FILED
Jun 30 2022, 8:35 am
CLERK
Indiana Supreme Court
Court of Appeals
and Tax Court

ATTORNEYS FOR APPELLANT

Theodore E. Rokita
Attorney General of Indiana

Jesse R. Drum
Assistant Section Chief, Criminal Appeals
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

Brian J. Johnson
Danville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

State of Indiana,

Appellant,

v.

Justin David Pearson,

Appellee.

June 30, 2022

Court of Appeals Case No. 22A-PC-95

Appeal from the Hendricks Superior Court

The Honorable Robert W. Freese, Judge

Trial Court Cause No. 32D01-2107-PC-4

Brown, Judge.

[1] The State of Indiana appeals the post-conviction court's grant of a petition for post-conviction relief filed by Justin David Pearson. We affirm.

Facts and Procedural History

[2] In September 2013, the State charged Pearson under cause number 32D01-1309-FA-9 with: Count I, burglary resulting in bodily injury as a class A felony; Count II, robbery as a class B felony; Count III, robbery as a class B felony; Count IV, criminal confinement as a class B felony; and Count V, criminal confinement as a class B felony. The State also alleged Pearson used a firearm in the commission of an offense.

[3] Pearson's parents sought an attorney to represent him, and they entered into an agreement with Ronald Frazier ("Frazier") to represent Pearson. The record contains a "Criminal Case Attorney Employment and Fee Agreement" dated September 27, 2013. Exhibit 1 (capitalization omitted). The agreement provided that the Frazier Law Firm would represent Pearson to the conclusion of the case, whether by dismissal or plea agreement; Pearson's parents agreed to pay $7,500 on behalf of Pearson; and an additional fee would be negotiated in the event the case proceeded to trial.[1] Frazier did not file an appearance for Pearson.

[4] On February 6, 2014, Ian William Thompson filed an appearance for Pearson. That same day, the trial court held a pretrial conference and accepted a plea

[1] The agreement in the record contains signature lines for Pearson, his parents, and Frazier, but is not signed.

agreement pursuant to which Pearson agreed to plead guilty to Count I, burglary as a class A felony, and the State agreed to dismiss all remaining counts. The plea agreement provided the parties agreed to a sentence of twenty-five years. It also provided that Pearson waived the right to challenge the sentence on the basis that it was erroneous, the right to challenge the trial court's finding and balancing of mitigating and aggravating factors, and the right to have the Court of Appeals review his sentence under "Indiana Appellate rule." Appellant's Appendix Volume II at 38. That same day, the court accepted Pearson's guilty plea and sentenced him to twenty-five years.

[5] On March 6, 2014, the Indiana Supreme Court entered a published order accepting Frazier's resignation. *See In re Frazier*, 4 N.E.3d 634 (Ind. 2014). The Court observed that Frazier had tendered an "affidavit of resignation from the bar of this State, pursuant to Indiana Admission and Discipline 23(17), which requires an acknowledgement that there is presently pending an investigation into or a proceeding involving allegations of misconduct and that [Frazier] could not successfully defend himself if prosecuted." *Id.* at 634. The Court ordered that "the resignation from the bar of this State tendered by [Frazier was] accepted effective immediately" and that "any attorney disciplinary proceedings pending against [Frazier were] dismissed as moot because of [Frazier's] resignation." *Id.* It observed that, if Frazier sought reinstatement, "the misconduct admitted in [Frazier's] affidavit of resignation, as well as any other allegations of misconduct, [would be] be addressed in the reinstatement process." *Id.*

[6] On July 8, 2021, Pearson filed a petition for post-conviction relief alleging that he did not intelligently plead guilty and/or was denied the effective assistance of counsel. On December 2, 2021, the court held an evidentiary hearing. Pearson testified that his parents hired Frazier to represent him and that he met with Frazier twice with regard to the case. He testified that the first meeting occurred within a few days of his arrest and lasted ten minutes. He indicated that Frazier reviewed the charges with him, he told Frazier about other people who were involved, and he did not know whether Frazier pursued a negotiation with the State regarding the information. He testified that the second time he met with Frazier was one week prior to sentencing. He also indicated that Frazier never provided him with copies of discovery, charges, probable cause affidavits, police reports, or statements. He stated that Frazier told him that he had a plea agreement with the State, it was a "one-time plea agreement," and, if he wanted to pay him $50,000, he could go to trial but he would lose. Transcript Volume II at 6. He also asserted that, when he questioned the "bodily injury in the discovery," Frazier told him that was irrelevant and "we didn't have time for that" and he "needed to take this plea agreement or tomorrow they were going to file more charges and set it for trial and [he] was going to get one hundred years." *Id.* at 7. He stated that Frazier told him that he would have the possibility of modifying his sentence after he had been in prison for a period of time. When asked whether or not Frazier told him if Frazier would be at the sentencing hearing, Pearson stated that "he was opening up a family branch of law and that he was not going to be there, but he was going to send an associate of his . . . in his place and it was

just a formality." *Id.* at 8. He indicated that he met Frazier's associate, Thompson, when he came to the sentencing hearing and "that was the first and only time that I met him." *Id.* He described the conversation with Thompson as follows: "Um my name is Ian Thompson I am an associate of Frazier Law Group uh this is the plea agreement go ahead and sign here here and here uh Judge is going to ask you some run of the mill questions and we'll get this under way." *Id.* He indicated that he contemplated reaching out to find an attorney to conduct a modification of his sentence and discovered in 2021 that Frazier had not been honest with him regarding opening a family law practice. He testified that Frazier did not tell him that he was facing disciplinary actions, that he was contemplating resignation, or that disbarment was "on the table." *Id.* at 10.

[7] During the direct examination of Pearson, the following exchange occurred:

> Q: If you would have known that Mr. Frazier was facing disciplinary actions and was potentially going to be disbarred or resign from the practice of law would you have gone forward with that plea agreement that was put in front of you?
>
> A: No[.]
>
> Q: Would you have relied on Mr. Frazier's advice?
>
> A: No[.]
>
> Q: Even knowing that he told you well it could be 100 years you still have[?]
>
> A: I would have sought new counsel[.]

> Q: Um and you would have done that as soon as you determine that this was his fate?
>
> A: Correct[.]
>
> Q: And that is independent of anything as far as the threats as far as the hundred years or fifty thousand dollars your decision would have been to not go forward with the plea [inaudible]
>
> A: Correct[.]

Id. at 10-11.

[8] On cross-examination, Pearson stated that he "would not have trusted [Frazier's] legal advice." *Id.* at 11. He acknowledged that he was found at the location of the burglary and was cooperative with the police. When asked if he talked with police and gave them a statement, he answered: "I don't recall[;] I never saw one, but it is my understanding that there was one." *Id.* at 13. He also stated that he was under the influence and was "told after the fact that there was a statement made by me from Frazier, but I never actually received a copy, but I was told that there was one." *Id.* On recross-examination, Pearson indicated that his attorney "said that they would file additional charges" and mentioned felony murder. *Id.* at 17.

[9] During closing argument, Pearson's post-conviction counsel asserted that there were two issues, ineffective assistance of counsel and whether Pearson knowingly or intelligently entered into a plea.

[10] On January 10, 2022, the court entered an order granting Pearson's petition and vacating his judgment and sentence. Specifically, the post-conviction court found:

> 3. On or about September 27, 2013 Pearson, through family retained the services of Ronald W. Frazier to represent him on the aforementioned charges for $10,000.
>
> 4. At no time during the entire pendency of the case did Fraz[i]er enter an appearance in Pearson's case, nor did he ever actually appear in court on Pearson's behalf.
>
> 5. Throughout the entirety of this matter, Frazier met with Pearson at the jail only twice, briefly; once, approximately one week after Pearson's arrest, and lastly, approximately a week before Pearson's plea and sentencing. Pearson never received any discovery in the case other than the charging information.
>
> 6. On November 13, 2013 the State of Indiana filed its discovery in this case, identifying fifty-three witnesses. Less than one month later, on December 5, 2013 Frazier requested that a pre-sentence report be prepared.
>
> 7. Approximately one week prior to Pearson's plea hearing on February 6, 2014, Frazier met with Pearson, for the second and final time, in a meeting lasting approximately fifteen minutes, where Frazier presented the proposed plea agreement to Pearson and advised Pearson to plead guilty.
>
> 8. The proposed plea agreement required Pearson to plead guilty to Count 1, with a sentence of twenty-five years at the Indiana Department of Correction[], with none of the time suspended. The terms of the plea agreement were fixed and did not provide for a modification of sentence.
>
> 9. In addition to telling Pearson that if he rejected the plea, Frazier would represent him but that Pearson would be looking

at "a hundred years" in prison, Frazier lied to Pearson, telling him that he could later petition to modify his sentence.

10. Altogether Frazier met with Pearson for less than thirty (30) minutes during the pendency of the case.

11. It was during this second and final meeting that Frazier informed Pearson that another attorney would be attending Pearson's plea hearing on his behalf because Frazier was "busy opening a family law practice."

12. The day of Pearson's plea hearing, February 6, 2014, attorney Ian Thompson entered an appearance on Pearson's behalf. Thompson's appearance is the only appearance filed on behalf of Pearson in the record.

13. It was only years later, prior to the filing of his Petition for Post-Conviction Relief, when seeking an attorney to file a petition to modify his sentence as Frazier promised Pearson that he could[,] that Pearson learned that Frazier had lied about opening a family law practice.

14. In fact, facing attorney discipline issues, Frazier resigned from the practice of law effective March 6, 2014, one month after Pearson's sentencing hearing.

15. It is apparent that the fact that Frazier never filed an appearance in Pearson's case nor appeared in court was intentional and part of Frazier's scheme to misrepresent the status of his law license, specifically that Frazier was anticipating resignation from the practice of law to avoid suspension or disbarment.

16. Had Pearson been aware that Frazier was facing disciplinary issues, and in particular, that Frazier was anticipating resigning from the practice of law, Pearson would not have hired Frazier, and certainly would not have relied on his advice to plead guilty.

Appellant's Appendix Volume II at 25-26.

Discussion

[11] Where, as here, the State appeals a judgment granting 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).

> On appeal of claims tried by the court without a jury or with an advisory jury, at law or in equity, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.

Id. (quoting *State v. Hollin*, 970 N.E.2d 147, 150 (Ind. 2012)). Under the clearly erroneous standard of review, we review only for the sufficiency of the evidence. *Id.* We neither reweigh the evidence nor determine the credibility of witnesses. *Id.* We consider only the probative evidence and reasonable inferences supporting the judgment and 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.* We do not defer to the post-conviction court's legal conclusions. *Hollowell v. State*, 19 N.E.3d 263, 269 (Ind. 2014).

[12] The State argues there is no evidence that Pearson involuntarily, unknowingly, or unintelligently pled guilty. It further asserts there is no evidence that the ability to modify his sentence was material to his decision to plead guilty or that Frazier misrepresented the status of his law license. It also contends there is no evidence that Pearson received ineffective assistance from his trial counsel. The

State argues "[i]t is difficult to imagine a more favorable outcome for a defendant with a substantial criminal history who was caught at the scene of the crimes and made a statement to the police." Appellant's Brief at 16. It asserts that "[n]ew counsel could have, and likely would have, recommended that Pearson accept the State's generous offer." *Id.* at 18.

[13] Pearson argues that the post-conviction court correctly found that he did not intelligently plead guilty and that he was denied effective assistance of counsel. He asserts that Frazier improperly advised him as to the possibility of modifying his sentence, misrepresented the status of his law license, failed to enter an appearance, misled him in order to induce him to sign a plea agreement, and failed to appear at his plea and sentencing hearings.

[14] To prevail on a claim of ineffective assistance of counsel a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), *reh'g denied*). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong

will cause the claim to fail. *French*, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

[15] The *Strickland* two-part analysis also governs "claims arising out of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 370 (1985). With respect to the deficient-performance component, there is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment. *See Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019), *reh'g denied*, *cert. denied*, 141 S. Ct. 553 (2020). Pearson "must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *See Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). We evaluate reasonableness from counsel's perspective at the time of the alleged error and in light of all the relevant circumstances. *Pennycuff v. State*, 745 N.E.2d 804, 811-812 (Ind. 2001). For the prejudice component, Pearson must demonstrate a "reasonable probability that he would have rejected the guilty plea and insisted on going to trial instead." *See Bobadilla v. State*, 117 N.E.3d 1272, 1284 (Ind. 2019). In making this showing, Pearson "cannot simply say that [he] would have gone to trial," he instead "must establish rational reasons supporting why [he] would have made that decision." *See id.*

[16] With respect to Pearson's assertion that his plea was not entered intelligently, a guilty plea constitutes a waiver of constitutional rights, and this waiver requires a trial court to evaluate the validity of every plea before accepting it. *Davis v. State*, 675 N.E.2d 1097, 1102 (Ind. 1996). For the plea to be valid, the

defendant's decision to plead guilty must be knowing, voluntary, and intelligent. *Id.* "Prior to the acceptance of a guilty plea, a trial court must determine that such plea is voluntarily made." *Curry v. State*, 674 N.E.2d 160, 161 (Ind. 1996), *abrogated on other grounds by Hall v. State*, 849 N.E.2d 466, 470 (Ind. 2006). "Voluntariness is . . . distinct from ineffective assistance of counsel . . . ." *State v. Moore*, 678 N.E.2d 1258, 1266 (Ind. 1997), *reh'g denied*, *cert. denied*, 523 U.S. 1079, 118 S. Ct. 1528 (1998). "The Supreme Court made clear in *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366 (1985) that 'voluntariness' . . . is not part of the ineffective assistance analysis under the Sixth Amendment." *Id.* "[V]oluntariness in Indiana practice . . . focuses on whether the defendant knowingly and freely entered the plea, in contrast to ineffective assistance, which turns on the performance of counsel and resulting prejudice." *Id.*

[17] Ind. Professional Conduct Rule 1.7(a)(2) provides in part that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest" and "[a] concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." Ind. Professional Conduct Rule 1.4 provides:

> (a) A lawyer shall:
>
> > (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law or assistance limited under Rule 1.2(c).
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[18] The record reveals that the State charged Pearson on September 24, 2013, and Pearson entered into an agreement with the Frazier Law Firm that same month. Frazier never filed an appearance for Pearson. No one from the Frazier Law Firm filed an appearance until Thompson filed an appearance on February 6, 2014, which was the same day the trial court held a pretrial conference, accepted the plea agreement, and sentenced Pearson. Pearson testified that Thompson merely stated "this is the plea agreement go ahead and sign here here and here uh Judge is going to ask you some run of the mill questions and we'll get this under way." Transcript Volume II at 8.

[19] Despite Frazier's assertion that he was opening up a family branch of law, he tendered an affidavit of resignation from the bar "pursuant to Indiana Admission and Discipline 23(17), which requires an acknowledgement that

there is presently pending an investigation into or a proceeding involving allegations of misconduct and that [Frazier] could not successfully defend himself if prosecuted." *In re Frazier*, 4 N.E.3d at 634. Pearson testified that Frazier did not tell him he was facing disciplinary actions or contemplating resignation or that disbarment was "on the table." Transcript Volume II at 10. He also testified that he would not have relied on Frazier's advice and would have sought new counsel if he had known Frazier was facing disciplinary actions and was potentially going to resign from the practice of law or be disbarred. The post-conviction court noted that the terms of the plea agreement were fixed and did not provide for a modification of sentence and found that "Frazier lied to Pearson, telling him that he could later petition to modify his sentence." Appellant's Appendix Volume II at 25. The post-conviction court found Pearson's testimony credible and found that "[h]ad Pearson been aware that Frazier was facing disciplinary issues, and in particular, that Frazier was anticipating resigning from the practice of law, Pearson would not have hired Frazier, and certainly would not have relied on his advice to plead guilty." *Id.* at 26. As noted, 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 reverse only on a showing of clear error. *Oney*, 993 N.E.2d at 161. Under these circumstances, we conclude that Pearson did not intelligently enter the plea agreement.

[20] For the foregoing reasons, we affirm the post-conviction court's order.

[21] Affirmed.

Mathias, J., and Molter, J., concur.