

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Chad E. Smith,  
*Appellant-Petitioner,*

v.

State of Indiana,  
*Appellee-Respondent*

January 20, 2022

Court of Appeals Case No.  
21A-PC-1208

Appeal from the Parke Circuit  
Court

The Honorable  
Harry Siamas, Special Judge

Trial Court Cause No.  
61C01-1908-PC-299

**Vaidik, Judge.**

## Case Summary

- [1] Chad E. Smith appeals the denial of his petition for post-conviction relief, arguing he received ineffective assistance of counsel and his guilty plea was not knowing, intelligent, and voluntary. Because Smith did not receive ineffective assistance and his claim regarding his guilty plea is barred by *res judicata*, we affirm.

## Facts and Procedural History

- [2] On June 19, 2018, Sondra Knight, Smith’s ex-girlfriend, called the Parke County Sheriff’s Office and alleged she and Smith were at her home that evening when Smith became aggressive—grabbing her by the hair, placing his hands over her mouth and nose, and using a nearby pair of sweatpants to strangle her. Smith then forced Knight out of her home and into his car. Smith drove to his home, and when they arrived, Smith left Knight in the running car while he went to open his garage door. He returned and forced her from the car into his house, where he boarded up the doors, tied her up, and threatened to kill her. Knight stated she was able to escape Smith’s home after he fell asleep. After speaking with Knight, deputies went to Smith’s home and arrested him.
- [3] The State charged Smith with Level 5 felony kidnapping (for “remov[ing] Sondra Knight by force and by using a vehicle from [her home]”), Level 5 felony criminal confinement (for “confin[ing] Sondra Knight at [Smith’s home]”), and Level 6 felony strangulation. *Amended Information*, No. 61C01-

1806-F5-191 (June 25, 2018).<sup>1</sup> The court also issued a no-contact order barring Smith from making any contact with Knight. The following month, after Smith telephoned Knight from jail, the State charged Smith with Class A misdemeanor invasion of privacy. The trial court set a September 26 deadline for plea agreements, and none was entered before that deadline.

[4] Smith’s jury trial was scheduled for October 9. That morning, Smith’s trial counsel and the State engaged in “back and forth” plea negotiations. Tr. Vol. II p. 22. Trial counsel informed Smith that his maximum potential sentence was between fourteen and sixteen years, a total that assumes Smith could be convicted of, and sentenced consecutively for, all crimes charged.<sup>2</sup> Because the trial court would not accept a written plea agreement since the deadline had passed, Smith agreed to plead guilty to Level 5 felony criminal confinement, Level 6 felony strangulation, and Class A misdemeanor invasion of privacy in exchange for the State dropping Level 5 felony kidnapping. Before accepting Smith’s guilty plea, the trial court stated Smith would be “plead[ing] guilty openly” and advised him as to the rights he was waiving by pleading guilty, as well as listing the crimes to which he was pleading guilty and the potential

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<sup>1</sup> Smith failed to provide the charging information for our review. We therefore cite to the documents found in the Odyssey Case Management System.

<sup>2</sup> Smith was charged with two Level 5 felonies, a Level 6 felony, and a Class A misdemeanor. The maximum sentence for a Level 5 felony is six years, the maximum sentence for a Level 6 felony is two-and-a-half years, and the maximum sentence for a Class A misdemeanor is one year. Ind. Code §§ 35-50-2-6, 35-50-2-7, 35-50-3-2.

sentences that could be imposed. Ex. p. 96. Smith indicated he understood and pled guilty. The State then moved to dismiss the kidnapping charge.

[5] Two months later, on the morning of his sentencing hearing, Smith filed a motion to withdraw his guilty plea, arguing his plea was not knowing, intelligent, and voluntary because he did not understand its terms. Specifically, Smith argued he did not realize he had entered an open plea and had been told he would receive “three years suspended” for the Level 5 felony criminal-confinement charge. *Id.* at 108. The trial court denied Smith’s motion and sentenced him to an aggregate sentence of eight-and-a-half years.

[6] In 2019, Smith filed his direct appeal, arguing the trial court erred in denying his motion to withdraw his guilty plea and that his sentence is inappropriate. We affirmed, finding the sentence is not inappropriate and that the court did not err in denying his motion to withdraw his guilty plea because there was “no indication that Smith did not offer his plea freely and knowingly.” *Smith v. State*, No. 19A-CR-68, 2019 WL 2128232, \*2 (Ind. Ct. App. May 16, 2019), *trans. denied*.

[7] Smith then filed a petition for post-conviction relief, asserting a variety of claims. A hearing on the petition was held in April 2021. Smith testified that he agreed to plead open to Level 6 felony strangulation but was told he would only receive three years, suspended, for Level 5 felony criminal confinement. He stated trial counsel told him that he would receive a written version of the agreement after the plea hearing, but he never did, and that he was receiving a

benefit from pleading because the State would dismiss the kidnapping charge. Smith also testified that when he read in the newspaper that he had pled “open,” he contacted trial counsel to withdraw his plea because he did not believe he pled open, although he confirmed he understood “what pleading open means.” Tr. Vol. II p. 46. Trial counsel testified and confirmed he would have explained to Smith that by pleading open “the whole range of punishments is available for the judge to impose.” *Id.* at 23. Both the prosecuting attorney and trial counsel testified that no specific sentence could be agreed to because the deadline for written plea agreements had passed, so any plea “would have to be solely open to the court.” *Id.* at 49. Finally, trial counsel testified he believed Smith received a benefit from the plea because the State dismissed the kidnapping charge.

[8] After the hearing, both parties filed memorandums. In his memorandum, Smith argued in part that trial counsel was ineffective for failing to ensure he received a written plea agreement and for misadvising him of his penal consequences, and that the trial court erred in not granting his motion to withdraw his guilty plea. The post-conviction court denied Smith’s petition, finding in part that Smith had failed to prove trial counsel was ineffective and his claim that he was to receive a specific sentence in exchange for his plea was not “credible.” Appellant’s App. Vol. II p. 18.

[9] Smith now appeals.

## Discussion and Decision

[10] The petitioner in a post-conviction proceeding bears the burden of proving the grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). Smith is appealing a negative judgment; therefore, he must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. “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.” *State v. Damron*, 915 N.E.2d 189, 191 (Ind. Ct. App. 2009), *reh’g denied, trans. denied.*

### I. Ineffective Assistance of Counsel

[11] Smith first asserts the post-conviction court erred in finding his trial counsel was not ineffective. When evaluating a defendant’s ineffective-assistance-of-counsel claim, we apply the well-established, two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017). The defendant must prove: (1) counsel rendered deficient performance, meaning counsel’s representation fell below an objective standard of reasonableness as gauged by prevailing professional norms and (2) counsel’s deficient performance prejudiced the defendant. *Id.* “The *Strickland* standard is not limited to the trial or appellate phases in criminal proceedings, but also applies when defendants allege ineffective assistance during the guilty plea

phase.” *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019). In the context of a guilty plea, a defendant shows prejudice by demonstrating there is a “reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.*

### **A. Lack of Written Plea**

[12] Smith first argues “the plea in this matter should have been reduced to writing pursuant to Indiana Law and a failure to do so . . . constituted ineffective assistance on behalf of his trial counsel.” Appellant’s Br. p. 8. The post-conviction court found trial counsel was not deficient in failing to secure a written plea agreement, but that even if this were deficient performance, Smith was not prejudiced. We need not decide deficiency because we agree Smith has failed to show prejudice.

[13] Smith alleges he was prejudiced by the lack of written plea agreement because it led to his “confusion as to [the] terms and conditions of any agreement” and that he was “relying on recommendations and a specific agreement from the State as to his sentence and but for those recommendations [he] would not have pled guilty to the charges at issue in this matter.” *Id.* at 10, 11.

[14] We agree with the post-conviction court that Smith’s claim is not “credible,” as the record indicates there was no agreement involving sentencing and that Smith understood this. Before Smith pled guilty, the trial court informed him of the crimes he was pleading to and went over the potential sentence that could be imposed, and Smith stated he understood. As we stated on direct appeal, this

“undermines any argument that he lacked knowledge of the sentence he would receive or that he was unaware of the crimes to which he was pleading guilty.” *Smith*, 2019 WL 2128232 at \*2. Most notably, the trial court stated Smith would be “plead[ing] guilty openly.” Trial counsel testified he would have explained to Smith what an open plea meant, and Smith confirmed he knew what an open plea was. Further, both trial counsel and the prosecutor testified that any sentence recommendation was not on the table during their negotiations because the time for submitting plea agreements had passed. As such, the record contradicts Smith’s self-serving testimony that the terms of the agreement were not clear to him.

[15] Smith has not shown the lack of written plea agreement in his case prejudiced him as required to establish ineffective assistance of counsel.

## **B. Advisement of Penal Consequences**

[16] Smith next claims his trial counsel was deficient in advising him of his penal consequences. Trial counsel advised Smith he faced fourteen to sixteen years if he went to trial, a figure that assumes Smith could be convicted of, and sentenced consecutively for, Level 5 felony criminal confinement, Level 5 felony kidnapping, Level 6 felony strangulation, and Class A misdemeanor invasion of privacy. Smith contends that the maximum he faced was actually nine-and-a-half years, because under *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), he could not have been convicted of both Level 5 felonies.



[17] Specifically, Smith argues that under *Richardson* his convictions for both kidnapping and criminal confinement would have violated double jeopardy.<sup>3</sup> In *Richardson*, our Supreme Court held that “two or more offenses are the ‘same offense’ in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” *Richardson*, 717 N.E.2d at 49.

[18] Smith argues the convictions would violate *Richardson* because “the evidence in support of both the criminal confinement charges and the kidnap[p]ing charges are essentially identical.” Appellant’s Br. p. 12. Under the *Richardson* actual-evidence test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Lee v. State*, 892 N.E.2d 1231, 1234 (Ind. 2008). To show that two challenged offenses constitute the “same offense” in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact finder to establish the essential elements of one offense may also have been used

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<sup>3</sup> Smith also argues his convictions for kidnapping and criminal confinement would have constituted double jeopardy under *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020). In *Wadle*, decided two years after Smith’s plea, our Supreme Court set forth a new test for substantive double-jeopardy claims. *Id.* at 253. It is unclear whether *Wadle* applies retroactively. Nonetheless, it is not the appropriate framework here, as we are analyzing not whether Smith’s convictions constituted double jeopardy, but whether his attorney was deficient in not advising him of the application of double jeopardy to his case. And there’s no question that trial counsel would not have been deficient in failing to anticipate the complete overhaul of double-jeopardy jurisprudence in Indiana. See *Walker v. State*, 843 N.E.2d 50, 60 (Ind. Ct. App. 2006) (noting counsel cannot be held ineffective for failing to anticipate a change in the existing law).

to establish the essential elements of a second challenged offense. *Id.* In determining the facts used by the fact finder to establish the elements of each offense, it is appropriate to consider the charging information, jury instructions, and arguments of counsel. *Id.*; *Spivey v. State*, 761 N.E.2d 831, 832 (Ind. 2002).

[19] Here, we must base our determination on the limited information about the crime in the record—mainly the charging information and arguments of counsel at sentencing—as there was no fact finding due to Smith’s guilty plea. According to the charging information, the kidnapping conviction was based on Smith’s actions at Knight’s home. The victim testified Smith attacked her at her home, strangled her, and forcibly removed her from her home and took her to his car. Next, the charging information indicates the confinement conviction was based on what happened later that night at Smith’s home. The victim testified that after Smith took her from her home, he drove her around, left her in the running car for a period of time, returned, and forced her into his home, where he tied her up.

[20] Given these circumstances, had the case gone to trial, it appears the State could have presented the case in a way that distinguished Smith’s actions and set forth independent evidence for each conviction. *See Bruce v. State*, 749 N.E.2d 587, 590 (Ind. Ct. App. 2001) (finding no double-jeopardy violation, even where “multiple offenses [were] committed as part of a protracted criminal episode” because “the case was prosecuted, and even defended, in such a manner so that the jury could not have reasonably used the same evidence to convict Bruce of both attempted aggravated battery and confinement”), *trans. denied*. As the

record indicates Smith’s convictions for kidnapping and criminal confinement would not necessarily fail the *Richardson* actual-evidence test, Smith has not shown his counsel was ineffective in advising him of his penal consequences.<sup>4</sup>

[21] In both ineffective-assistance-of-counsel claims, Smith has failed to demonstrate the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.

## II. Due Process

[22] Finally, Smith contends the cumulative effect of errors in both the trial and appellate proceedings was such that it violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law provision of Article 1, Section 12 of the Indiana Constitution. He cites *Collins v. State*, 321 N.E.2d 868, 874 (Ind. Ct. App. 1975), where this Court held that although none of the issues the defendant raised by themselves amounted to reversible error, “the total context of circumstances present, by the

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<sup>4</sup> Smith also argues his convictions should be vacated because his guilty plea was “not made voluntarily.” Appellant’s Br. p. 14. Smith acknowledges we rejected this claim in his direct appeal, and that issues litigated adversely to the defendant on direct appeal are barred by res judicata. However, Smith contends he is entitled to relief because two pieces of testimony at the post-conviction hearing—trial counsel’s statement that Smith received a “benefit from the dismissal of the kidnapping charge” and Smith’s own testimony that he was promised “a written version of said plea would be tendered prior to sentencing”—constitute “newly discovered evidence.” *Id.* at 16. Because the information in this testimony was known to Smith at the time of the motion-to-withdraw hearing, it is not newly discovered. And even if it were, Smith uses this testimony to assert his plea was involuntary in the same way he asserts his counsel was ineffective, i.e., he did not understand the terms of the plea due to the lack of written agreement and because he was erroneously told he would benefit from the dismissal of the kidnapping charge. For the same reasons Smith is not entitled to relief on these issues in the ineffective-assistance-of-counsel context, he is not entitled to relief in the knowing, intelligent, and voluntary context.

aggravating effect of each upon the other, demonstrate a clearly visible departure from the essential procedural elements of justice and fair play so substantial as to constitute a denial of due process to this defendant.” In support of this contention, Smith presents a list of alleged errors throughout his criminal proceedings, including “lack of a written plea, trial counsel’s failure to properly advise the Defendant as to the possible penalties, trial counsel’s failure to adequately prepare for trial and to take the deposition of the State’s key witness, trial counsel’s inability to accurately represent the Defendant due to illness and Appellant’s counsel’s failure to address key issues or even speak with the Defendant on direct appeal.” Appellant’s Br. pp. 17-18.

[23] But as the State points out, other than this list, Smith failed to provide argument or citation to authority for most of these alleged errors. The only errors he briefed were the lack of written plea agreement and trial counsel’s failure to properly advise defendant as to possible penalties, so these are the only alleged errors we will address. And as he has failed to show his trial counsel improperly advised him, that leaves only the lack of written plea agreement. Even if this was an error, it is not so substantial as to amount to a violation of due process.

[24] Affirmed.

May, J., and Molter, J., concur.