

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert L. McCoy,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

March 22, 2023

Court of Appeals Case No.
22A-PC-1980

Appeal from the Boone Circuit
Court

The Honorable Lori N. Schein,
Judge

Trial Court Cause No.
06C01-2109-PC-1166

Memorandum Decision by Judge Riley.
Chief Judge Altice and Judge Pyle concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Robert McCoy (McCoy), appeals the post-conviction court's Order, denying his petition for post-conviction relief.

[2] We affirm.

ISSUE

[3] McCoy presents this court with one issue, which we restate as: Whether the post-conviction court's denial of his petition for post-conviction relief is clearly erroneous.

FACTS AND PROCEDURAL HISTORY

[4] The facts pertaining to McCoy's underlying conviction, as previously determined by this court on direct appeal, are as follows:

On February 11, 2018, Lebanon Police officers responded to a call about a suspicious individual at the Kroger grocery store in Lebanon, Indiana. At approximately the same time, Kroger's store manager, Bryan Brooks (Brooks), was called to the front of the store by another employee to address a distressed male who was being followed by other individuals. When the officers arrived, Officer Aaron Carlson (Officer Carlson) noticed a black male, later identified as McCoy, speaking on the phone at the north entrance of the store. After making eye contact, McCoy briefly entered the store. When officers caught up with McCoy after he exited the store again, McCoy provided them with his name and date of birth and asked if they wanted to search him. McCoy did not have any warrants, and he was not placed under arrest or searched. McCoy explained that his vehicle had broken down on the road next to a local Popeye's restaurant and he was looking for help. Officer Carlson became suspicious as he had

passed that location on his way to Kroger and had not noticed a broken-down car. Officer Tyreese Griffin (Officer Griffin) walked with McCoy to the vehicle at Popeye's, which was running and had another individual in the driver seat. Officer Griffin briefly detained McCoy and the other individual based on the officer's suspicion of marijuana being in the vehicle. Finding no marijuana, Officer Griffin released both persons. At some point while the officers were accompanying McCoy, a Kroger customer informed Brooks that there was a firearm in one of the black shopping baskets near the north entrance of the store. After investigation, Brooks found a black automatic handgun inside the basket—nothing else was in the basket. Brooks secured the firearm and asked another employee to notify the officers who were still on the premises. Brooks—without wearing gloves—carried the firearm to the parking lot, where the officers properly secured and packaged the firearm for evidence. The following day, Brooks provided the officers with surveillance video from the area where the firearm was located.

McCoy v. State, 153 N.E.3d 363, 365 (Ind. Ct. App. 2020).

- [5] On February 20, 2018, the State filed an Information, charging McCoy with two felonies: Level 4 felony unlawful possession of a firearm by a serious violent felon and Level 5 felony carrying a handgun without a license. McCoy elected to proceed pro se. McCoy deposed Brooks and learned that Brooks had previously been an officer with the Juno Beach Police Department (JBPD) in Florida. On January 23, 2020, the trial court granted McCoy's request to issue a subpoena duces tecum to the JBPD for Brooks' employment records. On January 29, 2020, the trial court convened McCoy's bench trial. The JBPD had not yet complied with the subpoena. The following evidence was heard by the trial court:

Officer Carlson testified that while watching the surveillance video of the area where the firearm was located, he noticed McCoy walk up to the shopping baskets, but was unable to distinguish what the object was in McCoy's hand. Officer Griffin informed the trial court that in the video he observed McCoy remove an object that he believed to be a firearm and place it in the Kroger shopping basket. During cross-examination of Detective Bryan Spencer (Detective Spencer), Detective Spencer testified that based on the facts gathered during the examination, he was confident that the object McCoy pulled from his waistband and placed in the basket was a firearm. Likewise, Brooks concurred that in the video he saw McCoy place a firearm in the shopping basket.

Id. at 365-66 (transcript citations omitted). During McCoy's cross-examination of Brooks, McCoy asked Brooks about his previous employment at the JBPD. Brooks testified that he had left that job voluntarily because he was going through a divorce. Brooks denied that his departure from the JBPD had anything to do with his conduct. After the State moved to dismiss the carrying a handgun without a license charge, the trial court found McCoy guilty of Level 4 felony unlawful possession of a firearm by a serious violent felon.

[6] On February 19, 2020, McCoy filed a motion to correct error claiming that newly discovered evidence warranted a new trial. McCoy attached to his motion copies of documents he had received from the JBPD in response to the subpoena duces tecum which showed that, in 1990, Brooks had been terminated from his employment for six instances of sleeping while on duty and one incident of falsifying court records. On February 26, 2020, the trial court held McCoy's sentencing hearing. During his allocution, McCoy mentioned

the grounds for his motion to correct error and asserted that Brooks had committed perjury at trial. McCoy also remarked that his case had been complex and that the surveillance video of him at the Kroger did not show him with a firearm in his possession. Before rendering sentence, the trial court acknowledged the fact that McCoy had filed a motion to correct error and stated the following on the record:

You indicated this was a complex case, it really wasn't a complex case, Mr. McCoy. I did find you guilty beyond a reasonable doubt, but in truth there's no doubt in my mind that you were in possession of a firearm as charged by the State of Indiana. I want you to understand that. There's a video tape, it clearly shows you holding a gun and placing it in a public space where there could be children walking by and picking it up. So, I want you to understand, sir, that I do think you have done this crime and I do think it's beyond all doubt that you were in possession of a firearm by a serious violent felon.

(Trial Transcript p. 213). The trial court sentenced McCoy to ten years, with two years suspended to probation. McCoy's motion to correct error was later deemed denied when the trial court did not rule on it.

[7] McCoy pursued a direct appeal of his conviction, and on September 10, 2020, this court affirmed. On September 7, 2021, McCoy filed a petition for post-conviction relief which contained the following relevant allegations:

8. State concisely all the grounds known to you for vacating, setting aside or correcting your conviction and sentence. (See Rule [PC 1](#), Sec. 1a)

(a) Newly discovered evidence

* * *

9. State concisely and in the same order the facts which support each of the grounds set forth in (8).

(a) After the completion of trial, Petitioner received documents from the [JBPD]. Upon review of the documents, it was determined that State's witness, Bryan Brooks, was terminated from his employment as law enforcement officer for various reasons, including falsifying documents. This evidence completely contradicted Bryan Brooks['] testimony where he testified that he left his employment due to divorce. Additionally, Bryan Brooks committed perjury during the trial.

(PCR App. Vol. II, p. 7). On September 2, 2021, the State filed its Answer to McCoy's petition in which it admitted "the factual allegations contained in paragraphs . . . 8(a) and 9(a) of the Petition." (PCR App. Vol. II, p. 14). The State also answered that "[t]here is no basis in fact and no basis in law for the granting of post-conviction relief[,] and said petition should be denied." (PCR App. Vol. II, p. 14).

[8] On June 8, 2022, the post-conviction court held a hearing on McCoy's petition. The post-conviction court took judicial notice of the trial court proceedings, and copies of the trial court filings and transcripts were admitted into evidence. McCoy testified that, if he had been in possession of Brooks' employment records at the time of his trial, he would have cross-examined Brooks regarding the records and would have brought it to the trial court's attention that Brooks had committed perjury regarding his reasons for leaving the JBPD. McCoy believed that the information contained in the JBPD records "goes to [] Brooks'

credibility as a witness[.]” (PCR Transcript p. 17). McCoy argued at the post-conviction hearing that in its answers to his petition for post-conviction relief, the State had admitted that he was entitled to relief.

[9] On July 18, 2022, the post-conviction court entered its Order which was supported by the following relevant findings and conclusions:

17. The State does not dispute the fact that Brooks testified falsely.

* * *

21. Brooks’ prior employment and the reasons behind his termination are unrelated to the events which occurred on February 11, 2018 in Lebanon, Indiana.

22. As such, evidence related to Brooks’ termination from the [JBPD], if available at trial, could have only been used to impeach the testimony of Brooks by attacking Brooks’ credibility.

23. The [c]ourt therefore concludes that the newly discovered evidence is merely impeaching.

* * *

25. Other evidence produced by the State at the Petitioner’s criminal trial support[s] the Petitioner’s conviction.

26. This evidence includes testimony from other witnesses and video surveillance which captured the Petitioner’s actions in the Kroger grocery store on February 11, 2018.

27. In light of the other admitted evidence supporting the Petitioner's conviction, the [c]ourt concludes that the evidence related to Brooks' false testimony, if introduced at retrial, would not produce a different result.

(PCR App. Vol. II, pp. 25-27). The post-conviction court concluded that McCoy had failed to establish that he was entitled to relief.

[10] McCoy now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[11] Petitions for post-conviction relief are civil proceedings in which a petitioner may present limited collateral challenges to a criminal conviction and sentence. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018). In a post-conviction proceeding, the petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id.* When a petitioner appeals from the denial of his petition for post-conviction relief, he stands in the position of one appealing from a negative judgment. *Hollowell v. State*, 19 N.E.3d 263, 269 (Ind. 2014). To prevail on appeal from the denial of a petition for post-conviction relief, the petitioner must show that the evidence "as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court." *Id.* In addition, where a post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to its legal conclusions, but we will reverse its findings and judgment only upon a showing of clear error, meaning error which leaves us

with a definite and firm conviction that a mistake has been made. *Id.* In making this determination, we do not reweigh the evidence or judge the credibility of witnesses, and we consider only the probative evidence and reasonable inferences flowing therefrom that support the post-conviction court's judgment. *McKnight v. State*, 1 N.E.3d 193, 199 (Ind. Ct. App. 2013).

II. *The State's Judicial Admissions*

[12] Before we reach the merits of McCoy's post-conviction claims, we address McCoy's contention that the post-conviction court should have credited his argument that the State had admitted in its Answer to his petition that he was entitled to relief. In its appellee's brief, the State did not respond to McCoy's argument that it had admitted the merits of his case, and, therefore, McCoy urges us to apply a prima facie error standard of review. *See Posso v. State*, 180 N.E.3d 326, 336 (Ind. Ct. App. 2021) (reviewing a claim to which the State did not respond for prima facie error). However, as McCoy acknowledges, our less-rigorous standard of review applicable when the State fails to respond to an argument does not relieve us from our duty to correctly apply the law to the facts of the case. *See id.*

[13] "A judicial admission is an admission in a current pleading or made during the course of trial; it is conclusive upon the party making it and relieves the opposing party of the duty to present evidence on that issue." *Vigus v. Dinner Theater of Ind., L.P.*, 153 N.E.3d 1150, 1158 (Ind. Ct. App. 2020) (quotation omitted), *trans. denied*. To constitute a binding judicial admission, the party making the admission must clearly and unequivocally state a fact that is within

the party's knowledge. *Stewart v. Alunday*, 53 N.E.3d 562, 568 (Ind. Ct. App. 2016). In determining whether a party has made a judicial admission, we review the matter de novo and consider the party's statements and admissions as a whole. *Id.* at 570-71.

[14] Here, we agree with McCoy that the State made judicial admissions in its Answer to the petition for post-conviction relief: the State admitted that McCoy was raising a claim of newly discovered evidence which had been received after trial, Brooks had been terminated from the JBPD at least in part for falsifying court documents, and that Brooks had committed perjury when he had testified at trial in contradiction to the newly discovered evidence. These admissions bound the State, who, accordingly, did not contest these issues at McCoy's post-conviction hearing. In addition, the post-conviction court entered no findings contravening the State's admissions.

[15] Although we agree with McCoy that the State made binding judicial admissions, we disagree with him as to their effect. Contrary to McCoy's assertions, the State did not admit or concede that he was entitled to post-conviction relief. Rather, the State's admissions were limited to the factual assertions contained in McCoy's petition. Indeed, the State's answers also included its express denial that McCoy was entitled to relief, so even if we had construed the State's admissions to paragraphs 8(a) and 9(a) as conceding the merits of the petition, the State's answer that "[t]here is no basis in fact and no basis in law for the granting of post-conviction relief[,] and said petition should be denied" would have rendered those admissions non-binding. (PCR App.

Vol. II, p. 14); *see Stewart*, 53 N.E.3d at 570-71 (holding that contradictory and equivocal testimony on a factual issue precluded existence of a binding judicial admission). More importantly, as set forth in more detail below, in order to prevail on his post-conviction claim, McCoy was required to show that the newly discovered evidence was not merely impeaching and would produce a different result at retrial. The State made no admissions supporting those elements of McCoy's claim. Therefore, even under our relaxed standard of review, McCoy has failed to demonstrate that the post-conviction court erred when it did not credit his argument on this issue.

III. *Newly Discovered Evidence*

[16] Indiana Post-Conviction Rule 1(a)(4) provides that a person who has been convicted of a crime may petition for relief based on a claim “that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction . . . in the interest of justice.” A petitioner seeking relief based on newly discovered evidence must establish the following nine factors:

(1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

[17] *Taylor v. State*, 840 N.E.2d 324, 330 (Ind. 2006). We review petitions for post-conviction relief based on newly discovered evidence with great caution and

carefully scrutinize the new evidence. *Id.* The post-conviction court concluded that McCoy had failed to meet two of the nine criteria, namely, that his newly discovered evidence was not merely impeaching and that it will probably produce a different result at retrial. We address each conclusion in turn.

[18] Impeachment occurs when a witness is discredited, such as by catching the witness in a lie or by showing that the witness has been convicted of a crime. *Reeves v. State*, 174 N.E.3d 1134, 1143 (Ind. Ct. App. 2021), *trans. denied*. “The requirement that new evidence not be merely impeaching does not bar impeaching evidence that destroys or obliterates the testimony upon which a conviction was obtained.” *State v. Royer*, 166 N.E.3d 380, 399-400 (Ind. Ct. App. 2021) (internal quotes omitted). However, evidence which merely undermines a witness’s credibility, is not freestanding evidence of the defendant’s innocence, and which does not obliterate the testimony upon which the conviction was obtained is ‘merely impeaching’ for purposes of establishing a claim based on newly discovered evidence. *Reeves*, 174 N.E.3d at 1143 (upholding denial of post-conviction relief where Reeves’ new evidence of letters written by prosecution witness repudiating his own trial testimony placing Reeves at the murder scene were merely impeaching).

[19] McCoy argues that his newly discovered evidence could have been used to “attack Brooks’ credibility” and “would have been essential for the factfinder to use in determining Brooks’ credibility.” (Appellant’s Br. p. 12). McCoy’s argued use of the new evidence fits squarely within the definition of impeachment. *See Reeves*, 174 N.E.3d at 1143. Brooks’ employment records

were not freestanding evidence of McCoy's innocence, and they did not completely obliterate Brooks' or any other witness's testimony regarding the events at the Kroger on February 11, 2018. *See id.* Therefore, we cannot conclude that the post-conviction court's conclusion that McCoy's newly discovered evidence was merely impeaching was clearly erroneous.

[20] Our conclusion regarding the nature of the new evidence as being merely impeaching is an adequate basis for us to affirm the post-conviction court. *See Whedon v. State*, 900 N.E.2d 498, 504 (Ind. Ct. App. 2009) (declining to address the factors of whether newly discovered evidence was merely impeaching and would produce a different result at retrial where the evidence did not meet the factor of being credible). However, we briefly address McCoy's contentions regarding the second basis for the post-conviction court's denial of relief, that McCoy had failed to show that the introduction of the new evidence at retrial would likely produce a different result. McCoy asserts that, in light of the new evidence, the State might not call Brooks as a witness at retrial, and that without him, the State would be unable to "establish chain of custody or that a firearm was found in the shopping basket." (Appellant's Br. p. 12). Putting aside the speculative nature of this argument, it is not persuasive, as it ignores that the entire incident was captured on video, including footage which the trial court found conclusively showed McCoy placing the firearm in the basket, the store customer finding the firearm in the shopping basket, and Brooks retrieving it. McCoy does not explain what gaps might exist in the chain of custody without Brooks' testimony. In any event, the State is not required to establish a

perfect chain of custody, and any gaps in the chain merely go to the weight of the evidence and not its admissibility. *Speers v. State*, 999 N.E.2d 850, 855 (Ind. 2013). Therefore, any gap in the chain of custody resulting from Brooks' failure to testify upon retrial would not automatically result in a greater likelihood of acquittal. We can find no clear error in the post-conviction court's conclusions on this issue.

CONCLUSION

[21] Based on the foregoing, McCoy has not shown that the post-conviction court erred when it failed to grant him relief based upon the State's judicial admissions or that its denial of relief based on his newly discovered evidence was clearly erroneous.

[22] Affirmed.

[23] Altice, C. J. and Pyle, J. concur