

BRADFORD, Judge

Appellant-Petitioner Adrian Cole challenges the post-conviction court's denial of his petition for relief claiming ineffective assistance of trial counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

In 1991 Cole was convicted of attempted murder in Cause Number 49G05-9001-CF-5501 ("Cause No. 5501"), for which he received a fifty-year sentence in the Department of Correction. In 1996, Cole's conviction was set aside in postconviction proceedings. Cole was retried in 1999, but he pleaded guilty during trial in exchange for a sentence of forty-five years in the Department of Correction, with twenty-five years suspended and eight years of formal probation. Cole was released on probation on October 5, 2000.

After Cole was released on probation, he began working as a confidential informant with Detective Larry Jones of the Lawrence Police Department. According to Cole, his work as an informant was in an effort to reduce his probationary term. Cole's cooperation with authorities led to several arrests and the seizure of substantial amounts of narcotics and firearms. Cole also provided information regarding a fraudulent check scheme. According to Detective Larry Jones, Cole was never encouraged to commit criminal offenses for purposes of his role as a confidential informant.

Authorities subsequently discovered that Cole was also involved in a fraudulent check scheme. Due to this check fraud scheme, Cole and multiple co-defendants were charged in an eighty-count information in Cause Number Cause Number 49G05-0402-FC-32235 ("Cause No. 32235"). Cole was charged with forgery in ten of those counts.

On April 2, 2004, the State filed a Notice of Probation Violation in Cause No. 5501 alleging, as its first allegation, that Cole had been charged with ten counts of forgery under Cause No. 32235.¹ In addition, the State alleged Cole had failed to report his address to the probation department (allegation 2); had failed to pay his fines, costs and fees (allegation 3); and had left the State of Indiana without permission (allegation 4). Cole ultimately admitted to allegations 2 and 4, and on November 12, 2004, he was ordered to serve his full backup time of twenty-five years. The trial court indicated, however, that it would reconsider the sentence if Cole filed a petition to mitigate or if the parties agreed to revisit the sentence.

At the time Cole was ordered to serve his full backup time, the parties and court relied upon *Pugh v. State (Pugh I)*, 804 N.E.2d 202 (Ind. Ct. App. 2004), *trans.granted and vacated in relevant part*, 819 N.E.2d 375 (Ind. 2004).² Under *Pugh I*, a trial court, upon revoking probation, was required to order execution of the entire suspended sentence. 804 N.E.2d at 204-05. The Indiana Supreme Court subsequently reversed *Pugh I*, holding that the trial court, upon revoking probation, could impose less than the originally suspended sentence. *Pugh v. State (Pugh II)*, 819 N.E.2d 375-76 (Ind. 2004) (citing *Stephens v. State*, 818 N.E.2d 936, 942-43 (Ind. 2004)).

¹ This was not the first notice of probation violation filed in Cause No. 5501. On February 6, 2001, the State alleged a probation violation based upon firearms found in Cole's residence, which the trial court found. Following a second notice on October 30, 2002, based upon a charge of domestic battery, the trial court found a subsequent probation violation on November 19, 2002. In each instance, the trial court continued Cole's probation.

² The Appellant in *Pugh I* had petitioned for transfer to the Supreme Court in April of 2004. The Supreme Court granted transfer and issued its opinion on December 21, 2004.

At an October 27, 2005 guilty plea hearing, Cole pled guilty to four counts of Class C felony conspiracy to commit forgery in Cause No. 32235. At the close of that hearing, the trial court referenced the Supreme Court's reversal in *Pugh II* and indicated its willingness to revisit Cole's sentence in Cause No. 5501 at the sentencing hearing for Cause No. 32235. The court indicated that argument regarding Cause Nos. 5501 and 32235 would be consolidated for purposes of the hearing.

At the November 15 and December 16, 2005 sentencing hearing, the trial court found Cole's guilty plea as a mitigating factor. It further acknowledged Cole's efforts in assisting law enforcement but rejected his contention that his illegal conduct was due to law enforcement coercion. Among the aggravating factors, the trial court noted that Cole had committed the crimes in Cause No. 32235 while on probation. The court ultimately imposed concurrent six-year sentences on each of the four forgery counts in Cause No. 32235. The trial court re-imposed Cole's full backup sentence in Cause No. 5501, naming as an additional factor Cole's commission of the acts in Cause No. 32235 while he was on probation in Cause No. 5501. The trial court further ordered that the sentences in Cause Nos. 5501 and 32235 be served consecutively. Neither the trial court nor defense counsel advised Cole of his right to appeal his sentence, and Cole did not appeal the sentence.³

In 2006, Cole filed a pro se petition for post-conviction relief, as well as an amended pro se petition. On December 22, 2009, Cole, by counsel, integrated his claims

³ Cole's sentence in Cause No. 32235 was recently affirmed in a belated appeal. *See Cole v. State*, 49A02-0912-PC-1183 (Ind. Ct. App. June 18, 2010), *reh'g denied*.

into an amended PCR petition alleging lack of due process and ineffective assistance of counsel arising out of the trial court's and defense counsel's failure to advise Cole of his right to appeal his sentence and to pauper appellate counsel. At the October 6, 2010 post-conviction hearing, Cole testified that he was unaware of his right to appeal; that if he had been told about this right he would have appealed; and that he was indigent by the time of the proceedings.

The post-conviction court denied Cole's petition on March 15, 2011. The court found that neither it nor Cole's attorney had advised Cole of the right to appeal his twenty-five-year sentence for probation revocation. The court credited Cole's contention that he would have appealed if he had known about his right to do so, and it concluded that defense counsel performed deficiently in failing to inform Cole of his appellate rights. Nevertheless, the court found no prejudice, concluding that even if Cole had pursued an appeal, there would have been no alteration of his sentence, given the multiple factors demonstrating that his violation of probation was egregious. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Cole challenges the postconviction court's denial of his petition. In claiming that he was denied effective assistance of counsel,⁴ Cole argues that the post-conviction court was correct to find deficient performance but erred in concluding there was no prejudice.

⁴ To the extent Cole makes a due process claim, we consider it included in his ineffective assistance of counsel claim.

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Kubsch v. State*, 934 N.E.2d 1138, 1144 (Ind. 2010), *reh'g denied*. When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, “[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” *Id.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (internal quotation omitted)).

Pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984), criminal defendants have a Sixth Amendment right to “reasonably effective” legal assistance. *Roe v. Flores-Ortega*, 528 U.S. 470, 476 (2000). A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation “fell below an objective standard of reasonableness,” and (2) that counsel's deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 688, 694, *cited in Roe*, 528 U.S. at 476.

The *Strickland* test also applies to claims that counsel was constitutionally ineffective for failing to file a notice of appeal. *Roe*, 528 U.S. at 477. “[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” *Id.* at 480. To show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed. *Id.* at 484. The question whether a given defendant has made the requisite showing will turn on the facts of a particular case. *Id.* at 485. Evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination. *Id.* Notably, the prejudice inquiry is not wholly dissimilar from the inquiry used to determine whether counsel performed deficiently in the first place; both may be satisfied if the defendant shows non-frivolous grounds for appeal. *Id.* at 486.

II. Non-Frivolous Grounds for Appeal

Here, the post-conviction court found, and the State does not dispute, that defense counsel failed to inform Cole of his appellate rights in Cause No. 5501. There is no suggestion in the record that Cole demonstrated to counsel that he was interested in appealing. Therefore, under *Roe*, the central issue is whether a rational defendant would want to appeal. This question, properly viewed in terms of whether there were non-

frivolous grounds for appeal, may be used to answer both the deficient-performance prong and the prejudice prong of the *Strickland* test. *See Roe*, 528 U.S. at 486.

In addressing Cole's challenge, we are cognizant of the Indiana Supreme Court's emphasis on the importance of appellate counsel's duty to inform a defendant regarding his ability to appeal. The most serious sort of appellate counsel error occurs when counsel's nonfeasance or malfeasance acts to deprive the appellant entirely of his right to review. *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997). When an appellant's right to be heard on appeal is *completely* denied him by his counsel's performance, concerns of judicial economy and repose are little implicated. *Id.* (emphasis in original). Of course, a defendant is entitled to dispute on appeal the terms of a sentence ordered to be served in a probation revocation proceeding that differ from those terms originally imposed. *Stephens v. State*, 818 N.E.2d 936, 939 (Ind. 2004).

In imposing Cole's sentence in Cause No. 32235 and his full backup sentence in Cause No. 5501, the trial court stated as follows:

Looking at the mitigating factors, I'm not going to accept that his choice to cross the line was a result of law enforcement coercion. While certainly the Lawrence standards for determining who they're going to use and how they're going to use them could be more clear, the detective in his deposition made it clear that he never authorized the violation of the law, and there was never any discussion about violating the law between himself and Mr. Cole. I think it's a mitigating factor that Mr. Cole accepted responsibility by pleading guilty, although he did it late in the day and there's, it's beyond doubt that law enforcement assistance was received and a number of cases were made against [two other defendants], excuse me, although there's some who could argue that by getting them arrested he was clearing away the competition, Mr. Cole was. We'll leave that decision for another day. The, I agree with [the prosecutor] that the theft conviction and the fact that that theft conviction, that that probation was violated by the murder, or attempt murder, constitute a series of aggravating factors, the

attempt murder being the most serious. Another factor is that this crime was committed while Mr. Cole was on probation. I'm going to balance everything, give him six years on the, on each count, Counts 27, 44, 47 and 50. I'm going to run them concurrently. The probation was violated back in July of '04 and Mr. Cole was given the maximum backup time because the law at that time, law that has since then been reversed, required full backup time. The probation was reversed (sic) based on the fact that Mr. Cole left the State which was a direct violation of probation, and he didn't report his address which was a direct violation of probation. We now have an additional factor, and that is his conviction for this crime while he's on probation. I am going to require that he serve all of his backup time and I'll require that six years here be served consecutively to that backup time, which is, that cause number is [5501].

Pet. Exh. 7, Exh. Vol. 1, pp. 255-57.

With respect to the grounds for the underlying appeal, Cole argues that the trial court overlooked the considerable mitigating evidence demonstrating his extensive assistance to authorities on a multitude of cases, much of it with the blessing of his probation officer; that the trial court erred in justifying its imposition of the full backup sentence for attempted murder by relying upon "wholly dissimilar" property crimes; and that his full twenty-five-year backup sentence for probation revocation was too "tremendous" an amount of time to serve given the advisory six-year sentence for the crimes serving as a basis for the violation. Appellant's Br. pp. 19, 20. In Cole's view, these reasons establish the underlying merit to his appeal.

The State responds by arguing that the above grounds do not constitute a reasonable basis for an appeal. The State points out that sentences following probation revocations are not subject to an Indiana Appellate Rule 7(B) challenge and argues that any appeal by Cole would have been subject to a highly deferential standard of review. *See Prewitt v. State*, 878 N.E.2d 184, 187-88 (Ind. 2007). To be sure, a trial court's

sentencing decisions for probation violations are reviewable for an abuse of discretion only, and an abuse of discretion occurs only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* at 188.

It is true that Cole's appeal would have been subject to a highly deferential standard of review. As this court has observed, Indiana Code section 35-38-2-3 (2003), which governs the revocation of probation, does not require a trial court to balance aggravating and mitigating circumstances when considering sentencing upon a finding of probation violation. *Mitchell v. State*, 619 N.E.2d 961, 963 (Ind. Ct. App. 1993), *overruled in part by Patterson v. State*, 669 N.E.2d 220, 223 n.2 (Ind. Ct. App. 1995) (holding that a trial court should consider a probationer's mental health in a probation revocation proceeding). Indeed, "so long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to Indiana Code section 35-38-2-3, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence." *Goonen v. State*, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999); *see also, Bussberg v. State*, 827 N.E.2d 37, 43 (Ind. Ct. App. 2005) (finding no authority requiring a trial court to give reasons for its imposition of a particular punishment for a probation violation), *trans. denied*.

Here, Cole's challenges to his sentence are to the trial court's consideration of various aggravating and mitigating factors and to the allegedly excessive length of his sentence. Yet, as we have already observed, the trial court is not required to balance aggravating and mitigating circumstances when considering sentencing upon a probation violation. The record demonstrates that the trial court *did* consider all of the factors Cole

raises, namely, the effect of law enforcement coercion, which the trial court rejected; the mitigating effect of his guilty plea, which the trial court accepted; and the assistance which Cole provided to authorities, which the trial court recognized. The fact that the trial court's imposition of Cole's full backup sentence was partly based upon his commission of dissimilar crimes is irrelevant in the context of imposing a backup sentence for a probation violation. *Id.* Indeed, there is no dispute that Cole committed *four* crimes, in addition to having committed two other violations, any one of which would have justified the trial court's imposition of the full suspended sentence under Indiana Code section 35-38-2-3. As for Cole's allegation that his backup sentence was excessive compared to other sentences in cases where full backup time was imposed, this is essentially a claim that his sentence constitutes an outlier, which falls under Rule 7(B) and similarly does not apply in the probation revocation context. *See Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008) (characterizing Rule 7(B) review as an attempt to "leaven the outliers").

Cole's challenges were not cognizable appellate challenges and would have been summarily rejected. We must therefore conclude that a rational defendant would not have pursued these appellate challenges.⁵ Accordingly, despite the significant fact that Cole was denied an appeal, we cannot say that his ineffective assistance of counsel claim warrants relief.

The judgment of the post-conviction court is affirmed.

⁵ We are fully aware that in analyzing the rationality of pursuing an appeal, we have essentially conducted an independent appellate review of Cole's sentence.

ROBB, C.J., and BARNES, J., concur.