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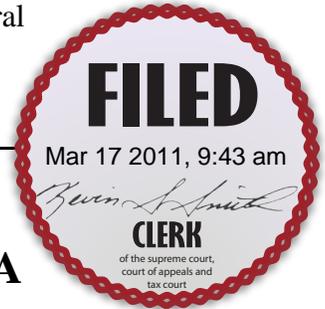
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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN R. WILLARD,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 20A04-1009-PC-565

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0905-PC-14

March 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issues

Here, a father was accused of molesting his thirteen-year-old daughter while she slept on the couch in the summer of 2007. The daughter told police that she woke up to find her father with his hand inside her pants, rubbing her “private parts.” The State charged the father with one count of class A felony child molesting.

In 2008, the legislature enacted a law that restricted the good time credit for which certain convicted felons would be eligible. The law would go into effect on July 1, 2008. In June 2008, the father’s defense attorney informed him about the revised law and stated that he might be subject to it and therefore face more actual prison time. After consulting with his attorney, the father decided to accept the State’s plea agreement, which offered him a maximum executed sentence of twenty-five years if he agreed to plead guilty to class A felony attempted child molesting. At the June 26, 2008 guilty plea hearing, the trial court made special mention of defense counsel’s request to enter a judgment of conviction that day to avoid the applicability of the July 1 law that might restrict the father’s eligibility for good time credit. The trial court accepted the father’s guilty plea, entered judgment against him that day, and later sentenced him to thirty-five years, with twenty-five years executed.

The father, John R. Willard, filed a petition for post-conviction relief, claiming that his counsel misinformed him regarding the applicability of the more stringent credit-time law. He argued that, had he known the revised law would not apply to him, he would not have pled guilty to class A felony attempted child molesting but instead would have proceeded to trial under the claim that he did not penetrate his daughter’s sex organ and therefore did not

commit class A felony child molesting. The post-conviction court denied his petition. Willard now appeals, claiming that he received ineffective assistance of trial counsel that materially affected his decision to plead guilty. We agree, vacate his conviction, and remand for proceedings consistent with this decision.

Facts and Procedural History

On June 28, 2007, thirteen-year-old K.H. was having visitation with her father, Willard. She fell asleep on the couch while Willard played a video game. Just after midnight, she awoke and found that Willard was lying behind her with his hand inside her pajama bottoms on her skin and was rubbing her “private parts.” Pet. Ex. B. She said that Willard kept feeling her lower and lower and that each time he would go lower, he would lick his hand and then “stick it back in.” *Id.* The next morning, K.H. reported the incident to her aunt, who reported it to the police.

On August 8, 2007, the State charged Willard with one count of class A felony child molesting. On June 26, 2008, Willard pled guilty via plea agreement to an amended charge of class A felony attempted child molesting. The plea agreement capped the executed portion of his sentence at twenty-five years. At the guilty plea hearing, defense counsel requested that the trial court enter judgment of conviction on that date because of a change in the law regarding allowable good time credit, which would become effective on July 1, 2008.

At the hearing, both defense counsel and the trial court expressed their belief that the revisions to the good time credit law might subject Willard to more actual prison time due to the new designation of a “credit restricted felon” (“CRF”). Also at the hearing, defense

counsel stated that the upcoming change in the credit time law “form[ed] one of the primary bases of [Willard’s] plea of guilty.” Pet. Ex. F at 16. The trial court accepted Willard’s plea and entered judgment against him at the close of the hearing. On October 9, 2008, the trial court sentenced Willard to thirty-five years, with ten years suspended to probation and twenty-five years executed, pursuant to the cap contained in the plea agreement.

On May 13, 2009, Willard filed a pro se petition for post-conviction relief, claiming that he was denied his constitutional right to effective assistance of counsel and that due to counsel’s deficient performance, his guilty plea was not knowingly, intelligently, or voluntarily entered. On January 10, 2010, acting with counsel, he filed an amended petition with exhibits.

On March 25, 2010, the post-conviction court held a hearing on Willard’s petition. Willard’s exhibits were admitted without objection, and Willard and his defense counsel testified regarding the advice he had received concerning the effect of the revised good time credit statute on his case and its effect on his decision to plead guilty. On August 6, 2010, the post-conviction court denied Willard’s petition and entered findings of fact and conclusions of law stating that defense counsel had rendered effective assistance and that Willard had knowingly, intelligently, and voluntarily entered his guilty plea. Appellant’s App. at 83-88. Willard now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Willard challenges the post-conviction court’s denial of his petition for post-

conviction relief. In a post-conviction proceeding, the petitioner “has the burden of establishing grounds for relief by a preponderance of the evidence.” Ind. Post-Conviction Rule 1(5); *Brown v. State*, 880 N.E.2d 1226, 1229 (Ind. Ct. App. 2008), *trans. denied*. When appealing the denial of a petition for post-conviction relief, the petitioner stands in the position of one appealing a negative judgment. *Brown*, 880 N.E.2d at 1229. Therefore, “[o]n review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court.” *Id.* Here, the post-conviction court entered findings of fact and conclusions of law in accordance with Indiana 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.” *Id.* at 1230 (citation and quotation marks omitted).

Willard contends that he was denied his constitutional right to effective assistance of counsel. A defendant must satisfy two components to prevail on an ineffective assistance claim. *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*. He must demonstrate both deficient performance and prejudice resulting from it. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is representation that fell below an objective standard of reasonableness, wherein counsel has “committ[ed] errors so serious that the defendant did not have the ‘counsel’ guaranteed by the Sixth Amendment.” *Brown*, 880 N.E.2d at 1230. We assess counsel’s performance based on facts that are known at the time and not through hindsight. *Shanabarger v. State*, 846 N.E.2d 702, 709 (Ind. Ct.

App. 2006), *trans. denied*. “[C]ounsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). Prejudice occurs when a reasonable probability exists that “but for counsel’s errors the result of the proceeding would have been different.” *Brown*, 880 N.E.2d at 1230. We can dispose of claims upon failure of either component. *Id.*

When reviewing a claim of ineffective assistance pertaining to a defendant’s decision to plead guilty, we examine the nature of the alleged error. In *Segura v. State*, 749 N.E.2d 496 (Ind. 2001), our supreme court divided ineffective assistance claims regarding guilty pleas into two general categories and outlined a different test for determining prejudice for each category. The first category, which involves cases where counsel failed to utilize a defense or mitigate a penalty, the defendant must demonstrate prejudice by showing that “there is a reasonable probability that a *more favorable result* would have been obtained in a competently run trial.” *Id.* at 507 (emphasis added). For the second category,

claims relating to [an improper advisement of] penal consequences, a petitioner must establish, by objective facts, circumstances that support the conclusion that counsel’s errors in advice as to penal consequences were *material to the decision to plead*. Merely alleging that the petitioner would not have pleaded is insufficient. Rather, specific facts, in addition to the petitioner’s conclusory allegation, must establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea.

Id. (emphasis added).

Willard asserts that his trial counsel misinformed him about the applicability of the revised good time credit statutes to his case and that as a result, he accepted the plea agreement to avoid the possibility of having to spend more time in prison. Because his claim

involves an erroneous advisement regarding penal consequences, namely, his good time credit eligibility, it falls into the second category of claims. As such, he was required to demonstrate by specific facts that defense counsel's erroneous advice was material to his decision to plead guilty and that, as such, there is an objective reasonable probability that if he had had competent representation, he would not have entered such a plea. *Id.*

Here, defense counsel's allegedly erroneous advice was that Willard should plead guilty to avoid the increased actual prison time to which he might be exposed under the revised good time credit statutes. In 2008, the Indiana General Assembly revised the good time credit statutes to restrict the credit time available to certain convicted felons. Under the revised statute, a "credit restricted felon" is defined as "a person who has been convicted of ... (1) Child molesting involving ... deviate sexual conduct ... if: (A) the offense is committed by a person at least twenty-one (21) years of age; and (B) the victim is less than twelve (12) years of age." Ind. Code § 35-41-1-5.5. "A person who is a credit restricted felon and who is imprisoned for a crime or imprisoned awaiting trial or sentencing is initially assigned to Class IV. A credit restricted felon may not be assigned to Class I or Class II." Ind. Code § 35-50-6-4(b); *see also* Ind. Code § 35-50-6-3(a) and -(b) (stating that a person assigned to Class I receives one day of credit time for each day of imprisonment, and a person assigned to Class II receives one day of credit time for every two days of imprisonment). "A person assigned to Class IV earns one (1) day of credit time for every six (6) days the person is imprisoned for a crime or confined awaiting trial or sentencing." Ind. Code § 35-50-6-3(d). In short, the new designation of CRF and the addition of a Class IV

designation, which allows only one day of credit per six days served, would increase the actual prison time exposure from fifty percent to eighty-five percent for those defendants who are classified as CRFs.

Willard asserts that his counsel's allegedly erroneous advice about the revised good time credit statutes materially affected the voluntariness of his guilty plea. In other words, counsel led him to believe (1) that he would be deemed a CRF who was eligible for only one day's credit for every six days served instead of one day's credit for every one day or two days served; and (2) that he must act quickly to ensure that he would not fall within the effective date of the revised statute.

We conclude that both the substance and the timing of Willard's decision to plead guilty were based in large part on his mistaken belief that he would be subject to more actual prison time if his conviction was not entered before the revised law became effective. First, with respect to substance, the incident to which Willard pled guilty occurred on June 29, 2007. Pet. Ex. A. The record lists the victim K.H.'s date of birth as March 3, 1994. Pet. Ex. B. Thus, because Willard's victim was not under the age of twelve, he does not fall within the statutory definition of a CRF. Moreover, the offense to which Willard ultimately pled guilty was *attempted* child molesting, which is not an offense listed in the CRF statute. Finally, with respect to timing, the key date for applicability of the revised statute was not the date of Willard's conviction but the date he committed the offense. *See Upton v. State*, 904 N.E.2d 700, 706 (Ind. Ct. App. 2009) (holding that the CRF statute could not be applied *ex post facto* to a defendant who committed the offense before July 1, 2008), *trans. denied*.

Willard committed his offense on June 29, 2007. As such, he would not be classified as a CRF subject to the more restrictive one-to-six ratio of credit days allowable. Based on the foregoing, we conclude that defense counsel performed deficiently by leading him to believe that the CRF statute would apply to him.

Moreover, the record indicates that counsel's erroneous advice was material to Willard's decision to plead guilty. At the guilty plea hearing, held just four days before the revised statute's effective date of July 1, 2008, both defense counsel and the trial court addressed the revised statute's effect on Willard's case:

THE COURT: [Defense counsel] has asked that I accept the plea today and enter Judgment of Conviction today. I suspect that the reason for that is to make it clear on the record that his client is entitled to the more liberal credit time statute, which is presently in effect but will soon be nothing but an unpleasant memory

[DEFENSE COUNSEL]: I appreciate that, Judge. If I may just say, for the record, that it would be my position that should the court enter Judgment of Conviction today, after receiving a factual basis, that the defendant would be qualified for the credit time as presently situated and that that is the intent of the parties, and *that forms one of the primary bases of his plea of guilty.*

THE COURT: Well, let me warn him then and, I suppose, you, I have control over credit time that I award you at the time of sentencing. The calculation of your credit time while an inmate at a department of correction facility is not within my purview. That is up to the department of correction—that is up to department of correction personnel. I cannot guarantee you that they will interpret the statute the same way that your lawyer interprets it or, for that matter, that I interpret it. So I don't want you to enter into this plea agreement with any misconceptions as to who has what authority in this case. I—my authority to award you credit time stops when I sentence you, and then it becomes an issue that you'll have to address with the department of correction. Do you understand what I'm saying?

DEFENDANT: Yes. Yes, sir.

Pet. Ex. F at 15-17 (emphasis added).

Also, Willard testified as follows at the post-conviction hearing:

Q: Did you want to plead guilty to Class A Felony, Attempted Child Molesting?

A: No, I didn't.

Q: Why did you?

A: I was afraid of the credit class time. I was told that that would apply to me.

Q: What did that mean to you?

A: That meant serving 85 percent of probably a presumptive sentence, from what I understood.

Q: So you were, you were—if I am correct, you were assuming that if you were found guilty, you would get a presumptive sentence, which would have been 30 years and you would have to serve 85 percent of that?

A: Yes. That's what we discussed at the time.

Q: How old would you have been when you were released?

A: Pretty old. 70 or 80 years old.

Q: Had you not been facing the possibility of Credit Class 4, what would you have done?

A: I would have had no choice but to go to trial.

Q: Why is that?

A: I felt like I had to fight for my life.

Tr. at 21-22.

This testimony indicates that the difference between fifteen years' and twenty-five-and-a-half years' actual prison time exposure on an advisory thirty-year sentence loomed

large to the forty-four-year-old Willard. In addition, Willard had a prior criminal record which, when combined with the fact that his offense against his daughter represented a violation of his position of trust, increased the possibility of an enhanced sentence if he were to proceed to trial. This made the plea agreement's twenty-five-year cap on the executed portion of his sentence even more enticing.

In sum, defense counsel provided erroneous advice regarding Willard's actual prison time exposure by leading him to believe that he would be classified as a CRF subject to the impending statutory revisions. Because of his age and circumstances favoring an enhanced sentence, such erroneous advice was material to Willard's decision to accept the plea agreement with its cap on the executed portion of his sentence. Thus, but for such erroneous advice, there is an objective reasonable probability that Willard would not have entered into a plea agreement. Accordingly, we vacate his conviction for class A felony attempted child molesting and remand for further proceedings consistent with this decision.

Vacated and remanded.

BRADFORD, J., dissents with separate opinion.

KIRSCH, J., concurs.

**IN THE
COURT OF APPEALS OF INDIANA**

JOHN R. WILLARD,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 20A04-1009-PC-565
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

BRADFORD, Judge, dissenting.

Because I believe that the post-conviction court properly denied Willard’s petition for post-conviction relief, I respectfully dissent.

Willard contends on appeal that the post-conviction court improperly denied his petition for relief. It is well-established that “[w]hen appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment.” *Cornelious v. State*, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006) (quoting *Fisher*

v. State, 810 N.E.2d 674, 679 (Ind. 2004)), *trans. denied*. On appeal, we will not reverse unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.* Further, a post-conviction court’s decision 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. *Id.* “Review for ‘clear error’ requires an ‘appellate court to assess whether there is *any* way the trial court could have reached its decision.”” *State v. McCraney*, 719 N.E.2d 1187, 1190 (Ind. 1999) (quoting *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997)) (emphasis in original). “In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law.” *Cornelious*, 846 N.E.2d at 357.

I. Whether Willard’s Guilty Plea was Knowing, Intelligent, and Voluntary

Willard argues that his guilty plea was not knowingly, intelligently, and voluntarily made because he was misinformed about whether he would potentially qualify for Class IV credit time as a credit-restricted felon. I agree with the majority that Willard’s counsel incorrectly advised him that he could potentially qualify for Class IV credit time because Willard’s victim was thirteen years old at the time he committed the instant offense. *See* Indiana Code § 35-41-1-5.5 (2008) (providing that a person may be considered a Class IV credit restricted felon if he, being at least twenty-one years old, molests a child who is less than twelve years old). Thus, Willard was incorrectly informed that he could potentially qualify for Class IV credit time.

The next question, then, is whether this misinformation rendered Willard's plea involuntary. A guilty plea entered after the trial court has reviewed the various rights that a defendant is waiving and has made the inquiries called for by statute is unlikely to be found wanting in a collateral attack. *Cornelious*, 846 N.E.2d at 357. “‘However, defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for relief.’” *Id.* (quoting *Moore*, 678 N.E.2d at 1266). In assessing the voluntariness of a plea, we review all of the evidence before the post-conviction court, including testimony given at the post-conviction hearing, the transcript of the petitioner's original sentencing, and any plea agreements or other exhibits that are a part of the record. *Id.* at 357-58.

The Indiana Supreme Court has observed that despite past references to pleas as involuntary because they were not based on informed or effective assistance of counsel, voluntariness is distinct from ineffective assistance of counsel. *Id.* at 358 (citing *Moore*, 678 N.E.2d at 1266). Voluntariness is not part of the ineffective assistance of counsel analysis under the Sixth Amendment. *Moore*, 678 N.E.2d at 1266 (citing *Hill v. Lockhart*, 474 U.S. 52, 55-57, 106 S.Ct. 366, 368-69 (1985)). Voluntariness in Indiana practice instead “‘focuses on whether the defendant knowingly and freely entered the plea, in contrast to ineffective assistance, which turns on the performance of counsel and resulting prejudice.’” *Cornelious*, 846 N.E.2d at 358 (quoting *Moore*, 678 N.E.2d at 1266).

Whether viewed as ineffective assistance of counsel or an involuntary plea, the post-conviction court must resolve the factual issue of the materiality of the bad advice in the [petitioner's] decision to plead, and post-conviction relief may be granted if the plea can be shown to have been influenced by

counsel's error. However, if the post-conviction court finds that the petitioner would have pleaded guilty even if competently advised as to the penal consequences, the error in advice is immaterial to the decision to plead and there is no prejudice.

Willoughby v. State, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003) (quoting *Segura v. State*, 749 N.E.2d 496, 504-05 (Ind. 2001)). Thus, it is immaterial whether Willard's claim is of an involuntary plea or ineffective assistance of counsel. Under either standard, Willard must demonstrate that the misinformation resulting from his trial counsel's incorrect advice was material to his decision to plead guilty.

In *Segura*, the Indiana Supreme Court identified two categories of ineffective assistance of counsel claims relating to guilty pleas, applying different treatments to each respective category depending on whether the ineffective assistance allegation related to (1) a defense or failure to mitigate a penalty, or (2) an improper advisement of penal consequences. 749 N.E.2d at 507. *Segura* further divided this second "penal consequences" category into two sub-categories, specifically (1) claims of promised leniency, and (2) claims of incorrect advice as to the law. *Id.* at 504.

1. Misinformation as to Willard's Potential Status as a Credit-Restricted Felon

Willard alleges that he would not have pled guilty but for defense counsel's advice that he would potentially qualify for Class IV credit time as a credit-restricted felon if he did not plead guilty before July 1, 2008. His challenge therefore qualifies under subsection (2) of the second category, specifically an improper advisement of penal consequences relating to incorrect advice as to the law.

In *Segura*, the Indiana Supreme Court held that in order to state a claim for post-conviction relief under this subcategory, 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. 749 N.E.2d at 507. The petitioner must instead establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead. *Segura*, 749 N.E.2d at 507. Specific facts, in addition to the petitioner's conclusory allegation, must establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea. *Id.* Under this analysis, the focus must be on whether the petitioner proffered specific facts indicating that a reasonable defendant would have rejected the petitioner's plea had the petitioner's trial counsel performed adequately. *See Willoughby*, 792 N.E.2d at 564.

In *Segura*, the defendant, who had pled guilty, sought post-conviction relief on the basis that trial counsel had failed to inform him about the possibility of deportation. 749 N.E.2d at 498. Defense counsel testified at the post-conviction hearing that he had never discussed deportation as a possible consequence of the guilty plea. *Segura*, 749 N.E.2d at 499. After determining that the applicable standard in evaluating the defendant's claim was whether he had established by "objective facts" that the defendant's decision to plead was driven by erroneous advice, the Supreme Court denied his claim because the defendant had made only a "naked allegation that his decision to plead would have been affected by counsel's advice." *Id.* at 508.

In *Willoughby*, this court, citing *Segura*, similarly determined that the defendant had failed to meet his burden to show that his decision to plead was driven by defense counsel's erroneous advice. 792 N.E.2d at 565. The defendant in *Willoughby* was charged with four theft charges arising out of one incident. 792 N.E.2d at 562. During plea negotiations, defense counsel failed to inform the defendant that, due to Indiana's single larceny rule, he could not be convicted of three of his four pending charges. *Willoughby*, 792 N.E.2d at 562. The defendant entered his plea but subsequently petitioned for post-conviction relief. During the post-conviction hearing, the defendant claimed that his plea was involuntary on the grounds that, had defense counsel adequately informed him, he would have been able to negotiate a more favorable plea. *Id.* at 565. This court denied the defendant's petition, concluding in light of his potential exposure to a sentence of eleven years rather than the four years under the plea, that he had not satisfied his burden to show that a reasonable defendant in his situation would have rejected the plea, even with full information about the single larceny rule. *Id.*

Here, Willard challenges his plea on the grounds that he was misinformed by defense counsel about whether he would potentially qualify for Class IV credit time as a credit-restricted felon if he did not plead guilty before July 1, 2008. In rejecting his claim, the post-conviction court found that during the post-conviction hearing, Willard testified that he remembered stating at the guilty plea hearing that he was willing to plead guilty to Class A felony Attempted Child Molesting because he was guilty of that crime. Willard provided a factual basis to support his guilty plea by outlining his actions, which included touching his

then-thirteen-year-old daughter's vagina, under her underwear, and then placing his fingers in his mouth.

The post-conviction court additionally found that at sentencing, Willard indicated that he was satisfied with his counsel's representation and that he understood that post-sentencing credit time classifications are determined by the Department of Correction and are not exclusively within the trial court's control,¹ and that by pleading guilty prior to July 1, 2008, defense counsel sought to make it clear in the record that Willard would not be subject to the more restrictive credit time classification. However, the post-conviction court also found that defense counsel did not expressly tell Willard that Class IV credit time would apply to him if he failed to plead guilty before July 1, 2008, and that Willard conceded that he was never expressly told that Class IV credit time would apply to his sentence if he did not plead guilty before July 1, 2008. In addition, during the post-conviction hearing, defense counsel testified that he did not recall Willard ever specifically telling him that the only reason he decided to plead guilty was to avoid the Class IV credit time classification.

The post-conviction court further found that Willard "was thoroughly advised of his

¹ Pursuant to Indiana Code section 11-11-5-3, the Department of Correction ("DOC") is expressly authorized to revise credit time class determinations, including reassignment to a lower credit time class and deprivation of earned credit time. *See Robinson v. State*, 805 N.E.2d 783, 790-91 (Ind. 2004). Once the DOC has made a determination as to which credit time class a defendant will be assigned to, the amount of credit time earned is computed in accordance with statute. *See generally*, Indiana Code § 35-50-6-3. Thus, I believe that the trial court accurately informed Willard that credit time determinations were not within its exclusive control.

rights at the time of his plea, that a proper factual basis was laid for his plea of guilty, and that, in addition to discussing the impending legislation creating Class IV credit time, [defense] counsel also explained his concerns about going to trial and strategy with [Willard].” Appellant’s App. p. 87. In light of this finding, the post-conviction court determined that:

The weight of the evidence does not support the conclusion that [Willard] was expressly misinformed regarding credit time. Moreover, even if there was some confusion regarding the issue, the other factors relevant to [Willard’s] guilty plea support that the plea was made knowingly and voluntarily. [Willard] has not demonstrated that any alleged error of counsel materially effected [sic] his decision to plead guilty. Consequently, no prejudice has been shown. [Willard] has not met his burden of persuading this court by a preponderance of the evidence that he was denied effective assistance of counsel in this regard.

Appellant’s App. p. 87.

The post-conviction court also noted the favorable nature of Willard’s plea. While I acknowledge that this court has in the past rejected the reasoning that, when a defendant enters into a plea based upon misinformation, the favorable nature of that plea demonstrates its voluntariness in spite of the misinformation, I believe that the instant matter is distinguishable.

In *Cornelious*, 846 N.E.2d at 357, a defendant pled guilty based upon the misrepresentation by defense counsel and the trial court that he could pursue a Criminal Rule 4 appeal following his plea. In awarding post-conviction relief, this court concluded that the unfulfilled promise to appeal was demonstrably material to the defendant’s decision to plead and therefore rendered the plea involuntary. *Id.* at 359-60. In reaching this conclusion, this

court found it fairly insignificant, in light of the unfulfilled promise driving the decision to plead, that the defendant had received a favorable plea and that the Criminal Rule 4 claim he wished to pursue was probably meritless. *Id.* at 359.

In *Lineberry v. State*, 747 N.E.2d 1151, 1157-58 (Ind. Ct. App. 2001), this court similarly rejected the State's contention that, given a defendant's significant benefit from the plea, including dismissal of other charges against him, his plea based upon misinformation was nevertheless voluntary. Notably in *Lineberry*, the defendant's misinformation was determined to be the primary inducement for the plea. *Id.*

However, unlike in *Cornelious* and *Lineberry*, where the defendants pled guilty based on a false hope of full exoneration from a potentially successful appeal, here the extent of the misinformation was relatively minimal because (1) Willard admitted to the inappropriate and illegal touching and was aware that his counsel had expressed great concern about whether Willard's proffered defense would be successful at trial; and (2) that the trial court thoroughly and correctly advised Willard of his rights. Willard faced the potential of a fifty-year sentence if convicted of Class A felony attempted child molestation following trial. In exchange for Willard's guilty plea, the State agreed to cap the executed portion of Willard's sentence at twenty-five years. The State also agreed to dismiss another pending charge and not to file any additional charges arising from the incidents which gave rise to the instant matter. Given the relatively minimal extent of the misinformation and the highly favorable nature of the plea, I would conclude, based on these facts, that Willard has failed to satisfy his high burden to show that the post-conviction court erred in determining that counsel's

misinformation was not material to Willard's decision to plead guilty and that a reasonable defendant in his situation would have rejected the plea. *See Segura*, 749 N.E.2d at 507; *Willoughby*, 792 N.E.2d at 565.