MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jason Perry,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

November 28, 2023

Court of Appeals Case No. 23A-PC-544

Appeal from the Posey Circuit Court

The Honorable Craig Goedde, Judge

Trial Court Cause No. 65C01-1505-PC-166

Memorandum Decision by Judge Bradford
Judges Vaidik and Brown concur.

Bradford, Judge.

Case Summary

[1] In 2014, Jason Perry pled guilty to the murder of his ex-girlfriend after shooting her in front of numerous eyewitnesses, including the ex-couple's son. On May 11, 2015, Perry petitioned for post-conviction relief ("PCR"), in which he alleged that his trial counsel had provided him with ineffective assistance. Following a hearing, the post-conviction court denied Perry's PCR petition. We affirm.

Facts and Procedural History

[2] Prior to May of 2013, Perry and Jessica Tice had been involved in a volatile relationship and shared a son. On the morning of May 22, 2013, Perry and Tice were involved in an altercation at their then-thirteen-year-old son's school. After Perry left the school, he was recorded by surveillance video purchasing ammunition from Walmart. Later that morning, at 11:22 a.m., police responded to a disturbance between Perry and Tice outside of a restaurant. When police arrived, Perry "was upset about not being able to see his child." Ex. Vol. p. 50. Police were called back to the restaurant at 12:09 p.m., after receiving reports of shots fired. Witnesses informed police that Perry had shot Tice. Tice died as a result of her injuries.

[3] On May 23, 2013, Perry was charged with murder. He was subsequently alleged to be a habitual offender and subject to a firearms enhancement for using a firearm during the commission of the offense. On August 8, 2013, the

State requested that Perry be sentenced to life without the possibility of parole ("LWOP") if found guilty.

[4] On April 18, 2014, Perry pled guilty to murder and admitted to being a habitual offender. In exchange for his guilty plea, the State agreed to drop the firearms enhancement and its request for LWOP and to recommend that the trial court impose an eighty-five-year sentence. The trial court accepted Perry's guilty plea and, on May 19, 2014, sentenced Perry in accordance with the terms of the plea agreement. Perry did not file a direct appeal.

[5] Perry filed a *pro-se* PCR petition on May 11, 2015, alleging that he had received ineffective assistance of trial counsel.[1] Perry alleged that his trial counsel had provided him with ineffective assistance in the following ways: trial counsel had failed to (1) inform him of a federal firearm charge, (2) move to suppress his confession and certain evidence recovered during a search of his vehicle, (3) remedy an alleged conflict of interest, (4) adequately investigate his case, and (5) raise a defense. Perry also alleged that his trial counsel had failed to properly advise him with regard to his guilty plea, which he claims rendered his plea invalid and illusory as he did not enter into the plea knowingly, intelligently, or voluntarily. The post-conviction court conducted a two-day evidentiary hearing, after which it took the matter under advisement. On March 10, 2023, the post-conviction court denied Perry's PCR petition.

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[1] Perry filed numerous amendments to his PCR petition, the final of which was filed in August of 2019.

Discussion and Decision

[6] "Post-conviction procedures do not afford the petitioner with a super-appeal." *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). "Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules." *Id.* A petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on appeal. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001); *Collier v. State*, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999), *trans. denied*.

[7] Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from the denial of a PCR petition, a petitioner must convince this court that the evidence, taken as a whole, "leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Stevens*, 770 N.E.2d at 745. "In other words, the [petitioner] must convince this Court that there is *no* way within the law that the court below could have reached the decision it did." *Id.* (emphasis in original). "It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law." *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*. "The post-conviction court is the sole judge of the

weight of the evidence and the credibility of the witnesses." *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

I. Post-Conviction Court's Reliance on Exhibit Tendered by Perry

[8] A post-conviction court "may receive affidavits, depositions, oral testimony, or other evidence." P-C.R. 1(5). "As the admission or exclusion of evidence is with the [post-conviction court's] sound discretion, a reviewing court defers to that court and will not disturb its ruling on review unless it has abused its discretion." *Badelle v. State*, 754 N.E.2d 510, 521 (Ind. Ct. App. 2001), *trans. denied*. Once evidence is properly before the court, it "may attach whatever weight and credibility to the evidence as [it] believe[s] is warranted." *Parks v. State*, 734 N.E.2d 694, 700 (Ind. Ct. App. 2000) (internal quotation omitted), *trans. denied*. Stated differently, "[i]t is within the province of the [post-conviction court] to determine facts from evidence presented to it and then to judge the credibility of those facts." *Dobbins v. State*, 721 N.E.2d 867, 875 (Ind. 1999).

[9] Perry contends that the post-conviction court erred in relying on Exhibit R in its statement of the relevant facts. Exhibit R is a merit-review memorandum, which was prepared by an attorney for the Office of the State Public Defender. Perry acknowledges on appeal that he tendered the exhibit as evidence to the post-conviction court but claims that it was admitted "to help establish his claim that the Office of the State Public Defender did not complete a thorough

investigation" and not to "prove the truth of the factual and legal assertions contained" therein. Appellant's Br. p. 21. Thus, he claims that "the [post-conviction] court admitted the memorandum for one purpose but then used it for another." Appellant's Br. p. 22.

[10] It is undisputed that evidence may be admitted for a limited purpose. *See generally* Ind. Evidence Rule 105 (providing that if the court admits evidence that is admissible for one purpose but not another, the court must restrict the evidence to its proper scope). However, the record in this case does not support Perry's assertion on appeal that Exhibit R had been tendered or admitted into evidence for a limited purpose. As the State points out, Perry tendered Exhibit R, and it was admitted into evidence, without limitation. *See* Tr. Vol. II pp. 171–72. While Perry could have requested that Exhibit R be admitted for a limited purpose only, he did not do so. As such, we agree with the State that once Exhibit R was admitted, "it was entirely within the post-conviction court's province to rely on the evidence admitted by [Perry] to reach its factual findings." Appellee's Br. p. 13. The post-conviction court, therefore, did not err by relying on Exhibit R in crafting its overview of the relevant underlying facts.

II. Ineffective Assistance of Counsel

[11] Perry also contends that the post-conviction court erred in determining that his trial counsel did not provide him with ineffective assistance. "The right to effective counsel is rooted in the Sixth Amendment to the United States

Constitution." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "'The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). "'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Id.* (quoting *Strickland*, 466 U.S. at 686).

[12] A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel's performance was deficient by demonstrating that counsel's representation "fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Id.* (internal quotation omitted). "We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or most effective way to represent a client," and therefore, under this prong, we will assume that counsel performed adequately and defer to counsel's strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.*

[13] Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. *Reed*, 866 N.E.2d at 769. A petitioner may

show prejudice by demonstrating that there is "a reasonable probability (*i.e.* a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id.* (emphasis added, internal quotation omitted). A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams*, 706 N.E.2d at 154. Stated differently, "[a]lthough the two parts of the Strickland test are separate inquires, a claim may be disposed of on either prong." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing *Williams*, 706 N.E.2d at 154).

[14] In the context of a guilty plea, the prejudice prong of the *Strickland* test focuses on whether counsel's deficient performance affected the outcome of the plea process. To satisfy the prejudice requirement, the petitioner therefore must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. To prove they would have rejected the guilty plea and insisted on trial, defendants must show some special circumstances that would have supported that decision. Defendants cannot simply say they would have gone to trial, they must establish rational reasons supporting why they would have made that decision.

Jones v. State, 151 N.E.3d 790, 797 (Ind. Ct. App. 2020) (cleaned up), *trans. denied*.

A. Failure to File Motion to Suppress

[15] Perry asserts that certain statements that he allegedly made to police prior to being *Mirandized*,[2] specifically, his statement informing one of the investigating officers where the murder weapon was located, should have been suppressed. He also asserts that although he was eventually *Mirandized*, his additional statements, including his confession, should have been suppressed because he could not be found to have validly consented to being interrogated by investigating officers due to the fact that he had claimed to be suicidal and had been under the influence of benzodiazepine and opiates at the time. Perry therefore argues that his trial counsel provided deficient performance by failing to move to suppress the evidence recovered from his vehicle, including the murder weapon, and his statements to the investigating officers.

[16] Again, to establish a claim of ineffective assistance of counsel, a petitioner must establish both deficient performance and prejudice and, if we can dismiss an ineffective-assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *See Grinstead*, 845 N.E.2d at 1031. In this case, even if we were to assume that the trial court would have suppressed Perry's statements to police and the evidence recovered from his vehicle, Perry cannot prove that he was prejudiced by his trial counsel's allegedly deficient performance. Again, in order to prove prejudice, a petitioner

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

must demonstrate a reasonable probability that but for counsel's alleged errors, the result of the proceeding would have been different, *see Reed*, 866 N.E.2d at 769, and in the context of a guilty plea, provide a rational reason supporting a claim that he would not have pled guilty. *See Jones*, 151 N.E.3d at 797.

[17] The evidence of Perry's guilt was substantial. Both his son and Tice's mother had been eyewitnesses to the shooting, with the post-conviction court hearing evidence that there had been "[a]t least" five eyewitnesses. Tr. Vol. II p. 20. Perry had been recorded on Walmart surveillance video purchasing ammunition in the hours between the confrontation at his and Tice's son's school and the shooting. Perry had also received a substantial benefit from pleading guilty, with the State having agreed to rescind its request for LWOP in exchange for Perry's guilty plea. Perry has also failed to provide a rational reason why he would have allegedly gone to trial rather than pleading guilty if the challenged evidence had been suppressed.[3] Perry has failed to prove that he was prejudiced by trial counsel's allegedly deficient performance.

B. Alleged Conflict of Interest

[18] Perry also argues that his trial counsel provided ineffective assistance by failing to resolve an alleged conflict of interest. Perry was represented in the underlying criminal proceedings by Michael Cochren and Lisa Moody. In

[3] Perry merely argues that the challenged evidence "would have been highly prejudicial, and conversely that [trial counsel's] attempt to suppress this evidence could have changed the outcome of this case." Appellant's Br. p. 45.

support of his claim that his trial counsel had provided deficient performance by failing to remedy an alleged conflict of interest, Perry claims that Cochren had represented both him and Stephen McGill, a potential witness against him, "during the relevant times underlying this appeal." Appellant's Br. p. 41.

[19] To prevail on a claim of conflict of interest, a petitioner "must demonstrate to the post-conviction court that trial counsel had an actual conflict of interest and that the conflict adversely affected counsel's performance." *Jackson v. State*, 676 N.E.2d 745, 754 (Ind. Ct. App. 1997), *trans. denied*. "The mere possibility of conflict is insufficient to impugn a criminal conviction." *Bieghler v. State*, 481 N.E.2d 78, 98 (Ind. 1985). To prove that the alleged conflict of interest adversely affected counsel's performance, a petitioner must make a showing of "(1) a plausible strategy or tactic that was not followed but might have been pursued; and (2) an inconsistency between that strategy or tactic and counsel's other loyalties, or that the alternate strategy or tactic was not undertaken due to the conflict." *Shepherd v. State*, 924 N.E.2d 1274, 1287 (Ind. Ct. App. 2010) (internal quotation omitted), *trans. denied*.

[20] In arguing that Cochren had failed to resolve a conflict of interest, Perry points to a statement by McGill, an inmate that was, at the time, housed in the same facility as Perry, in which McGill claimed to have observed Perry and Tice arguing and overheard Perry threatening to "get" Tice in the weeks before Tice's murder. Ex. Vol. p. 100. Perry further points to a statement during the deposition of Detective Derek McGraw, in which Cochren referred to McGill as "[a]nother client of mine." Ex. Vol. p. 117. However, upon being

questioned by Perry during the evidentiary hearing, Cochren stated "with regard to [McGill], I'm not sure whether I had represented him at the time that I represented you or before I represented you." Tr. Vol. II pp. 110–11.

[21] In rejecting Perry's argument, the post-conviction court found that "Perry failed to provide sufficient proof to convince the Court that [McGill] even had any damaging testimony against him in this matter or that [Cochren] represented [McGill] at the same time [Cochren] represented Perry." Appellant's App. Vol. II p. 44. The post-conviction court further found "[m]oreover, and more importantly, Perry provided zero evidence as to how any such conflict affected the voluntary nature of his plea. Because Perry could not establish sufficient evidence that a conflict of interest even existed nor that any such conflict affected his plea, his claims must fail." Appellant's App. Vol. II p. 44.

[22] Regardless of when Cochren had represented McGill in relation to his representation of Perry, however, Perry cannot establish that the alleged conflict of interest adversely affected counsel's performance. *See Jackson*, 676 N.E.2d at 754. Perry does not allege, much less establish, that there was "a plausible strategy or tactic that was not followed but might have been pursued" or "an inconsistency between that strategy or tactic and [Cochren's] other loyalties, or that the alternate strategy or tactic was not undertaken due to the conflict." *Shepherd*, 924 N.E.2d at 1287.

[23] Again, in this case, the evidence of Perry's guilt was substantial. Multiple eyewitnesses, including his son and Tice's mother, had observed the shooting.

Perry had been recorded on Walmart surveillance video purchasing ammunition in the hours between the confrontation at his and Tice's son's school and the shooting. Perry had also received a substantial benefit from pleading guilty, with the State having agreed to rescind its request for LWOP in exchange for Perry's guilty plea. As such, we cannot say that the post-conviction court abused its discretion in determining that Perry was not entitled to PCR because there was "zero evidence as to how any such [alleged] conflict affected the voluntary nature of [Perry's] plea." Appellant's App. Vol. II p. 44.

[24] The judgment of the post-conviction court is affirmed.

Vaidik, J., and Brown, J., concur.