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IN THE
COURT OF APPEALS OF INDIANA

State of Indiana,
Appellant-Respondent,

v.

Edward Hamilton,
Appellee-Petitioner.

October 24, 2022

Court of Appeals Case No. 22A-PC-703

Appeal from the Marion Superior Court

The Honorable Patrick J. Murphy, Magistrate

Trial Court Cause No. 49D21-2010-PC-30854

Tavitas, Judge.

Case Summary

[1] Edward Hamilton pleaded guilty in 2017 to dealing in a narcotic drug, a Level 2 felony, and was sentenced to fourteen years, with twelve years executed and two years suspended to probation. In 2020, Hamilton filed a petition for post-conviction relief claiming that he received ineffective assistance of trial counsel. The post-conviction court ("PC Court") granted Hamilton's petition, and the State appeals. The State argues the PC Court clearly erred in determining that Hamilton's trial attorneys were ineffective for: (1) failing to properly advise him that his sentence would be non-suspendable; and (2) failing to investigate Hamilton's learning disability. Because we find the undisputed facts show that Hamilton was not prejudiced by his trial counsel's alleged errors, we reverse.

Issues

[2] The State raises two issues, which we restate as:

I. Whether the PC Court clearly erred in determining that Hamilton's trial attorneys were ineffective for failing to advise Hamilton that his sentence would be non-suspendable.

II. Whether the PC Court clearly erred in determining that Hamilton's trial attorneys were ineffective for failing to investigate Hamilton's learning disability.

Facts

[3] On April 11, 2017, the police found Hamilton in his car with over 300 grams of illicit drugs. As a result, on June 21, 2017, the State charged Hamilton with

four counts: (1) dealing in cocaine in an amount of at least ten grams, a Level 2 felony; (2) possession of at least twenty-eight grams of cocaine, a Level 3 felony; (3) dealing in heroin and/or fentanyl in an amount of at least ten grams, a Level 2 felony; and (4) possession of heroin and/or fentanyl in an amount of at least twenty-eight grams, a Level 3 felony.

[4] Hamilton retained private counsel—attorneys Scott Devries and Stephen Gray—to represent him in this criminal case. Hamilton's attorneys negotiated a plea agreement with the State in which Hamilton agreed to plead guilty to Count 3. In exchange, the State agreed to dismiss the other charges and also agreed that Hamilton's sentence would be capped at fifteen years. The trial court accepted the plea agreement on July 17, 2018.

[5] At the November 9, 2018 sentencing hearing, attorney Devries argued that the trial court should suspend some or all of Hamilton's sentence. The trial court noted that ten years of Hamilton's sentence would be non-suspendable due to Hamilton's prior conviction for the same offense.[1] The following exchange between the trial court and the parties then occurred:

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[1] The PC Court was referring to Indiana Code Section 35-50-2-2.2(b), which provides:

> If a person is convicted of a Level 2 felony or a Level 3 felony and has any prior unrelated felony conviction, other than a conviction for a felony involving marijuana, hashish, hash oil, or salvia divinorum, the court may suspend only that part of a sentence that is in excess of the minimum sentence for the:
> (1) Level 2 felony; or
> (2) Level 3 felony[.]

The minimum sentence for a Level 2 felony is ten years. *See* Ind. Code § 35-50-2-4.5. Thus, ten years of Hamilton's sentence was non-suspendable.

[DEVRIES]: I thought he was suspendable. In our discussions, I thought he was suspendable.

THE COURT: He is pleading to dealing in a narcotic drug and it is the same code and he has [a] prior unrelated.

[PROSECUTOR]: That would be correct, judge.

THE COURT: I am sorry.

[PROSECUTOR]: That would be correct.

THE COURT: Okay. Just wanted to make sure. I think it is non-suspendable.

[DEVRIES]: But if – okay. If he is non-suspendable the court still can do a – split the sentence.

THE COURT: Oh, I understand – I understand that.

[DEVRIES]: And he thought it was suspendable. I thought it was suspendable. I do not know that we ever relayed that to him. I was not there the day of the guilty plea. But my understanding was is [sic] that he thought it was – I thought it was suspendable and he thought it was suspendable.

THE COURT: He is charged with 35-48-44. And Indiana Code – which is what he pled to, that is count three. And I am happy to have you agree [sic] that it is different. But under 35-50-2-2.2, "person who is convicted of dealing in heroin is a Level 2 or 3 felony under 35-48-4-1 or 35-48-4-2 and has a prior unrelated felony conviction, the court may suspend only that part of the sentence that is in excess of the minimum sentence, for the Level 2 or 3 felony." Drugs obviously are heroin and fentanyl.

[PROSECUTOR]: It seems that Mr. Gray and I had a discussion about that the morning of trial, but I would not swear to it. There was another attorney . . . involved in it. And it seems like I have had that discussion with Mr. Gray on a couple cases. I am not sure if it was on this one or not. But I thought

we had discussed that[.] Obviously if we did, he did not pass that along to Mr. Hamilton. Not that I want to open a can of worms but just for appellate purposes, is that something that the court thinks needs to be addressed to make sure the plea is still willing and voluntary?

THE COURT: I was kind of waiting to see if Mr. Devries was going to ask anything but I – alright. Mr. Hamilton, obviously the court has gone through your plea agreement with you, previously. Correct? In terms of what the sentencing available to the court is.

MR. HAMILTON: Yes.

THE COURT: And I can listen to the transcript but typically, the courts admonishment whenever there is open sentencing is — and obviously it is in the words themselves, 'you understand that the - both attorneys make arguments and present evidence, then the court makes a decision', whenever there is an open sentencing component. Correct?

MR. HAMILTON: Correct.

THE COURT: And just on the plain language of the statute – or plain language of the plea agreement, you knew back in July when we went through the plea agreement that it could be – the court can do anything up to 15 years. Is that correct?

MR. HAMILTON: Yes, I was understood [sic] with that. Yes.

THE COURT: Okay. Now, did you have a conversation with either Mr. Devries or Mr. Gray with [sic] regarding the potential non-suspendability of your sentence?

MR. HAMILTON: I thought it was suspendable too. Plus, it can be anywhere what I can get. That is what I thought.

THE COURT: Okay. Now that part is true in terms of placement would be up to the court.

MR. HAMILTON: Right.

THE COURT: Although I will surely recognize that it is – with a non-suspendable sentence of 10 years, the likelihood of a Community Corrections placement for that period of time would be pretty slim. Are you still wanting to enter into this plea knowingly and voluntarily?

[DEVRIES]: Could I have just a minute, your honor?

THE COURT: Mm-hmm.

[DEVRIES]: Your honor, could I just have a minute? I am trying to get ahold of Mr. Gray. Can you bear with me?

THE COURT: Sure. Go off record for a minute.

BRIEF RECESS

[DEVRIES]: Alright. Judge, I am sorry. I talked to Mr. Gray. And you know, he is trying to piece together his memory from when they did this in July. He does not recall telling Mr. Hamilton that he was non-suspendable. He does not have any recollection of that.

THE COURT: So what are you asking the court to do?

[DEVRIES]: I asked – and I do not blame Mr. Frank for this. I asked him if we could amend it to Count 1, which I believe that dealing cocaine is suspendable. Right?

THE COURT: Yes.

[DEVRIES]: Okay. But he is not inclined to do it. And I understand his position. **Your honor, [Hamilton] is willing to proceed with the plea.**

THE COURT: Thank you.

[PROSECUTOR]: Judge, I hate to ask this **but either could the court inquire upon Mr. Hamilton or could I just for appellate and PCR purposes that he definitely wants to go forward on this at the advice of his counsel, even though he did not know it when he took the plea?**

THE COURT: You can go right ahead.

[PROSECUTOR]: **Mr. Hamilton, your attorney indicated that you want to go forward with the plea now that you know that 10 years of this is non-suspendable. Are you fully aware of that and do you understand what that means?**

MR. HAMILTON: **Yes, sir.**

[PROSECUTOR]: **And you still want to go forward with the plea that you signed on the morning of the trial?**

MR. HAMILTON: **Yes.**

[PROSECUTOR]: Alright.

THE COURT: Anyone force you or threaten you to go through with that, Mr. Hamilton?

MR. HAMILTON: No.

THE COURT: **Alright. You are fully knowledgeable of all of the consequences of your plea. Is that correct?**

MR. HAMILTON: **Yes**.

Trial Tr. 19-22 (emphases added).

[6] The trial court sentenced Hamilton to fourteen years—one year less than the fifteen-year cap provided in the plea agreement—with twelve years thereof executed and two years suspended to probation. The trial court also ordered

that Hamilton serve ten years of his executed sentence in the Department of Correction and the remaining two years as a direct placement in Community Corrections. Hamilton did not appeal his sentence.

[7] On October 5, 2020, Hamilton filed a petition for post-conviction relief, which he subsequently amended on December 17, 2020. In Hamilton's amended petition for post-conviction relief, Hamilton argued his conviction should be set aside because: (1) Hamilton was denied the effective assistance of counsel; (2) Hamilton's trial counsel's representation fell below an objective standard of reasonableness for, inter alia, failing to investigate Hamilton's disability; (3) Hamilton's guilty plea and sentence were premised on incorrect legal advice, i.e., that his sentence would be suspendible; and (4) there was a reasonable probability that the outcome of the proceeding would have been different but for the ineffective assistance of Hamilton's counsel.

[8] The PC Court held an evidentiary hearing on Hamilton's petition on December 13, 2021. At the hearing, Hamilton presented as evidence the transcript of the sentencing hearing, some of Hamilton's school records, and the testimony of Attorney Devries. On February 22, 2022, the PC Court entered an order granting Hamilton's petition. The order signed by the trial court is entitled "Hamilton's Proposed Findings of Fact and Conclusions of Law." Appellant's App. p. 22.

[9] The trial court judge apparently signed the proposed findings and conclusions without changing the title to reflect the order. Although adopting a party's

proposed findings and conclusions is not prohibited, this practice "results in an 'inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court.'" *Stevens v. State*, 770 N.E.2d 739, 762 (Ind. 2002) (quoting *Prowell v. State*, 741 N.E.2d 704, 709 (Ind. 2001)); *see also Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 274 n.1 (Ind. 2003) (noting that the practice of adopting proposed findings and conclusions verbatim "weakens our confidence as an appellate court that the findings are the result of considered judgment by the trial court."). Although we "by no means encourage the wholesale adoption of a party's proposed findings and conclusions, the critical inquiry is whether such findings, as adopted by the court, are clearly erroneous." *Id*. Here, our confidence is lessened even further by the trial court's failure to even alter the title or heading of Hamilton's proposed findings and conclusions.

Standard of Review

[10] Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *reh'g denied, cert. denied*, 141 S. Ct. 553 (2020); Ind. Post-Conviction Rule 1(1)(b). "The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal." *Gibson*, 133 N.E.3d at 681. "Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are res judicata." *Id.* The petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id.;* P.-C.R. 1(5).

[11] Where, as here, the State appeals a judgment granting a defendant's petition for post-conviction relief, "we review using the standard in Indiana Trial Rule 52(A)." *State v. Oney*, 993 N.E.2d 157, 161 (Ind. 2013). That is, we will not set aside the findings or judgment unless they are clearly erroneous, and we give due regard to the opportunity of the post-conviction court to judge the credibility of witnesses. *Id*. (citing T.R. 52(A)). Under this "clearly erroneous" standard of review, we review only for the sufficiency of the evidence, i.e., we neither reweigh the evidence nor determine the credibility of witnesses, and we consider only the probative evidence and reasonable inferences supporting the judgment, and we will reverse only on a showing of clear error. *Id*. "Clear error" is that which leaves us with a definite and firm conviction that a mistake has been made. *Id*.

Ineffective Assistance of Trial Counsel

[12] To prevail on his ineffective assistance of counsel claims, the petitioner 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*, 133 N.E.3d at 682 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984))). Failure to satisfy either prong will cause the claim to fail. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*; *see also Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069 ("The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to

dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.").

[13] 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." *Gibson,* 133 N.E.3d at 682 (quoting *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *cert. denied*, 555 U.S. 972, 129 S. Ct. 458 (2008)). We strongly 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.*

[14] "The Supreme Court . . . has explained that a [petitioner] shows prejudice from mis-advice during the guilty-plea stage by showing 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) (citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985)). To show that he would have rejected the guilty plea and insisted on going to trial, a petitioner cannot simply say he would have gone to trial; instead, a petitioner must show some "special" or "unusual" circumstances that would have supported a rational decision to go to trial. *Id*. at 1284-85 (citing *Hill*, 474 U.S. at 60, 106 S. Ct. at 371; *Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958, 1967 (2017)). "Indeed, . . . 'Courts should not upset a plea solely because of *post hoc* assertions from a [petitioner] about how he would have pleaded but for his attorney's deficiencies. Judges should

instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id*. at 1286 (quoting *Lee*, ___ U.S. at ___, 137 S. Ct. at 1967).

[15] "Reviewing courts, therefore, should be 'asking what an individual defendant would have done,' not what hypothetical defendants would do in similar situations." *Id*. at 1286 (quoting *Lee*, ___ U.S. ___, 137 S. Ct. at 1967). The Supreme Court "expressly rejected any categorical rules whereby the prosecution could negate a defendant's prejudice claim by pointing out that he had no viable trial defense or that the government had a particularly strong case against him." *Id*.

I. Failure to Advise Hamilton that His Sentence was Non-Suspendable

[16] Regarding Hamilton's claim of ineffective assistance for failing to properly advise him of the penalty he was facing, the PC Court found:

> 3.4.9. The failure to accurately convey the range of potential penalties available to the Court at sentencing breaches the duty of defense counsel to fully advise his client on whether a particular plea to a charge appears desirable. *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998).
>
> 3.4.10. The fact alone of a divergence between the actual sentencing exposure and counsel's faulty advice is objective evidence sufficient to support a finding of prejudice under *Strickland*. *Id*. at 381.
>
> 3.4.11. For this reason alone, Hamilton was denied the effective assistant of trial counsel and the judgment of conviction must be vacated.

Appellant's App. p. 26. The State argues that the trial court's ruling conflates the issues of deficient performance and prejudice. We agree.

[17] We can assume *arguendo* that Hamilton's trial attorneys' performance was deficient for failing to advise Hamilton that ten years of the sentence he received would be non-suspendable by operation of statute. The question then becomes, as explained in *Bobadilla*, whether Hamilton showed a reasonable probability that, but for this mis-advise, he would have rejected the guilty plea and instead insisted on going to trial. 117 N.E.3d at 1284 (citing *Hill*, 474 U.S. at 59, 106 S. Ct. at 370). To show that he would have insisted on going to trial, Hamilton cannot merely say, after the fact, that he would have done so. *Id*. at 1286 (citing *Lee*, ___ U.S. at ___, 137 S. Ct. at 1967). Instead, Hamilton was required to show some "special" or "unusual" circumstances that would have supported a rational decision to go to trial. *Id*. 1284-85 (citing *Hill*, 474 U.S. at 60, 106 S. Ct. at 371; *Lee*, ___ U.S. at ___, 137 S. Ct. at 1967).

[18] The record before us is devoid of such special or unusual circumstances. To the contrary, here, we know precisely what Hamilton would have done had he not been misadvised. The trial court remedied the mis-advice by accurately informing Hamilton of the consequences of his guilty plea, i.e., that he was facing a non-suspendible sentence. Yet Hamilton explicitly stated that he still desired to accept the guilty plea rather than go to trial. *See* Trial Tr. pp. 21-22. Hamilton failed to present evidence of special or unique circumstances supporting a finding that, but for his trial counsels' errors, he would have insisted on going to trial. Under these facts and circumstances, we can only

conclude that the PC Court clearly erred by concluding that Hamilton was prejudiced by the mis-advice of his trial attorneys with regard to the sentence Hamilton was facing.[2]

B. Failure to Investigate Hamilton's Learning Disability

[19] The State also claims that the PC Court clearly erred by determining that Hamilton's trial attorneys were ineffective for failing to investigate Hamilton's learning disability. The PC Court found:

> There is a reasonable probability that Hamilton's learning disability prejudiced him in comprehending the proceedings and his trial counsel's incorrect advice. There is further a reasonable probability that a proper presentation of this evidence to the prosecution and to the trial court would have impacted sentencing because it tended to reduce Hamilton's culpability.

Appellant's App. p. 27.

[20] The only evidence of Hamilton's learning disabilities that Hamilton presented to the PC Court was his school records. These records reflect that: (1) intellectually, Hamilton functioned in the "low average range with performance abilities superior to verbal abilities. [Hamilton]'s performance abilities were in an average range while his verbal abilities were in a borderline range"; (2)

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[2] The PC Court also found that Hamilton's trial attorneys were ineffective for failing to preserve for appeal the issue of the suspendability of Hamilton's sentence. But Hamilton's plea agreement contained a waiver of the right to appeal the sentence. Appellant's App. pp. 28-29. Moreover, even if Hamilton could have appealed, Indiana Code Section 35-50-2-2.2(b) clearly provides that ten years of Hamilton's sentence was non-suspendable. *See* note 1, *supra*. Thus, even if Hamilton's counsel preserved this issue for appeal, it would have been without merit.

academically, Hamilton was "below expectations in Reading Recognition and Reading Comprehension"; and (3) "[t]he discrepancies between his current level of functioning and his expected level [were] great enough to warrant placement in a program for the learning disabled." Ex. Vol. p. 37-38.

[21] Hamilton, however, presented no evidence that his trial attorneys failed to investigate or learn of Hamilton's learning disability. Indeed, at the post-conviction hearing, Hamilton never asked his trial attorney whether he had investigated Hamilton's learning disability. The only question asked on this issue was whether Attorney Devries was "aware of [Hamilton's] intellectual capabilities?" P-CR Tr. p. 14. Attorney Devries acknowledged, "He's got some learning disabilities, yes." *Id*. This does not support a finding that Hamilton's trial attorneys did not investigate Hamilton's learning disability. To the contrary, it appears that they were well aware of his disability.

[22] Assuming again *arguendo* that Hamilton's trial attorneys did fail to properly investigate his learning disability, there was no evidence to support a finding of prejudice on this issue. The PC Court found that "there is a reasonable probability that Hamilton's learning disability prejudiced him in comprehending the proceedings and his trial counsel's incorrect advice." Appellant's App. Vol. II p. 27. Hamilton, however, did not testify that he had difficulty understanding the proceedings. And his testimony at the sentencing hearing contradicts any such claim. It was clear that Hamilton understood that he was facing up to fifteen years and that a portion of his sentence was non-

suspendable. Still, Hamilton clearly and unequivocally stated that he wished to proceed with the guilty plea.

[23] Likewise, there was no evidence to support the trial court's finding that there was a reasonable probability that "a proper presentation of this evidence [of Hamilton's learning disability] to the prosecution and to the trial court would have impacted sentencing because it tended to reduce Hamilton's culpability." Appellant's App. p. 27. Hamilton presented no evidence that connected his learning disability to his culpability in dealing a large quantity of illicit drugs. We cannot say that having a moderate learning disability, by itself, automatically lessens one's criminal culpability. *Cf. McCarty v. State*, 802 N.E.2d 959, 967-68 (Ind. Ct. App. 2004) (holding that post-conviction petitioner was prejudiced by his trial counsel's failure to bring to trial court's attention his learning disability because petitioner had the mental capacity of a child and, therefore, could not have lawfully been sentenced to life without parole but trial court sentenced him to an effective life term of 195 years).

[24] Moreover, the question is not whether a more thorough investigation of Hamilton's disabilities would have "impacted sentencing," as found by the PC Court. Appellant's App. p. 27. To show prejudice under *Bobadilla*, Hamilton was required to show that, but for his counsel's errors, he would have rejected the plea agreement and insisted on going to trial. 117 N.E.3d at 1284 (citing *Hill*, 474 U.S. at 59, 106 S. Ct. at 370). Hamilton failed to demonstrate that, but for his trial attorneys' alleged failure to investigate his learning disabilities, he would have insisted on going to trial.

Conclusion

[25] The PC Court clearly erred in determining that Hamilton was prejudiced by any deficient performance on the part of his trial attorneys. Although Hamilton's trial attorneys failed to properly advise him that a portion of his sentence would be non-suspendable, the trial court corrected this error, and Hamilton was properly informed of the potential sentence he was facing. Hamilton clearly and unequivocally chose to proceed with the plea. Hamilton, therefore, failed to present evidence of special or unique circumstances supporting a finding that, but for his counsels' errors, he would have insisted on going to trial. We also conclude that the PC Court clearly erred in determining that Hamilton was prejudiced by his trial attorney's alleged failure to investigate his learning disabilities. The evidence shows that his attorneys were well aware of his learning disabilities. More importantly, Hamilton failed to present any evidence showing how he was prejudiced by his trial attorney's alleged failure to investigate his learning disabilities. We therefore reverse the judgment of the PC Court.

[26] Reversed.

May, J., concurs.

Riley, J., dissents.