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IN THE
COURT OF APPEALS OF INDIANA

PRENTISS A. HUFF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-1008-PC-575
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G23-0805-PC-123941

January 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Prentiss A. Huff appeals the denial of his petition for post-conviction relief (PCR), by which he challenged his conviction of unlawful possession of a firearm by a serious violent felon as a class B felony. Huff presents the following restated issues for review:

1. Was Huff's guilty plea entered knowingly, intelligently, and voluntarily?

2. Did Huff receive ineffective assistance of trial counsel?

3. Did Huff receive ineffective assistance of appellate counsel?

We affirm.

In an unpublished memorandum decision affirming the appropriateness of his sentence, this court set out the underlying facts in Huff's direct appeal as follows:

> On May 22, 2008, Huff was found by police with a loaded .45-caliber pistol. He had previously been convicted of aggravated battery. When arrested, Huff admitted that he knew that he was wanted by police because of an outstanding arrest warrant and that he was carrying the handgun for protection. On May 27, 2008, the State charged Huff with class B felony unlawful possession of a firearm by a serious violent felon. At the final pretrial conference on July 31, 2008, Huff agreed to plead guilty as charged in exchange for the State's agreement to a six-year sentence with placement open to argument to the trial court.
>
> At the August 21, 2008, sentencing hearing, the trial court took note of Huff criminal history, including the fact that he was on parole when he committed the instant offense, and that he had obtained a vocational degree while previously incarcerated. The trial court sentenced Huff to the agreed-upon six years, with placement in the Department of Correction (DOC) for five years and Marion County Community Corrections (Community Corrections) for one year.

Huff v. State, No. 49A04-0809-CR-549, slip op. at 1 (Ind. Ct. App. March 18, 2009). Huff filed a *pro se* PCR petition on August 24, 2009. Counsel was later appointed to represent Huff in this matter. After he subsequently amended his PCR petition, the post-conviction court held a hearing on the petition on April 30, 2010. On July 28, 2010, the post-conviction

court denied the PCR petition. This appeal ensued.

We note at the outset that in a post-conviction proceeding, the petitioner bears the burden of establishing his claims for relief by a preponderance of the evidence. *Overstreet v. State*, 877 N.E.2d 144 (Ind. 2007), *cert. denied*, 129 S.Ct. 458 (2008). When appealing from the denial of a PCR petition, the petitioner stands in the position of one appealing from a negative judgment and therefore must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id*. We further observe that the post-conviction court is the sole judge of the weight of the evidence and credibility of witnesses. *J.J. v. State*, 858 N.E.2d 244 (Ind. Ct. App. 2006).

1.

Huff contends his guilty plea should be set aside because he did not enter into it knowingly, intelligently, and voluntarily. Specifically, he contends he was induced to plead guilty because trial counsel misadvised him that the State would recommend that he serve his entire six-year sentence in a community corrections program rather than the DOC.

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 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.

Huff contends counsel misinformed him that the State would recommend that his sentence be served in community corrections, as opposed to prison. The transcript of the guilty plea hearing belies this assertion. At the guilty plea hearing, the trial court reviewed the terms of the agreement with Huff, as reflected in the following:

> [Court]: … I have here a plea agreement and what it says basically is that you're going to plead guilty to Count One, Unlawful Possession of a Firearm by a Serious Violent Felon, as a Class B felony. In exchange for said admission, the State is going to dismiss any other charges, but there wasn't [sic] any. You were only charged with that one count. Okay.
>
> Now once again, in exchange for that, they've agree to give you an executed sentence of six years *with placement open to argument before the Court*. Okay. And that the firearm in this matter will be destroyed. Is that your understanding?
>
> [Huff]: Yes, ma'am.

Transcript at 10 (emphasis supplied). Later during the hearing, after the State established a factual basis and the court accepted the guilty plea, the following colloquy took place:

> [Court]: … And they put together a [presentence investigation] report for me. I need that report before I can sentence you. Do you understand that? A copy will be provided to you and your attorney, as well as the prosecutor, and we'll discuss it when we come back for sentencing. Okay?
>
> [Huff]: Yes, ma'am.
>
> [Court]: All right. Because I've accepted the plea agreement, you know you're going to get the minimum, but your attorney is going to argue on that date of why I should keep you out of DOC, *and I'm sure that the prosecutor is probably going to be arguing for DOC*. Do you understand?
>
> [Huff]: Yes, ma'am.

Id. at 19 (emphasis supplied).

As reflected in the above comments, Huff was apprised at the hearing that the court's understanding was that the agreement called for a six-year sentence, with placement, e.g.,

community corrections or prison, left open for argument. Huff confirmed on two occasions that was his understanding as well. It is significant that the plea agreement in question was reached just moments before the foregoing exchanges occurred. Apparently, the trial court called a brief recess during the final pretrial conference after defense counsel mentioned that the State had just made a "one-day" plea offer and that counsel needed time to review it with Huff. *Appellant's Appendix* at 104. The trial court granted a recess and encouraged counsel to review the agreement in order "that all his questions are answered." *Id*. After Huff conferred with his counsel during the recess, the discussion set forth above ensued.

Ultimately, the post-conviction court found that Huff lacked credibility in claiming that he was misinformed about this aspect of the plea agreement by his attorney, as reflected in the following excerpt from the order denying his PCR petition:

> The record of the guilty plea hearing contradicts Huff's recollection [that he was misinformed]. The trial court went to great length [sic] explaining the terms of the plea agreement to Huff and advised him as to the terms of the plea which called for open placement, and informed Huff that at sentencing, his attorney would be arguing for Community Corrections while the prosecutor would more than likely be arguing for Department of Correction[] time. There is no testimony other than Huff's self-serving testimony at the post-conviction relief hearing that trial counsel told him otherwise which would indicate that Huff was mistaken or misled as to the terms of the proposed plea.

Id. at 108.

We agree with the post-conviction court's assessment of the evidence relative to this claim. When questioned at the plea hearing, Huff confirmed that he understood placement would be at issue and that the prosecutor was going to be arguing for time at the Department of Correction. This indicates that Huff was aware of the actual sentencing possibilities and negates the first element Huff must prove in order to successfully attack his guilty plea based

upon alleged misinformation concerning sentencing, i.e., that he was not aware of the actual sentencing possibilities. *See Harris v. State*, 762 N.E.2d 163. Therefore, Huff has failed to establish that his guilty plea was not knowingly, intelligently, and voluntarily entered.

2.

Huff contends he received ineffective assistance of trial counsel by failing to subpoena a witness and failing to present a defense based upon that missing witness's testimony. In order to prevail on his claims that trial and appellate counsel rendered ineffective assistance, Huff must demonstrate the existence of the two components of that claim, as established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Creekmore v. State*, 853 N.E.2d 523 (Ind. Ct. App. 2006), *clarified on reh'g*, 858 N.E.2d 230. He must first establish that counsel's performance was deficient, i.e., fell below an objective standard of reasonableness and that the errors in representation were so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment. *Id*. A showing of deficient performance alone is not enough, however, to prevail on a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668. The petitioner must also show that the deficient performance prejudiced the defense. *Id*. Because a petitioner must prove both elements, the failure to prove either element defeats the claim. *See Young v. State*, 746 N.E.2d 920 (Ind. 2001) (holding that because the two elements of *Strickland* are separate and independent inquiries, the court may dispose of the claim on the ground of lack of sufficient prejudice if it is easier).

The incident resulting in the handgun conviction occurred on May 22, 2008. On that day, Sgt. Ryan Harmon of the Indiana State Police saw three men exit a residence, one of whom was Huff. At the time, Huff was carrying a black nylon Nike bag. The three men got

into a car and drove away. Approximately ten minutes later, Indianapolis Metropolitan Police Department officers stopped the vehicle. After the occupants were removed from the vehicle and Huff had been handcuffed, the officers conducted a search around the rear passenger seat of the vehicle, where Huff had been sitting. They found a black nylon Nike bag containing a loaded handgun. The handgun had not been reported stolen. According to the probable cause affidavit, Huff told the officers he was carrying the gun for protection. At some point thereafter, Dameion J. Crawford, the driver of the car on the day in question, wrote a letter to the court indicating that the gun in the Nike bag was his. He claimed that he had a permit to carry the handgun, he never informed Huff of the contents of the bag, and he never saw Huff open it.

In is PCR petition, Huff contends trial counsel rendered ineffective assistance of counsel in neglecting to pursue a defense of denial based upon Crawford's version of events and by failing to speak with Crawford and subpoena him to attend the scheduled jury trial. In fact, trial counsel testified at the post-conviction hearing that he did know about Crawford's letter and in fact had spoken with Crawford. The post-conviction court was not obligated to believe Crawford's claim at the post-conviction hearing that trial counsel had not spoken with him before the plea agreement was accepted. Trial counsel further testified that he believed Crawford would have shown up at trial if it came to that and therefore did not believe it was important to obtain a subpoena to secure Crawford's testimony. In any event, trial counsel stated that he was aware of the evidence that the State intended to present in the event the matter went to trial. This included the testimony of the arresting officer. Trial counsel was "deeply concerned" that this officer "had a lot more credibility" than Crawford.

Transcript of Post-Conviction Hearing at 28. In the end, after evaluating the evidence, counsel advised Huff to accept the plea agreement because the attorney "felt if [Huff] tried the case, … he was going to get a lot more time than the minimum the State was offering." *Id*. at 29. This means, of course, that trial counsel believed the evidence of guilt was strong. Based upon the record before us, this conclusion was not unreasonable.

In summary, there was evidence that counsel did not, in fact, *neglect* to purse a defense strategy based upon Crawford's proposed testimony. Rather, counsel evaluated the prospect of success at trial based upon that testimony and found it wanting. Therefore, counsel recommended that Huff not proceed to trial on the strength of Crawford's testimony. We note in this regard that, for purposes of the offense to which Huff pleaded guilty, it is irrelevant whether Crawford owned the handgun in the Nike bag. The State need only have proven that Huff knowingly possessed the gun. Sgt. Harmon would have testified that he saw Huff carrying the bag containing the gun and, of course, the bag was found in the area where Huff had been sitting in the car, i.e., the back seat on the passenger side. It appears that Huff's defense would have been that he was carrying the Nike bag for Crawford and did not know there was a gun inside it. The success of this strategy would have depended not only upon a favorable assessment of Crawford's credibility (i.e., that Huff was not told about the contents of the bag and that he had not looked inside it), but would have required the fact-finder to discount Sgt. Harmon's testimony that Huff admitted at the scene that he had been carrying the gun for his own protection. In view of this, trial counsel's decision to recommend accepting a plea agreement including the minimum sentence was not unreasonable. Huff did not receive ineffective assistance of counsel in this respect.

3.

Huff contends he received ineffective assistance of appellate counsel. This claim involves appellate counsel's failure to challenge on direct appeal the denial of Huff's motion to withdraw his guilty plea. In reviewing claims of ineffective assistance of appellate counsel, we use the same standard applied to claims of ineffective assistance of trial counsel. *Harris v. State*, 861 N.E.2d 1182 (Ind. 2007). The party seeking post-conviction relief must show that appellate counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the deficient performance of counsel the result of the proceeding would have been different. *Id*. "When raised on collateral review, ineffective assistance claims generally fall into three basic categories: (1) denial of access to an appeal, (2) waiver of issues, and (3) failure to present issues well." *Ritchie v. State*, 875 N.E.2d 706, 723 (Ind. 2007). Huff's claim falls into the second category - conditionally.

The record indicates that appellate counsel opted not to present this issue on appeal because he believed the record was not adequately developed to permit effective presentation of it. He recommended that Huff pursue this issue in a post-conviction proceeding. Huff contends that appellate counsel's "decision to not pursue the motion to withdraw would be reasonable if [this] court agrees that … an adequate record [regarding that issue] had not been made[.]" *Appellant's Brief* at 10. Thus, Huff casts the issue as dependent upon our determination of whether the failure to present the issue upon direct appeal waived the issue once and for all – if it did, then appellate counsel rendered ineffective assistance in waiving the issue. If it did not, then Huff is free to present this issue upon petition for post-conviction relief.

Huff's post-conviction appellate brief in the instant proceeding offers no argument independent of the ones he offered at the guilty plea hearing in support of the motion to withdraw his guilty plea. Indeed, as Huff's post-conviction counsel concedes, "[f]rom the colloquy at the sentencing hearing, it is difficult to determine what issue Huff was arguing that created a manifest injustice permitting withdrawal of the plea." *Appellant's Brief* at 12-13. We agree with counsel, however, that "[i]t appears as though he [argued] that his plea [was] not knowing, intelligent, or voluntary because his plea was coerced." *Id*. at 13. Even assuming for the sake of argument that the issue was not waived, we have already determined in Issue 1 above that Huff has failed to establish that his guilty plea was the result of misinformation from his attorney about the nature of his sentence. This claim (i.e., that he was misinformed about the nature of his sentence) was the "coercion" Huff identified at the guilty plea hearing as the basis for his motion to withdraw. Our resolution of that question adverse to Huff in Issue 1 necessarily indicates that a challenge on the merits to the trial court's denial of his motion to withdraw must fail. In order to gain reversal of the denial of his PCR petition on this ground – whether via ineffective assistance of appellate counsel or on the merits of the ruling on the motion to withdraw - Huff must demonstrate that the denial of the motion to withdraw constituted error and requires reversal. For the reasons set out above, he has failed to do this.

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.