MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael Yates,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

May 27, 2022

Court of Appeals Case No. 21A-PC-2677

Appeal from the Howard Superior Court

The Honorable William C. Menges, Judge

Trial Court Cause No. 34D01-1306-PC-459

Bailey, Judge.

Case Summary

[1] Michael Yates appeals the denial of his petition for post-conviction relief, which challenged his conviction for Attempted Armed Robbery, a Class B felony.[1] Yates articulates five issues, contending that he was denied fundamental due process and effective assistance of trial and appellate counsel. He primarily focuses upon the State's failure to correct or clarify testimony of the State's principal identification witness, Launden Luckett, that Luckett would serve fifteen years in prison; that is, the jury never learned that Luckett's inducement to testify included the disposition of several cases for which he faced criminal exposure of more than 200 years imprisonment. We address the single dispositive issue of ineffectiveness of appellate counsel. Concluding that Yates was denied effective assistance of appellate counsel because counsel failed to argue, in accordance with *Napue v. Illinois*, 360 U.S. 264 (1959), that the State had violated Yates's due process rights, we reverse and remand for retrial.

Facts and Procedural History

[2] The following facts are derived from grand jury, trial, and post-conviction hearing evidence. In April of 2008, Luckett, who was at that time a member of the Blackstone gang based in Chicago, Illinois, had traveled to Kokomo, Indiana to sell drugs for a Kokomo resident known to Luckett as "Pudge."

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[1] Ind. Code §§ 35-42-5-1(2), 35-41-5-1.

(P.C.R. Exhibits Vol. III, pg. 158.) On April 4, 2008, Luckett received a phone call from his fellow gang member, Sean Landrum, who informed Luckett that "there was a guy over in Gateway Gardens [who] had some jewelry on [and] had some money." (Tr. at 153.) Landrum indicated that he would be with that person at a certain apartment and that he would leave the door open to allow Luckett entry. That evening, Luckett and a companion that Luckett would later identify as Yates proceeded to execute the robbery plan, disguised and armed with guns. *Yates v. State*, No. 34A04-1010-CR-606, slip op. at 1, (Ind. Ct. App. April 7, 2011), *trans. denied*.

[3] The subject apartment was rented by Taneka Dunn. She was home with her girlfriend, Shanika Smith, and guests Landrum and Keith Taylor, when two men entered. Taylor, the intended robbery target, saw that the intruders were armed, and he jumped out of an upstairs window. The intruders fled without taking any property from Taylor or the apartment. Neighbor Anthony Hall ran out of his apartment armed with a golf club, which he brandished at the fleeing men. None of the individuals involved reported the incident to the Kokomo police.

[4] Very early the next morning, an event took place that law enforcement would consider to be related to the attempted robbery. A group of young men pursued a vehicle occupied by Abby Rethlake, Morgan Vetter, and Mark Matthews, and fired multiple shots into the vehicle. Rethlake was killed and the other passengers were wounded. Kokomo Police Detective Michael Banush was assigned to be the lead investigator.

[5] Luckett returned to Chicago and was soon incarcerated on an unrelated charge. At some point, Luckett was assigned a prison cellmate who recorded conversations between himself and Luckett. After Luckett incriminated himself with regard to illegal activities in Kokomo, Detective Banush met with Luckett for a series of interviews.

[6] Initially, Luckett gave a statement denying his involvement in the Rethlake murder or attempted robbery of Taylor. He later communicated that he wanted "a deal" and, when given the "deal," Luckett "changed his mind" about providing a full statement. (P.C.R. Ex. Vol. II, pg. 82.) Detective Banush conducted a detailed interview with Luckett, with Detective Banush having been informed that Luckett's attorney and the Howard County Prosecutor had reached an agreement about Luckett's legal jeopardy. Detective Banush understood that Luckett had been promised immunity for any past criminal conduct other than the shooting of Morgan Vetter[2] and that Luckett had signed an agreement to that effect. Accordingly, Detective Banush informed Luckett that "he basically had immunity for anything he had done in the past." (*Id.* at 91.) However, as was customary, Detective Banush was not provided with a copy of a signed agreement. Apparently, none existed at that time.[3]

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[2] Forensic evidence indicated that Luckett's gun was used to shoot Vetter but not Rethlake. Yates was identified as the vehicle driver who purportedly did not fire his weapon.

[3] According to counsel's disclosures in post-conviction proceedings, Luckett's attorney has since been disbarred in the State of Indiana, and – facing criminal charges for theft of client monies – absconded to Australia.

[7] Based upon Luckett's police statement, in June of 2009, both Luckett and Yates were charged with the attempted robbery of Taylor. A trial date was set for Yates. Prior to that trial, Luckett provided grand jury testimony with regard to Rethlake's murder. Luckett acknowledged that the Prosecutor was asking the grand jury to indict Luckett for Murder, Attempted Murder, Conspiracy to Commit Murder, and Aggravated Battery. He testified that he participated in the criminal activity because he believed that "Pudge" was in danger from a rival gang and the rivalry would also endanger Luckett and his associates. He also testified that he expected to serve an aggregate term of fifteen years' imprisonment. The grand jury testimony was sealed upon the Prosecutor's request.

[8] Yates was brought to trial on the Attempted Robbery charge on November 2, 2009. Because the crime had not been timely reported, there was a lack of physical evidence. The case turned upon identification of Luckett's accomplice. Luckett testified that Yates was his accomplice.

[9] Landrum testified that he did not see who entered the apartment, and Smith claimed to have "no idea" who the perpetrators were. (P.C.R. Ex. Vol. II, pg. 40.) Dunn, who knew Yates and had dated his brother, expressed her "feeling" that Yates was the person with Luckett, based upon hairstyle and eyes. (*Id.* at 17.) Taylor testified that Yates was not one of the men who had attempted to rob him. Taylor acknowledged that he had written a letter to the Prosecutor to that effect. According to Taylor, Luckett's accomplice was a heavy-set, light-skinned black man with long hair. Taylor estimated the weight of the

accomplice at 250 to 270 pounds, heavier than Yates. Finally, Hall testified that police had shown him a photograph of Yates and he could not identify "anything about [Yates]." (*Id.* at 230.) Hall, who ran from his apartment without his glasses, did not claim that he could see the men in detail, but rather that he could see their size. According to Hall, the men were "roughly the same size." (*Id.* at 235.)

[10] As for his agreement with the State, Luckett informed the jury that he would be serving fifteen years' imprisonment. He testified that he would be pleading guilty to Armed Robbery but also testified that the charge would be dismissed. In a conference outside the presence of the jury, a discussion ensued as to whether more information should be elicited to apprise the jury of the extent to which Luckett had been incentivized to testify. According to the Prosecutor, Luckett "answered that question" of whether he "intended to plead guilty to the charges in this case." (*Id.* at 95.) With reference to "other cases Luckett is cooperating in," the Prosecutor's position was that "I don't want to get into that." (*Id.* at 96.) Defense counsel expressed concern about potentially propounding questions that violated the motion in limine which he had drafted (seeking to exclude from the jury information that Yates had been charged with the Rethlake murder) but asserted that his client had a right to expect the Prosecutor to make a broader disclosure "without me relying upon Mr. Luckett." (*Id.*)

[11] The trial court agreed with defense counsel that he could explore the unwritten agreement in more depth but warned defense counsel of acting at "his own

peril" if he chose to ask, "how much time is getting chopped off." (*Id.* at 98-99). The trial court reasoned:

> I don't think the State needs to get into the details and the exact charges that are being dismissed but the fact that he is pleading guilty to other charges and the conviction will result in another, you know, will result from another charge but he's taking fifteen years in connection with a blanket plea involving this case, is I think proper and that's where you get to.

(*Id.* at 99-100.) The trial court ruled that the Prosecutor could speak in "generalities" and there was an "implication" that Luckett was "getting much more in return for his testimony." (*Id.* at 102-03.) Ultimately, the jury learned of Luckett's detriment under the agreement – a prison term of fifteen years – but did not learn of the benefits rendered him under the agreement – resolution of much greater legal jeopardy.

[12] The jury convicted Yates as charged, and he was sentenced to twenty years' imprisonment. As for Luckett, the charge of Attempted Robbery was dismissed. Also, the Prosecutor declined to act upon the grand jury indictments of Luckett for Murder, Attempted Murder, or Conspiracy to Commit Murder. Some pending charges of Auto Theft and Receiving Stolen Property were dismissed. Approximately one year after his testimony, Luckett was a party to a written plea bargain recommendation whereby Luckett would plead guilty to Aggravated Battery for shooting Vetter and would be sentenced to "up to" fifteen years in prison. (P.C.R. Tr. at 16.) Luckett received a sentence of fifteen years with three years suspended. When Luckett was released from prison after

serving less than six years, he received the balance of the Abby Rethlake Reward Fund.

[13] Yates filed a belated appeal, and his conviction and sentence were affirmed. On June 18, 2013, Yates filed a pro-se petition for post-conviction review. With assistance of counsel, Yates filed an amended petition in 2020. He alleged that he was denied effective assistance of trial and appellate counsel, denied exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, (1963), and denied due process of law when false evidence stood uncorrected, contrary to the rationale of *Napue*.

[14] The post-conviction court heard evidence on December 18, 2020, and May 28, 2021. On November 22, 2021, the post-conviction court entered its findings of fact, conclusions thereon, and order denying Yates post-conviction relief. He now appeals.

Discussion and Decision

Standard of Review

[15] The petitioner for post-conviction relief must establish that he is entitled to relief by a preponderance of the evidence. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). "Because he is now appealing a negative judgment, to the extent his appeal turns on factual issues, [the petitioner] must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Id*. We accept the post-

conviction court's findings of fact unless clearly erroneous but accord no deference to conclusions of law. *Turner v. State*, 974 N.E.2d 575, 581 (Ind. Ct. App. 2012), *trans. denied*. We will reverse the post-conviction court's decision only if the evidence is without conflict and leads to a conclusion opposite that reached by the post-conviction court. *Id*. at 581-82.

Analysis

[16] Yates asserts that his fundamental due process rights were violated when the State obtained a tainted conviction by failing to correct Luckett's incomplete and misleading testimony. He directs our attention to *Napue*, which recognized that the State's use of false material evidence violates a defendant's Fourteenth Amendment rights.

[17] We decline to address a freestanding claim of fundamental trial error. As explained by our Indiana Supreme Court:

> It was wrong to review the fundamental error claim in a post-conviction proceeding. As we explained in *Canaan v. State*, 683 N.E.2d 227, 235 n. 6 (Ind.1997), the fundamental error exception to the contemporaneous objection rule applies to direct appeals. In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.

Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). In this case, trial counsel's attempts to clarify the terms of Luckett's deal were thwarted at trial, and the grand jury records were unsealed only after Yates's trial for Attempted

Robbery. In these circumstances, we address Yates's *Napue* claim not as freestanding error, but rather in the context of whether he received effective assistance of appellate counsel, who was in a position to raise the issue.

[18] The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel performed deficiently and that the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997). To satisfy the first prong, the petitioner must show that counsel's performance was deficient in that counsel's representation fell below an objective standard of reasonableness and that counsel committed errors so serious that petitioner did not have the "counsel" guaranteed by the Sixth Amendment. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). To show prejudice, the petitioner must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different. *Id*.

[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. *Fisher v. State*, 810 N.E.2d 674, 677 (Ind. 2004). To show that counsel was ineffective for failing to raise an issue on appeal thus resulting in waiver for collateral review, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). To evaluate the performance prong when counsel waived issues upon appeal, we apply the following test: (1)

whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Id.* (citing *Timberlake v. State*, 753 N.E.2d 591, 605–06 (Ind. 2001), quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir.1986)). If the analysis under this test demonstrates deficient performance, then we examine whether, "the issues which ... appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." *Id*. Further, we must consider the totality of an attorney's performance to determine whether the client received constitutionally adequate assistance. *Id.*

[20] Here, appellate counsel raised issues of whether the trial court abused its discretion by denying a defense motion for a continuance and whether Yates's sentence was inappropriate. These issues had little chance of success. The motion for a continuance had been filed because Yates insisted that his trial counsel was not prepared for trial. However, trial counsel assured the trial court that he was prepared for trial. And it was highly unlikely that the twenty-year sentence would be found to be inappropriate in light of Yates's criminal history and his conduct during the trial. That is, Yates was recorded entreating a friend to influence or intimidate a juror.

[21] We next consider whether a claim that Yates was denied due process because the jury never learned that the primary witness against him avoided approximately 200 years of incarceration in exchange for his testimony constituted a stronger appellate issue. With reference to *Napue* and its progeny, it is well established that "a conviction obtained through use of false evidence,

known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. at 269 (internal citations omitted). "Evidence of any understanding or agreement as to a future prosecution would be relevant to [witness] credibility and the jury was entitled to know of it." *Giglio v. United States*, 405 U.S. 150, 155 (1972). In the United States Supreme Court decision of *Napue*, *supra*, the promised consideration was a recommendation for, and a promise to effectuate, if possible, a reduced sentence. 360 U.S. 264.

[22] A defendant's Fourteenth Amendment due process rights are violated when the prosecution knowingly uses false testimony without disclosing its falsity or attempting to correct the false testimony. *Smith v. State*, 34 N.E.3d 1211, 1219 (Ind. 2015) (citing *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957), where the defendant's defense would have been corroborated had the witness testified truthfully, but the prosecutor knowingly allowed false testimony to go uncorrected); *Miller v. Pate*, 386 U.S. 1, 6-7 (1967) (where the Court found that the prosecutor had deliberately misrepresented the truth).

> The main thrust of the case law in this area focuses on whether the jury's ability to assess all of the facts and the credibility of the witnesses supplying those facts has been impeded to the unfair disadvantage of the defendant. Active or passive behavior by the State that hinders the jury's ability to effectively act as the fact-finder is impermissible and may violate a defendant's due process rights.

Smith, 34 N.E.3d at 1220. As stated in *Napue*:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

360 U.S. at 269.

[23] The trial record herein, in conjunction with grand jury testimony (unsealed by the time of Yates's belated appeal), plainly supports an argument that there was misrepresentation uncorrected by the State. Indeed, the Prosecutor actively argued against revealing the breadth of Luckett's incentivization, and the trial court strongly discouraged defense counsel from continued exploration. The ultimate ruling was that the jury would learn of generalities not specifics.

[24] That said, however, *Napue* incorporates a finding of materiality of the evidence. As a panel of this Court has explained:

> A finding of materiality is required. In the case of perjured testimony, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the fact finder. In a case characterized by a pretrial request for specific information, the test of materiality is whether the suppressed evidence might have affected the outcome of the trial.

Deatrick v. State, 392 N.E.2d 498, 501 (Ind. Ct. App. 1979).

[25] Here, Luckett's credibility was crucial. The State lacked physical evidence and rested its case almost entirely upon Luckett's identification of Yates as his accomplice. Dunn's identification of Yates was couched in terms of thinking and guessing. She thought she recognized some of Yates' hair escaping from a wig, the wearing of which Luckett could not verify.[4] Two of Dunn's house guests were called as witnesses but could not provide identification testimony. The intended victim appeared as a defense witness and testified that Yates was not one of the intruders; rather, the intruders were Luckett and a heavy-set man. Taylor acknowledged having written to the Prosecutor in an attempt to clear Yates of suspicion. Dunn's neighbor, who had confronted the intruders, testified for the defense that he was unable to recognize anything familiar when presented with a photograph of Yates.

[26] Had the jury been accurately informed of Luckett's criminal exposure and the benefit he received in exchange for his testimony, Luckett's credibility could well have been undermined. And his credibility was central to Yates's conviction. Under these circumstances, we conclude that the unraised due process claim was clearly more likely to result in reversal than the issues raised.

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[4] Luckett testified that Yates wore a hoodie and wrapped a white t-shirt around his face. When the prosecutor asked if either of them had a wig, Luckett responded: "Not that I can recall. I think one of us did have a wig, now that you mentioned it. I'm not a hundred percent sure if I had the wig on or if Foolish had the wig on. I can't remember about the hair part … but it does ring a bell though." (P.C.R. Ex. Vol. II, pgs. 79 – 80.)

Conclusion

[27] Under the circumstances of this case, appellate counsel performed deficiently by failing to raise a due process issue. Yates was prejudiced by the omission. Because Yates did not receive effective assistance of appellate counsel, we reverse the denial of his petition for post-conviction relief and remand for retrial.

[28] Reversed and remanded.

Najam, J., and Bradford, C.J., concur.