[Appendix A]

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 17, 2020
Decided December 23, 2020

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 20-2716

KENNETH MCBRIDE,
Petitioner-Appellant,

v.

DUSHAN ZATECKY,
Respondent-Appellee.

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

No. 3:19-CV-50

Robert L. Miller, Jr.,
Judge.

ORDER

Kenneth McBride 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. This court has 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. McBride's motions to proceed in forma pauperis and for appointment of counsel are DENIED.

[Appendix B]

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 26, 2021

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 20-2716

KENNETH McBRIDE,
Petitioner-Appellant,

v.

DUSHAN ZATECKY,
Respondent-Appellee.

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

No. 3:19-CV-50

Robert L. Miller, Jr., *Judge.*

ORDER

No judge of the court having called for a vote on the Petition for Rehearing En Banc, filed by Petitioner-Appellant on January 8, 2021, and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition for Rehearing En Banc is **DENIED.**

[APPENDIX C]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

KENNETH MCBRIDE,

Petitioner,

v.

CAUSE NO.: 3:19-CV-50-RLM-MGG

WARDEN;

Respondent.

OPINION AND ORDER

Kenneth McBride, a prisoner without a lawyer, filed a habeas corpus petition challenging his 2012 convictions in Marion County for criminal confinement and robbery. For the reasons stated below, the court denies his petition.

I. BACKGROUND

In deciding the petition, the court must presume the facts set forth by the state courts are correct. 28 U.S.C. § 2254(e)(1). It's Mr. McBride's burden to rebut this presumption with clear and convincing evidence. *Id.* The Indiana Court of Appeals set forth the facts underlying Mr. McBride's convictions as follows:

> On March 7, 2012, around 4:30 p.m., Officer Ryan Irwin of the Indianapolis Metropolitan Police Department (IMPD) responded to the dispatch of a robbery in progress at the Oriental Market (Market), a grocery store on Lafayette Road owned by Bay Le Zhu (Zhu) and her husband. Officer Irwin arrived within one minute and found that the employees, two of whom had obvious injuries, and Zhu's six-year-old son Brian were locked inside the Market. Irwin also found a twelve gauge shotgun lying on the ground next to the market.

It was later established that Zhu, Brian, Zhu's nephew Yixiu Chen (Yixiu), Kia Wong (Wong) and his wife, Cai Nong Chen (Cai), were all at the market when McBride and two other men, each armed and wearing dark clothing, gloves, and masks, entered the Market through a back door and locked the door behind them. The men confined everyone in the kitchen, striking several of the victims with their guns and binding their hands and legs with duct tape. After the men demanded money, Zhu gave them $1200 that she had in her pocket and was escorted out of the kitchen to the cash register, where they took additional money. When Van Duong, a regular customer, came by, he noticed that the door was locked even though the lights were on and the "open" sign was displayed. Suspicious, Duong peered through the Market window and observed masked men but none of the store employees. When he looked again, he saw Zhu taking money from the register, and she gave him a sign to call for help.

McBride and the other men escaped in Wong's vehicle, taking with them Wong's cell phone, Yixius's cell phone and many of his keys including his house and the Market keys, Zhu's purse and keys, the $1200 that Zhu had on her, and the money from the cash register. Duong got a good look at McBride and provided the license plate number of the getaway vehicle to the 911 dispatcher. He also reported that the vehicle had traveled south on Lafayette Road. Officers located the vehicle after a citizen reported seeing someone flee from the vehicle.

At around 5:00 p.m., McBride and his co-defendant, Adrian Jackson, were apprehended. They were found crouched down between a wood deck area and a garage, wearing dark clothing and shoes matching those worn by the robbers. Around and under the deck where McBride and Jackson were apprehended, the officers recovered several pieces of dark clothing, including a stocking cap mask, three dark gloves, the distinctive jacket worn by one of the men during the robbery with a Bic lighter in it that matched McBride's DNA, multiple cell phones, a set of keys, and a small purse, all of which were items taken from the victims during the robbery. Additionally, a piece of foreign currency and a rifle with Jackson's DNA were recovered. Officers also found $622 on McBride and $1106 on Jackson.

Jackson and McBride were arrested and taken to the police station and Zhu, Cai, Wong, and Duong were brought over for a show-up identification. All but Wong identified either one or both men as the robbers with seventy to one hundred percent certainty. Duong positively identified both men, stating that Jackson was the

driver and McBride was the front seat passenger in the getaway vehicle.

On March 9, 2012, the State charged McBride with Counts I and II, class B felony criminal confinement, Counts III, IV, and V, class B felony robbery, and Counts VI, VII, VIII, class C felony battery. On March 13, 2012, McBride was appointed a public defender. On that day he also made a pro se request for a speedy trial, but on May 10, 2012, his counsel requested a continuance, which the trial court granted. McBride was unhappy about his appointed counsel's decision to request a continuance despite his speedy trial request and proceeded to file motions and briefs pro se. McBride claimed that because his appointed counsel sought a continuance against his will and was not doing what he asked her to do, she had violated his constitutional right to counsel as well as the rules of professional conduct.

On July 31, 2012, a waiver of counsel hearing was held, during which McBride asked the trial court if he could proceed as co-counsel. This request was denied because the trial court stated he was attempting to take the lead in his own defense, thus placing his counsel at risk. McBride then petitioned the trial court to proceed pro se.

At a later hearing on August 16, 2012, the trial court questioned McBride about his knowledge of the requirements for pro se litigants and advised McBride of the responsibilities, dangers, and disadvantages that he might face by proceeding pro se. The trial court also told McBride he was responsible for objections and that objections are the manner in which he could preserve issues for appeal. The trial court specifically told McBride that if objections are not made during trial, that particular issue would be waived on appeal. During the advisement of rights hearing, the trial court was not convinced that McBride would be prepared to proceed pro se and expressed this concern to McBride several times. McBride acknowledged the fact that he needed counsel but refused to allow his appointed counsel to represent him because according to him, his rights had been violated by the appointed counsel.

Having been informed of no specific instance of how McBride's rights had been violated by his counsel, the trial court told McBride that if he felt he needed counsel, he would have to accept his appointed counsel because there was no evidence that the appointed counsel had done anything wrong, and McBride did not have the right to counsel of his choice.

> The trial court also verified that McBride had the educational background and mental capacity to defend himself and that no one had made either promises or threats to coerce him into waiving his right to counsel. After the trial court read the advisement of rights, McBride still insisted on representing himself and signed a written advisement form stating that he had thoroughly reviewed all the dangers and disadvantages of self-representation and had full knowledge of them. Although the trial court granted McBride's request to proceed pro se, it also appointed McBride with "standby counsel" that could answer questions about trial procedure.
>
> A jury trial was held from September 17–19, 2012. On September 19, 2012, the State dismissed Count VIII, and the jury found McBride guilty on Counts I through VII. During McBride's sentencing hearing on October 5, 2012, the trial court merged Count I into II, Count VI into Count III, and Count VII into Count IV and sentenced McBride to six years of incarceration on Count II and eight years each on Counts III, IV, and V, with each sentence to run consecutively, for a total aggregate sentence of thirty years.

McBride v. State, 992 N.E.2d 912, 914-16 (Ind. Ct. App. 2013) (footnotes omitted).

On direct appeal, Mr. McBride was represented by counsel and raised the following claims: (1) the trial court erred when it let him proceed *pro se* because his waiver of counsel wasn't knowing, voluntary, and intelligent; (2) the trial court committed fundamental error when it admitted evidence obtained through an improper show-up identification procedure; (3) the trial court abused its discretion in imposing consecutive sentences; and (4) his sentence was inappropriately long under Indiana Appellate Rule 7(B). *Id.* at 916-920. The Indiana Court of Appeals rejected these arguments. The court concluded that Mr. McBride made a knowing and intelligent waiver of his right to counsel; that he waived any objection to the show-up identification and that the identification procedure didn't amount to a fundamental error; and that the trial court didn't

abuse its discretion in imposing the sentence. *Id.* at 921. The court affirmed Mr. McBride's convictions and sentence in all respects. *Id.* Mr. McBride filed a petition to transfer to the Indiana Supreme Court, raising one claim: that the trial court committed reversible error when it permitted him to proceed *pro se.* The Indiana Supreme Court denied transfer. McBride v. State, 999 N.E.2d 417 (Ind. 2013).

Mr. McBride then filed a state post-conviction petition. (ECF 12-8.) The evidentiary hearing was rescheduled several times due to Mr. McBride's requests to amend the petition and for continuances of the hearing. A hearing was finally held on December 6, 2016, but the docket reflects that Mr. McBride didn't appear. The petition was denied, and Mr. McBride didn't pursue an appeal.

In January 2017, Mr. McBride filed a "motion to correct sentence" in the trial court. The motion was denied. He later sought and was granted leave to pursue a belated appeal of the trial court's order. On appeal, he raised one claim: that the trial court erred in refusing to correct his sentence, because consecutive sentences should not have been imposed under state law. McBride v. State, 111 N.E.3d 257 (Table), 2018 WL 4290642, at *2 (Ind. Ct. App. Sept. 5, 2018). The Indiana Court of Appeals concluded that the claim was barred by res judicata: Mr. McBride had already litigated the propriety of his consecutive sentences on direct appeal. The court also found no merit to Mr. McBride's argument, because the trial court appropriately relied on several aggravating factors to impose consecutive sentences, including the existence of multiple victims and the young age of one of the victims. The court rejected Mr. McBride's argument that his

sentence violated a state statutory cap for a "single episode of criminal conduct," because the cap didn't apply to crimes of violence. The Indiana Supreme Court denied transfer. McBride v. State, 119 N.E.3d 90 (Ind. 2018).

Mr. McBride then filed this federal petition raising the following three claims: (1) his Sixth Amendment right to counsel was denied when the trial court permitted him to proceed *pro se*; (2) his sentence violated the "14th and 5th Amendment Due Process and Double Jeopardy Clause[s]"; and (3) he was "denied due process and effective assistance of counsel by the admission of [the] show-up line-up." (ECF 1 at 3-4.)

II. ANALYSIS

Mr. McBride's petition is governed by the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996, which permits a court to grant habeas relief to a person in custody pursuant to a state court judgment "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The court can grant an application for habeas relief if it meets the stringent requirements of 28 U.S.C. § 2254(d), set forth as follows:

> 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

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> (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.

This standard is "difficult to meet" and "highly deferential." Hoglund v. Neal, 959 F.3d 819, 832 (7th Cir. 2020) (quoting Cullen v. Pinholster, 563 U.S. 170, 181 (2011)). "It is not enough for a petitioner to show the state court's application of federal law was incorrect; rather, he must show the application was unreasonable, which is a 'substantially higher threshold.'" Hoglund v. Neal, 959 F.3d at 832 (quoting Schriro v. Landrigan, 550 U.S. 465, 473 (2007)). In effect, "[a] petitioner must 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 fair-minded disagreement." *Id.* (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).

Before considering the merits of a habeas petition, the court must ensure that the petitioner has exhausted all available remedies in state court. 28 U.S.C. § 2254(b)(1)(A); Hoglund v. Neal, 959 F.3d at 832. The exhaustion requirement flows from recognition that the state courts must be given the first opportunity to address and correct violations of their prisoner's federal rights. Davila v. Davis, 137 S. Ct. 2058, 2064 (2017); O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)). For that opportunity to be meaningful, the petitioner must fairly present his constitutional claim in one complete round of state review. Baldwin v. Reese, 541 U.S. 27, 30-31 (2004); O'Sullivan v. Boerckel, 526 U.S. at 845. This includes seeking discretionary review in the state court of last resort. O'Sullivan v.

Boerckel, 526 U.S. at 848. The companion procedural default doctrine, also rooted in comity concerns, precludes a federal court from reaching the merits of a claim if the claim was presented to the state courts and was denied on the basis of an adequate and independent state procedural ground, or if the claim was not presented to the state courts and the time for doing so has passed. Davila v. Davis, 137 S. Ct. 2058, 2064 (2017); Coleman v. Thompson, 501 U.S. 722, 735 (1991).

In claim one, Mr. McBride asserts that his Sixth Amendment right to counsel was denied when the trial court permitted him to proceed *pro se*. The Indiana Court of Appeals rejected this argument on direct appeal, concluding that Mr. McBride made a "knowing, voluntary, and intelligent waiver of his right to counsel." McBride v. State, 992 N.E.3d at 921. Mr. McBride hasn't established that this decision was contrary to or unreasonable application of Supreme Court precedent.

The Sixth Amendment affords criminal defendants the right to counsel, but a defendant also has a qualified right to self-representation if he so chooses. Faretta v. California, 422 U.S. 806, 835 (1975). "This is true despite the fact that it is generally foolish for a person defending serious criminal charges to proceed without counsel." Tatum v. Foster, 847 F.3d 459, 461 (7th Cir. 2017). The Supreme Court has held that trial judges should advise defendants of the dangers of self-representation before they can make a knowing, voluntary, and intelligent waiver of counsel. Faretta v. California, 422 U.S. at 835. A waiver's validity is "case specific," Jean-Paul v. Douma, 809 F.3d 354, 359 (7th Cir. 2015),

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and depends on the particular facts of the case, the background of the defendant, his experience, and his actions. Iowa v. Tovar, 541 U.S. 77, 81 (2004). Trial judges are "entitled—indeed encouraged—to warn defendants of the risks that attend self-representation." Tatum v. Foster, 847 F.3d at 461. "In the end, however, *Faretta* requires them to honor the defendant's wishes, assuming that the defendant is generally competent." *Id.* It is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel. Iowa v. Tovar, 541 U.S. at 92.

In rejecting this claim on direct appeal, the Indiana Court of Appeals recognized Mr. McBride's Sixth Amendment right to proceed without counsel, and applied state case law consistent with Faretta and Tovar in determining that his waiver of counsel was knowing and voluntary.[1] McBride v. State, 992 N.E.2d at 916-18. The record amply supports the court's determination.

There is nothing in the record to suggest, nor does Mr. McBride argue, that he suffers from a mental impairment or was otherwise incompetent to make the decision to proceed without counsel. Instead, he argues that he didn't knowingly and voluntarily waive his right to counsel because the trial court forced him to proceed *pro se*, but the record contradicts this argument. The trial court held two hearings on Mr. McBride's request to represent himself. The first was

[1] A state court needn't cite to or even be aware of applicable Supreme Court case law "so long as neither the reasoning nor the result of the state-court decision contradicts" Supreme Court precedent. Early v. Packer, 537 U.S. 3, 8 (2002).

conducted by a judge *pro tempore*,[2] who explored whether Mr. McBride wanted to proceed on his own, because he persisted in filing *pro se* motions and briefs even though he was represented by public defender Jennifer Harrison. It's apparent that no formal decision was made at that hearing whether Mr. McBride would be allowed to represent himself, as both Mr. McBride and Ms. Harrison appeared for a second hearing before the presiding judge on August 16, 2012, during which the judge conducted a thorough inquiry into Mr. McBride's request to proceed without counsel. The court repeatedly warned Mr. McBride about the dangers of proceeding without counsel and emphasized the responsibilities he would have at trial if he elected to represent himself. The court told Mr. McBride more than once that, based on the court's own experiences with Ms. Harrison, she was an effective and competent attorney. The court stated that it saw no conflicts or errors in Ms. Harrison's representation to date, and instructed Mr. McBride that he was not entitled to the court-appointed attorney of his choosing.

The court further advised Mr. McBride that his choices were to retain an attorney of his choosing, remain represented by Ms. Harrison as court-appointed counsel, or proceed on his own. Mr. McBride was clear that if those were the choices, he preferred to represent himself. He answered a series of questions from the court indicating that he understood the dangers of proceeding on his own and the responsibilities he had if the case proceeded to trial. He affirmed

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[2] A judge *pro tempore* is a temporary judge appointed by the circuit court to perform certain limited functions, including conducting preliminary hearings in criminal matters. *See* IND. CODE §§ 33-38-11-1, 33-38-11-2.

that he was waiving his right to counsel freely and voluntarily. The court granted Mr. McBride's request to proceed *pro se*, but also appointed Ms. Harrison as standby counsel to assist him during the trial. On the day of the trial, Mr. McBride represented to the court that he was prepared to proceed, and he was an active participant in the trial proceedings. Among other things, he raised issues about the state's discovery production, carefully parsed through the jury instructions, gave an opening statement, cross-examined witnesses, including conducting a detailed questioning of the state's DNA expert, objected to the admission of evidence, and made a lengthy closing argument pointing out inconsistencies in the witnesses' accounts. Mr. McBride also argued for leniency at sentencing. In imposing the sentence, the court commented to Mr. McBride that he appeared to be a "very smart individual."[3]

Some of Mr. McBride's answers to the court's questions during the waiver-of-counsel hearing appear equivocal, but not for any confusion or misunderstanding by Mr. McBride. Rather, it appears he was trying to "hedge his bets" by both demanding a different court-appointed attorney and asking to proceed *pro se*. At one point, he requested that he be permitted to proceed as "co-counsel" with Ms. Harrison, but the court rightly rejected this suggestion as untenable. Indiana doesn't allow such "hybrid" representation. *See* McNair v. State, 147 N.E.3d 1053 (Ind. Ct. App. 2020) ("[T]he law is clear that once counsel

[3] The record reflects that Mr. McBride had some familiarity with the criminal justice system before the trial in this case: he had prior convictions for felony battery and resisting law enforcement as well as a juvenile record.

is appointed, a defendant speaks to the trial court through counsel and the trial court is not required to respond to a defendant's request or objection.").

Our court of appeals has recognized that "[a] knowing and intelligent waiver" under Faretta "need not be explicit." United States v. Thomas, 833 F.3d 785, 792 (7th Cir. 2016). "[S]o long as the district court has given a defendant sufficient opportunity to retain the assistance of appointed counsel, defendant's actions which have the effect of depriving himself of appointed counsel will establish a knowing and intentional choice." *Id.* (citation omitted). Mr. McBride's representations to the court as well as his actions—namely, his continued filing of *pro se* documents despite admonishments by the court that he must speak through his counsel—evidenced that he did not want Ms. Harrison's assistance. After questioning him, the court found him "clear thinking," albeit "pretty hardheaded." The court gave him the opportunity to keep Ms. Harrison as his counsel, retain counsel of his choosing, or proceed on his own, and fully advised him of the dangers of proceeding without counsel. Mr. McBride made it clear that he wouldn't proceed further with Ms. Harrison as his counsel and that, given those choices, he was electing to represent himself.

Mr. McBride says the court should have given him a different court-appointed attorney when he became dissatisfied with Ms. Harrison, but as the Indiana Court of Appeals observed, he had no general Sixth Amendment right to free representation by the attorney of his choosing. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006); Wheat v. United States, 486 U.S. 153, 159 (1988). Nothing in the record suggests that Ms. Harrison was unqualified or

had a conflict that prohibited her continued representation. Rather, Mr. McBride's arguments before the trial court were premised on the fact that Ms. Harrison requested a continuance of the trial date, even though Mr. McBride wanted a speedy trial.[4] As the trial court explained to him, this was a complex case involving multiple charges and victims. The case had only been pending for a few months at that point, and Ms. Harrison had an ethical obligation to ensure that she was adequately prepared to proceed to trial. Mr. McBride simultaneously complained to the court that Ms. Harrison had not yet conducted depositions and a "photo line-up" with each victim, but as the trial court explained, such actions would take time to complete. The record suggests that Ms. Harrison did actually depose some of the witnesses before Mr. McBride terminated her representation.

In summary, the record shows that Mr. McBride made the choice to proceed *pro se* with his "eyes open." Faretta v. California, 422 U.S. at 835. His decision to represent himself on serious criminal charges might have been unwise, but Faretta protects his right to make that choice. *Id.*; *see also* United States v. Thomas, 833 F.3d at 793 (defendant's decision to proceed without counsel was knowing and voluntary, where two hearing were held on defendant's request, he was adequately advised of the dangers of proceeding without counsel, and he had a basic understanding of the charges and potential penalties). The

[4] The record doesn't show any undue delay in the proceedings. It reflects that Mr. McBride appeared for an initial hearing on March 9, 2012, and Ms. Harrison was appointed on March 13. The trial was originally scheduled for May 22. On May 10, counsel requested a continuance of the trial date. The trial was rescheduled for July 23. In early July, the state requested a continuance, to which Ms. Harrison didn't object. The trial was then rescheduled for September 17, and it proceeded on that date.

Indiana Court of Appeals' resolution of this claim was not contrary to or an unreasonable application of Supreme Court precedent. Accordingly, the claim is denied.

In claim two, Mr. McBride asserts that his sentence violated the "14th and 5th Amendment Due Process and Double Jeopardy Clause[s]." (ECF 1 at 3.) The respondent argues that this claim is procedurally defaulted. (ECF 12 at 8.) To properly exhaust a claim under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner must "present both the operative facts and the legal principles that control each claim" at each level of state review. Stevens v. McBride, 489 F.3d 883, 894 (7th Cir. 2007). This includes alerting the state court to the "federal nature" of the claim. Baldwin v. Reese, 541 U.S. 27, 33 (2004). Mr. McBride didn't do that for this claim. Instead, his challenges to his sentence rested on state law. He cannot assert a federal claim in this federal proceeding that he didn't exhaust in state court. Nor can he reassert his state-law challenges to his sentence, because errors of state law don't provide a basis for granting federal habeas relief. 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Mr. McBride filed a traverse in support of his petition, but didn't respond to the state's procedural default argument or provide grounds for excusing his default. (*See* ECF 21.) Therefore, the court can't consider this claim on the merits.

In claim three, Mr. McBride asserts that he was "denied due process and effective assistance of counsel by the admission of [the] show-up line-up." (ECF 1 at 4.) The respondent argues that this claim is also procedurally defaulted. Mr. McBride raised the show-up claim on direct appeal before the Indiana Court of

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Appeals, but he didn't include the claim in his petition to transfer. He didn't raise any ineffective assistance of counsel claim on direct appeal or on appeal of the denial of his motion to correct his sentence. Because he didn't assert these claims in his state appeals and the time for doing so has passed, they, too, are procedurally defaulted. Mr. McBride doesn't acknowledge his default or provide any grounds for excusing it, so the court can't consider this claim on the merits, either.

Rule 11 of the Rules Governing Section 2254 Cases requires a court to either issue or deny a certificate of appealability whenever it enters a final order adverse to the petitioner. To obtain a certificate of appealability, 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) (internal quotation marks and citation omitted). For the reasons fully explained above, Mr. McBride's claims are not cognizable in this proceeding, procedurally defaulted, or otherwise without merit under governing standards. The court finds no basis to conclude that reasonable jurists would debate the outcome of the petition or find a reason to encourage Mr. McBride to proceed further. Accordingly, the court declines to issue him a certificate of appealability.

III. CONCLUSION

For the reasons set forth above, the petition (ECF 1) is DENIED, and the petitioner is DENIED a certificate of appealability. The clerk is DIRECTED to enter judgment for the respondent.

SO ORDERED on August 19, 2020

s/ Robert L. Miller, Jr.
JUDGE
UNITED STATES DISTRICT COURT

[Appendix D]

FOR PUBLICATION

ATTORNEY FOR APPELLANT:

MICHAEL R. FISHER
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

KENNETH MCBRIDE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1211-CR-547
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
Cause No. 49G01-1203-FB-15543

August 15, 2013

OPINION–FOR PUBLICATION

BAKER, Judge

EXHIBIT E

Following a jury trial, the appellant-defendant, Kenneth McBride, was found guilty of Counts I and II, class B felony criminal Confinement,[1] Counts III, IV, and V, class B felony Robbery,[2] and Count VI and VII, class C felony Battery,[3] for which the trial court sentenced McBride to an aggregate term of thirty years.

McBride appeals, asking our Court to vacate all of his convictions or, in the alternative, to revise his sentence pursuant to our authority under Indiana Appellate Rule 7(B). Specifically, McBride claims that the trial court committed reversible error when it allowed him to proceed pro se because he did not make a knowing, voluntary, and intelligent waiver of his right to counsel. McBride also contends that the trial court committed fundamental error when it admitted evidence obtained through an improper show-up identification procedure and that his thirty-year executed sentence is inappropriate in light of the nature of the offenses and his character.

Finding no reversible error and concluding that McBride's sentence is not inappropriate, we affirm.

FACTS

On March 7, 2012, around 4:30 p.m., Officer Ryan Irwin of the Indianapolis Metropolitan Police Department (IMPD) responded to the dispatch of a robbery in progress at the Oriental Market (Market), a grocery store on Lafayette Road owned by

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[1] Ind. Code § 35-42-3-3.

[2] I.C. § 35-42-5-1.

[3] I.C. § 35-42-2-1

Bay Le Zhu (Zhu) and her husband. Officer Irwin arrived within one minute and found that the employees, two of whom had obvious injuries, and Zhu's six-year-old son Brian were locked inside the Market. Irwin also found a twelve gauge shotgun lying on the ground next to the market.

It was later established that Zhu, Brian, Zhu's nephew Yixiu Chen (Yixiu), Kia Wong (Wong) and his wife, Cai Nong Chen (Cai), were all at the market when McBride and two other men, each armed and wearing dark clothing, gloves, and masks, entered the Market through a back door and locked the door behind them. The men confined everyone in the kitchen, striking several of the victims with their guns and binding their hands and legs with duct tape. After the men demanded money, Zhu gave them $1200 that she had in her pocket and was escorted out of the kitchen to the cash register, where they took additional money. When Van Duong, a regular customer, came by, he noticed that the door was locked even though the lights were on and the "open" sign was displayed. Suspicious, Duong peered through the Market window and observed masked men but none of the store employees. When he looked again, he saw Zhu taking money from the register, and she gave him a sign to call for help.

McBride and the other men escaped in Wong's vehicle, taking with them Wong's cell phone, Yixius's cell phone and many of his keys including his house and the Market keys, Zhu's purse and keys, the $1200 that Zhu had on her, and the money from the cash register. Duong got a good look at McBride and provided the license plate number of the getaway vehicle to the 911 dispatcher. He also reported that the vehicle had traveled

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south on Lafayette Road. Officers located the vehicle after a citizen reported seeing someone flee from the vehicle.

At around 5:00 p.m., McBride and his co-defendant, Adrian Jackson,[4] were apprehended. They were found crouched down between a wood deck area and a garage, wearing dark clothing and shoes matching those worn by the robbers. Around and under the deck where McBride and Jackson were apprehended, the officers recovered several pieces of dark clothing, including a stocking cap mask, three dark gloves, the distinctive jacket worn by one of the men during the robbery with a Bic lighter in it that matched McBride's DNA, multiple cell phones, a set of keys, and a small purse, all of which were items taken from the victims during the robbery. Additionally, a piece of foreign currency and a rifle with Jackson's DNA were recovered. Officers also found $622 on McBride and $1106 on Jackson.

Jackson and McBride were arrested and taken to the police station and Zhu, Cai, Wong, and Duong were brought over for a show-up identification. All but Wong identified either one or both men as the robbers with seventy to one hundred percent certainty. Duong positively identified both men, stating that Jackson was the driver and McBride was the front seat passenger in the getaway vehicle.

On March 9, 2012, the State charged McBride with Counts I and II, class B felony criminal confinement, Counts III, IV, and V, class B felony robbery, and Counts VI, VII, VIII, class C felony battery. On March 13, 2012, McBride was appointed a public

[4] Adrian Jackson's appeal has been assigned appellate cause number 49A05-1211-CR-553, and we hand down that appeal contemporaneously with this one.

defender. On that day he also made a pro se request for a speedy trial, but on May 10, 2012, his counsel requested a continuance, which the trial court granted. McBride was unhappy about his appointed counsel's decision to request a continuance despite his speedy trial request and proceeded to file motions and briefs pro se. McBride claimed that because his appointed counsel sought a continuance against his will and was not doing what he asked her to do, she had violated his constitutional right to counsel as well as the rules of professional conduct.

On July 31, 2012, a waiver of counsel hearing was held, during which McBride asked the trial court if he could proceed as co-counsel. This request was denied because the trial court stated he was attempting to take the lead in his own defense, thus placing his counsel at risk. McBride then petitioned the trial court to proceed pro se.

At a later hearing on August 16, 2012, the trial court questioned McBride about his knowledge of the requirements for pro se litigants and advised McBride of the responsibilities, dangers, and disadvantages that he might face by proceeding pro se. The trial court also told McBride he was responsible for objections and that objections are the manner in which he could preserve issues for appeal. The trial court specifically told McBride that if objections are not made during trial, that particular issue would be waived on appeal. During the advisement of rights hearing, the trial court was not convinced that McBride would be prepared to proceed pro se and expressed this concern to McBride several times. McBride acknowledged the fact that he needed counsel but

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refused to allow his appointed counsel to represent him because according to him, his rights had been violated by the appointed counsel.

Having been informed of no specific instance of how McBride's rights had been violated by his counsel, the trial court told McBride that if he felt he needed counsel, he would have to accept his appointed counsel because there was no evidence that the appointed counsel had done anything wrong, and McBride did not have the right to counsel of his choice.

The trial court also verified that McBride had the educational background and mental capacity to defend himself and that no one had made either promises or threats to coerce him into waiving his right to counsel. After the trial court read the advisement of rights, McBride still insisted on representing himself and signed a written advisement form stating that he had thoroughly reviewed all the dangers and disadvantages of self-representation and had full knowledge of them. Although the trial court granted McBride's request to proceed pro se, it also appointed McBride with "standby counsel" that could answer questions about trial procedure.

A jury trial was held from September 17-19, 2012. On September 19, 2012, the State dismissed Count VIII, and the jury found McBride guilty on Counts I through VII. During McBride's sentencing hearing on October 5, 2012, the trial court merged Count I into II, Count VI into Count III, and Count VII into Count IV and sentenced McBride to six years of incarceration on Count II and eight years each on Counts III, IV, and V, with

each sentence to run consecutively, for a total aggregate sentence of thirty years. McBride now appeals.

DISCUSSION AND DECISION

I. Waiver of Right to Counsel

McBride first alleges that the trial court erred when it permitted him to proceed pro se because his waiver of his right to counsel was not knowing, voluntary, and intelligent. Specifically, McBride claims that he only waived his right to counsel because a judge pro tempore informed him that by his actions of filing pro se motions and interposing objections, he had waived his right to counsel.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel. Jones v. State, 783 N.E.2d 1132, 1138 (Ind. 2003). Implicit in the right to counsel is the right to self-representation. Drake v. State, 895 N.E.2d 389, 392 (Ind. Ct. App. 2008). However, before a defendant waives his right to counsel and proceeds pro se, the trial court must determine that the defendant's waiver of counsel is knowing, voluntary, and intelligent. Jones, 783 N.E.2d at 1138. We review de novo a trial court's finding that a defendant waived his right to counsel. Miller v. State, 789 N.E.2d 32, 37 (Ind. Ct. App. 2003)

"The right to counsel in a criminal proceeding does not mean that the defendant has an absolute right to be represented by counsel of his own choosing." Smith v. State, 474 N.E.2d 973, 978-79 (Ind. 1985). A trial court may, in the exercise of its sound discretion, deny a defendant's request for a new court appointed attorney. Luck v. State,

466 N.E.2d 450, 451 (Ind. 1984). Such a ruling is reviewable only for an abuse of discretion. Id.

Our Supreme Court has stated that there are no specific "talking points" a trial court must follow when advising a defendant of the dangers and disadvantages of proceeding without counsel. Poynter v. State, 749 N.E.2d 1122, 1126 (Ind. 2001). Instead, a trial court needs only to come to a "considered determination" that the defendant is making a knowing, voluntary, and intelligent waiver of his or her right to counsel. Id. Our Supreme Court has adopted four factors for a trial court to consider when determining whether a knowing, voluntary and intelligent waiver has occurred:

> the extent of the court's inquiry into the defendant's decision, other evidence into the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, the background and experience of the defendant, and the context of the defendant's decision to proceed pro se.

Id. at 1127-28. In making this analysis, a trial court is in the best position to assess whether the defendant has made a knowing, voluntary, and intelligent waiver, and the trial court's finding will most likely be upheld "where the judge has made the proper inquiries and conveyed the proper information, and reaches a reasoned conclusion." Poynter, 479 N.E.2d at 1128.

We are perplexed by McBride's involuntary waiver claim because he does not claim that the trial court failed to advise him of the advantages of having an attorney represent him. He makes no argument that the four Poynter factors were not met in his case but instead claims that he only waived his right to counsel because at a waiver of

counsel hearing on July 31, 2012, a judge pro tempore informed him that he had waived his right to counsel by his actions of filing pro se motions and interposing objections. This is inaccurate because the record clearly shows that the judge pro tempore did not explicitly tell McBride that he had waived his rights by filing motions and briefs pro se. Instead, McBride was informed that if he wished to represent himself and continue filing motions and briefs pro se, the court would have to relieve his counsel of her obligations because McBride was attempting to take the lead in his own defense, thus placing his attorney at risk. Tr. p. 435. The trial court further stated that if McBride wished to allow his counsel do her job, she would continue to represent him and that this was his choice. Id. Moreover, not once during the August 16, 2012 hearing did McBride express to the trial court that he was waiving his right to counsel because he was advised by the judge pro tempore that his rights had already been waived.

McBride also makes the argument that he had requested, more than once, that the trial court appoint him alternative counsel but that his request was denied, thus showing that his waiver of right to counsel was involuntary. We reject McBride's contention because McBride is not entitled to appointed counsel of his choosing. Smith, 474 N.E.2d at 978-79. And he presented no evidence establishing that his appointed counsel was ineffective. Accordingly, this argument fails.

II. Show-up Identification

McBride also claims that the trial court committed fundamental error when it admitted evidence obtained through an improper show-up identification procedure.

Specifically, he argues that the show-up identification was overly suggestive because he was in handcuffs and the victims were informed before the identification that the police had recovered their properties from the defendant. McBride further contends that even though he failed to object at trial, the admission of the show-up identification evidence was fundamental error.

The admission or exclusion of evidence falls within the sound discretion of the trial court, and its determination regarding the admissibility of evidence is reviewed only for an abuse of discretion. Gordon v. State, 981 N.E.2d 1215, 1217 (Ind. Ct. App. 2013). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effects of the facts and circumstances before the court. Id. To preserve an error for review, the specific objection relied upon on appeal must have been stated in the trial court as a basis for the objection. Hale v. State, 976 N.E.2d 119, 123 (Ind. Ct. App. 2012). Thus, a claim may be waived for the purposes of an appeal where the defendant failed to object that the evidence was improperly admitted. Id. at 1218.

As discussed above, the trial court specifically informed McBride that he would be responsible for objections and that those objections were how McBride would preserve errors for appeal. Tr. p. 453. The trial court further advised McBride that if he failed to make objections, he would waive those errors on appeal. Id. McBride stated that he understood these advisements. Id.

McBride admits that he did not oppose the admission of the show-up identification and that he did not move to suppress this evidence or object to its admission at trial. Appellant's Br. p. 19. Thus, these issues are waived.

McBride attempts to avoid waiver by invoking the fundamental error doctrine. In support of this contention, McBride claims that the show-up identification procedure was unduly suggestive because the suspects were the only choice offered, as opposed to a line-up or photo array where multiple options are presented to the witnesses. However, the fundamental error doctrine is an extremely narrow doctrine and "applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." Gordon, 981 N.E.2d at 1218.

Even though our Supreme Court has cautioned against one-on-one show-up identifications because of their inherent suggestiveness, identification evidence gathered via a show-up procedure is not subject to a per se rule of exclusion in accordance with the fundamental error doctrine. Id. Rather, the admissibility of show-up identification evidence turns on an evaluation of the totality of the circumstances and whether those circumstances lead to the conclusion that the confrontation was conducted in a manner that could guide a witness into making a mistaken identification. Id.

In Mitchell v. State, this Court listed several factors for trial courts to consider when determining whether show-up identification evidence was permissible, including the witness's opportunity to view the criminal, the distance between the witness and the

criminal during the crime, the lighting conditions, and the length of time between the commission of the crime and the show-up identification. 690 N.E.2d 1200, 1204 (Ind. Ct. App. 1998)

Here, the crime scene was well-lit, and the surveillance video shows that the mask did not completely hide their facial features. State's Ex. 11. Yixiu testified that he could see the shape of the faces of two of the robbers because the masks were very thin. Tr. p. 85-86. The show-up identification also occurred soon after the robbery, and the other witnesses presented testimony regarding their identification of McBride. Moreover, the first officer was at the scene around 4:30 p.m., McBride and Jackson were apprehended few blocks away around 5:00 p.m., and the witnesses were brought in for the show-up identification shortly thereafter. Id. at 53-54, 86, 198.

Under these circumstances, McBride has failed to show that the show-up identification was unduly suggestive. The State presented the surveillance video at trial as well as evidence that McBride and Jackson were apprehended wearing the same clothes the robbers were said to have been wearing with other stolen items found were they were apprehended. Id. at 255-65, 283; State's Ex. p. 11, 48-53.

Nevertheless, McBride maintains that the show-up identification was unduly suggestive because the witnesses were told by the police that they had recovered the stolen property from them before the witnesses were asked to make the identification. Appellant's Br. p. 18. However, Cai did not testify that any police officer told her anything that would have influenced her identification, and none of the other witnesses

testified that they saw the items observed by Cai or that they were influenced by anything leading up to their identifications.

As a result, when considering the circumstances here, McBride's claim of fundamental error fails.

III. Sentencing

A. Abuse of Discretion

McBride next argues that the trial court erred in imposing consecutive sentences. Specifically, he claims that even though he was sentenced to less than the advisory term on each of the class B felonies, the trial court erred by ordering that his sentences run consecutively, especially considering the fact that he has a minor criminal history.

The decision to impose consecutive sentences lies within the discretion of the trial court. Ind. Code § 35-50-1-2; Gilliam v. State, 901 N.E.2d 72, 74 (Ind. Ct. App. 2009). However, a trial court is required to state its reasoning for imposing consecutive sentences. Gilliam, 901 N.E.2d at 74. In order to impose consecutive sentences, a trial court must find at least one aggravating circumstance. Owens v. State, 916 N.E.2d 913, 917 (Ind. Ct. App. 2009). It is a well-established principle that the existence of multiple crimes or victims constitutes a valid aggravating circumstance that a trial court may consider in imposing consecutive sentences. O'Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001).

During McBride's sentencing hearing, the trial court stated that the sentences should run consecutively because McBride and his co-defendant had committed the

crimes against multiple victims in the presence of a six-year-old. Tr. p. 428. These are indeed valid aggravating circumstances that can be used to impose consecutive sentences.

McBride also alleges that the consecutive sentences are not appropriate because he has a minor criminal history. Appellant Br. p. 20. He further claims that he is the father of a three-year-old daughter and that imprisonment would result in undue hardship to him or his dependent. Id. at 24-25. Thus, it appears that McBride is arguing that the trial court erred by failing to find mitigating factors that were supported by the evidence.

Although the failure to find mitigating circumstances that are clearly supported by the record may suggest they were overlooked, a trial court does not have to afford the same credit or weight to the proffered mitigating circumstance as a defendant may suggest. Thacker v. State, 709 N.E.2d 3, 10 (Ind. 1999). Moreover, if the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist. Anglemyer v. State, 868 N.E.2d 482, 493 (Ind. 2007).

In this case, the trial court in fact considered McBride's contentions that he had a less severe criminal history than his co-defendant and that imprisonment would result in undue hardship to him or his three-year-old daughter. However, the trial court found that these factors were not significant and, thus, were not factors that would have an impact on the sentence. Thus, McBride's claim fails.

McBride also alleges that because he proceeded pro se, he was unaware of the statutory factors that the trial court could have considered under Indiana Code section 35-

38-1-7.1 when sentencing him. Appellant Br. p. 24. McBride's lack of knowledge regarding this statute does not affect the trial court's sentencing decision. As discussed above, McBride's waiver of counsel was knowingly, voluntarily, and intelligently made. Thus, he was therefore responsible for knowing what statutory factors he should argue at his sentencing hearing.

B. Inappropriate Sentence

Finally, McBride argues that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B). Under this rule, we have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, this Court concludes the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "persuade the appellate court that his or her sentence has met the inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494.

Here, McBride has failed to make any discernible argument regarding the nature of the robbery or his character. Thus, we find that he has failed to present a cogent argument in support of this claim and has, therefore, waived the issue. See Ind. App. Rule 46(A)(8)(a).

Waiver notwithstanding, regarding the nature of the offenses, we note that the advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). The advisory sentence for both class B felony criminal confinement and class B felony

robbery is ten years with a sentencing range from six years to twenty years. I.C. § 35-50-2-5. McBride was sentenced to six years on the felony confinement conviction and eight years each on the felony robbery convictions. Thus, for each of his convictions, McBride's sentences fell below the advisory term.

Our review of the record reveals that McBride committed multiple crimes of violence. McBride and the other men robbed the victims while armed with guns that they used to physically assault the victims. They also bound the victims with duct tape and confined them in the kitchen with guns pointed at them. And finally, they engaged in this conduct in the presence of a six-year-old boy.

Notwithstanding these circumstances, McBride claims that the offenses should be considered as being less serious because the guns recovered were unloaded and he could not have shot anyone during this incident. However, McBride and the other men used the guns in a threatening manner causing the victims to experience substantial fear. Indeed, although the guns were not fired at the victims, the guns were used to inflict bodily injuries on the victims. Thus, McBride's nature of the offense argument avails him of nothing.

Likewise, our review of McBride's character reveals that McBride has a lengthy criminal history that involves prior crimes of violence. As a juvenile, McBride had four true findings for battery and one for disorderly conduct. PSI p. 4-5. As an adult, McBride has convictions for class D felony battery, class A misdemeanor resisting law enforcement, and violation of his probation. Id. at 5-6.

McBride argues that the State contended at sentencing that he was at a very high risk to reoffend but that there was nothing to support the State's contention but for the deputy prosecutor's speculations. Notwithstanding this claim, that McBride is likely to reoffend was not an aggravating circumstance considered by the trial court. However, McBride's criminal and juvenile histories demonstrate that he has no respect for our judicial system despite the opportunities that were offered to him to change. As a result, McBride has failed to show that his sentence was inappropriate.

Conclusion

In sum, we conclude that McBride made a knowing, voluntary, and intelligent waiver of his right to counsel. We also conclude that McBride waived his objection to the show-up identification, and the show-up procedure did not amount to fundamental error. Finally, we conclude that the trial court neither abused its discretion in sentencing McBride nor sentenced him inappropriately.

The judgment of the trial court is affirmed.

MAY, J., and MATHIAS, J., concur.

[Appendix E]

IN THE

INDIANA COURT OF APPEALS

No. 49A05-1211-CR-000547

KENNETH McBRIDE Appellant (Defendant Below)	)	Appeal from the Marion Superior Court, Criminal Division 1
	)	Cause No. 49G01-1203-FB-015543
v.	)	
STATE OF INDIANA Appellee (Plaintiff Below)	)	The Honorable Kurt Eisgruber, Judge

PETITION FOR REHEARING

ORDER

Appellant's Petition for Rehearing is DENIED this 7th day of October, 2013.

All panel Judges concur.

Margret G Robb

Margret G. Robb, Chief Judge
Court of Appeals of Indiana

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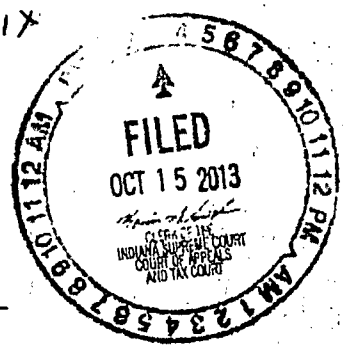
ORIGINAL APPENDIX F

IN THE

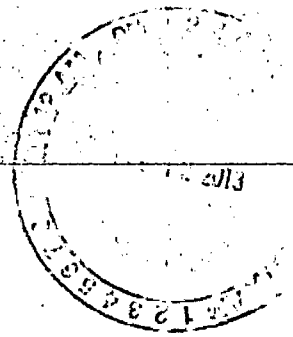
INDIANA SUPREME COURT



Cause No. _____

Court of Appeals Cause No. 49A05-1211-CR-000547

KENNETH McBRIDE Appellant (Defendant Below)	)	Appeal from the Marion Superior Court, Criminal Division 1
	)	Cause No. 49G01-1203-FB-015543
v.	)	
STATE OF INDIANA Appellee (Plaintiff Below)	)	The Honorable Kurt Eisgruber, Judge



ORDER

Petition to Transfer is hereby DENIED,
this 12th day of December, 2013.

Brent E. Dickson
CHIEF JUSTICE

All Justices concur.

[APPENDIX G]

MEMORANDUM DECISION

APPELLANT PRO SE

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Attorney General of Indiana

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Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Kenneth McBride,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

September 5, 2018

Court of Appeals Case No. 49A05-1705-CR-1050

Appeal from the Marion Superior Court

The Honorable Kurt Eisgruber, Judge

Trial Court Cause No. 49G01-1410-PC-48689

Baker, Judge.

[1] Kenneth McBride appeals the trial court's denial of his motion to correct erroneous sentence. Finding no error, we affirm.

Facts

[2] The underlying facts, as described by this Court in McBride's direct appeal, are as follows:

> On March 7, 2012, around 4:30 p.m., Officer Ryan Irwin of the Indianapolis Metropolitan Police Department (IMPD) responded to the dispatch of a robbery in progress at the Oriental Market (Market), a grocery store on Lafayette Road owned by Bay Le Zhu (Zhu) and her husband. Officer Irwin arrived within one minute and found that the employees, two of whom had obvious injuries, and Zhu's six-year-old son Brian were locked inside the Market. Irwin also found a twelve gauge shotgun lying on the ground next to the market.
>
> It was later established that Zhu, Brian, Zhu's nephew Yixiu Chen (Yixiu), Kia Wong (Wong) and his wife, Cai Nong Chen (Cai), were all at the market when McBride and two other men, each armed and wearing dark clothing, gloves, and masks, entered the Market through a back door and locked the door behind them. The men confined everyone in the kitchen, striking several of the victims with their guns and binding their hands and legs with duct tape. After the men demanded money, Zhu gave them $1200 that she had in her pocket and was escorted out of the kitchen to the cash register, where they took additional money. When Van Duong, a regular customer, came by, he noticed that the door was locked even though the lights were on and the "open" sign was displayed. Suspicious, Duong peered through the Market window and observed masked men but none of the store employees. When he looked again, he saw Zhu taking money from the register, and she gave him a sign to call for help.

> McBride and the other men escaped in Wong's vehicle, taking with them Wong's cell phone, Yixius's cell phone and many of his keys including his house and the Market keys, Zhu's purse and keys, the $1200 that Zhu had on her, and the money from the cash register. Duong got a good look at McBride and provided the license plate number of the getaway vehicle to the 911 dispatcher. He also reported that the vehicle had traveled south on Lafayette Road. Officers located the vehicle after a citizen reported seeing someone flee from the vehicle.
>
> At around 5:00 p.m., McBride and his co-defendant, Adrian Jackson, were apprehended. They were found crouched down between a wood deck area and a garage, wearing dark clothing and shoes matching those worn by the robbers. Around and under the deck where McBride and Jackson were apprehended, the officers recovered several pieces of dark clothing, including a stocking cap mask, three dark gloves, the distinctive jacket worn by one of the men during the robbery with a Bic lighter in it that matched McBride's DNA, multiple cell phones, a set of keys, and a small purse, all of which were items taken from the victims during the robbery. Additionally, a piece of foreign currency and a rifle with Jackson's DNA were recovered. Officers also found $622 on McBride and $1106 on Jackson.
>
> Jackson and McBride were arrested and taken to the police station and Zhu, Cai, Wong, and Duong were brought over for a show-up identification. All but Wong identified either one or both men as the robbers with seventy to one hundred percent certainty. Duong positively identified both men, stating that Jackson was the driver and McBride was the front seat passenger in the getaway vehicle.

McBride v. State, 992 N.E.2d 912, 914-15 (Ind. Ct. App. 2013) (footnote omitted).

[3] On March 9, 2012, the State charged McBride with two counts of Class B felony criminal confinement, three counts of Class B felony robbery, and three counts of Class C felony battery. A jury trial took place from September 17-19, 2012. On September 19, 2012, the State dismissed one of the Class C felony battery charges. The jury found McBride guilty on all other charges. On October 5, 2012, a sentencing hearing took place, during which the trial court merged one count of the criminal confinement conviction into the other and merged the battery convictions into two counts of the robbery convictions. The trial court sentenced McBride to six years executed for the criminal confinement conviction and eight years executed for each of the three robbery convictions, with all sentences to run consecutively, for an aggregate sentence of thirty years. *Id.* at 916.

[4] On direct appeal, McBride argued in relevant part that the trial court erred by imposing consecutive sentences. This Court held that the trial court did not err by imposing consecutive sentences because the sentences were based on the aggravating factors that McBride had committed the crimes against multiple victims and in the presence of a six-year-old, which were valid aggravating factors that could be used to impose consecutive sentences. *Id.* at 919-20.

[5] On February 12, 2016, McBride filed an amended petition for post-conviction relief, which the post-conviction court denied on December 6, 2016. On January 13, 2017, McBride filed a motion to correct erroneous sentence, arguing that the trial court erred by imposing consecutive sentences when it did

not base his sentence on any aggravators. The trial court denied the motion on January 17, 2017. McBride now appeals.

Discussion and Decision

[6] McBride's sole argument on appeal is that the trial court erred by denying his motion to correct erroneous sentence. We will reverse a trial court's ruling on a motion to correct sentence only if the ruling is against the logic and effect of the facts and circumstances before it. *Woodcox v. State*, 30 N.E.3d 748, 750 (Ind. Ct. App. 2015). While we defer to the trial court's factual determinations, we review legal conclusions de novo. *Id.*

[7] Initially, we note that McBride's claims are barred as a matter of res judicata. As a general rule, when this Court decides an issue on direct appeal, the doctrine of res judicata applies, thereby precluding its review in post-conviction proceedings. *State v. Holmes*, 728 N.E.2d 164, 168 (Ind. 2000). The doctrine of res judicata prevents the repetitious litigation of that which is essentially the same dispute. *Id.* This Court upheld the validity of McBride's sentence on direct appeal, specifically holding that the trial court had relied on valid aggravating factors to support the consecutive sentences. *McBride*, 992 N.E.2d at 919-21. Because McBride already litigated on direct appeal the validity of his consecutive sentences, he may not attempt to litigate that issue for a second time through his motion to correct erroneous sentence.

[8] The matter of res judicata notwithstanding, we find no merit in McBride's argument. He first alleges that his consecutive sentences were unlawful because

the trial court did not find any aggravating factors to support imposing consecutive sentences. A trial court is required to state its reasoning and to find at least one aggravating factor to impose consecutive sentences. *Id.* at 919. Here, the trial court's oral and written sentencing statements clearly show that it found and relied upon several aggravating factors to support the consecutive sentences, including the nature and circumstances of the crimes, the existence of multiple victims, and the young age of one of the victims. Appellant's App. p. 30-32.

[9] McBride also argues that the trial court erred by imposing consecutive sentences for his three convictions of Class B felony robbery because the crimes arose out of a single episode of criminal conduct.[1] But at the time of the offenses, Class B felony robbery was a "crime of violence," and the limit on consecutive sentences for single episodes of criminal conduct did not apply to crimes of violence. Ind. Code § 35-50-1-2(a)(12), -(c) (2012). Therefore, McBride's sentences were not subject to statutory limits on sentences for single episodes of criminal conduct. McBride's argument is unavailing.

[10] The judgment of the trial court is affirmed.

May, J., and Robb, J., concur.

---

[1] This argument should have been raised in McBride's direct appeal and is now untimely. Nevertheless, we will briefly address it.