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**IN THE
COURT OF APPEALS OF INDIANA**

JEFFREY OLSON,)

Appellant-Defendant,)

vs.)

No. 79A02-0812-PC-1073

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0305-FC-37

July 1, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jeffrey Olson pleaded guilty to Fraud on a Financial Institution,¹ a class C felony, and admitted to being a Habitual Offender.² The sole issue on appeal is whether the post-conviction court properly denied Olson's petition for post-conviction relief upon its determination that Olson's guilty plea was knowingly and voluntarily entered.

We affirm.

Prior to 2002, Olson was arrested and charged in Federal District Court with being a felon in possession of a firearm. Olson pleaded guilty to the federal charge and was sentenced to six years.

On May 9, 2003, the State of Indiana charged Olson with numerous offenses for acts that occurred between August 2002 and October 2002. Specifically, the State charged Olson with two counts of class C felony fraud on a financial institution, five counts of class D felony theft, and one count of class D felony money laundering. The State also alleged Olson to be a habitual offender. After being charged, Olson consulted with Attorney Michael Lohorn regarding a possible guilty plea. In discussing sentencing, Attorney Lohorn told Olson that it was up to the trial court to decide whether he would serve his sentence concurrent or consecutive to the federal sentence already imposed.

At an initial hearing held on September 23, 2003, Olson, pursuant to a written plea agreement with the State, pleaded guilty to one count of class C felony fraud on a financial institution and admitted to being a habitual offender. The State agreed to dismiss the

¹ Ind. Code Ann. § 35-43-5-8 (West, Premise through 2008 2nd Regular Sess.).

² Ind. Code Ann. § 35-50-2-8 (West, Premise through 2008 2nd Regular Sess.).

remaining charges. The plea agreement further provided that sentencing was left to the discretion of the trial court, but the sentence was capped at sixteen years.³ The plea agreement said nothing about concurrent or consecutive sentencing.

On November 21, 2003, the trial court sentenced Olson to eight years on the class C felony conviction and enhanced the sentence by eight years for the habitual offender determination, but then suspended six years to probation. Olson's aggregate sentence was thus sixteen years with six years suspended. The trial court rejected Olson's request that the sentence be served concurrent with the federal sentence and ordered the sentence served consecutive to the sentence imposed in the federal matter.

In the years that followed, Olson filed three separate motions for modification of his sentence (November 18, 2005, May 19, 2006, and January 29, 2007) and a motion to correct erroneous sentence (March 31, 2008).⁴ Olson never filed a direct appeal challenging his sentence. On June 11, 2008, Olson filed a petition for post-conviction relief alleging that his guilty plea was not knowingly and intelligently entered because he was not properly advised of the possibility that his sentence in the state matter could be imposed consecutive to his sentence in the federal matter. The post-conviction court held a hearing on September 24, 2008. During the hearing, Attorney Lohorn testified that he discussed concurrent and consecutive sentences with Olson and that Olson was aware that his sentence in the state

³ The first plea agreement tendered by the State provided for a cap of twenty years. Attorney Lohorn negotiated with the State for the sixteen-year cap. When Attorney Lohorn presented Olson with the plea agreement he ultimately accepted, Attorney Lohorn advised him that "the deal's not gonna get better." *Post-Conviction Transcript* at 36.

⁴ After the filing of his motion to correct erroneous sentence, the trial court directed Olson to file a petition for post-conviction relief.

matter could be ordered consecutive to his federal sentence. On November 3, 2008, the post-conviction court issued its findings of fact and conclusions of law denying Olson his requested relief. Olson now appeals.

In a post-conviction proceeding, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Wesley v. State*, 788 N.E.2d 1247 (Ind. 2003). When challenging the denial of post-conviction relief, the petitioner appeals a negative judgment, and in doing so faces a rigorous standard of review. *Wesley v. State*, 788 N.E.2d 1247. To prevail, the petitioner must convince this court that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.* We will disturb the post-conviction court's decision only where the evidence is without conflict and leads to but one conclusion and the post-conviction court reached the opposite conclusion. *Id.*

Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Ind. Post-Conviction Rule 1(6). “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.” *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004) (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)). In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998). The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.*

On review of a guilty plea, we look at all the evidence before the post-conviction court. *Harris v. State*, 762 N.E.2d 163 (Ind. Ct. App. 2002), *trans. denied*. If the evidence exists to support the court's determination that the guilty plea was voluntary, intelligent, and knowing, we will not reverse. *Id.*

“When a guilty plea is attacked because of alleged misinformation concerning sentencing, the issue of the validity of such plea is determined by a two-part test: 1) whether the defendant was aware of actual sentencing possibilities and 2) whether the accurate information would have made any difference in his decision to enter the plea.”

Id. at 166-67.

Olson asserts that he was not aware of the actual sentencing possibilities because he was not properly advised that his sentence in the state matter had to be served consecutive to his sentence in the federal matter. In support of his argument, Olson directs us to Ind. Code Ann. § 35-35-1-2 (West, Premise through 2008 2nd Regular Sess.), which provides that a court shall not accept a guilty plea without first determining that the defendant (1) understands the nature of the charges; (2) has been informed that a guilty plea effectively waives several constitutional rights including trial by jury, confrontation of witnesses, compulsory process, and proof of guilt beyond a reasonable doubt without self-incrimination; and (3) has been informed of the maximum and minimum sentences for the crime charged, *including any possibility of the imposition of consecutive sentences*. *See id.* The statute further provides that “[a]ny variance from the requirements of this section that does not violate a constitutional right of the defendant is not a basis for setting aside a plea of guilty.” I.C. § 35-35-1-2(c).

In Indiana, “it is established law that there is no right to serve concurrent sentences for different crimes in the absence of a statute so providing, and that concurrent sentences may be ordered only when they are to be served in the same institution.” *Shropshire v. State*, 501 N.E.2d 445, 446 (Ind. 1986) (quoting *Smith v. State*, 330 N.E.2d 384, 388 (Ind. Ct. App. 1975), *trans. denied*) (rejecting defendant’s claim that he was entitled to credit on sentence imposed in state matter for time spent in federal custody). Because Olson had a federal conviction and a state conviction, he could not have served his sentences in the same institution; thus, the trial court did not have the discretion to order the sentence served concurrently with the federal sentence.

We note that a defendant is entitled to accurate information with respect to the actual penal consequences of his plea of guilty. *Peace v. State*, 736 N.E.2d 1261 (Ind. Ct. App. 2000), *trans. denied*. Absent coercion or deception, we must consider all of the facts and circumstances, including any misadvice, in order to determine whether the defendant voluntarily and intelligently pleaded guilty. *Id.* Erroneous advice does not necessarily warrant reversal as a matter of law. *Id.* “We have held that when the sentencing advice of defense counsel is at issue, we consider all relevant facts and circumstances, including the actual sentence risk, the plea agreement, and the post-conviction hearing evidence, in order to determine if the advice was so egregiously erroneous as to take on the character of an illusory threat.” *Id.* at 1267.

There is no dispute that prior to accepting Olson’s guilty plea and admission to the habitual offender allegation, the trial court advised Olson of his rights as well as the possible

penalties he was facing. Neither the trial court, nor Olson’s attorney, however, advised Olson that his sentence *had* to run consecutive to his federal sentence. The State acknowledges that, from the record, Olson was not aware of this fact when he decided to plead guilty. Indeed, Olson’s attorney advised Olson that the decision of whether he would serve his sentence concurrently or consecutively to the federal sentence was within the discretion of the trial court. Olson was misadvised on this aspect of sentencing possibilities. The State points out, however, and we agree, that the record demonstrates Olson was aware of the possibility that he could serve his sentence consecutively to the federal sentence and he still elected to go forward with his guilty plea.

Olson also maintains that had he known that his sentence had to be served consecutively to the federal sentence he would not have pleaded guilty. Olson points to the fact that he had small children to think about and would not have accepted the plea agreement had he been properly advised of the consecutive requirement because it would have kept him away from his children for a greater period of time.

In *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001), our Supreme Court set forth the standard by which to evaluate claims such as Olson’s:

[I]n order to state a claim for postconviction relief a petitioner may not simply allege that a plea would not have been entered. Nor is the petitioner’s conclusory testimony to that effect sufficient to prove prejudice. To state a claim of prejudice from counsel’s omission or misdescription of penal consequences that attaches to both a plea and a conviction at trial, the petitioner must allege . . . “special circumstances,” or, as others have put it, “objective facts” supporting the conclusion that the decision to plead was driven by the erroneous advice.

We believe a showing of prejudice from incorrect advice as to the penal consequences is to be judged by an objective standard, i.e., there must be a

showing of facts that support a reasonable probability that the hypothetical reasonable defendant would have elected to go to trial if properly advised. Nevertheless, . . . a petitioner may be entitled to relief if there is an objectively credible factual and legal basis from which it may be concluded that “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.”

(footnotes and citations omitted). “Whether viewed as ineffective assistance of counsel or an involuntary plea, the postconviction court must resolve the factual issue of the materiality of the bad advice in the decision to plead, and postconviction relief may be granted if the plea can be shown to have been influenced by counsel’s error.” *State v. Cozart*, 897 N.E.2d 478, 484 n.3 (Ind. 2008) (quoting *Segura v. State*, 749 N.E.2d at 504-05).

Here, the post-conviction court essentially concluded that whether the sentences were to be served concurrently or consecutively was not material to Olson’s decision to plead guilty, and thus, he was not harmed by the failure to inform him that the state sentence had to be served consecutive to the federal sentence. From an objective standpoint, Olson pleaded guilty to one charge of class C felony fraud on a financial institution and admitted to being a habitual offender and the State dismissed a class C felony offense and five class D felony offenses. Further, if Olson had been convicted of all of these charges and sentenced consecutively, with the maximum habitual offender enhancement, Olson would have faced a potential sentence of forty-six years. By pleading guilty, Olson received a sixteen-year sentence, which is significantly shorter than the sentence he would have faced if he had gone to trial. After Attorney Lohorn negotiated the plea agreement, he advised Olson that “the deal’s not gonna get better.” *Post-Conviction Transcript* at 36. Under these circumstances, a reasonable defendant would have elected to plead guilty rather than go to trial. Other than

his self-serving assertion, Olson has not shown that he would not have pleaded guilty had he been properly advised that his sentence had to be served consecutive to the federal sentence. The post-conviction court did not err in concluding that Olson knowingly and voluntarily entered his guilty plea.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.