MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Troy Belk,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 21, 2021

Court of Appeals Case No. 19A-PC-2193

Appeal from the Marion Superior Court

The Honorable Barbara Crawford, Judge

The Honorable Amy J. Barbar, Magistrate

Trial Court Cause No. 49G01-1603-PC-11173

Altice, Judge.

Case Summary

[1] Troy Belk appeals the post-conviction court's denial of his petition for post-conviction relief, in which he claimed that his trial counsel provided ineffective assistance by failing to communicate a plea offer from the State to him.

[2] We affirm.

Facts & Procedural History

[3] In February 2015, Belk was convicted as charged, following a jury trial, of Class A felony robbery, Class B felony robbery, Class B felony aggravated battery, and two counts of Class B felony criminal confinement, stemming from a home invasion. The evidence showed that two men, Kenney and Spann, were at Spann's house, which was used as a location to sell marijuana, and another man, Carter, entered the house while armed. Carter hit Spann on the head with the gun, ordered both Kenney and Spann to the ground, and took money from them. Carter then made a phone call and said, "I got these b****es – y'all better hurry up," after which Belk and a man named Riley, both armed with guns, entered the home. *Belk v. State*, Cause No. 49A05-1503-CR-105 at *1 (Ind. Ct. App. Nov. 30, 2015). Other relevant facts as found in the direct appeal include:

> Belk kicked Kenney in the face, demanded money from him, and told Kenney that they had his mother and would kill her if he did not reveal the location of the money. Kenney, who recognized Belk, asked him, "Troy, why you doin['] this – Troy – you know I ain't got no money[.]" Belk then grabbed a baseball bat that was in Spann's house and hit Kenney with it several times.

> During this time, Carter continued to keep his gun pointed at Kenney. Riley unplugged the surveillance cameras and stood over Spann with his gun pointed at him. When Spann looked up at Riley, he told Spann that he would shoot Spann in the face if Spann looked at him again.
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> Thereafter, Carter and Belk dragged Kenney into the kitchen, continued to beat him, and asked him where the "stuff" was. Riley then grabbed Spann by the shirt, dragged him to the kitchen, and continued to hold his gun on him. Belk "ra[n]sack[ed]" the kitchen and rummaged through closets while Riley kept his gun pointed at Spann. Riley said that he had an "itchy trigger finger" and cocked his gun. At that same time, the doorbell rang. Belk and Riley ran to the door while Carter, still armed and pointing his gun at Kenney, stayed in the kitchen with Kenney and Spann. Belk said, "open the door and let him in – we gonna kill him with these two."
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> At that point, Kenney jumped on Carter and told Spann to run. Kenney punched Carter, who then shot Kenney in the face. Spann ran down the hall, saw Kenney fall to the ground, and saw a "flame" or a bullet coming toward him. Spann then dove out the window and ran down the alley, yelling repeatedly, "They tryin[']] to kill us."

Id. at *1-2 (citations to transcript omitted). Spann gave police Belk's name as a suspect, and Kenney and Spann identified Belk, Carter, and Riley as the perpetrators. Belk and the others were charged with multiple crimes. Attorney Mitchell Swedarsky represented Belk in the trial proceedings.

[4] At the February 20, 2015 sentencing hearing, Belk gave a statement in allocution. He stated, in part, that, from the beginning, he wanted to reach a

plea and not go to trial but "not once was I ever [] offered a plea or given the opportunity to be accountable[.] . . . I was told due to my co-defendant didn't want to take a plea bargain[,] I had to be forced into trial [] from day one." *Appellant's Appendix Vol. IV* at 154. The State responded in argument with the following:

> [A]s far as his [] wanting to take responsibility, an option for him was to plead open to the Court yet he didn't do that. . . . I don't have to offer them a plea agreement. I can offer a plea agreement to one of 'em and if they take it then the other might fall in line but he does not have a constitutional right to a plea agreement so if he really wanted to accept responsibility and say Judge, this whole time I wanted to [] accept responsibility he could have just came in and pled open to the Court – that would have been a mitigator, however, there are no mitigators in Mr. Belk's case.

Id. at 167. Swedarsky replied with the following about Belk and plea offers:

> He's always wanted to try to do something to get this resolved, however because the co-defendant was going to trial he lost that option. Sure he could have pled open to all the counts but you know in the [] situation as it was he ended up going to trial with everyone else because that's what they were doing and that's – I mean, it's not his intention all along, Judge. I know him and I have spoken at length about trying to get this resolved for him but because [co-defendant] Mr. Carter wanted to go to trial Mr. Belk went to trial as well so here we are today[.]

Id. at 176. The trial court imposed an aggregate sentence of forty years, with thirty-five years to be served in the Indiana Department of Correction (DOC)

and five years in community corrections. Belk's convictions were affirmed on direct appeal.[1]

[5] On March 23, 2016, Belk filed a pro se petition for post-conviction relief, and on February 9, 2019, he filed, by counsel, an amended petition. It alleged, as is relevant here, that Swedarsky provided ineffective assistance of counsel by failing to communicate one or more plea offers to Belk. Belk asserted that, as he was preparing to file his petition for post-conviction relief and was assembling trial documents, he "was surprised to find in his defense file a plea offer for 25 years with 15 years executed, five years of community corrections and five years suspended." *Appellant's Appendix Vol. II* at 56. Belk maintained that he "was never shown any plea offers." *Id*.

[6] The court held an evidentiary hearing on Belk's petition for post-conviction relief on May 14, 2019. At the hearing, Belk presented the testimony of Swedarsky, who had been practicing law for thirteen years. Swedarsky testified that it was his practice to make sure that his criminal clients knew and understood any offer and that "any time [he] got an offer," he made sure that he conveyed it to the defendant. *Transcript* at 25. Swedarsky's testimony included the following:

> A: [Belk and I] spoke about a plea throughout but it was his contention throughout all the proceedings to only take a D [sic]

[1] We remanded to the trial court to correct sentencing documents.

> Felony.[2] I talked to prosecutor Vince (inaudible) often and we tried to negotiate[] down to that; the only time he made an[] offer for [B] Felony is if Mr. Belk would agree to testify against his Co-Defendants and he did not.
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> Q: Were there any offers? Did you actually get a plea offer?
>
> A. I did.
>
> Q. You recall what that was?
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> A. It was for a A Felony. I don't remember the specific terms.
>
> Q. Was it in writing or was it just verbal?
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> A. I know maybe originally there was some things floating around between prosecutors but I know there was one [] in writing as well and I did show Mr. Belk at some point and time.

Id. at 24-25. Swedarsky continued that "[o]ur goal was trying to get it down to a [B] felony but last and the best offer was an A felony and when I told [Belk] about it[,] he rejected it[.]" *Id*. at 25. Swedarsky explained that early in the case the then-prosecutor, Amie Martens, had engaged in discussions with Swedarsky trying to get the matter resolved, but a B felony offer never materialized, and when the case was transferred over to another prosecutor, Ben Strahm, Strahm "never offered a B felony unless Mr. Belk was willing to

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[2] Although the Transcript states "D" felony, it is clear by the rest of the Transcript, Exhibits, and arguments on appeal that this was a scrivener's error and that it should have read "B" felony.

testify against his Co-Defendants." *Id*. at 35. Swedarsky was asked if he told or showed Belk any offers at the October 23, 2014 final pretrial conference, or thereafter between October 23 and January 20, 2015, and Swedarsky replied that "there were pleas offered" over an extended period of time, but he could not recall the exact dates. *Id*. at 26. Swedarsky re-affirmed, "[T]he last and best offer was an A felony and when I told [Belk] about it[,] he rejected it[.]" *Id*. at 25.

[7] During Swedarsky's testimony, a series of emails that had been exchanged between him and the prosecutor's office were admitted. There were emails between Swedarsky and Martens in March 2014, others between Swedarsky and Strahm in October 2014, and some between Swedarsky and Strahm in January 2015. More specifically, on October 15, 2014, Strahm emailed Swedarsky stating that a Class B felony aggravated battery was lower than what he believed he could prove at trial and he would be willing to offer a Class A felony robbery plea with a cap of twenty-five years at the DOC, which offer would expire at the upcoming October 23 final pretrial conference. Later in the day on October 15, Swedarsky replied and advised Strahm that Martens had discussed a B felony plea, "but nothing was reduced to writing" before Martens left, and Swedarsky urged Strahm to stick with that B felony offer, noting Belk was "the least culpable, as he was not one of the shooters." *Appellant's Appendix Vol. II* at 139. Strahm responded and rejected the theory that Belk was the least culpable, noted Belk had a poor criminal history, and stated that a Class B felony aggravated battery "would not be an appropriate plea[.]" *Id*. at 140. On

October 22, 2014, Strahm sent Swedarsky an email that referred to an attached plea agreement.

[8] An unsigned and undated plea agreement (the Plea Agreement) – which Swedarsky presumed, but was not certain, had been attached to the October 22 email – was admitted at the post-conviction hearing. It provided Belk would plead guilty to A felony robbery with a total sentence of twenty-five years with fifteen executed at the DOC, five on community corrections, and five suspended. When Swedarsky was asked if he ever gave that agreement to Belk, he stated, "Yes, I told him about it and he did not want it." *Transcript* at 32. Swedarsky could not recall whether he did or did not give Belk a copy of the Plea Agreement but said that he and Belk "definitely did talk about it" and Belk was "pretty much adamant that he would only take a B felony and if it was an A[,] we would go forward with trial." *Id*. The parties appeared for the October 23, 2014 final pretrial conference but at the request of the three co-defendants, it was continued to a date in January 2015. There was no discussion on the record of any plea agreement.

[9] The next string of admitted emails was in January 2015, closer to the February 2015 jury trial setting. Strahm emailed Swedarsky and Riley's attorney stating that because co-defendant Carter was not willing to accept an open plea, "I cannot offer your clients a plea[,]" and explaining, "Why would I offer a lower [B felony aggravated battery] if we are forced to trial on an [A felony robbery] with one of the co-defendants?" *Id*. at 142.

[10] Belk also testified at the post-conviction hearing, stating that he first learned about the Plea Agreement while incarcerated and after he received his attorney's files while pursuing his petition for post-conviction relief. Belk stated that he "never knew of a plea" and would have taken it had he known about it. *Id.* at 41. He denied having told Swedarsky that he only would accept a B felony offer, stating that he was more concerned with the length of sentence and time served in the DOC than the level of felony, and he reaffirmed that Swedarsky "never showed me or told me about the [P]lea [A]greement."[3] *Id*. at 43.

[11] On August 19, 2019, the post-conviction court entered its findings of fact and conclusions of law denying his petition. In so doing, the court observed:

> The emails show that from 10/22/14 – 1/20/15, counsel was negotiating for a B felony plea. He had been given one evidently by the first prosecutor but then that plea was pulled by the subsequent prosecutor. [Belk] said he remembers being told the plea offer they'd agreed on was pulled. Belk countered with a plea calling for 14 years executed (which would have to be a B felony). After another series of emails, a plea is emailed to counsel. [Swedarsky] thinks it is the A felony plea to which Petitioner refers. But, 3 months later the State pulls all offers[.]

Appellant's Appendix Vol. II at 94 (citation to record omitted). The post-conviction court, after assessing "the credibility of counsel's testimony[,]"

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[3] Belk recalled that earlier in the case, in August or September 2014, Swedarsky had told him that he had reached a verbal agreement with the State but the State "pulled" it. *Appellant's Appendix Vol. II* at 200.

concluded: "Based upon all of the circumstances, emails, and statements at sentencing, the Court finds by a preponderance of the evidence that counsel did communicate all plea offers to his client." *Id*. 94-95. Belk now appeals. Additional facts will be provided below as necessary.

Discussion & Decision

[12] Belk appeals the post-conviction court's denial of his amended petition for post-conviction relief. A post-conviction petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). In appealing a negative judgment, Belk faces a "rigorous standard of review." *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001).

> [A]ppellate courts consider only the evidence and reasonable inferences supporting the post-conviction court's judgment. The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. Because [Belk] is now appealing from a negative judgment, to the extent his appeal turns on factual issues [he] must convince this court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. We will disturb the decision only if the evidence is without conflict and leads only to a conclusion contrary to the result of the post-conviction court.

Woods v. State, 48 N.E.3d 374, 377 (Ind. Ct. App. 2015) (quoting *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*) (internal citations omitted).

[13] Where, as here, the post-conviction court makes findings of fact and conclusions of law in accordance with P-C.R. 1(6), we do not defer to the

court's legal conclusions, and "the findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Overstreet v. State*, 877 N.E.2d 144, 151 (Ind. 2007) (quotation omitted).

[14] In reviewing a claim of ineffective assistance of counsel, we begin with a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). To demonstrate ineffective assistance, a petitioner must establish both deficient performance and resulting prejudice. *Pontius v. State*, 930 N.E.2d 1212, 1219 (Ind. Ct. App. 2010), *trans. denied*. The failure to establish either will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002).

[15] Belk claims that his trial counsel was ineffective for failing to convey to him the Plea Agreement offered by the State. "Counsel have a duty to 'inform their clients of plea agreements proffered by the prosecution,' and 'failure to do so constitutes ineffective assistance under the sixth and fourteenth amendments.'" *Schmid v. State*, 972 N.E.2d 949, 953 (Ind. Ct. App. 2012) (quoting *Dew v. State,* 843 N.E.2d 556, 568 (Ind. Ct. App. 2006), *trans. denied*), *trans. denied*. However, proof of the failure to convey a plea offer "does not relieve a defendant of the burden of establishing by a preponderance of the evidence . . . that counsel acted unreasonably by failing to inform him of the plea offer and that, but for counsel's actions, there was a reasonable probability that he would have

accepted the plea offer." *Dew*, 843 N.E.2d at 568 (citing *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986)).

[16] Here, Belk has not proven that his trial counsel failed to convey the State's offer in the Plea Agreement, which makes the analysis of whether Belk would have accepted the plea offer unnecessary. Both Belk and Swedarsky testified that Belk desired to reach a plea agreement rather than proceed to trial. However, the commonality in their testimonies mostly ends there. Swedarsky testified that it was his practice to discuss all plea offers with his clients, and he remembered doing so with Belk in this case. Swedarsky testified that Belk told him that he would only agree to a B felony. As evidenced in the emails with the prosecutor, Swedarsky attempted to negotiate a plea that Belk would find to be acceptable. The only formal written offer was for Belk to plead guilty to a Class A felony with a twenty-five-year sentencing cap. And Swedarsky testified that he "definitely did talk about" this offer with Belk – although he could not recall exactly on what date he did so[4] – and Belk rejected it. *Transcript* at 32. Belk, on the other hand, testified that Swedarsky did not communicate the Plea Agreement to him, and if he had known about it, he would have accepted it.

[4] According to the State, Swedarsky's public defender log of activity indicates that he had a telephone call with Belk after the October 22 offer, but we find the log is not legible and we do not rely on it. Regardless, however, and as the State observes, both Swedarsky and Belk appeared in court for the October 23, 2014 final pretrial (that was continued to another date in January 2015), providing the opportunity for discussion of the Plea Agreement at that time. Further, although the October 22 email indicated that the offer with the twenty-five-year cap would expire at the October 23 pretrial, the record indicates that plea negotiations continued after that date as evidenced by Strahm's email on January 20, 2015 stating, "I cannot offer your clients a plea" due to the fact that co-defendant Carter would not accept a plea. *Appellant's Appendix Vol. II* at 142.

The post-conviction court heard the testimony and considered the exhibits, including the emails between Swedarsky and the prosecutors, and determined that Swedarsky "did communicate all plea offers to his client." *Appellant's Appendix Vol. II* at 95. Belk's claim is a request for us to reweigh the evidence and assess witness credibility, which we cannot do. *See Schmid*, 972 N.E.2d at 954.

[17] Belk has not met his burden to demonstrate that the evidence "leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court." *Woods*, 48 N.E.3d at 377. Accordingly, we affirm the post-conviction court's denial of Belk's petition for post-conviction relief.

[18] Judgment affirmed.

Kirsch, J. and Weissmann, J., concur.