MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Devon R. Radcliff,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 15 2022

Court of Appeals Case No. 21A-PC-2112

Appeal from the Ohio Circuit Court

The Honorable James D. Humphrey, Judge

Trial Court Cause No. 58C01-1904-PC-1

Molter, Judge.

[1] In 2015, Devon R. Radcliff broke into a high school concession stand and stole various snacks. Then, several months later, he broke into his employer's

hardware store and stole several items of property. After initially fleeing the scene, he returned to the store and burned it down. The State charged Radcliff with a total of twelve offenses for these two incidents. After Radcliff pleaded guilty to Level 5 felony burglary for the first incident and Level 3 felony burglary and Level 4 felony arson for the second incident, the State dismissed the remaining charges.

[2] A few years later, Radcliff petitioned for post-conviction relief, alleging ineffective assistance of counsel and that his guilty plea was not knowing, voluntary, and intelligent. The crux of Radcliff's claims was that his trial counsel exaggerated the potential maximum sentence Radcliff would have faced had he gone to trial. After concluding that Radcliff could not overcome his burden of showing that trial counsel provided deficient representation or that his plea was not knowing, voluntary, and intelligent, the post-conviction court denied Radcliff relief. Finding no error, we affirm.

Facts and Procedural History

[3] In September 2015, Radcliff and Curtis Taulbee broke into a concession stand at Rising Sun High School. The pair not only stole candy and several bottles of soda from the concession stand, but they also badly damaged it. The snacks they stole were valued between $150 to $200, and the cost to repair the concession stand was roughly $2,300.

[4] Several months later, Radcliff, who was an employee at Valley Supply Hardware, and Taulbee broke into the hardware store and stole numerous items

they hid in Radcliff's vehicle. Radcliff and Taulbee then returned to the store to burn it down. After roughly twenty failed attempts to start a fire, they finally ignited a fire with gasoline. After then fleeing, they returned to watch the store burn.

[5] Eventually, the local fire department arrived at the scene to put the fire out. While fighting the fire, one firefighter was injured from smoke inhalation. Also, although the local fire department managed to successfully extinguish the fire, most of the store was already destroyed. The pecuniary loss to the store's owners was over $1 million.

[6] The State charged Radcliff with several crimes under two cause numbers. Under 58C01-1609-F5-4 ("F5-4"), the State charged Radcliff with burglary as a Level 5 felony and theft as a Class A misdemeanor for the incident at the concession stand. The State then charged Radcliff with the following crimes under 58C01-1606-F3-2 ("F3-2") for the incident at the hardware store: Level 5 felony burglary; Level 5 felony conspiracy to commit burglary; Level 6 felony theft; Level 6 felony conspiracy to commit theft; Level 3 felony burglary resulting in bodily injury; Level 3 felony conspiracy to commit burglary resulting in bodily injury; Level 3 felony arson resulting in bodily injury; Level 3 felony conspiracy to commit arson resulting in bodily injury; Level 4 felony arson resulting in pecuniary loss of at least $5,000; and Level 4 felony conspiracy to commit arson resulting in pecuniary loss of at least $5,000.

[7] In February 2017, Radcliff entered into a plea agreement with the State. As to F5-4, he pleaded guilty to Level 5 felony burglary, and, as to F3-2, Radcliff pleaded guilty to Level 3 felony burglary resulting in bodily injury and Level 4 felony arson resulting in pecuniary loss of at least $5,000. In exchange, the State dismissed the remaining charges under both cause numbers. The plea agreement left sentencing to the trial court's discretion, except that the sentences under the two cause numbers were to run concurrently.

[8] The trial court accepted Radcliff's guilty plea and entered a sentencing order in April 2017. For F5-4, it sentenced Radcliff to four years for burglary. Then, for F3-2, the court sentenced Radcliff to fourteen years for burglary and twelve years with six years suspended for arson. The court ordered the sentences in F3-2 to run consecutively. It also ordered the total sentence for F5-4 to run concurrently to the total sentence for F3-2 so that the total period of incarceration would be twenty-six years with six years suspended to probation.

[9] In April 2019, Radcliff filed a petition for post-conviction relief, which he amended in January 2021. He asserted that trial counsel rendered ineffective assistance by overstating the maximum sentence that Radcliff would have faced at trial and causing Radcliff to accept a plea offer that he otherwise would not have accepted. Radcliff also asserted that his plea was not knowing, voluntary, and intelligent for these reasons.

[10] The post-conviction court held an evidentiary hearing in June 2021. Trial counsel, who had over twenty years of experience in criminal law, generally

testified that he advised Radcliff to accept the plea offer because he believed it provided a lesser maximum sentence (twenty-eight years) than what Radcliff would have potentially faced at trial (around forty years). Also, trial counsel explained that, because Radcliff had confessed to the police and physical evidence corroborated his confession, Radcliff would have had no defenses at trial. Trial counsel further explained that he believed Radcliff's plea could have been another mitigating factor for the trial court to consider, especially since trial counsel believed Radcliff's only mitigating factor was his age.

[11] At the hearing, Radcliff also testified. He argued that he accepted the plea offer due to trial counsel's advice and that he would have rejected it if he had known that the agreement allegedly allowed for a greater maximum sentence than what he would have faced at trial. According to Radcliff, he would have only faced a twenty-seven year maximum sentence at trial. However, the post-conviction court rejected Radcliff's arguments.

[12] As to Radcliff's first claim, the post-conviction court concluded that Radcliff failed to prove that trial counsel provided deficient representation. The court explained that Radcliff could have faced up to forty years in prison if he had been convicted of each offense. The court also reasoned that, even if the plea agreement provided for a greater maximum sentence than allowed by law, it did not find Radcliff's argument persuasive because he still received an aggregate sentence (twenty-six years with six years suspended) that was less than the maximum sentence Radcliff proposed he would have faced at trial (twenty-seven years).

[13] As to Radcliff's second claim, the post-conviction court found that Radcliff had not proven by a preponderance of the evidence that his plea was not knowing, voluntary, and intelligent. Thus, the court concluded that Radcliff received the benefit of his bargain, and it denied Radcliff relief. Radcliff now appeals.

Discussion and Decision

I. Standard of Review

[14] Radcliff appeals the post-conviction court's denial of his petition for post-conviction relief. To obtain relief on post-conviction, a petitioner "bears the burden of establishing grounds for relief by a preponderance of the evidence." *Campbell v. State*, 19 N.E.3d 271, 273–274 (Ind. 2014). The petitioner also stands in the position of one appealing from a negative judgment. *Id.* at 274. Thus, to prevail on appeal, a petitioner must show "that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Wilson v. State*, 157 N.E.3d 1163, 1170 (Ind. 2020); *see also Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000). Our Supreme Court has also stated that an appellate court should not reverse a denial of post-conviction relief unless "there is no way within the law that the court below could have reached the decision it did." *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). So, a post-conviction court's findings and judgment will be reversed only if they are clearly erroneous. *Davidson v. State*, 763 N.E.2d 441, 443–44 (Ind. 2001); *see also Ben-Yisrayl*, 729 N.E.2d at 106. In that analysis, the post-conviction court is the "sole judge of the evidence and the credibility of the witnesses." *Hall v. State*, 849 N.E.2d 466, 468–69 (Ind. 2006).

II. Effectiveness of Trial Counsel

[15] Radcliff argues that his trial counsel rendered ineffective assistance of counsel. To prevail on his ineffective assistance of counsel claim, Radcliff must show that: (1) his counsel's performance fell short of prevailing professional norms; and (2) his counsel's deficient performance prejudiced his defense. *Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

[16] A showing of deficient performance "requires proof that legal representation lacked an objective standard of reasonableness, effectively depriving the defendant of his Sixth Amendment right to counsel." *Id.* (quotation marks omitted). We presume that counsel exercised "reasonable professional judgment" and "rendered adequate legal assistance." *Id.* Defense counsel enjoys "considerable discretion" in developing legal strategies for a client. *Id.* This "discretion demands deferential judicial review." *Id.* Finally, counsel's "[i]solated mistakes, poor strategy, inexperience, and instances of bad judgement do not necessarily render representation ineffective." *Id.*

[17] "To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In the context of a guilty plea, for the prejudice component, the petitioner must demonstrate a "reasonable probability that he would have rejected the guilty

plea and insisted on going to trial instead." *Bobadilla v. State*, 117 N.E.3d 1272, 1284 (Ind. 2019). In making this showing, the petitioner "cannot simply say [that he] would have gone to trial," he instead "must establish rational reasons supporting why [he] would have made that decision." *Id.* Failure to satisfy either prong will cause the claim to fail. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006).

[18] The ineffectiveness that Radcliff alleges is that his counsel incorrectly advised him of his potential sentence, which led him to accept a plea offer under the mistaken impression that he would otherwise face a greater sentence by going to trial. Neither trial counsel nor Radcliff can recall the specific advice counsel provided regarding the potential sentence, but they agree the plea agreement called for a maximum sentence of 28 years, and trial counsel advised Radcliff he could face a greater sentence by going to trial. Appellant's Br. at 9; Appellant's Reply Br. at 4–5. They also agree that as to F5-4 (the concession stand case), Radcliff faced at least seven years. Appellee's Br. at 18; Appellant's Reply Br. at 5. And they agree that for F3-2 (the hardware store case), "based on various permutations . . . Radcliff was facing anywhere from 31 to 38 to 41 years." Appellee's Br. at 17–19; Appellant's Reply Br. at 6.

[19] But Radcliff argues his trial counsel overlooked that the Sentencing Cap Statute, Indiana Code § 35-50-1-2, limited his exposure in the hardware store case to 20 years (for a combined total of 27 years when added to the 7 years in the concession stand case). That statute provides that consecutive sentences are limited based on the felony level of the most serious conviction when crimes

arose from an "episode of criminal conduct," defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Ind. Code § 35-50-1-2(b), (c). Radcliff claims all the crimes in the hardware store case stem from a single episode, and the most serious charge was a Level 3 felony, so his maximum sentence in that case was 20 years. This argument fails for two reasons.

[20] First, he has not demonstrated that the trial court clearly erred in finding that the charges in the hardware store case did not necessarily stem from a single episode of conduct. "Whether certain offenses constitute a single episode of criminal conduct is a fact-intensive inquiry determined by the trial court." *Fix v. State*, 186 N.E.3d 1134, 1144 (Ind. 2022) (quotation marks omitted). According to the charging information, the Level 5 felony burglary charge was based on Radcliff's initial actions in the hardware store. Radcliff first broke into and entered the hardware store, using keys to the store, to steal several items from the store and hide them in his vehicle. Next, the charging information indicates the Level 3 felony burglary resulting in bodily injury charge was based on what happened later that night when Radcliff returned to the hardware store to burn it down. After attempting to burn the store down eighteen times, Radcliff succeeded.

[21] Given these circumstances, had the case gone to trial, it appears the State could have presented the case in a way that distinguished Radcliff's actions and set forth independent evidence for each conviction. *See Bruce v. State*, 749 N.E.2d 587, 590 (Ind. Ct. App. 2001) (finding no double-jeopardy violation, even

where "multiple offenses [were] committed as part of a protracted criminal episode" because "the case was prosecuted, and even defended, in such a manner so that the jury could not have reasonably used the same evidence to convict Bruce of both attempted aggravated battery and confinement"), *trans. denied*. Thus, Radcliff's convictions for Level 5 felony burglary and Level 3 felony burglary resulting in bodily injury would not have necessarily constituted a single episode of criminal conduct. That is consistent with trial counsel's testimony that, when advising Radcliff, he did not believe the offenses under F3-2 arose out of a single episode of criminal conduct. Tr. at 12–13. And, as the post-conviction court noted, the potential sentence for these two charges alone was roughly twenty-two years. Appellant's App. Vol. 2 at 80.

[22] Second, the Sentencing Cap Statute does not apply to a "crime of violence," which includes the Level 3 burglary (Count 5), for which Radcliff faced up to 6 years. Ind. Code § 35-50-1-2(a)(15), (c). Adding these 6 years to the 20 years Radcliff concedes he faced for the remaining counts in the hardware store case, plus the 7 years he concedes he faced for the concession stand incident, yields a potential sentence of 33 years, still well above the 28-year cap for the plea offer.

[23] Radcliff claims this crime-of-violence exception does not apply because while it applies to a Level 3 burglary charge, it does not apply to a Level 5 burglary charge, and he believes there was only sufficient evidence for a Level 5 charge, not a Level 3 charge. Ind. Code § 35-50-1-2(a)(15). Burglary is elevated to a Level 3 felony only "if it results in bodily injury to any person other than a defendant." Ind. Code § 35-43-2-1(2). Here, that injury was the firefighter's

injury from smoke inhalation, and Radcliff argues that resulted from the arson, not the burglary.

[24] In support of this claim, Radcliff cites to *Birch v. State*, 569 N.E.2d at 709. In *Birch*, the defendant grabbed the victim, threw her into an alley, pulled out a knife, and demanded all her money. *Id.* at 710. After she gave him her money, the defendant slapped her in the back of the head and demanded sex. *Id.* She refused, and he proceeded to attack her. *Id.* During the struggle, the victim's hands and throat were cut. *Id.* On appeal, another panel of this court held that "[s]ince the victim's serious bodily injury was the result of the attempted rape and not the robbery, [the] defendant could not be convicted of robbery as a Class A felony." *Id.*

[25] A critical distinction here is that Radcliff was charged with felony burglary. To convict Radcliff of Level 3 felony burglary, the State would have had to prove beyond a reasonable doubt that Radcliff broke into and entered the hardware store with the intent to commit a felony (arson), and serious bodily injury resulted. Ind. Code § 35-43-2-1(2). Radcliff's argument that, like *Birch*, the injury resulted not from the elevated crime (burglary here, robbery in *Birch*) but rather a subsequent crime (arson here, attempted rape in *Birch*) fails because in this case the arson was an element of the burglary; the arson was the felony Radcliff intended to commit when he broke into and entered (burglarized) the store.

[26] Moreover, "[a]ggravation by reason of resulting injury does not depend upon when a crime begins or ends, but rather depends upon the causation of the injury . . . . Regardless of the intent of the perpetrator, if the injury occurs as a consequence of the conduct of the accused," the offense may be elevated. *Minniefield v. State*, 539 N.E.2d 464, 467 (Ind. 1989). The burglary was a proximate cause of the firefighter's injury, and therefore it qualified for elevation to a Level 3 felony.[1]

In sum, the post-conviction court did not clearly err by concluding Radcliff faced the potential for a much greater sentence by going to trial and that he failed to sustain his burden to demonstrate his trial counsel was ineffective in advising Radcliff to accept the plea offer.

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[1] Alternatively, Radcliff argues that at the time of the plea offer, "the fact of a victim's injury could elevate the felony level of only one conviction; multiple elevations based on a single injury violated the common law." Appellant's Br. at 19. Since both the burglary and arson were elevated on the basis of the arson, he argues a trial court would generally elevate the felony level of the conviction that most immediately caused the injury. For the same reason he contends the Level 5 felony burglary should not have been elevated to a Level 3 felony burglary—because he argues it was the arson rather than the burglary that caused the injury—he contends a trial court likely would have elevated the arson rather than the burglary, and without the burglary being elevated to a Level 3 felony, there would be no crime of violence, and the Sentencing Cap Statute would cap his sentence at 20 years. But for the same reasons we rejected his previous argument, a court would not necessarily be foreclosed from concluding that the burglary caused the injury and that, therefore, the burglary was appropriately elevated to a Level 3 felony. Further, Radcliff's burden for post-conviction relief is to show that trial counsel was ineffective, and trial counsel was not questioned about this issue at the post-conviction hearing. As stated above, we typically presume that counsel exercised "reasonable professional judgment" and "rendered adequate legal assistance." *Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019) (quotation marks omitted). Thus, Radcliff has not met his burden on post-conviction to show that his counsel was ineffective.

III. Validity of Guilty Plea

[27] Finally, Radcliff argues that his guilty plea was not knowing, voluntary, and intelligent. "A valid guilty plea depends on whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Gibson*, 133 N.E.3d at 697 (quotation marks omitted). In furtherance of this objective, Indiana Code section 35-35-1-2 provides, in part, that the court accepting the guilty plea shall determine whether the defendant: (1) understands the nature of the charges; (2) has been informed that a guilty plea effectively waives several constitutional rights, including trial by jury, confrontation and cross-examination of witnesses, the right to subpoena witnesses, and proof of guilt beyond a reasonable doubt without self-incrimination; and (3) has been informed of the maximum and minimum sentence for the crime charged. *See Diaz v. State*, 934 N.E.2d 1089, 1094 (Ind. 2010). In assessing the voluntariness of the plea, we review "all the evidence before the post-conviction court, including testimony given at the post-conviction trial, the transcript of the petitioner's original sentencing, and any plea agreements or other exhibits which are part of the record." *Id.* (quotation marks omitted).

[28] According to Radcliff, his guilty plea was not knowing, voluntary, and intelligent because trial counsel incorrectly informed him of the maximum sentence he would have faced at trial. In making this argument, Radcliff directs us to *Reeves v. State*, 564 N.E.2d 550 (Ind. Ct. App. 1991), *trans. denied*. In *Reeves*, Reeves's attorney advised him that he faced the choice of accepting a

plea agreement which carried a maximum sentence of fifteen years or going to trial with the prospect of receiving sentences totaling up to sixty years, which included an improper habitual offender charge that would carry an additional thirty years. *Id.* at 553. A panel of this court held that "[t]he uncontradicted evidence [led] unerringly to the conclusion that the erroneous advice Reeves received from his court-appointed counsel played a significant part in the plea negotiations and rendered the bargain illusory." *Id.* We also held that "Reeves's attorney's recommendation that he accept the plea agreement to avoid being charged as [a] habitual offender—when Reeves was not habitual eligible—constitute[d] ineffective assistance of counsel rendering Reeves's plea involuntary." *Id.*

[29] Here, we do not find *Reeves* instructive. First, neither trial counsel nor Radcliff could recall the particular advice that trial counsel gave Radcliff regarding his potential maximum sentence at trial. Second, as discussed above, trial counsel did not perform deficiently. Given the circumstances and the evidence that the State possessed, it was not unreasonable for trial counsel to believe that Radcliff could have faced a maximum sentence well above twenty-eight years had he gone to trial. Thus, the present case clearly differs from *Reeves*—trial counsel's advice did not render the bargain illusory, and Radcliff clearly received the benefit of his bargain.

[30] Further, the record does not show that Radcliff's guilty plea was not knowing, voluntary, and intelligent. At the guilty plea hearing, the trial court advised Radcliff of his rights, and the following discussion occurred:

> THE COURT: Have you or anyone else received any promises, besides the plea agreement, or been given anything of value to have you enter the plea of guilty you're making here today?
>
> DEFENDANT: No, sir.
>
> THE COURT: Has anyone forced or threatened or placed you or anyone else in fear to have you plead guilty to these charges?
>
> DEFENDANT: No, sir.
>
> THE COURT: Is the plea you're offering here today your own free choice and decision?
>
> DEFENDANT: Yes, sir.
>
> . . . .
>
> THE COURT: You've been represented by [trial counsel], are you satisfied with his representation?
>
> DEFENDANT: Yes, sir.

Ex. 11 at 12, 53. The trial court also advised Radcliff of his sentencing exposure for the charges to which he was pleading guilty. *Id.* at 9–10.

[31] The transcript of the guilty plea hearing, therefore, makes it clear that Radcliff was not coerced into entering into the plea agreement and that Radcliff was acting knowingly, voluntarily, and intelligently. The post-conviction court concluded that Radcliff "ha[d] not proven by a preponderance of the evidence

that his plea was not voluntary." Appellant's App. Vol. 2 at 82. And Radcliff has failed to demonstrate that the post-conviction court's conclusion was clearly erroneous.

[32] In sum, the post-conviction court's denial of Radcliff's petition for post-conviction relief was not clearly erroneous. We affirm.

[33] Affirmed.

Mathias, J., and Brown, J., concur.