MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE
COURT OF APPEALS OF INDIANA

John Jay Lacey,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

March 9, 2022

Court of Appeals Case No. 21A-PC-783

Appeal from the Boone Superior Court

The Honorable Matthew C. Kincaid, Judge

Trial Court Cause No. 06D01-2009-PC-1069

Brown, Judge.

[1] John Jay Lacey, pro se, appeals the denial of his petition for post-conviction relief. We affirm.

Facts and Procedural History

[2] On June 22, 2016, the State charged Lacey with aggravated battery as a level 3 felony.[1] *Lacey v. State*, No. 19A-CR-2715, slip op. at 1 (Ind. Ct. App. August 17, 2020). The State later alleged he was an habitual offender.[2] *Id*. The State and Lacey entered into a plea agreement filed with the court on November 18, 2016, in which Lacey agreed to plead guilty as charged and the State agreed not to file any additional charges. *Id*. The agreement provided for an open sentence but limited the habitual offender enhancement to fourteen years. *Id*. On December 14, 2016, the court held a hearing at which it questioned Lacey, informed him of the allegations, possible penalties, and rights he would give up by pleading guilty, reviewed the terms of the plea agreement, including the possible maximum sentence under the agreement, and confirmed that Lacey understood the terms. Lacey pled guilty pursuant to the terms of the plea agreement, and the prosecutor elicited testimony from Lacey to establish a factual basis. The court found that Lacey understood the charges and the

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[1] In its findings of fact, the post-conviction court stated "Lacey stabbed a homeless woman who was living in a makeshift camp behind the Kentucky Fried Chicken Restaurant in Lebanon, Indiana." Appellant's Appendix Volume VI at 48.

[2] An entry on June 30, 2016, in the chronological case summary ("CCS") states that, following a request for a public defender, the court appointed Dennis Williams ("Attorney Williams"). An entry on July 11, 2016, states the court held an "Initial Hearing on Notice of Intent to Seek Habitual Offender Status," Lacey appeared, and "Counsel for Defendant appears." Appellant's Appendix Volume II at 63. An entry on August 29, 2016, indicates Brett B. Gibson ("Attorney Gibson") filed an appearance as counsel for Lacey.

possible penalties, his guilty plea was freely and voluntarily made, a factual basis had been established, Lacey appeared lucid, answered at times in complete sentences, and consulted with his attorney, and there was no reason for the court to think there was any incapacity. The court took the plea under advisement. On February 15, 2017, the court held a hearing, confirmed that the parties wished for the court to accept the plea agreement, accepted the plea agreement, found that Lacey was violent and his crime was calculated, and sentenced him to fifteen years for aggravated battery and enhanced the sentence by thirteen years for an aggregate sentence of twenty-eight years. *Id*.

[3] In August 2018, Lacey filed a motion to correct erroneous sentence asserting the two previous crimes in the State of Florida were insufficient to support the habitual offender enhancement, and the court denied the motion. *Id*. On appeal, Lacey argued that his habitual offender enhancement was improper. He also asserted that, "[b]ecause the Habitual Offender Enhancement was applied erroneously, the Plea Agreement . . . by extension should be considered erroneous, null and void" and requested this Court to "[t]hrow out the . . . plea agreement." Cause No. 18A-CR-2623, Appellant's Brief at 11, 16. We held there was insufficient evidence to support the habitual offender enhancement. *Lacey v. State*, 124 N.E.3d 1253, 1257 (Ind. Ct. App. 2019). We found that, at the time of Lacey's sentencing in February 2017, Indiana law provided that a person convicted of a level 1 through level 4 felony was an habitual offender if at least one of the prior unrelated felonies was not a level 6 felony, a level 6 felony conviction was defined to include a conviction in any jurisdiction other

than Indiana with respect to which the convicted person might have been imprisoned for more than one year, Lacey might have been imprisoned for more than one year for each of the Florida convictions and therefore those convictions were treated as level 6 felonies, and the Florida convictions could not support an habitual offender enhancement. *Id*. at 1256-1257. We remanded for resentencing. *Id.* at 1257.

[4] On July 17, 2019, the trial court held a sentencing hearing on remand.[3] The prosecutor stated "I believe that the Court of Appeals has instructed basically that . . . the thirteen year portion of this sentence be vacated and that Mr. Lacey be sentenced . . . according to the level three felony that this Court sentenced him on back in two thousand seventeen" and asked the court "to incorporate that February [15, 2017] hearing, but there is . . . no additional or new information that the State wishes to present." Appellant's Appendix Volume II at 153. Lacey's defense counsel indicated he had no objection to the court incorporating the prior sentencing hearing, and the court took notice of and incorporated the sentencing hearing. The court asked if the defense had anything to present on sentencing, and Lacey's defense counsel, Attorney Abels, stated: "No, we don't, Your Honor. We are requesting that the Court sentence him to the original fifteen years on the felony three sentence also." *Id*. The court vacated its previous finding that Lacey was an habitual offender and

[3] An entry in the CCS on June 25, 2019, indicates Matthew Abels filed an appearance for Lacey.

ordered that his sentence of fifteen years for aggravated battery as a level 3 felony remain.

[5] On September 11, 2019, Lacey filed a motion to vacate conviction, which the court denied. *Lacey*, No. 19A-CR-2715, slip op. at 1. On September 25, 2019, Lacey filed a Motion to Vacate Plea Agreement asserting the habitual offender allegation was the determining factor and benefit in signing the plea agreement, he was not advised by counsel that the habitual offender enhancement was erroneous, and he was no longer receiving the benefit of the sentence cap on the habitual offender enhancement, and the court denied the motion. *Id*. On appeal, this Court remanded for the trial court to treat Lacey's request to vacate judgment and withdraw the plea as a petition for post-conviction relief. *Id*. at 3.

[6] On October 16, 2020, Lacey filed an Amended Motion to Set Aside Guilty Plea to Vacate Plea Agreement and Conviction. He argued he was deprived of effective assistance of counsel by his trial attorneys. He argued Attorney Williams did not object to the State's filing of the habitual offender enhancement, his plea was not entered knowingly, intelligibly, or voluntarily due to Attorney Gibson's failure to inform him that he did not qualify as an habitual offender, and Attorney Abels did not inform him "that the entire plea had been rendered void by the fact the Indiana Court of Appeals reversed the habitual offender finding . . . which frustrated the entire agreement" and "failed to object to the Court's decision to leave [the aggravated battery conviction] in place." Appellant's Appendix Volume II at 18.

[7] On February 5, 2021, the court held a hearing at which it heard testimony from Attorney Gibson. On March 12, 2021, the court denied Lacey's petition.

Discussion

[8] Lacey is proceeding pro se. A pro se litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented. *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). Lacey contends he should be allowed to withdraw his guilty plea and cites Ind. Code § 35-35-1-4(c). With respect to his plea agreement, he asserts "the prohibited and valid provisions of his plea agreement are not severable," "[t]o sever the provisions frustrates the entire contract," and his counsel did not request that the entire plea agreement be vacated. Appellant's Brief at 63. He also argues he was denied the effective assistance of counsel because he was not informed that his Florida convictions would not support an habitual offender enhancement and his counsel on resentencing did not move to set aside his plea.

[9] The State argues that Lacey invited any error related to his sentence, the purpose of the plea agreement was not frustrated by the excision of the habitual offender enhancement, and the remainder of the agreement was enforceable. It argues Lacey did not show that his trial attorneys were ineffective, it would have filed an attempted murder charge if the plea agreement were rejected, there was a strategic reason for not challenging the agreement, and Lacey did not show he was prejudiced.

[10] In order to obtain relief on post-conviction, 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). 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). A reviewing court accepts the post-conviction court's findings of fact unless they are "clearly erroneous." *Davidson v. State*, 763 N.E.2d 441, 443-444 (Ind. 2002). 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, 468-469 (Ind. 2006). "Although we do not defer to the post-conviction court's legal conclusions, a post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Hollowell v. State*, 19 N.E.3d 263, 269 (Ind. 2014) (citation and internal quotations and brackets omitted).

[11] Ind. Code § 35-35-1-4(c), to which Lacey cites, provides:

> [U]pon motion of the convicted person, the court shall vacate the judgment and allow the withdrawal whenever the convicted person proves that withdrawal is necessary to correct a manifest injustice . . . . For purposes of this section, withdrawal of the plea is necessary to correct a manifest injustice whenever:
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> (1) the convicted person was denied the effective assistance of counsel;
> (2) the plea was not entered or ratified by the convicted person;
> (3) the plea was not knowingly and voluntarily made;

> (4) the prosecuting attorney failed to abide by the terms of a plea agreement; or
> (5) the plea and judgment of conviction are void or voidable for any other reason.

"Manifest injustice" is necessarily an imprecise standard, and an appellant seeking to overturn a trial court's decision faces a high hurdle under the current statute and its predecessors. *See Coomer v. State*, 652 N.E.2d 60, 62 (Ind. 1995). "The trial court's ruling on a motion to withdraw a guilty plea arrives in this Court with a presumption in favor of the ruling." *Id*. *See also Davis v. State*, 770 N.E.2d 319, 326 (Ind. 2002) ("Trial court rulings on such requests are presumptively valid."), *reh'g denied.*

A. *Plea Agreement*

[12] Lacey claims that his guilty plea must be set aside because this Court's reversal of the habitual offender finding "frustrate[d] the entire contract." Appellant's Brief at 63. We first observe that, at the July 17, 2019 hearing following remand, Lacey's counsel indicated that Lacey did not have anything to present on sentencing and expressly stated: "We are requesting that the Court sentence [Lacey] to the original fifteen years on the felony three sentence also." Appellant's Appendix Volume II at 153. Lacey thus affirmatively requested the sentence of fifteen years entered by the trial court on resentencing. If the court had set aside Lacey's plea as to aggravated battery, the State may have filed an attempted murder charge and significantly increased his penal exposure. There is some evidence that Lacey's request was part of a deliberate strategy and,

accordingly, we find that Lacey invited any error. *See Batchelor v. State*, 119 N.E.3d 550, 557-558 (Ind. 2019) (noting a "party will not be permitted to take advantage of errors which he himself committed or invited or induced the trial court to commit, or which were the natural consequences of his own neglect or misconduct" and "to establish invited error, there must be some evidence that the error resulted from the appellant's affirmative actions as part of a deliberate, well-informed trial strategy") (citations and internal quotations omitted).

[13] Even assuming Lacey did not invite any error, we observe that the trial court was not required to set aside Lacey's plea. On appeal from the denial of his motion to correct erroneous sentence, Lacey asserted that, because his habitual offender enhancement "was applied erroneously," his plea agreement should have been "considered erroneous," and he requested this Court to set aside the plea agreement. Cause No. 18A-CR-2623, Appellant's Brief at 11, 16. In our May 23, 2019 opinion, we reversed the habitual offender enhancement and remanded for resentencing, but we did not conclude the plea agreement was unenforceable in its entirety. *See Lacey*, 124 N.E.3d at 1256-1257. We thus did not agree with Lacey that the remainder of his plea agreement must be set aside. To the extent this Court has considered and rejected Lacey's argument in his previous appeal that the remainder of his plea agreement must be set aside, we are not required to revisit his argument. *See Cutter v. State,* 725 N.E.2d 401, 405 (Ind. 2000) (observing the "doctrine of the law of the case is a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially the same

facts" and the doctrine is applied only "to those issues actually considered and decided on appeal"), *reh'g denied*. Even if we revisit his claim, we find his argument to be unpersuasive and that reversal is not warranted.

[14] A plea agreement is contractual in nature and binds the defendant, the State, and the trial court. *Lee v. State*, 816 N.E.2d 35, 38 (Ind. 2004). If a contract contains "an illegal provision that can be eliminated without frustrating the basic purpose of the contract, the court will enforce the remainder of the contract." *Id*. at 39. "Although we acknowledge that a sentencing provision is an important component of a plea agreement, we do not agree that severing the sentence provision necessarily does violence to the remainder of the agreement. This is so because the *consequences* of a guilty plea are collateral to the paramount issue of guilt or innocence." *Id*. (citation and quotations omitted). "Thus, where a defendant enters a plea of guilty knowingly, intelligently, and voluntarily, there is no compelling reason to set aside the conviction on grounds that the sentence is later determined to be invalid." *Id*.

[15] Here, Lacey acknowledges the State threatened to charge him with attempted murder. *See* Appellant's Brief at 47, 56-57. The record reveals the court reviewed the plea agreement with Lacey and confirmed that he understood its provisions and entered the plea agreement knowingly and voluntarily. At the post-conviction hearing, Attorney Gibson testified that "the Prosecutor had threatened to file an attempted murder charge if [Lacey] didn't take the plea," he and Lacey "discussed the value of taking a plea with the habitual versus risking [the State] filing an attempted murder charge," the State "had a letter

from an inmate at the jail . . . where the inmate was . . . prepared to testify that [Lacey was] bragging at the jail [that he] intended to kill the victim," and he and Lacey "compared the math of what that would be because it was clear with the evidence there that [Lacey] would be convicted on the attempted murder." Transcript Volume II at 11-12. He further testified: "I have notes that we discussed they were going to file an attempted charge against [Lacey] that would have placed [him] at . . . a much higher sentence than anything we could've done on the current charges and that was a driving force to plead it." *Id*. at 14. He testified: "Our conversation would've been here is what you face on the current charges, here is what you face if they file the attempted murder, and the probability of winning a trial is [] zero in my opinion." *Id*. at 15. He testified there was an inmate who said that Lacey "was bragging at the jail that he intended to kill the victim and that he would finish her off when he got out of jail," "the victim almost did die," "the plea negotiations involved if you don't take a deal we are going to file attempted murder," and "that put a lot of pressure on pleading to avoid the consequences of a conviction for that high-level offense." *Id*. at 21.

[16] By agreeing to the terms of the plea agreement, Lacey significantly reduced his penal exposure.[4] With the reversal of the habitual offender enhancement, the

[4] Lacey faced a maximum sentence of thirty years under the plea agreement (a maximum of sixteen years for his level 3 felony and a maximum habitual offender enhancement, as capped, of fourteen years). *See* Ind. Code § 35-50-2-5(b) (a person who commits a level 3 felony shall be imprisoned for a fixed term of between three and sixteen years with the advisory sentence being nine years). If he were convicted of attempted

enforcement of "the remainder of the contract," *see Lee*, 816 N.E.2d at 39, specifically, the provisions that Lacey agreed to plead guilty to aggravated battery as a level 3 felony and in exchange the State agreed not to file any additional charges, resulted in Lacey receiving an even more significant reduction of his penal exposure.[5] The court sentenced Lacey to fifteen years for his level 3 felony conviction. Lacey received the benefit of his plea bargain. Lacey has not overcome the presumption of validity accorded the trial court's ruling. Based upon the record, the reversal of Lacey's habitual offender enhancement did not frustrate the basic purpose of the plea agreement and reversal is not warranted on this basis.

B. *Ineffective Assistance*

[17] To succeed on ineffective assistance of counsel claims, Lacey must show: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficiency was so prejudicial as to create a reasonable probability the outcome would have been different absent counsel's errors. *See Hollowell*, 19 N.E.3d at 268-269 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)). Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. *Weisheit v. State*,

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murder, he would have faced a maximum sentence of forty years. *See* Ind. Code § 35-41-5-1 (attempted murder is a level 1 felony); Ind. Code § 35-50-2-4(b) (a person who commits a level 1 felony shall be imprisoned for a fixed term of between twenty and forty years with the advisory sentence being thirty years).

[5] At resentencing, the court sentenced Lacey for aggravated battery as a level 3 felony. *See* Ind. Code § 35-50-2-5(b) (maximum sentence of sixteen years for a level 3 felony); Ind. Code § 35-50-2-4(b) (maximum sentence of forty years for a level 1 felony).

109 N.E.3d 978, 983 (Ind. 2018), *reh'g denied*. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 6 (2003). Failure to satisfy either prong will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.* "Reasonable strategy is not subject to judicial second guesses." *Burr v. State*, 492 N.E.2d 306, 309 (Ind. 1986). *See also Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998) ("This Court will not lightly speculate as to what may or may not have been an advantageous trial strategy as counsel should be given deference in choosing a trial strategy which, at the time and under the circumstances, seems best.") (citation omitted).

[18] Here, the post-conviction court found that "[Attorney] Gibson, like the prosecutor, was of the mistaken belief that Mr. Lacey's prior criminal history formed a factual basis for a habitual offender enhancement." Appellant's Appendix Volume VI at 52. The court found Attorney Gibson told Lacey that, if he did not plead guilty, the State would file an attempted murder charge against him and Attorney Gibson testified "this was a significant factor in both his advice to Mr. Lacey and for Mr. Lacey to ultimately . . . plead guilty." *Id.* at 54. The court found Attorney Gibson's testimony to be credible. The court found "Lacey avers that he would not have plead [sic] guilty to aggravated battery if he had known that his sentence could not be enhanced by a habitual offender finding" and "[t]he Court does not believe this statement." *Id.* The

court found "[t]he reason the Court does not believe it is that if Mr. Lacey had not pled guilty the State would have filed an attempted murder charge," "[t]he maximum sentence Mr. Lacey might have gotten (which he did not get) would have been just the advisory sentence for a conviction for attempted murder – a real possibility and concern of his counsel," "[a]ggravating circumstances of his prior convictions in Florida and other aggravating circumstances might have led to a sentence above the advisory thirty years," and "[i]t is more likely than not that Mr. Lacey would have pled guilty to aggravated battery anyway." *Id.* at 55. The court found Lacey "has not proven that he was prejudiced by any failure of his lawyer to correctly advise him about the insufficiency of the habitual offender factual basis." *Id.* The court also found that, "[e]ven with the setting aside of the habitual offender, both sides to the contract – what was a largely open plea agreement with a cap on sentencing less than the statutory maximum for a habitual offender – got what they bargained for" and that Lacey "has no prejudice insofar as he bargained to be convicted of a level 3 felony and of being a habitual offender and now he has not been found to be a habitual offender and instead is only convicted of a level 3 felony." *Id.* at 55-56.

[19] Attorney Gibson testified that the prosecutor had threatened to file an attempted murder charge against Lacey, described the evidence the State could have introduced in support of an attempted murder charge, and testified that he and Lacey compared the possible sentences which Lacey could receive. Attorney Gibson also testified that it was clear from the evidence that Lacey would have been convicted of attempted murder. The record reveals that Lacey

obtained a significant benefit by pleading guilty pursuant to the plea agreement and that, with the reversal of the habitual offender enhancement, the enforcement of the remainder of the plea agreement resulted in Lacey receiving an even more significant benefit. Attorney Abels did not move to set aside the plea agreement in its entirety, and the court resentenced Lacey to a term of fifteen years for his level 3 felony conviction. The post-conviction court found that Lacey did not show he was prejudiced by any failure of his counsel to correctly advise him about the insufficiency of the habitual offender factual basis. As for the assertion his defense counsel should have requested that the court set aside his plea at resentencing, as noted above the reversal of the habitual offender enhancement did not frustrate the basic purpose of the plea agreement and thus the court was not required to set aside the remainder of the plea agreement. Further, with the setting aside of the habitual offender enhancement, Lacey still received the benefit of his plea bargain as found by the post-conviction court and cannot establish that he was prejudiced by his counsel not requesting that his level 3 felony be set aside. Based upon the record, we cannot say that Lacey has overcome the presumption in favor of the ruling below or that the evidence unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court.

[20] For the foregoing reasons, we affirm the denial of Lacey's petition.

[21] Affirmed.

May, J., and Pyle, J., concur.