sentence for a current conviction." *Id.* at 79. The appellate court, after reviewing the specific details of the case, also found that the sentencing error caused a manifestly unreasonable sentence. *Id.* at 80-81.

Fugate is distinguishable in numerous respects. First, Wheeler offers no authority that expungement orders have the same preclusive effect as acquittals under Indiana law. Next, Wheeler's sentence was not as harsh the *Fugate* defendant's sentence in comparison to the maximum sentence. The *Fugate* defendant received the maximum sentence possible with his convictions, *Id.* at 77, but Wheeler could have received a substantially larger sentence -- a maximum of two hundred eighty years. Additionally, the sentencing considerations in *Fugate* are vastly different than those applicable to Wheeler. Succinctly, the *Fugate* defendant was an eighteen year old convicted for the non-violent crime of drunkenly stealing miscellaneous goods from an auction barn through an unlocked back door on a single occasion. *Id.* at 76. For the reasons I have already articulated, Wheeler's crimes were far more serious.

In his appeal of the determination on the successive petition, Wheeler cited *Day v. State*, 560 N.E.2d 641 (Ind. 1990), as authority that the sentence would be different absent consideration of the September 11 attempt. In that case, the trial court issued the maximum sentence to a defendant after finding that his criminal history was an aggravating factor based on petitions alleging offenses committed as a juvenile. *Id.* at 642. The appellate court ordered resentencing, finding that this was an improper consideration because the petitions were filed in a case that concluded without any fact adjudication. *Id.* at 643-44. The appellate court reasoned that "the mere fact that a

petition was filed alleging delinquency does not suffice as proof of a criminal history."

Id. at 643. By contrast, in the instant case, the prosecution did not rely solely on pleadings to demonstrate the September 11 attempted rape. Though the evidence suggesting that Wheeler committed the September 11 attempted rape was not overwhelming, the allegations were supported by evidence, including the victim's identification of Wheeler from a photographic array. PCR App. 128-29.

In sum, Wheeler has not demonstrated that the sentencing court's finding that he committed the September 11 attempted rape was inaccurate. Even if he had, Wheeler has not shown that the consideration of the September 11 attempted rape had a substantial and injurious effect on the sentence, nor has he shown that the State court's finding that his sentence would have been the same was unreasonable. Therefore, Wheeler's claim that the sentencing court relied on inaccurate information is not a basis for habeas relief.

Ineffective Assistance of Counsel

Wheeler alleges that the State court made an unreasonable determination that his trial counsel was not ineffective for failing to investigate the September 11 attempted rape and challenging its consideration at the sentencing hearing. To prevail on an ineffective assistance of counsel claim in the State courts, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984). There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the

challenged action might be considered sound trial strategy." *Id.* at 689. The test for prejudice is whether there was a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In assessing prejudice under *Strickland* "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). However, "[o]n habeas review, [the] inquiry is now whether the state court unreasonably applied *Strickland*." *McNary v. Lemke*, 708 F.3d 905, 914 (7th Cir. 2013). "Given this high standard, even 'egregious' failures of counsel do not always warrant relief." *Id.*

The Court of Appeals of Indiana found no prejudice based on the conclusion that the sentencing determination would have likely been the same even if the September 11 attempted rape was not considered. ECF 44-7 at 15-16. As detailed above, Wheeler has not shown that this conclusion was unreasonable; thus Wheeler has not shown that the finding of no prejudice was unreasonable. Therefore, Wheeler's claim of ineffective assistance of trial counsel is not a basis for habeas relief.

Jury Finding

Wheeler also asserts that he is entitled to habeas relief because the trial court enhanced his sentence based on a fact that had not been submitted to a jury -- the September 11 attempted rape. He relies on *Blakely v. Washington*, 542 U.S. 296 (2004). In that case, the Supreme Court of the United States reaffirmed the principle that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond

the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

Let's suppose that *Blakely* somehow invalidates the scheme under which Wheeler was sentenced. The fact that Wheeler was sentenced fifteen years prior to *Blakely* raises the question of whether *Blakely* applies retroactively. *See Teague v. Lane*, 489 U.S. 288, 310 (1989). The Seventh Circuit Court of Appeals has held that the *Apprendi* rule does not apply retroactively, and its reasoning extends to the *Blakely* rule. *See Curtis v. United States*, 294 F.3d 841, 842 (7th Cir. 2002); *United States v. Davis*, 348 F. Supp. 2d 964, 968 (N.D. Ind. 2004).

Because *Blakely* does not apply retroactively, Wheeler may only assert *Blakely* if it was issued prior to the finality of his conviction. *Teague*, 489 U.S. at 311. Wheeler's conviction became final on direct appeal after the Indiana Supreme Court denied his petition for transfer and after the time for him to petition for certiorari to the Supreme Court of the United States elapsed. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Wheeler submitted the petition for transfer on June 1991, indicating that his conviction became final that year. ECF 6-6. Because *Blakely* does not apply retroactively and was issued after Wheeler's conviction became final, Wheeler cannot assert *Blakely* to challenge his sentence. Therefore, Wheeler's claim that the issue of whether he committed the September 11 attempted rape should have been submitted to a jury is not a basis for habeas relief.

CERTIFICATE OF APPEALABILITY

Pursuant to Section 2254 Habeas Corpus Rule 11, I must grant or deny a certificate of appealability. To obtain a certificate of appealability under 28 U.S.C. § 2253(c), the petitioner must make a substantial showing of the denial of a constitutional right by establishing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For the reasons explained in this opinion for denying habeas corpus relief, there is no basis for encouraging Wheeler to proceed further. For the same reasons, he may not appeal in forma pauperis because an appeal could not be taken in good faith.

ACCORDINGLY:

The court GRANTS Petitioner Anthony Morris Wheeler's motion for leave to file an addendum (ECF 51); DENIES the habeas corpus petition; DENIES a certificate of appealability pursuant to Section 2254 Habeas Corpus Rule 11; DENIES leave to appeal in forma pauperis pursuant to 28 U.S.C. § 1915(a)(3); and DIRECTS the clerk to enter judgment in favor of the Respondent and against the Petitioner.

SO ORDERED on July 11, 2018.

/s/ Philip P. Simon
UNITED STATES DISTRICT JUDGE

Wheeler v. State

Court of Appeals of Indiana

August 4, 2016, Decided; August 4, 2016, Filed

Court of Appeals Case No. 49A02-1509-PC-1436

Reporter

2016 Ind. App. Unpub. LEXIS 890 *; 60 N.E.3d 1144

Anthony Wheeler, Appellant-Petitioner, v. State of Indiana, Appellee-Respondent.

Notice: PURSUANT TO INDIANA APPELLATE RULE 65(D), THIS MEMORANDUM DECISION SHALL NOT BE REGARDED AS PRECEDENT OR CITED BEFORE ANY COURT EXCEPT FOR THE PURPOSE OF ESTABLISHING THE DEFENSE OF RES JUDICATA, COLLATERAL ESTOPPEL, OR THE LAW OF THE CASE.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

Prior History: [*1] Appeal from the Marion Superior Court. The Honorable Lisa F. Borges, Judge. The Honorable Anne Flannelly, Magistrate. Trial Court Cause No. 49G04-8808-PC-78324.

Wheeler v. State, 567 N.E.2d 1207, 1991 Ind. App. LEXIS 375 (Ind. Ct. App., 1991)

Core Terms

post-conviction, sentence, aggravating, arrest, trial court, convictions, expungement, appellate counsel, proceedings, felonies, direct appeal, enhanced, Counts, consecutive sentences, trial counsel, charges, ineffective assistance, arrest record, res judicata, aggravating circumstances, pro se, ineffective, unavailable, parties, raped

Counsel: ATTORNEY FOR APPELLANT: Michael K. Ausbrook, Bloomington, Indiana.

ATTORNEYS FOR APPELLEE: Gregory F. Zoeller, Attorney General of Indiana; Brian Reitz Deputy, Attorney General, Indianapolis, Indiana.

Judges: Kirsch, Judge. Riley, J., and Pyle, J., concur.

Opinion by: Kirsch

Opinion

MEMORANDUM DECISION

Kirsch, Judge.

P1 Anthony Wheeler ("Wheeler") was convicted of and sentenced for two counts of criminal deviate conduct, as Class A felonies, two counts of burglary, as Class B felonies, and two counts of confinement, also as Class B felonies. His convictions were affirmed on appeal. Wheeler now appeals the denial of his successive petition for post-conviction relief contending that the post-conviction court erred in denying his petition and raises the following restated issues:

- I. Whether Wheeler's due process rights were violated when he was sentenced to an enhanced and consecutive sentence of ninety years; and
- II. Whether Wheeler received ineffective assistance of his trial counsel.

P2 We affirm.

Facts and Procedural History

P3 The facts supporting Wheeler's convictions [*2] as set forth by this court in an unpublished decision on his appeal of the denial of his first petition for post-conviction relief are as follows:

[O]n June 22, 1988, the victim, S.M.A., was approached by Wheeler when she stopped to use the phone on her way home from work. Wheeler asked her for a cigarette. She gave him one and lit it for him and then went home.

S.M.A. had intended to lay out in the sun in her backyard when she got home. Upon arriving home, she placed some pillows in her back yard. She went back inside to change into her bathing suit but did

not lock the back door. As she came out of the bathroom, she encountered Wheeler in the hallway. Wheeler had rope wrapped around both hands and was holding a knife. He grabbed S.M.A. by the neck and threw her back into the bathroom into the bathtub causing her to strike her head on the bathtub. Wheeler then forced her to commit an act of fellatio upon him. Next, he turned her around, pulled her bathing suit off, leaned her over the bathtub and raped her from behind. He ordered her to remain there for a few minutes as he was going to leave.

S.M.A. did not report the above incident to the police. She stayed away from her home for approximately [*3] three weeks. Upon S.M.A.'s request, her landlord secured her windows by placing nails into the sills.

On July 21, 1988, Wheeler broke into S.M.A.'s house late at night through a window and attacked S.M.A. as she lay there sleeping on the couch in the living room with her son. Wheeler threatened her with a knife and told her he would cut her throat if she made any noise that might wake up her boyfriend who was sleeping in the bedroom. He also threatened to kill her boyfriend if she should wake him up. Wheeler grabbed S.M.A. by the hair and forced her to commit an act of fellatio upon him. He then forced her to the floor and made her get down on all fours and raped her from behind. Wheeler then led S.M.A. by the arm into the kitchen and later had her walk him to the front door. S.M.A. did not resist because she feared further violence. Before leaving, Wheeler asked S.M.A. if he could return. She agreed to allow Wheeler to return the following Monday night after 8:00 p.m. She called the police the morning after the second attack. The police were present and arrested Wheeler when he arrived at S.M.A.'s home the following Monday night.

On August 1, 1988, the State charged Wheeler with two [*4] counts of burglary as class B felonies (Counts I and V); two counts of Court of criminal deviate conduct as class A felonies (Counts II and VI); two counts of confinement as class B felonies. (Counts IV and VIII). Counts I through IV stemmed from the incident on July 21, 1988, and Counts V through VIII stemmed from the incident that occurred on June 22, 1988. Wheeler was eventually released on bond. On October 4, 1988, the State moved to revoke Wheeler's bond, alleging as the basis therefrom that Wheeler had been

arrested for an attempted rape on September 11, 1988. Following an evidentiary hearing, the trial court denied the State's request to revoke Wheeler's bond.

Following a two-day jury trial that commenced on April 17, 1989, Wheeler was found guilty as charged. At a May 12, 1989 sentencing hearing, defense counsel asked the court to consider the fact that the charges against Wheeler stemming from the September 11 incident had been dismissed. In response, the State informed the court through the testimony of a deputy prosecutor that those charges were dismissed because of Wheeler's convictions in the instant case and because of the victim's reluctance to testify. The State pointed [*5] out that although the charges were dismissed the evidence against Wheeler was strong; noting specifically that the victim in the September 11 incident had identified Wheeler as her attacker. In setting forth the sentence imposed, the trial court stated:

I don't think I can ignore the fact that again, while the defendant was out on this particular matter, the 9/11/88 offense was committed. And as the Pre-Sentence Investigation Report indicate [sic] the aggravating circumstances certainly outweigh the mitigating in this particular matter. The aggravating especially being as outlined in the Pre-Sentence Investigation Report, namely, that the defendant is in need of correctional rehabilitative treatment that can best be provided by his commitment to a penal facility; imposition of a reduced sentence would depreciate the seriousness of the offence, and by reason of those matters of aggravation, the court at this time, Mr. Wheeler, will sentence you to the Indiana Department of Corrections [sic].

The trial court sentenced Wheeler to an aggregate term of ninety years—thirty-five years for each class A felony conviction and ten years for each class B felony conviction, with the sentences for [*6] the felony convictions resulting from each attack to run consecutively to each other and the two sets of four convictions (each set representing one attack) to run concurrently.

On direct appeal, Wheeler's appellate counsel presented the following issues for this court's review: (1) Whether the trial court's sentencing

statement was sufficient to support the imposition of enhanced and consecutive sentences; (2) whether Wheeler's ninety-year sentence was unconstitutional; (3) whether Wheeler received ineffective assistance of trial counsel; and (4) whether the evidence of penetration was sufficient to support Wheeler's rape convictions. This court affirmed Wheeler's convictions in a memorandum decision. As part of its analysis of Wheeler's first sentencing claim, this court noted that "the trial court did state a specific fact which supported the imposition of enhanced and consecutive sentences — that Wheeler was arrested and charged with the '9/11/88 offense'" Slip op. at 7. Our court docket and the trial court's chronological case summary indicate that Wheeler, pro se, filed a petition for rehearing that was denied by this court and a petition for transfer, which our Supreme Court denied. [*7] On July 5, 2005, Wheeler filed a pro se petition for post-conviction relief. On January 2, 2007, the State responded to Wheeler's PCR petition, raising res judicata and laches as affirmative defenses. On April 6, 2009, Wheeler, by counsel, requested permission to amend Wheeler's pro se petition for post-conviction relief. In his amended PCR petition, Wheeler claimed his appellate counsel was ineffective for failing to challenge the trial court's finding that the September 11 offenses were "committed" while Wheeler was out on bond in the present case. Wheeler maintains that this is an erroneous historical fact that could not have been used to support imposition of enhanced and consecutive sentences. The post-conviction court held evidentiary hearings on June 9, 2009 and January 19, 2010. Wheeler stipulated that he never requested assistance from the trial court or from his appellate counsel in filing his petitions for rehearing and transfer. Copies of Wheeler's petitions for rehearing and transfer were not made part of the record in Wheeler's PCR proceeding. The parties also stipulated to the admission of an affidavit from Wheeler's appellate counsel in which counsel stated that he [*8] had no specific recollection of his handling of Wheeler's appeal. On January 5, 2011, the post-conviction court entered its order denying Wheeler his requested relief.

Wheeler v. State, No. 49A02-8907-CR-332, slip op. at *2-3. (Ind. Ct. App. Mar. 14, 1991); see also *Wheeler v. State*, No. 49A02-1101-PC-22, 2011 Ind. App. Unpub. LEXIS 1234, *1-8 (Ind. Ct. App. Sept. 2, 2011, reh'g denied, trans. denied. (internal citations omitted).

A panel of this court held as follows:

. . . [W]e note that in deciding Wheeler's sentencing claims, this court found that Wheeler had been "arrested and charged" with the September 11 offenses and that such had occurred while Wheeler was out on bond. This court did not find that Wheeler actually committed the offenses. This is a fair reading of the trial court's sentencing statement. Further, the record is clear that all the parties and the trial court were aware that the charges had been dismissed because of the convictions in this case and the victim's reluctance to testify. The argument Wheeler now seeks to put forth is unavailing as it requires a very narrow reading of parts of the record in isolation.

[2011 Ind. App. Unpub. LEXIS 1234 at *13](#). The court continued:

Moreover, even if appellate counsel had presented the argument in more explicit terms, Wheeler has not shown that his sentence [*9] would have been reversed. As noted above, it is clear from the record that the parties and the trial court were well aware that the charges against Wheeler for the September 11 incident had been dismissed. The State presented evidence during the sentencing hearing explaining that the charges were being dismissed in part because of the convictions in this case as well as the reluctance of the victim of the September 11 offenses to testify. [.] Wheeler does not deny the fact that he was arrested and charged for the September 11 incident and does not argue that such fact could not be considered as support for imposition of enhanced and consecutive sentences.

[2011 Ind. App. Unpub. LEXIS 1234 at *15](#).

Wheeler, by counsel Brent Westerfeld, pursued an appeal of the denial of his petition for post-conviction relief, regarding two of the PCR issues: (I) whether Wheeler's appellate counsel was ineffective for failing to argue on direct appeal that the trial court had enhanced his sentence based on an impermissible factor, specifically that the trial court had relied upon "an erroneous historical fact . . . that while Wheeler was out on bond on his particular matter, the 9/11/88 offense was committed;" and (II) whether Wheeler's [*10] appellate counsel was ineffective for failing to seek rehearing and/or transfer, arguing that appellate counsel (a) should have sought rehearing because the appellate court had made a misstatement of

fact when it concluded that the trial judge had used the arrest and charge for the 9/11/88 offense as an aggravating circumstance when the trial judge instead had found that the 9/11/88 offense was committed while Wheeler was on bond in this case, and (b) should have sought rehearing and/or transfer in light of *Tunstill v. State*, 568 N.E.2d 539 (Ind. 1991), decided two weeks after the appellate court's decision in this case was handed down. The Indiana Wheeler's claim was "unavailing as it required a very narrow reading of the parts of the record in isolation." The Indiana Supreme Court denied transfer on November 16, 2011.

Appellant's App. at 21-22. (internal citations omitted).

P4 Wheeler, *pro se*, filed to expunge the record of his September 11, 1988 arrest in June of 2012. The petition was denied on June 15, 2012, but Wheeler filed a motion to correct error. *Id.* On September 5, 2012, the Indianapolis Metropolitan Police Department filed an objection to the petition. The trial court held a hearing on the motion to correct error on [*11] December 13, 2012 and ordered Wheeler's September 11, 1988 arrest record expunged.

On May 17, 2013, the Indiana Court of Appeals authorized Wheeler's filing of a *pro se* successive petition for post-conviction relief. The successive petition was then filed with the post-conviction court on July 6, 2013, claiming as grounds for relief: (a) that he received ineffective assistance of trial, appellate, and post-conviction counsel pertaining to the 9/11/88 charge and arrest used as an aggravating circumstance at sentencing; (b) that the trial court abused its discretion in relying on a "misrepresentation of facts" in imposing enhanced and consecutive sentences resulting in a violation of due process rights; and (c) that recent expungement of the 9/11/88 arrest renders it impermissible to support the previously-imposed sentence.

Appellant's App. at 22.

P5 Wheeler's successive post-conviction relief evidentiary hearing was held on August 19, 2014. *Id.* All parties stipulated that Michael Siegel represented Wheeler during his trial in this matter and that he was deceased and therefore not able to testify in the original post-conviction relief proceedings. *Id.* at 23. The post-conviction affidavit of Wheeler's [*12] appellate counsel, Kenneth Roberts, reflects that he did not have any files regarding Anthony Wheeler and no

independent recollection of his appeal. *Id.* at 24.

P6 Brent Westerfeld ("Westerfeld") represented Wheeler during his first PCR proceeding and testified at Wheeler's successive PCR hearing that he and Wheeler challenged appellate counsel's effectiveness and also raised a free-standing error regarding the aggravated sentence based on an act of which Wheeler had not been convicted. *Id.* at 25. Westerfeld testified that he attempted to find out whatever he could regarding the investigation of the September 11 incident. He looked through the entire prosecution file and tried to track down the complainant of the September 11 incident, but he could not locate her. *Tr.* at 41-42. Westerfeld could not talk to trial counsel as he had passed away, and appellate counsel had absolutely no memory of the case despite attempts to refresh his memory. *Id.* Westerfeld testified during the successive PCR hearing about his representation during Wheeler's first post-conviction proceedings that he does not remember if he attempted to look at the court file for the September 11th incident, and his experience with dismissed [*13] cases is that the court files are destroyed and not microfilmed. *Id.* However, it is his practice to attempt to recover all documents related to a case. *Id.*

P7 Westerfeld did not have an opinion regarding the expungement and whether he should have pursued one. *Id.* at 39. He explained that the argument he pursued on behalf of Wheeler was that the trial court had incorrectly stated that Wheeler had committed the offense. Therefore, Westerfeld's focus throughout was not whether Wheeler was arrested; a record of arrest for that offense was irrelevant according to Westerfeld. *Appellant's App.* at 26.

P8 Following Wheeler's successive post-conviction proceeding, the court concluded that whether Wheeler received ineffective assistance of trial counsel was an issue raised, reviewed, and decided adversely to Wheeler in his direct appeal and first post-conviction relief proceeding. *Appellant's App.* at 34. The successive post-conviction court also concluded that the post-conviction court properly found the claim unavailable due to res judicata. *Id.* Wheeler also claimed that his post-conviction relief counsel was ineffective. *Id.* The successive post-conviction court said that the Indiana Supreme Court has [*14] held that a claim of defective performance of post-conviction counsel "poses no cognizable grounds for post-conviction relief" and denied Wheeler's claim again. *Id.* at 36.

P9 In response to Wheeler's claims that the post-conviction court abused its discretion in his first request for post-conviction relief, the successive post-conviction court concluded that the information used to aggravate Wheeler's sentence was knowable and available at the time of trial, direct appeal, and the first post-conviction relief effort. *Id.* at 37. Furthermore, the trial court's sentencing statement was reviewed by this court

"to determine that it was sufficient to justify the imposition of enhanced and consecutive sentences, whether the court ignored mitigating factor, whether the court's consideration of the 9/11/88 arrest was proper, and whether Wheeler's sentence was unconstitutional as grossly out of proportion to the severity of the crimes constituting cruel and unusual punishment."

Id. at 38. Finding that this issue was examined and affirmed on direct appeal and in the first post-conviction relief, the successive post-conviction court determined that Wheeler's right to bring those claims had been waived and further review was [*15] barred. *Id.* at 37-39.

P10 The successive post-conviction court did not bar Wheeler's claim that the aggravator involved in the September 11, 1988 charge and arrest relied upon by the sentencing court had recently been expunged from Wheeler's arrest record, rendering the aggravating circumstances "impermissible as a matter of law to support the sentence." That issue was unavailable at the time of Wheeler's trial, direct appeal, and first post-conviction relief proceedings. *Id.* at 39. However, the successive post-conviction court concluded that: (1) Wheeler's sentence included multiple aggravators and one is enough to aggravate a sentence; and (2) even when a trial court considers improper aggravators in imposing a sentence, the sentence will be affirmed if it is otherwise supported by a legitimate aggravator. *Appellant's App.* at 39-40. The successive post-conviction court concluded that sufficient aggravators remained to support Wheeler's sentence in the presentence report and denied Wheeler post-conviction relief. Wheeler now appeals.

Discussion and Decision

P11 Indiana has long deemed post-conviction proceedings to be collateral, quasi-civil and totally separate and distinct from the underlying criminal [*16] trial. *Hall v. State, 849 N.E.2d 466, 472 (Ind. 2006)*.

Post-conviction proceedings are not an opportunity for

the petitioner to file a super appeal, but rather, present a chance to raise issues that were unknown or unavailable at the time of the original trial or direct appeal. *Turner v. State, 974 N.E.2d 575, 581 (Ind. Ct. App. 2012)*, *trans. denied*. Post-conviction rules contemplate a "narrow remedy for subsequent collateral challenges to conviction." *Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006)* (emphasis in original). Wheeler must establish his claims by a preponderance of the evidence. *Ind. Post-Conviction Rule 1(5)*.

P12 In reviewing the judgment of a post-conviction court, we consider only the evidence and reasonable inferences supporting the judgment. *Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006)*. We cannot reweigh the evidence or reexamine the credibility of the witnesses. *Id. at 468-69*. The post-conviction court here made findings of fact and conclusions thereon, which "will be reversed only upon showing a clear error—that which leaves [this court] with a definite and firm conviction that a mistake has been made." *Hollowell v. State, 19 N.E.3d 263, 268-69 (Ind. 2014)* (citing *Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000)*).

P13 Not all issues are available for post-conviction review. *Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001)* (citing *Rouster v. State, 705 N.E.2d 999, 1003 (Ind. 1999)*). For example, issues that were known and available, but not raised on direct appeal, are waived. *Id.* (citing *Rouster, 705 N.E.2d at 1003*). Moreover, issues that have already been raised, and decided adversely are res judicata. *Id.* (citing *Rouster, 705 N.E.2d at 1003*).

I. [*17] Due Process

P14 Wheeler argues that his federal due process rights were violated because he was not sentenced on materially accurate information, and this case represents "an extreme malfunction in the state's criminal justice system." *Appellant's Br.* at 13. Wheeler contends that his now-expunged arrest record, regarding the September 11, 1988 incident, was the principle justification for Wheeler's enhanced and consecutive sentence totaling ninety years. He also argues that the sentencing court did not give enough weight to his absolute lack of criminal history or arrest record under *Loveless v. State, 642 N.E.2d 974, 976 (Ind. 1994)* (stating that age and lack of delinquent or criminal record "deserve substantial mitigating weight"). We disagree.

P15 Contrary to Wheeler's claim, this case does not involve "an extreme malfunction in the state's criminal justice system." *Appellant's Br.* at 13. Society has a large interest in ensuring the finality of convictions and upholding the integrity of the criminal justice system. *Jackson v. State*, 826 N.E.2d 120, 129 (Ind. Ct. App. 2005), *trans. denied*. All parties, including Wheeler, were aware that the case from the September 11, 1988 incident was dismissed because the State had obtained eight other felony convictions and the victim was reluctant to [*18] testify. The record shows the prosecution was also attempting to use resources responsibly by not over prosecuting Wheeler. *Appellant's App.* at 30-31. Wheeler cannot now take advantage of the State's discretion to avoid prosecutorial "over-kill" in not pursuing those charges. *Id.*

P16 Even if Wheeler's arrest record was expunged at the time of sentencing, the expungement would not have prevented the prosecution from discussing the September 11, 1988 incident. "Uncharged misconduct is a valid aggravator." *Singer v. State*, 674 N.E.2d 11, 14 (Ind. Ct. App. 1996). The only case that Wheeler relied on for this point, *Day v. State*, 560 N.E.2d 641 (Ind. 1990), involved juvenile records, and did not mention expungement. In *Day*, our Supreme Court explained that when juvenile proceedings end without a disposition, "the mere fact that a petition was filed alleging delinquency does not suffice as proof of a criminal history." *Id. at 643*. Even accepting the differences between the juvenile proceedings in *Day* and the adult proceedings here, *Day* can be distinguished further from the instant case because it did not involve expungement, but delinquency proceedings without a disposition. *Id.* *Day* does not change the fact that Wheeler's conduct on September 11, 1988, could be a valid aggravating factor with [*19] or without expungement of that arrest record. *Lockard v. State*, 600 N.E.2d 985, 987-88 (Ind. Ct. App. 1992) (citing *Hensley*, 573 N.E.2d 913, 917 (Ind. Ct. App. 1991)).

P17 Here, the pre-sentence investigation report included the following aggravating factors: Wheeler raped the same victim on two separate occasions; Wheeler threatened to kill both the victim and her boyfriend; Wheeler attacked the victim while the victim's young son was asleep in the same room; Wheeler stated that he believed he had consent despite breaking into the victim's residence, threatening the victim, the victim having verbally refused; and Wheeler's history of inappropriate sexual behavior to subordinates at work.

Id. at 32. The fact that Wheeler was arrested while out on bond could have been used as an aggravating factor. *Concepcion v. State*, 567 N.E.2d 784, 791 (Ind. 1991) ("[T]he nature of the crimes and the manner in which the crimes were committed may be considered as aggravating circumstances."). Wheeler's sentence would have likely been the same with or without the mention of his conduct on September 11, 1988.

II. Ineffective Assistance of Trial Counsel

P18 Wheeler further contends that his trial counsel was ineffective because he failed to more fully investigate the circumstances surrounding the September 11, 1988 incident. The State contends, and we agree that this claim is [*20] barred by res judicata. The doctrine of res judicata "prevents the repetitious litigation of that which is essentially the same dispute." *State v. Holmes*, 728 N.E.2d 164, 168 (Ind. 2000). Wheeler "cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define the alleged error." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000).

P19 Wheeler first raised ineffective assistance of trial counsel during his direct appeal proceedings, and the claim was litigated and decided adversely to Wheeler. Successive claims are barred by res judicata. Furthermore, as stated above, expungement of the September 11, 1988 incident would likely not have changed Wheeler's sentence, as there were multiple other aggravators to use. The post-conviction court did not err when it denied Wheeler's successive petition for post-conviction relief.

P20 Affirmed.

P21 Riley, J., and Pyle, J., concur.

End of Document

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR
COURT CRIMINAL DIVISION VI
CAUSE # 49G06-8809-CF-102000

ANTHONY M. WHEELER)
Petitioner,)

v.)

INDIANAPOLIS METROPOLITAN
POLICE DEPARTMENT)
Respondent,)

FILED

(85) FEB 15 2013

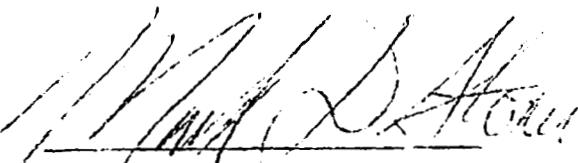
Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

COURT ORDER

The court having heard arguments on the petitioner's Petition to Expunge Arrest Records filed under I.C. 35-38-5-1 on June 4, 2012 and heard on December 13, 2012, finds that the petitioner has met his burden of proof, disproven the Indianapolis Metropolitan Police Departments contention that Petitioner is ineligible for expungement of arrest records and satisfied the criteria's found in 35-38-5-1 (1) (a) (f).

The court now grants petitioner's Petition for Expunegemnt of Arrest Records and orders the Indianapolis Metropolitan Police Department, and all other law enforcement agencies to destroy all fingerprints, photographs, or arrest records in their possession and related to the charges of attempted rape and confinement against Anthony M. Wheeler and his arrest under cause number 49G06-8809-CF-102000 within thirty (30) days of receipt of said court order, in compliance with 35-3805-2.

So Ordered this day of FEB 13 2013


JUDGE, MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 6

STATE OF INDIANA) SS: IN THE MARION SUPERIOR COURT
COUNTY OF MARION) CRIMINAL DIVISION, ROOM NO. 4

FILED

STATE OF INDIANA Cr4 MAY 12 1989 Cr4
vs. 49G048807
Anthony M. Wheeler NO. CF 78324

JUDGE
FINDINGS

JUDGE'S FINDINGS OF FACT AND
REASONS FOR FINDING AGGRAVATING/
MITIGATING CIRCUMSTANCES

The Court having heard the evidence, received the pre-sentence
report, and heard from defendant, his attorney, and the State now

finds:

FACTS

1. Deft, in need of rehabilitative treatment best accomplished at a penal facility.
2. Deft committed offense while out on bond on similar charge.
3. _____
4. _____
5. _____

THEREFORE, the Court finds from these facts that less than/more
than the presumptive sentence should be imposed for the following
reasons:

Any sentence less than presumptive would depreciate the
seriousness of the offense.

The defendant is, therefore, sentenced to a period of 10
years on each Ct I, IV, V, and VIII and 35 years on each
Ct. II, III, VI and VII. Counts V - VIII to be served concurrently
with each other and concurrent with Cts I - IV.
Ct 4 consec to Ct 3 Ct 3 consec to Ct 2 Ct 2 consec to Ct 1
DAVID F. McNAMAR SPECIAL JUDGE
PATRICIA J. GIFFORD, JUDGE
MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM FOUR

Date: 5-12-89

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