MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Adam Selbee,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

November 29, 2022

Court of Appeals Case No. 22A-PC-1642

Appeal from the Lawrence Superior Court

The Honorable Robert R. Cline, Judge

Trial Court Cause No. 47D02-1802-PC-297

Bradford, Chief Judge.

Case Summary

[1] In July through October of 2016, Adam Selbee set multiple fires to structures and hay bales. He was subsequently charged with four counts of Level 4 felony arson and three counts of Class B misdemeanor criminal mischief. Selbee pled guilty to the arson charges and was sentenced, pursuant to the terms of his plea agreement, to an aggregate term of thirty-two years, with twenty years executed and twelve years suspended to probation. On February 20, 2018, Selbee filed a *pro se* petition seeking post-conviction relief ("PCR"), which counsel later amended to include a challenge to the voluntary nature of Selbee's guilty plea and claims of ineffective assistance of trial and appellate counsel. Following a hearing, the post-conviction court denied Selbee's petition. We affirm.

Facts and Procedural History

[2] Beginning in July of 2016, Selbee, using combustibles or ignitable liquid, set five structure fires and three "hay bale fires." Ex. Vol. p. 24. The structure fires included the following types of buildings: a gymnasium, a non-residential structure on a couple's property, and a residence. The fires were set on different days in July, September, and October of 2016. In addition to setting the fires, Selbee—who was a volunteer fire fighter and an EMT—later indicated that "he said [he] enjoyed responding to [the fires] and, and kind of being a hero…. He kind of got a pleasure from doing that." Ex. Vol. p. 25.

[3] On October 18, 2016, the State charged Selbee with four counts of Level 4 felony arson and three counts of Class B misdemeanor criminal mischief. At his initial hearing, Selbee initialed and signed a document acknowledging that he understood the following:

> (a) I am presumed to be innocent and will be acquitted unless the prosecutor proves my guilt beyond a reasonable doubt.
> (b) I have the right to remain silent and to say or do nothing in my own defense without it being held against me.
> (c) I have the right to a public and speedy trial by jury.
> (d) I have the right to be present when witnesses testify against me and to cross-examine them.
> (e) I have the right to have witnesses subpoenaed and required to be present to testify for me.
> (f) If I am convicted of any charge[,] I have the right to appeal my conviction to the Indiana Court of Appeals or the Indiana Supreme Court unless expressly herein waived.
> (g) If found guilty by plea, I have the right to file a motion for Post Conviction Relief and Motion to Correct Errors. I further understand that by waiting to pursue these possible remedies, I may harm my ability to obtain relief from conviction in this Cause.
> (h) I have the right to the advice and assistance of a lawyer at all times during these proceedings. If I cannot afford a lawyer the Court will appoint the Public Defender to represent me.
> (i) I have the right to a reasonable continuance to hire a lawyer or to subpoena witnesses.
> (j) If I plead guilty[,] I give up each of these rights, except for the right to an attorney.

Ex. Vol. p. 87. At his initial hearing, Selbee indicated that he had read the acknowledgment of rights and understood and had no questions regarding the rights described therein.

[4] On May 25, 2017, Selbee entered into a plea agreement, under the terms of which Selbee agreed to plead guilty to all four arson counts in exchange for the dismissal of the criminal-mischief counts and a separate criminal case. The terms of the plea agreement also indicated that (1) Selbee's executed sentence would be capped at twenty-four years and (2) Selbee agreed to waive his right to appeal his sentence "on the basis that it is erroneous or for any other reason so long as the judge sentence[d him] within the terms of the plea agreement." Ex. Vol. p. 81. Additionally, at the time he entered into his guilty plea, Selbee executed an "Acknowledgement of Rights," which stated, in relevant part, as follows:

> 2. I understand that I have the right to:
>
> a. a public and speedy trial by jury;
> b. to confront and cross-examine the witnesses called to testify against me;
> c. to compulsory process to require witnesses to come to court and testify on my behalf;
> d. to require the State to prove my guilt beyond a reasonable doubt at a trial at which I may not be compelled to testify against myself;
> e. to retain counsel, or if I am indigent, to have counsel appointed to represent me at no expense;
> f. to a reasonable continuance to engage counsel or subpoena witnesses;
> g. to appeal a conviction.
>
> 3. I understand that if I plead guilty, I give up every right listed in paragraph two (2) above.

Ex. Vol. p. 83. During the guilty plea hearing, Selbee acknowledged that he had read and signed the acknowledgment of rights, he understood the rights set forth within, and he did not have any questions regarding the rights that he was waiving by pleading guilty. The trial court accepted Selbee's guilty plea and sentenced Selbee to an aggregate term of thirty-two years, with twenty years executed and twelve years suspended to probation.

[5] Selbee filed a direct appeal, which was dismissed with prejudice on October 25, 2017. On February 20, 2018, Selbee filed a *pro se* PCR petition, which counsel later amended to include a challenge to the voluntary nature of Selbee's guilty plea and claims of ineffective assistance of trial and appellate counsel. Following a hearing, the post-conviction court denied Selbee's PCR petition.

Discussion and Decision

[6] "Post-conviction procedures do not afford the petitioner with a super-appeal." *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). "Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules." *Id.* A petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on appeal. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001); *Collier v. State*, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999), *trans. denied*.

[7] Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from the denial of a PCR petition, a petitioner must convince this court that the evidence, taken as a whole, "leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Stevens*, 770 N.E.2d at 745. "In other words, the defendant must convince this Court that there is *no* way within the law that the court below could have reached the decision it did." *Id.* (emphasis in original). "It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law." *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*. "The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses." *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

[8] In arguing that the post-conviction court erred in denying his PCR petition, Selbee contends that his guilty plea was not knowing, intelligent, and voluntary, his trial counsel provided ineffective assistance at sentencing, and his appellate counsel provided ineffective assistance on direct appeal. For its part, the State argues that the record supports the post-conviction court's determination that Selbee knowingly and voluntarily pled guilty, trial counsel did not provide ineffective assistance at sentencing, and appellate counsel did not provide ineffective assistance on direct appeal.

I. Whether Selbee Knowingly, Intelligently, and Voluntarily Pled Guilty

[9] Selbee argues that his guilty plea was not knowing, intelligent, and voluntary because he was not advised that he was waiving (1) his privilege against compulsory self-incrimination, (2) his right to trial by jury, and (3) his right to confront one's accusers as required by *Boykin v. Alabama*, 395 U.S. 238 (1968). The State argues to the contrary, claiming that Selbee was adequately advised that he was waiving the aforementioned rights. We agree with the State.

[10] > According to [*Boykin*], a trial court must be satisfied that an accused is aware of his right against self-incrimination, his right to trial by jury, and his right to confront his accusers before accepting a guilty plea. [*Id.* at 243]. However, *Boykin* "does not require that the record of the guilty plea proceeding show that the accused was formally advised that entry of his guilty plea waives certain constitutional rights[,]" nor does *Boykin* require that the record contain a formal waiver of these rights by the accused. *State v. [J.E.]*, 707 N.E.2d 314, 318 (Ind. Ct. App. 1999) (quotation omitted), *reh'g denied, opinion expressly adopted by* 723 N.E.2d [863, 865] (Ind. 2000); *Barron v. State*, 164 Ind. App. 638, 644,] 330 N.E.2d 141, 144 (1975). Rather, *Boykin* only requires a conviction to be vacated if the defendant did not know or was not advised at the time of his plea that he was waiving his *Boykin* rights. *Davis v. State*, 675 N.E.2d 1097, 1103 (Ind. 1996); *see also [U.S.] ex rel. Miller v. McGinnis*, 774 F.2d 819, 824 (7th Cir. 1985) (holding that a defendant must be "fully cognizant" that he is waiving his *Boykin* rights by pleading guilty).

Dewitt, 755 N.E.2d at 171. However,

> [a] defendant's guilty plea is not tainted merely because the trial court fails to repeat defendant's rights for him, so long as the record of the guilty plea proceeding contains evidence from which the trial court may validly conclude that defendant was meaningfully informed of the specific rights enumerated in *Boykin*. The trial court has an absolute duty to make an independent determination, on the basis of evidence in the record before it, whether a defendant's plea is made voluntarily and intelligently.

State v. Lime, 619 N.E.2d 601, 604 (Ind. Ct. App. 1993) (internal citations omitted), *trans. denied*.

[11] The record reveals that Selbee was informed of his *Boykin* rights on at least two separate occasions, once pre-plea and once at the time of his guilty plea. On November 7, 2016, Selbee initialed and signed an acknowledgement of rights which provided, in relevant part, as follows:

> I understand that:
>
> (a) I am presumed to be innocent and will be acquitted unless the prosecutor proves my guilt beyond a reasonable doubt.
> (b) I have the right to remain silent and to say or do nothing in my own defense without it being held against me.
> (c) I have the right to a public and speedy trial by jury.
> (d) I have the right to be present when witnesses testify against me and to cross-examine them.
> (e) I have the right to have witnesses subpoenaed and required to be present to testify for me.
> (f) If I am convicted of any charge[,] I have the right to appeal my conviction to the Indiana Court of Appeals or the Indiana Supreme Court unless expressly herein waived.
> (g) If found guilty by plea, I have the right to file a motion for Post Conviction Relief and Motion to Correct Errors. I further

understand that by waiting to pursue these possible remedies, I may harm my ability to obtain relief from conviction in this Cause.
(h) I have the right to the advice and assistance of a lawyer at all times during these proceedings. If I cannot afford a lawyer the Court will appoint the Public Defender to represent me.
(i) I have the right to a reasonable continuance to hire a lawyer or to subpoena witnesses.
(j) If I plead guilty[,] I give up each of these rights, except for the right to an attorney.

Ex. Vol. p. 87. Selbee indicated during his initial hearing that he had read and understood his rights. At the time Selbee entered his guilty plea, Selbee executed an "Acknowledgement of Rights" which provided, in relevant part, as follows:

2. I understand that I have the right to:

a. a public and speedy trial by jury;
b. to confront and cross-examine the witnesses called to testify against me;
c. to compulsory process to require witnesses to come to court and testify on my behalf;
d. to require the State to prove my guilt beyond a reasonable doubt at a trial at which I may not be compelled to testify against myself;
e. to retain counsel, or if I am indigent, to have counsel appointed to represent me at no expense;
f. to a reasonable continuance to engage counsel or subpoena witnesses;
g. to appeal a conviction.

3. I understand that if I plead guilty, I give up every right listed in paragraph two (2) above.

Ex. Vol. p. 83. During the guilty plea hearing, Selbee acknowledged that he had read and signed the acknowledgment of rights, he understood the rights set forth within, and he did not have any questions regarding the rights that he was waiving by pleading guilty. Furthermore, Selbee's trial counsel testified at the PCR hearing that while he did not remember explicitly going over Selbee's *Boykin* rights, Selbee and counsel had discussed the rights that Selbee would waive by pleading guilty and that counsel had "read the rights to him." Tr. Vol. II p. 12. Given the record before us, including Selbee's statement that he had signed the advisement of rights and understood the rights he was waiving by pleading guilty, we cannot say that the PCR court erred in finding that Selbee was sufficiently informed of his *Boykin* rights and that his guilty plea was knowingly, intelligently, and voluntarily made.[1]

II. Whether Trial Counsel Provided Ineffective Assistance at Sentencing

[12] Selbee also contends that his trial counsel provided ineffective assistance at sentencing. "The right to effective counsel is rooted in the Sixth Amendment to the United States Constitution." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind.

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[1] In his reply brief, Selbee points to case law indicating that an advisement of rights at an initial hearing alone is insufficient to prove that a defendant was aware of their *Boykin* rights at the time a subsequent guilty plea is entered into. *See Maleck v. State*, 265 Ind. 604, 606, 358 N.E.2d 116, 118 (1976) ("[I]t is necessary for the trial judge to fully advise a defendant of his rights at the time a guilty plea is tendered, or have a record before him which demonstrates a full advisement. Only when a defendant is seriously considering entering a guilty plea will the advisement be meaningful to him and for the trial judge in determining an intentional and intelligent waiver of known rights."). The instant matter, however, is not a situation where Selbee was only advised of his rights at his initial hearing as the record makes it clear that Selbee was advised of his *Boykin* rights *both* at his initial hearing and at the time he entered into his guilty plea.

2006). "'The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). "'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Id.* (quoting *Strickland*, 466 U.S. at 686).

[13] A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel's performance was deficient by demonstrating that counsel's representation "fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Id.* (internal quotation omitted). "We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or most effective way to represent a client," and therefore, under this prong, we will assume that counsel performed adequately and defer to counsel's strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.*

[14] Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. *Reed*, 866 N.E.2d at 769. A petitioner may show prejudice by demonstrating that there is "a reasonable probability (*i.e.* a

probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id.* (emphasis added, internal quotation omitted). A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams*, 706 N.E.2d at 154. Stated differently, "[a]lthough the two parts of the Strickland test are separate inquires, a claim may be disposed of on either prong." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing *Williams*, 706 N.E.2d at 154).

[15] Selbee argues that his trial counsel provided ineffective assistance of counsel at sentencing by failing to (1) object when the trial court referred to arson as a violent crime, (2) argue that his guilty plea should be granted mitigating weight, and (3) object when the trial court mentioned his prior juvenile dealings with the courts when discussing potential aggravating circumstances. However, it is of note that the consecutive-sentencing cap was not likely to apply to Selbee's case as it was unlikely that the trial court would have found Selbee's crimes, which again occurred in different months at different locations, were a single episode of criminal conduct. In addition, Selbee's trial counsel was not required to explicitly argue that his guilty plea should be granted mitigating weight given the substantial benefit that Selbee received by having additional charges and an unrelated criminal case dismissed. Trial counsel was also not required to object to the trial court's statement regarding Selbee's prior dismissed juvenile adjudication as it was clear from the trial court's statement

that the court was all but disregarding the adjudication. For these reasons, trial counsel cannot be said to have provided ineffective assistance at sentencing.

[16] Furthermore, in the context of a guilty plea, a petitioner "must show the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). Thus, in order to show prejudice, Selbee was required to prove "'that there is a reasonable probability that, but for counsel's errors, [he] would not have pleaded guilty and would have insisted on going to trial.'" *Id.* (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Selbee cannot do so as the trial court sentenced him to a sentence that was within the sentence limitations agreed to by Selbee and the State in his plea agreement.

[17] As it relates to sentencing, the plea agreement indicated that

> The State of Indiana and the Defendant, Adam Selbee, agree:
>
> a. The sentence shall be Open and subject to the Judge's discretion, except that the executed sentence on each Count shall be capped at six (6) years, exposing [Selbee] to twenty-four (24) years incarcerated.
>
> b. The issue of whether Counts I, II, III & IV shall run concurrent or consecutive is also left to the Court's discretion.

Appellant's App. Vol. II p. 81. Consistent with the parties' agreement, the trial court sentenced Selbee to a thirty-two-year sentence, with twenty years executed and twelve years suspended to probation. Selbee makes no argument on appeal that he was unaware of his potential sentence exposure or assertion that he would not have pled guilty if he knew that the trial court would sentence

him within the agreed range. Selbee, therefore, cannot show that he was prejudiced by trial counsel's performance during the sentencing hearing following his guilty plea.

III. Whether Appellate Counsel Provided Ineffective Assistance on Direct Appeal

[18] Selbee last contends that his appellate counsel provided ineffective assistance on direct appeal. "We apply the same standard of review to a claim of ineffective assistance of appellate counsel as we do to an ineffective assistance of trial counsel claim." *Coleman v. State*, 196 N.E.3d 731, 740 (Ind. Ct. App. 2022).

> Thus, a petitioner alleging a claim of ineffective assistance of appellate counsel is required to show that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. (cleaned up).

[19] Ineffective assistance of appellate counsel claims "'generally fall into three basic categories: (1) denial of access to an appeal, (2) waiver of issues, and (3) failure to present issues well.'" *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013) (quoting *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006)). Selbee claims that his appellate counsel provided ineffective assistance by failing to raise certain issues on appeal. Specifically, he argues that appellate counsel failed to argue that the trial court abused its discretion in making two statements during

sentencing (*i.e.*, stating that arson is a violent crime and mentioning a dismissed juvenile adjudication) and in ordering him to pay restitution beyond that contemplated by the plea agreement.

[20] As a condition of his plea agreement, Selbee "knowingly and voluntarily agree[d] to waive the right to appeal [his] sentence on the basis that it is erroneous or for any other reason so long as the judge sentences [him] within the terms of the plea agreement." Ex. Vol. p. 81. As is noted above, the trial court sentenced Selbee in a manner consistent with the plea agreement. As a result, pursuant to the terms of the plea agreement, Selbee cannot establish prejudice as he had waived his right to challenge the propriety of the trial court's sentencing considerations on appeal. His appellate counsel, therefore, cannot be found to have provided ineffective assistance for raising a challenge to the trial court's sentencing considerations on direct appeal. Furthermore, Selbee's argument regarding the restitution order is moot as the post-conviction court found that "[t]he civil judgment in favor of the Perry Township Trustee in the amount of $480,000 is improper and should be stricken from the Sentencing Order." Appellant's App. Vol. II p. 172. As such, we cannot say that Selbee has been prejudiced by appellate counsel's failure to argue on direct appeal that the $480,000 restitution order should be stricken.

[21] The judgment of the post-conviction court is affirmed.

Mathias, J., and Pyle, J., concur.