MEMORANDUM DECISION

APPELLANT PRO SE

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ATTORNEYS FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

Jeffrey Allen Rowe,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 29, 2021

Court of Appeals Case No. 20A-PC-346

Appeal from the LaPorte Circuit Court

The Honorable Thomas J. Alevizos, Special Judge

Trial Court Cause No. 46C01-0911-PC-228

Altice, Judge.

Case Summary

[1] Jeffrey Allen Rowe appeals, pro se, from the denial of his petition for post-conviction relief on his claim that trial counsel was ineffective for failing to communicate to him a formal plea offer made by the State prior to his jury trial. Specifically, Rowe challenges the post-conviction court's finding that counsel did indeed present the plea offer to Rowe.

[2] We affirm.

Facts & Procedural History

[3] We do not go into great detail regarding the facts of the crime for which Rowe was convicted, as they were set out fully in his first direct appeal. *See Rowe v. State*, No. 46A03-0809-CR-439, 2009 WL 1175664 (Ind. Ct. App. Apr. 30, 2009) (*Rowe I*). Suffice it to say, seeking money to buy crack cocaine, on January 21, 2007, Rowe drove with his girlfriend Bobbi Jo Lewis and another woman to the apartment of seventy-three-year-old Robert Toutloff, who had been a good Samaritan to Lewis in recent months. Wearing a hooded sweatshirt, Rowe knocked on Toutloff's door and then violently forced it open when Toutloff unlocked the deadbolt. Toutloff fell to the floor, and Rowe jumped on top of him and began punching him in the face and head, demanding money. The beating continued until Toutloff directed Rowe to a drawer containing about $70. Rowe took the money and fled with the two women. Toutloff suffered cuts to his face and neck, a broken nose, and severe bruising on his torso. He remained in the hospital for three days.

[4] On January 30, 2007, Rowe was charged with robbery and burglary, both as class A felonies, and a habitual offender count was later added. Elizabeth Flynn (Attorney Flynn) represented Rowe through the end of October 2007, until withdrawing due to a conflict. Thereafter, Gregory Hofer (Attorney Hofer) represented Rowe through the jury trial, which began on June 9, 2008, and sentencing. Rowe was convicted as charged, found to be a habitual offender, and sentenced to seventy years in prison (concurrent, forty-year terms for each class A felony conviction and a thirty-year enhancement for being a habitual offender).

[5] On direct appeal in *Rowe I*, we reduced Rowe's burglary conviction to a class B felony based on a double jeopardy violation and remanded for resentencing. The trial court then sentenced Rowe to forty years for the class A felony robbery, along with a concurrent fifteen-year sentence for the class B felony burglary, and enhanced the robbery conviction by thirty years based on the habitual offender finding, for an aggregate seventy-year term. Rowe appealed again, and we affirmed. *Rowe v. State*, No. 46A03-0907-CR-344, 2010 WL 2812698 (Ind. Ct. App. July 19, 2010) (*Rowe II*), *trans. denied*.

[6] After *Rowe II*, Rowe filed, pro se, a number of amended petitions for post-conviction relief in 2014 and thereafter. Among other things, Rowe alleged that Attorney Flynn and Attorney Hofer had each rendered ineffective assistance of counsel. One such argument was that they had improperly refused to communicate Rowe's requested plea agreement to the State, under which he had proposed pleading guilty to robbery as a class B felony in exchange for a

twelve-year sentence, with the remaining counts dismissed and for any sentence for a probation violation under another felony Cause No. 46D01-0512-FC-163 (FC-163) to be served concurrently with the twelve-year sentence. Rowe also alleged that Attorney Hofer failed to inform him of a plea offer from the State that called for Rowe to plead guilty to either robbery or burglary as a class A felony and to serve a twenty-year sentence. Rowe asserted that he would have accepted the State's plea offer had he known about it.

[7] Following the denial of Rowe's motions for summary disposition, the post-conviction court held an evidentiary hearing on December 1, 2017, and August 10, 2018. The witnesses included the detective involved in the criminal investigation, the prosecuting attorney, Attorney Flynn, and Rowe. We summarize the testimony relevant for our purposes below.

[8] Attorney Flynn testified that she made a strategic decision not to present Rowe's proposed plea deal to the State, which she believed was unreasonable and would upend any future fruitful negotiation. The prosecuting attorney testified that he would likely not have accepted a twelve-year plea deal and that any counteroffer "certainly" would not have been any less than twenty years. *Transcript* at 71. Though he had no independent recollection of it, the prosecuting attorney identified a written plea offer made by him on or about March 19, 2008, which provided that in return for a guilty plea to either class A robbery or burglary, the State would agree to a twenty-year executed sentence, served consecutively to any sentence imposed in FC-163, and dismissal of the remaining counts.

[9] Rowe testified, in relevant part, that Attorney Hofer never informed him about the State's proposed plea agreement and that he would have accepted the offer had he known about it, because he thought he was facing the possibility of spending the rest of his life in prison. Although he had told Attorney Hofer that he would not be willing to accept thirty or forty years, Rowe explained that his "intention was … to start at 12 years and from 12 years have room to negotiate[.]" *Id*. at 87. Additionally, for the first time, Rowe acknowledged his own culpability in the robbery and presence at the scene, though he claimed, contrary to the evidence presented at his jury trial, that Lewis was the one who beat Toutloff and that he acted only as an accomplice.

[10] Attorney Hofer was not present for the hearing due to a mix-up regarding issuance of his subpoena. As a result, the post-conviction court continued the hearing to August 24, 2018, so Attorney Hofer could be properly subpoenaed. After two additional continuances, however, the trial court cancelled the subsequent hearing date and issued an order on April 3, 2018, denying Rowe's petition for post-conviction relief. Rowe appealed.

[11] In *Rowe v. State*, No. 18A-PC-1031, 2019 WL 1549751 (Ind. Ct. App. April 10, 2019) (*Rowe III*), *trans. denied*, we affirmed in part, reversed in part, and remanded for further proceedings. Specifically, we affirmed the post-conviction court's denial of Rowe's motions for summary disposition and its rejection of the claim that Attorney Flynn was ineffective for refusing to relay Rowe's proposed twelve-year plea agreement to the State, as such was a strategic decision. The ineffective assistance claims relating to Attorney Hofer were a

more difficult call, however, due to his absence from the hearing. Regarding the twelve-year plea, we concluded that Rowe had failed to demonstrate prejudice because the testimony of the prosecuting attorney indicated that the offer would have been rejected and that no better offer than the twenty-year plea would have been made by the State.

[12] In *Rowe III*, we reversed and remanded on the issue of whether Attorney Hofer was ineffective with respect to his handling of the State's twenty-year plea offer. We explained:

> [E]ven though Rowe has no constitutional right to plea bargain, "'defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.'" *Woods v. State*, 48 N.E.3d 374, 381 (Ind. Ct. App. 2015) (quoting *Missouri v. Frye*, 566 U.S. 134, 145 (2012)). Accordingly, once the State decided to engage in plea bargaining and offer a plea to Rowe's trial counsel, [Attorney Hofer] was obligated to communicate that offer to Rowe. And the failure of a defense attorney to communicate a plea offer to an accused is deficient performance. *See id*.
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> Because the question of whether Rowe received the effective assistance of trial counsel turns on whether his trial counsel communicated the State's twenty-year plea offer to him and not whether he had the right to engage in plea bargaining, the post-conviction court's finding that Rowe did not have the constitutional right to engage in plea bargaining does not support its conclusion that Rowe did not receive ineffective assistance from his trial counsel.
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> The post-conviction court also based its ultimate conclusion that the supplemental hearing was unnecessary and that Rowe had

received the effective assistance of trial counsel on its finding that Rowe admitted to having committed the underlying offenses to the post-conviction court. But Rowe's guilt or innocence of those offenses is again not relevant to the question of whether his trial counsel had conveyed the plea agreement from the State and, therefore, rendered effective assistance….

[H]ere, Rowe's testimony that he committed burglary and could have pleaded guilty to burglary, as a Class A felony, is consistent with his testimony that he would have accepted the State's offer to plead guilty to either burglary or robbery, as a Class A felony. Rowe's admission of guilt does not support the post-conviction court's finding that his counsel acted effectively but, rather, is consistent with his testimony that he was prejudiced by his trial counsel's alleged failure to communicate the plea agreement because he would have accepted the State's twenty-year plea offer, which would have been a materially more favorable sentence than the sentence he ultimately received….

The post-conviction court's findings that Rowe did not have a constitutional right to engage in plea bargaining and that Rowe had admitted his guilt do not support the post-conviction court's conclusion that he did not receive the ineffective assistance of trial counsel. Before the post-conviction court can make a conclusion regarding whether Rowe received effective assistance from his trial counsel related to the State's twenty-year plea, the court must first determine whether [Attorney Hofer] presented the State's plea offer to Rowe. Here, the only evidence submitted that Rowe's counsel conveyed the State's plea offer to him was

> an affidavit by [Attorney Hofer] in which he stated that he had communicated the State's plea offer to Rowe.[1]
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> But, as discussed above, the affidavit from [Attorney Hofer] created a genuine issue of material fact regarding whether [Attorney Hofer] had relayed the plea agreement to him. And Rowe should have been provided the opportunity to present evidence to resolve that question of fact. However, because the post-conviction court cancelled the supplemental hearing at which [Attorney Hofer] was scheduled to appear, Rowe was not able to question [him] in order to challenge the statements made in the affidavit or otherwise present evidence – whether in the form of testimony from his trial counsel or exhibits – in support of his claim that his trial counsel had not communicated the State's offer to him and had, therefore, not rendered effective assistance. Thus, while the affidavit was sufficient to preclude summary disposition, without Rowe having the opportunity to challenge it, the affidavit was not sufficient for the trial court to determine that Rowe had received the effective assistance of trial counsel. *Accordingly, we remand to the post-conviction court to hold the supplemental hearing and to allow Rowe to question his trial counsel and to present evidence relevant to the question of whether Rowe's trial counsel had communicated the State's twenty-year plea offer to him.*

Rowe III, slip op. at 22-25 (emphasis supplied).

[13] On September 12, 2019, the post-conviction court held the supplemental hearing as required by *Rowe III*. Attorney Hofer testified that on the morning of the jury trial he informed Rowe, as well as Rowe's father, of the State's twenty-

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[1] This affidavit had been submitted by the State in opposition to one of Rowe's motions for summary disposition.

year offer and that, against his advice, Rowe rejected it. Attorney Hofer testified that there was no possibility that he overlooked telling Rowe about the plea. Further, although he could not specifically recall the written offer (dated less than three months before trial), as more than eleven years had passed, Attorney Hofer testified that he "absolutely" would have conveyed the offer to Rowe and recommended acceptance given Rowe's "great" sentencing exposure. *Transcript* at 123, 124.

[14] In response to Attorney Hofer's testimony, Rowe testified/argued that he believed he was "facing 200 years" and "[l]ogically, it doesn't make sense for me to have turned down the 20-year plea agreement." *Id*. at 130. Pointing to his proposed twelve-year plea, Rowe explained: "I clearly wanted to negotiate a plea agreement. That was always my position." *Id*.

[15] On January 6, 2020, the post-conviction court issued an order denying Rowe's only remaining claim for relief based on Attorney Hofer's alleged ineffective assistance. In doing so, the post-conviction court made the following findings:

> 6. At the supplemental hearing on September 12, 2019, trial counsel contended that he did communicate the State's plea offer of twenty years to Petitioner on the morning of trial, and Petitioner rejected it.
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> 7. Petitioner asserts that counsel's testimony is contradicted by Deputy Prosecuting Attorney Atley Price's testimony that he likely would have rescinded the plea offer before the day of trial. However, there is no evidence that he did, in fact, rescind the offer before trial.

> 8. Additionally, with respect to the issue of Petitioner's credibility, the court recognizes that while Petitioner's admission of guilt during a PCR hearing in August 2017, does not completely deprive him of any remedy to be provided by this court, it does challenge the credibility of Petitioner's testimony.
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> 9. Thus, upon hearing the testimony of trial counsel that he clearly remembers informing Petitioner of the state's offer, along with Petitioner's admission of guilt in open court, the court lends little weight to Petitioner's testimony that his trial attorney had failed to communicate the State's plea offer to him. Therefore, Petitioner has failed to show that counsel's performance was deficient.

Appellant's Appendix Vol. II at 24-25. Rowe now appeals. Additional information will be provided below as needed.

Standard of Review

[16] Rowe appeals from a negative judgment and therefore must establish that the evidence, as a whole, leads unmistakably and unerringly to a conclusion contrary to that reached by the post-conviction court. *Wilson v. State*, 157 N.E.3d 1163, 1170 (Ind. 2020). This is a "rigorous standard of review." *Id.* Further, although we will not defer to the post-conviction court's legal conclusions, its "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." *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017) (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)). "The post-conviction court is the sole judge of the weight of the evidence and the

credibility of witnesses." *Perryman v. State*, 13 N.E.3d 923, 931 (Ind. Ct. App. 2014), *trans. denied*.

[17] When evaluating an ineffective assistance of counsel claim, which is the only issue in this case, we apply the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Humphrey*, 73 N.E.3d at 682. That is, the defendant must show both deficient performance by counsel and resulting prejudice. *Id*. The failure to establish either will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002).

Discussion & Decision

[18] The sole issue on appeal is whether the evidence supports the post-conviction court's finding that Attorney Hofer communicated the State's twenty-year plea offer to Rowe. In this regard, Rowe contends that the post-conviction court failed to consider the objective evidence – jail phone calls and pretrial letters – that he claims show his desire to enter into a plea agreement. He also challenges the court's finding that there is no evidence that the prosecuting attorney rescinded the offer prior to trial and contends that the post-conviction court improperly considered Rowe's admission of guilt as reflecting negatively on his credibility. Finally, Rowe characterizes Attorney Hofer's testimony as confusing and internally inconsistent. In sum, Rowe asserts that "[n]o reasonable factfinder would credit Hofer's testimony over Rowe's, given the other evidence submitted." *Appellant's Brief* at 30.

[19] We reject Rowe's invitation to reweigh the evidence and to judge witness credibility. Rowe and Attorney Hofer presented directly opposing testimony, and it was the post-conviction court's duty to determine which of them to believe. Further, contrary to Rowe's suggestion on appeal, Attorney Hofer unequivocally testified that he informed Rowe of the plea offer on the morning of trial and that Rowe rejected the offer. Attorney Hofer testified that there was no possibility that he overlooked telling Rowe about the plea, which he believed Rowe should have accepted.

[20] The so-called objective evidence to which Rowe directs us shows that Rowe desired a much more advantageous plea deal than the one offered by the State – twelve years as opposed to twenty years with any additional sentence for the probation violation in FC-163 to be served concurrently rather consecutively. Although this evidence does not foreclose the possibility that he would have accepted an offer greater than the one Rowe proposed, it does not clearly contradict Attorney Hofer's testimony that he notified Rowe of the State's offer and that Rowe rejected the offer. In other words, it was not clearly erroneous for the post-conviction court to rely on Attorney Hofer's testimony despite this evidence, and Rowe's suggestion that the trial court was required to make a specific finding of fact regarding this evidence is without support in the law.

[21] As noted above, Rowe also challenges the following finding made by the post-conviction court:

> 7. Petitioner asserts that counsel's testimony is contradicted by Deputy Prosecuting Attorney Atley Price's testimony that he

> likely would have rescinded the plea offer before the day of trial. However, there is no evidence that he did, in fact, rescind the offer before trial.

Appellant's Appendix Vol. II at 24-25. This finding is wholly supported by the record. Consistent with this finding, Price testified that he had "no independent recollection of" the plea offer that he made, as documented by Petitioner's Exhibit 3. *Transcript* at 70. When Rowe asked whether Price would have entertained any counteroffers, Price responded:

> Other than the parameters which are outlined in [Petitioner's Exhibit 3], at that point in time, no. Certainly between the time that this letter is dated and the closer we drew to the trial date, I *likely* would have withdrawn this and made no further offers much less made any counteroffer.

Id. (emphasis supplied). The post-conviction court recognized this speculative testimony but then observed that there was no evidence that Price actually rescinded the plea offer before trial. In addition to there being no such evidence, there is Attorney Hofer's testimony that the State's plea offer was available and rejected by Rowe on the morning of his trial.

[22] Finally, Rowe faults the post-conviction court for considering his admission of guilt in August 2017 as detracting from his credibility. Citing *Jervis v. State*, 28 N.E.3d 361 (Ind. Ct. App. 2015), *trans. denied*, Rowe suggests that he had to admit his involvement in the robbery to establish that he would have accepted the State's plea offer and that the trial court would have accepted the plea. *See id*. at 367 (where petitioner "clearly and expressly, on many occasions,

professed his innocence and had no intention of pleading guilty," the court found no prejudice because petitioner failed to show that he would have accepted the plea if properly presented by counsel or that the trial court would have allowed the plea over his protestation of innocence). That may very well be the case, but we do not believe that this reality runs counter to the post-conviction court's credibility consideration. For years, Rowe consistently represented that he was not in any way involved with the robbery and suggested that another man – John Benson – was the perpetrator.[2] At the evidentiary hearing in August 2017, Rowe acknowledged that his third motion for summary disposition, filed on June 30, 2017, was "the first time that I've actually gave [sic] a true accounting of what happened." *Transcript* at 89. In light of Rowe's vacillating positions and deferred admission of guilt (only as an accomplice), we do not question the trial court's credibility determinations or its decision to rely on Attorney Hofer's clear testimony that he recalled informing Rowe of the State's offer on the morning of trial.

[23] In sum, Rowe has failed to establish that the evidence, as a whole, leads unmistakably and unerringly to a conclusion contrary to that reached by the post-conviction court. In other words, the trial court's ultimate finding that

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[2] For example, in Rowe's first amended petition for post-conviction relief, filed in June 2014, he alleged that Attorney Hofer was ineffective for failing to depose Benson "when he knew there was evidence indicating that he could have been the person that committed the robbery/burglary at issue" and for preventing Rowe from "fulling pressing the defense that Mr. John Benson was the individual who committed the robbery/burglary." *Appellant's Appendix at Vol. II* at 54. In this vein, at the December 1, 2016 hearing, Rowe asked for Benson to be subpoenaed "as an alternative suspect … that was never questioned, deposed, or called as a trial witness." *Transcript* at 7.

Attorney Hofer communicated the State's plea offer to Rowe is supported by the evidence and not clearly erroneous. Because Rowe failed to establish deficient performance by Attorney Hofer, the post-conviction court properly denied his petition for post-conviction relief.

[24] Judgment affirmed.

Mathias, J. and Weissmann, J., concur.