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ATTORNEY FOR APPELLANT:

STEVEN KNECHT
Vonderheide & Knecht, P.C.
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

TONY L. TAYLOR,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 79A02-0903-PC-209
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Gregory J. Donat, Judge
Cause Nos. 79E01-9704-DF-135 and 79E01-9707-DF-289

August 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Tony L. Taylor appeals the post-conviction court's denial of his petition for relief. We affirm.

Issue

Did the post-conviction court err by denying Taylor's petition for relief?

Facts and Procedural History

On February 11, 1997, Taylor operated a motor vehicle while his license was suspended as a habitual traffic violator ("HTV"). On June 15, 1997, Taylor again operated a motor vehicle while his license was suspended as an HTV. On both occasions, Taylor knew that his license was suspended.

The State charged Taylor with class D felony operating while an HTV for each incident. The first incident was charged as cause number 79E01-9704-DF-135, and the second incident was charged as cause number 79E01-9707-DF-289.

On September 10, 1997, Taylor entered into a plea agreement to resolve both cases. The agreement provided that Taylor would plead guilty as charged, and the State would recommend that the trial court impose concurrent three-year sentences, to be suspended, and one year on probation. The State also agreed to dismiss a petition to revoke probation in another case against Taylor. Finally, the agreement provided that Taylor would receive a "lifetime suspension of driving privileges[.]" Appellant's App. at 25. On November 24, 1997, the trial court accepted the guilty plea and imposed the agreed-upon sentence.

In March 2008, Taylor filed petitions for post-conviction relief in both cases. He

alleged that he received ineffective assistance of trial counsel and that his guilty pleas were not knowing and voluntary. He specifically claimed that his trial counsel had advised him that if he pled guilty in both cases, he would be permitted to petition to have his license reinstated after ten years. After pleading guilty, Taylor learned that he is statutorily prohibited from seeking reinstatement.[1] In his petition for post-conviction relief, Taylor alleged: (1) that his trial counsel was ineffective because he told Taylor that he would be eligible to apply for reinstatement after ten years, and (2) that his guilty plea was involuntary. The post-conviction court denied his petition. Taylor now appeals.

Discussion and Decision

> [A] petitioner who has been denied post-conviction relief faces a rigorous standard of review on appeal. The post-conviction court's denial of relief will be affirmed unless the petitioner shows that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. A post-conviction petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence.
>
> Additionally, a petitioner who has been denied post-conviction relief is in the position of appealing from a negative judgment. This court accepts the post-conviction court's findings of fact unless they are clearly erroneous. We consider only the probative evidence and reasonable inferences therefrom that support the post-conviction court's determination and will not reweigh the evidence or judge the credibility of the witnesses.

Pinkins v. State, 799 N.E.2d 1079, 1091 (Ind. Ct. App. 2003) (citations and quotation marks omitted), *trans. denied* (2004).

[1] Pursuant to Indiana Code Section 9-30-10-14, a person whose driving privileges have been suspended for life may petition a court in a civil action for a rescission of the suspension order and reinstatement of driving privileges if several conditions exist, including the condition that the petitioner has not been convicted of operating while privileges are suspended as a class D felony more than once.

A. Ineffective Assistance of Counsel

Taylor claims that his trial counsel was ineffective in advising him that he was eligible to apply for reinstatement of his driver's license ten years after these convictions, when in fact he was statutorily prohibited from ever being considered for reinstatement.

> We evaluate claims concerning denial of the Sixth Amendment right to effective assistance of counsel using the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the deficiencies in the counsel's performance were prejudicial to the defense. As to counsel's performance, we presume that counsel provided adequate representation. Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference. Furthermore, a petitioner must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience.

Hart v. State, 889 N.E.2d 1266, 1272 (Ind. Ct. App. 2008) (some citations and quotation marks omitted). Where a defendant challenges counsel's performance after pleading guilty, the defendant must establish both that counsel's performance was deficient and a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Oliver v. State*, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), *trans. denied*.

When a petitioner alleges that he was incorrectly advised by counsel regarding the potential penal consequences of his guilty plea, it is not sufficient for the petitioner simply to allege that he would not have pled guilty if he had been provided with the correct information. *See Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001) ("[I]n order to state a claim for post-conviction 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."). The petitioner must present "special circumstances" or "objective facts" to show that his decision to plead guilty was "driven by the erroneous advice." *Id*. He must present facts that support a reasonable probability that "the hypothetical reasonable defendant would have elected to go to trial if properly advised." *Id*. Taylor failed to satisfy this burden.

One of Taylor's trial attorneys, Nicholas C. Deets, testified that he had no recollection of the case and thus could not confirm or corroborate Taylor's description of events. Moreover, Carl Sandy, an attorney who also represented Taylor at the time of the guilty plea negotiations, did not testify at the post-conviction hearing. We may presume then that Sandy would not have corroborated Taylor's claim of ineffective assistance. *See Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989) (holding that where petitioner fails to procure testimony of trial counsel, post-conviction court may infer that trial counsel would not have corroborated appellant's allegations).

Taylor claims that because "[t]here is no evidence to counter [his]testimony about the advice he received from his lawyer, … it must be assumed that his lawyer did, indeed, give incorrect advice." Appellant's Br. at 15. In fact, the post-conviction court was free to disbelieve Taylor's testimony that his trial counsel did in fact misinform him, and we will not substitute our judgment of witness credibility for that of the post-conviction court. *See Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004) (holding that post-conviction court is sole judge of weight of evidence and credibility of witnesses).

In its order denying Taylor's ineffective assistance claim, the post-conviction court stated, "Petitioner's bald assertion is unsupported by specific facts." Appellant's App. at 70.

We agree. Nor has he presented objective facts or special circumstances to show that his decision to plead guilty was driven by his counsel's allegedly erroneous advice. For all these reasons, Taylor's claim fails.

B. Guilty Plea

Taylor also contends that his guilty pleas were not entered knowingly, intelligently, or voluntarily because he was "misinform[ed] … about one of the consequences of his plea[,]" namely that he would never be eligible for reinstatement of his driver's license. Appellant's Br. at 12. 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. *State v. Moore*, 678 N.E.2d 1258, 1265 (Ind. 1997), *cert. denied*. "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*. at 1266. In assessing the voluntariness of a plea, we review all 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*.

When a guilty plea is attacked because of an 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. *Jackson v. State*, 676 N.E.2d 745, 752 (Ind. Ct. App. 1997), *trans. denied*. 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), *trans. denied*. It is the petitioner's burden to prove the grounds for relief by a preponderance of the evidence. *Disney v. State*, 441 N.E.2d 489, 492 (Ind. Ct. App. 1982).

In exchange for Taylor's guilty pleas in these two cases, the State agreed to recommend that the trial court order concurrent three-year sentences, suspend them, and order one year of probation. The written plea agreement also included the lifetime suspension of Taylor's driver's license. As the State points out, even if Taylor's counsel had advised him that he would be eligible to apply for reinstatement ten years after the convictions, it should have been clear to him that such an application could be denied, and yet he agreed to plead guilty. If Taylor had proceeded to trial and been found guilty of both charges, his license still would have been suspended for life, and he would likely not have received the benefits he received pursuant to the plea agreement, namely suspended prison terms. Taylor has failed to point out any weakness in the evidence against him or any other reasons that "the hypothetical reasonable defendant would have elected to go to trial if properly advised." *Segura*, 749 N.E.2d at 507. His sole evidence before the post-conviction court was his own self-serving testimony that he would not have pleaded guilty if he had known that he would be forever barred from applying for reinstatement of his driver's license. As noted above, the post-conviction court was free to disbelieve Taylor's testimony. Therefore, he failed to satisfy his burden before the post-conviction court, and his claim

fails.

Affirmed.

MAY, J., and BROWN, J., concur.