MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Mario L. Hollins,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Plaintiff.

September 6, 2023

Court of Appeals Case No. 23A-PC-280

Appeal from the Lake Superior Court

The Honorable Gina L. Jones, Judge

The Honorable Kathleen A. Sullivan, Magistrate

Trial Court Cause No. 45G03-2202-PC-3

Memorandum Decision by Judge Riley.
Judges Bradford and Weissmann concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Mario Hollins (Hollins), appeals the post-conviction court's denial of his petition for post-conviction relief.

[2] We affirm.

ISSUE

[3] Hollins presents this court with one issue, which we restate as: Whether Hollins received ineffective assistance of counsel on direct appeal, where Appellate Counsel did not challenge Hollins' sentence as being in violation of his plea agreement.

FACTS AND PROCEDURAL HISTORY

[4] On October 27, 2017, the State filed an Information, charging Hollins with two Counts of Level 4 felony burglary, two Counts of Level 6 felony residential entry, and Class A misdemeanor resisting law enforcement. Hollins was represented by appointed Guilty Plea Counsel. On September 24, 2019, Hollins executed a stipulated plea agreement with the State pursuant to which he would plead guilty to the two Level 4 felony burglaries. The relevant terms of Hollins' plea agreement were as follows:

> A. The Defendant agrees to plead guilty to Count 1: Burglary, a Level 4 Felony, in Cause #45G03-1710- F4-000038;

> B. The Parties agree that they are free to fully argue their respective positions as to the sentence to be imposed by the [c]ourt;
>
> C. However, the Parties agree and understand that they are fully free to argue the maximum cap of Eight (8) years as to the sentence which may be imposed by the [c]ourt and argue whether Count I and II shall be served consecutively or concurrently;
>
> D. The Defendant understands that a Level 4 Felony carries a possible sentence of 2-12 years in jail/prison; that the advisory sentence is 6 years;
>
> E. The Defendant understands that if credit time is granted for a Level 4 Felony it is one (1) day credit for 3 days served;
>
> F. The Defendant agrees to plead guilty to Count II: Burglary, a Level 4 Felony, in Cause #45G03-1710- F4-000038;
>
> G. The Parties agree that they are free to fully argue their respective positions as to the sentence to be imposed by the [c]ourt;
>
> H. However, the Parties agree and understand that they are fully free to argue the maximum cap of Eight (8) years as to the sentence which may be imposed by the [c]ourt and argue whether Count I and II shall be served consecutively or concurrently;
>
> I. The Defendant understands that a Level 4 Felony carries a possible sentence of 2-12 years in jail/prison; that the advisory sentence is 6 years;
>
> J. The Defendant understands that if credit time is granted for a Level 4 Felony it is one (1) day credit for 3 days served[.]

[5] (PCR Exh. Vol. p. 4). In exchange for Hollins' guilty plea, the State agreed to not seek an habitual offender enhancement and to dismiss the remaining charges against him. On September 24, 2019, the trial court held Hollins' guilty plea hearing, accepted Hollins' plea, and took the matter under advisement. On October 25, 2019, the trial court held Hollins' sentencing hearing. The

State requested that Hollins receive eight years for each burglary, to be served consecutively, for an aggregate sentence of sixteen years. Guilty Plea Counsel argued that Hollins should receive an aggregate sentence of four years. The trial court found that Hollins' criminal record, consisting in part of four prior felonies and two pending felonies, as an aggravating circumstance, and the court found no mitigating circumstances. The trial court imposed eight-year sentences on each of Hollins' burglary convictions, and in light of the fact that there were two separate victims of the offenses, the court ordered Hollins to serve his sentences consecutively, resulting in a sixteen-year aggregate sentence.

[6] Hollins pursued a direct appeal and was represented by appointed Appellate Counsel, who argued that the trial court abused its discretion by failing to accord mitigating weight to Hollins' guilty plea and remorse and requested that we revise Hollins' sentence pursuant to Indiana Appellate Rule 7(B). On April 8, 2020, this court issued its opinion affirming Hollins' sixteen-year sentence. In our discussion, we observed that "Hollins' plea agreement provided for a maximum cap of eight years for each of the Level 4 felonies." *Hollins v. State*, 145 N.E.3d 847, 850 (Ind. Ct. App. 2020), *trans. denied*.

[7] On February 9, 2022, Hollins filed his pro se petition for post-conviction relief in which he raised a plethora of claims, including that Guilty Plea Counsel and Appellate Counsel were ineffective for failing to challenge his sentence as violative of his plea agreement, which Hollins contended provided for an overall eight-year sentencing cap, not an eight-year cap as to each individual sentence. On April 14, 2022, the State filed an answer to Hollins' petition and

raised the affirmative defense of res judicata. On September 9, 2022, Hollins amended his petition to remove all his claims, save his ineffectiveness claim pertaining to Appellate Counsel.

[8] On October 12, 2022, the post-conviction court held a hearing on Hollins' petition. The post-conviction court took judicial notice of the guilty plea record, and the record on direct appeal, including the transcripts of Hollins' guilty plea and sentencing hearings, were admitted into evidence. Only Appellate Counsel and Hollins provided testimony at the post-conviction hearing. Appellate Counsel testified that, prior to formulating the issues to offer on direct appeal, he would have reviewed the specific terms of Hollins' plea agreement. Appellate Counsel confirmed that he had conferred with Hollins in person before drafting the arguments to be offered on direct appeal. When asked if Hollins had mentioned "any confusion with the sentence he received," Appellate Counsel initially answered that he did not have any specific recollection about that topic but then clarified that he did not "believe there was an issue raised about the plea agreement. The usual response was that they believe they had received too lengthy a sentence, which I believe [] Hollins did also." (PCR Transcript Vol. II, p. 11). Appellate Counsel related that he had not considered raising on direct appeal the issue of Hollins' sentence being in violation of his plea agreement. For his part, Hollins maintained that he had thought that his plea agreement provided for an overall cap of eight years on the aggregate sentence imposed and that he had discussed this with Appellate

Counsel, who had informed him it was an issue to be raised through a petition for post-conviction relief.

[9] Hollins and the State both filed proposed findings of fact and conclusions of law. On January 10, 2023, the post-conviction court adopted the State's proposed findings of fact and conclusions of law and denied Hollins' petition. The post-conviction court found that this court's opinion on direct appeal acted as res judicata barring Hollins' claims and, furthermore, that Hollins had failed to present strong and convincing evidence that Appellate Counsel's performance was deficient or that Hollins had been prejudiced by Appellate Counsel's performance.

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

DISCUSSION AND DECISION

A. *Standard of Review*

[11] Hollins claims that Appellate Counsel was ineffective for failing to raise his desired issue on direct appeal. 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 such a 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 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 enters 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*.

[12] Hollins directs our attention to the fact that the post-conviction court adopted the State's proposed findings of fact and conclusions of law without making any alterations or corrections. Although our supreme court has recognized that this practice has the practical benefit of helping a trial court to keep cases moving through the docket, the court has also observed that when a trial court adopts a party's findings and conclusions verbatim, "there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court." *Prowell v. State*, 741 N.E.2d 704, 709 (Ind. 2001). Therefore, although the wholesale adoption of a party's findings and conclusion has not been banned, it is not encouraged by Indiana's appellate courts. *Bautista v. State*, 163 N.E.3d 892, 898 (Ind. Ct. App. 2021).

II. *Strickland*

[13] We evaluate ineffective assistance of appellate counsel claims under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hollowell*, 19 N.E.3d at 269. To prevail on such a claim, a petitioner must show that 1) his counsel's performance was deficient based on prevailing professional norms;

and 2) that the deficient performance prejudiced the defense. *Weisheit*, 109 N.E.3d at 983 (citing *Strickland*, 466 U.S. at 687). Ineffective assistance of appellate counsel claims generally fall into three categories, namely (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Hollowell*, 19 N.E.3d. at 270. Hollins' claim falls within the second of these categories. *See Collins v. State*, 817 N.E.2d 230, 232 (Ind. 2004) (holding that sentencing issues which are available, but not raised, on direct appeal are waived).

[14] In evaluating the performance prong of the *Strickland* standard on a claim of failure to raise an issue on appeal, we determine whether the unraised issue is significant and obvious from the face of the record and whether the unraised issues are clearly stronger than the raised issues. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). To prevail upon such a claim, a defendant must overcome the "strongest presumption of adequate assistance, and judicial scrutiny is highly deferential." *Id.* In evaluating the prejudice prong of the *Strickland* standard, we determine whether the issues that appellate counsel failed to raise would have been clearly more likely to result in reversal. *Id*. It is very rare that we find appellate counsel to be ineffective for failing to raise an issue on appeal, as the decision of what issues to raise is one of the most important strategic decisions made by appellate counsel. *Id*.

III. *Analysis*

A. *Preclusive Effect of Direct Appeal Opinion*

[15] The underpinning of Hollins' arguments on both the performance and prejudice elements of *Strickland* is that the trial court sentenced him outside of the terms of his plea agreement, which he maintains provided for an overall cap of eight years on his aggregate sentence for both burglary convictions, not an eight-year cap on the sentence for each burglary conviction. Before analyzing the merits of Hollins' claims, we pause to address the State's contention that Hollins is foreclosed from making these arguments after we observed in denying his sentencing claims on direct appeal that "Hollins' plea agreement provided for a maximum cap of eight years for *each* of the Level 4 felonies." *Hollins*, 145 N.E.3d at 850 (emphasis added). The State argues that this portion of our opinion on direct appeal implicates the doctrines of issue preclusion and the law of the case.

[16] If an issue, although styled differently, was previously considered and determined in a defendant's direct appeal, the State may raise the defense of prior adjudication or res judicata if the issue is raised as a basis for post-conviction relief. *Jervis v. State*, 28 N.E.3d 361, 368 (Ind. Ct. App. 2015), *trans. denied*. The doctrine of issue preclusion

> bars the subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit. If issue preclusion applies, the former adjudication is conclusive in the subsequent action, even if the actions are based on different claims. The former adjudication is conclusive only as to those issues that

> were actually litigated and determined therein. Thus, issue preclusion does not extend to matters that were not expressly adjudicated and can be inferred only by argument.

Marion Cnty. Circuit Court v. King, 150 N.E.3d 666, 674 (Ind. Ct. App. 2020) (quoting *Angelopoulos v. Angelopoulos*, 2 N.E.3d 688, 696 (Ind. Ct. App. 2013), *trans. denied*), *trans. denied*; *see also Miller v. Patel*, 212 N.E.3d 639, 647 (Ind. 2023) (explaining that issue preclusion does not apply if the issue is one that was not actually litigated and determined). The law of the case doctrine 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. Under that doctrine, the decision of an appellate court becomes the law of the case and governs the case throughout all of its subsequent stages, as to all questions which were presented and decided, both directly and indirectly.

Maciaszek v. State, 113 N.E.3d 788, 791 (Ind. Ct. App. 2018); *see also Clemons v. State*, 967 N.E.2d 514, 519 (Ind. Ct. App. 2012) (noting that "questions not conclusively decided in the prior appeal do not become the law of the case."), *trans. denied*.

[17] Here, neither the doctrine of claim preclusion nor the doctrine of the law of the case prevents Hollins from making his appellate claims. The issue of the precise terms of the sentencing cap in Hollins' plea agreement was not actually presented, let alone litigated and decided, during Hollins' direct appeal. Put another way, on direct appeal, neither the State nor Hollins questioned the terms of Hollins' plea agreement, and, as a result, we were not called upon to

determine the terms of Hollins' plea agreement before addressing his claim of abuse of the trial court's sentencing discretion or reviewing his sentence pursuant to Appellate Rule 7(B). Therefore, the issue was neither "expressly adjudicated" for purposes of claim preclusion, *Marion Cnty. Circuit Court*, 150 N.E.3d at 674, nor was it "presented and decided", even indirectly, for purposes of establishing the law of the case. *Maciaszek*, 113 N.E.3d at 791. Indeed, Appellate Counsel's failure to litigate this claim on direct appeal is the very essence of Hollins' request for post-conviction relief. Therefore, we will address the merits of Hollins' argument.

B. *Effectiveness of Appellate Counsel*

[18] Hollins argues that Appellate Counsel should have raised what he contends was the meritorious, significant, and obvious issue that his sentence was violative of his plea agreement instead of the two issues that Appellate Counsel did raise on direct appeal. Hollins further claims that, if Appellate Counsel had raised the desired issue, it would have resulted in this court reversing the trial court's sentence and remanding for resentencing pursuant to an overall eight-year cap on his sentence. Resolution of these issues calls upon us to consider the parameters of Hollins' plea agreement.

[19] The Indiana courts have long held that plea agreements are in the nature of contracts between defendants and the State. *Lee v. State*, 816 N.E.2d 35, 38 (Ind. 2004). As a result, when construing a plea agreement, "we are guided by contract interpretation principles, beginning with the agreement's plain

language and determining the intent of the parties at the time the plea was entered." *State v. Smith*, 71 N.E.3d 368, 370 (Ind. 2017). When a plea agreement's terms are unambiguous, they are conclusive of the parties' intent, and we apply its terms without resort to extrinsic evidence. *Wright v. Sate*, 700 N.E.2d 1153, 1155 (Ind. 1998). The terms of a plea agreement are not ambiguous simply because the defendant and the State disagree about the proper interpretation of its terms. *Id*. Rather, we will only find a plea agreement to be ambiguous if reasonable people would find it subject to more than one construction. *Id*. If the terms of a plea agreement are ambiguous, "the general rule is that any ambiguities in such agreements must be construed against the State because the State ordinarily drafts them." *Morris v. State*, 985 N.E.2d 364, 367 (Ind. Ct. App. 2013).

[20] Hollins argues that the terms of his plea agreement are unambiguous and support his position, and that, in the event that the terms are ambiguous, they should be construed in his favor in support of his claims for post-conviction relief. Although we find that the terms of Hollins' plea agreement are unambiguous, after examining the structure of his plea agreement as a whole and the language used within its individual paragraphs, we reject his desired construction.

[21] Although Hollins is correct that his plea agreement did not contain an express provision that there was a sixteen-year cap on his aggregate sentence, Hollins' plea agreement was structured to treat each burglary Count individually. Paragraphs A through E pertained to Count I, and paragraphs F through J

pertained to Count II. Paragraphs A through E set out that Hollins would admit Count I, provided that each party was free to argue its position as to "the sentence" to be imposed, detailed that the parties understood that "they are fully free to argue the maximum cap of Eight (8) years as to the sentence which may be imposed by the [c]ourt and argue whether Count I and Count II shall be served consecutively or concurrently[,]" recited the sentencing parameters for a Level 4 felony, and provided that Hollins understood how credit time would be computed. (PCR Exh. Vol. p. 4). These same paragraphs were reproduced as paragraphs F through J, with no change except that paragraph F detailed that Hollins agreed to plead guilty to Count II. Although reasonable people might find that paragraph C was subject to more than one interpretation in isolation, that ambiguity was removed by the recitation of the same terms as to Count II in paragraphs F through J, and particularly through the inclusion of paragraph H, which reiterated the eight-year sentencing cap. A reasonable person would understand that there would be no need to replicate the same sentencing cap in paragraph H if, as Hollins maintains, the sentencing cap in paragraph C was meant to be an aggregate one. Within this two-part structure of Hollins' plea agreement, the references in paragraphs C and H to "the sentence" plainly refer to the sentence to be imposed on each Count. (PCR Exh. Vol. p. 4).

[22] This reading of the plea agreement accords with the law of contracts, in that we will determine the meaning of a contract by examining all of its provisions, and we will not give special emphasis to any word, phrase, or paragraph. *Simon Prop. Grp., L.P. v. Michigan Sporting Goods Distrib., Inc.*, 837 N.E.2d 1058, 1070

(Ind. Ct. App. 2005), *trans. denied*. In addition, one of the well-settled principles of contract construction is that "[c]ourts will make all attempts to construe the language in a contract so as not to render any words, phrases, or terms ineffective or meaningless." *Scottsdale Ins. Co. v. Harsco Corp.*, 199 N.E.3d 1210, 1217 (Ind. Ct. App. 2022), *trans. denied*; *see also Walb v. Constr. Co. v. Chipman*, 175 N.E. 132, 135 (Ind. 1931) ("No part of a contract will be treated as redundant or as surplusage if a meaning reasonable and consistent with other parts of the contract can be given it."). If we were to accept Hollins' reading of his plea agreement, it would render paragraph H, which repeats the eight-year sentencing cap as to Count II, redundant and meaningless. In other words, if the parties had intended that paragraph C's provision of a "maximum cap of Eight (8) years as to the sentence which may be imposed by the [c]ourt" to be a cap on Hollins' overall sentence, there would have been no need to include paragraph H.[1]

[23] Neither of the cases relied upon by Hollins are persuasive, as they are factually distinguishable. In *Valenzuela v. State*, 898 N.E.2d 480 (Ind. Ct. App. 2008), *trans. denied*, we held that a plea agreement providing for a "Cap of Thirty Five Years (35)" for two charges was unambiguous, such that the trial court had

[1] Although we do not rely on any extrinsic evidence in reaching our conclusion today, we observe that at Hollins' guilty plea hearing, he nodded in the affirmative when the trial court told him, "So you're facing two possible eight-year sentences that could run concurrently or they could run consecutively. Okay?" (G.P. Transcript p. 8). In addition, Guilty Plea Counsel did not object at sentencing when the State argued for a sixteen-year sentence, and Appellate Counsel's testimony at the post-conviction hearing did not support Hollins' claim that he thought there was an eight-year cap on his aggregate sentence or that Hollins had expressed a desire to appeal based on the purported ambiguity in his plea agreement.

violated Valenzuela's plea agreement when it sentenced him to forty-five years, with thirty-two years executed. *Id*. at 483. However, unlike Hollins' plea agreement, the plea agreement in *Valenzuela* was not structured to address each of Valenzuela's two convictions separately. *Id*. at 481-82. Similarly, in *Grider v. State*, 976 N.E.2d 783 (Ind. Ct. App. 2012), the plea agreement covered separate sets of felonies in three separate causes, all of which were covered in a single plea agreement that provided that Grider's sentence would "be open to the [c]ourt with all counts to run concurrently." *Id*. at 785. This court held that the phrase "all counts to run concurrently" was unambiguous and, absent any qualifying language, meant that all the charges covered in the plea agreement would be served concurrently. *Id*. at 786. As part of our rationale, we observed that the plea agreement referred to "the sentence" rather than "the sentences", which we found clearly indicated that the parties contemplated a single sentence for all the charges. *Id*. This same rationale does not apply here, where the plea agreement was structured in two independent identical parts, and, as a result, the parties used the singular form of "sentence" when referring to the individual sentencing cap for each conviction.

[24] Hollins' appellate arguments rise and fall on the premise that his suggested reading of his plea agreement is correct. Because we have rejected that reading, we conclude that Hollins' contentions that Appellate Counsel's performance was deficient and that he was prejudiced thereby must also fail. Accordingly, we do not disturb the post-conviction court's denial of relief.

CONCLUSION

[25] Based on the foregoing, we hold that Appellate Counsel was not ineffective for failing to proffer an argument based on an inaccurate reading of Hollins' plea agreement.

[26] Affirmed.

[27] Bradford, J. and Weissmann, J. concur