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.

FILED
Oct 08 2009, 9:06 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

THEODORE J. MINCH
Sovich Minch, LLP
McCordsville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DAVID W. KUBELSKY,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A05-0901-PC-50
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jeffrey R. Marchal, Master Commissioner
Cause Nos. 49G06-0508-FB-138822 & 49G06-0508-PC-13882

October 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

David Kubelsky appeals the post-conviction court's denial of his petition for post-conviction relief. Specifically, he contends that his trial counsel was ineffective for concealing discovery from him, improperly advising him of the likely sentence he would receive, and otherwise coercing him to plead guilty. Kubelsky also contends that his trial counsel was ineffective for failing to move to exclude evidence or dismiss the charges against him. We affirm.

Facts and Procedural History

On August 10, 2005, the Marion County Sheriff's Department received information that Kubelsky was attempting to hire someone to severely beat Kelly Hinds. Preliminary investigation revealed that there was already a pending battery charge against Kubelsky in which Hinds was the victim. An undercover police officer contacted Kubelsky through phone calls, and they met on August 11, 2005. During their meeting, which was audio- and video-recorded, Kubelsky asked the undercover officer to injure Hinds in retaliation for the pending domestic battery charge. Specifically, he indicated that "the use of a baseball bat or a hammer would be appropriate in order to injure her and also indicated that breaking her teeth, beating her in the back of the head, breaking her ribs, arms or legs, or a combination of those things would be appropriate . . . ." Ex. p. 14. Kubelsky gave the undercover officer maps he had drawn to help him locate Hinds, information on how to identify her, and $100 as a down payment. He also requested that the undercover officer bring Hinds' bra back to him as proof that he had completed the job.

On August 12, 2005, the undercover officer contacted Kubelsky to inform him that he had completed the job. Upon meeting, the undercover officer described to Kubelsky what he had done to Hinds, although he had not in fact done anything to her, and presented Kubelsky with Hinds' bra. Kubelsky paid the undercover officer another $400.

The State charged Kubelsky on August 16, 2005, with conspiracy to commit aggravated battery as a Class B felony and invasion of privacy as a Class A misdemeanor. At the time, Kubelsky was already facing two misdemeanor battery charges in two different cause numbers. Kubelsky retained Harry Sauce to represent him in all three cases. He was incarcerated through the disposition of the case, which was continued through several pretrial conferences. The trial court ordered discovery to be completed on January 10, 2006. The State acted in good faith in turning over discovery as it became available, Tr. p. 38-40, and Kubelsky concedes that he received the last of the discovery on January 4, 2006, Appellant's Br. p. 13. In February 2006, the parties advised the trial court that an agreement had been reached. In May 2006, Kubelsky pled guilty pursuant to an open plea agreement to conspiracy to commit aggravated battery as a Class B felony.[1] In exchange, the State agreed to dismiss the remaining Class A misdemeanor invasion of privacy charge as well as the two charges of misdemeanor battery.

At the guilty plea hearing, Kubelsky acknowledged that he was guilty of conspiracy to commit aggravated battery and that he understood both the terms of the plea agreement and the charge read to him by the trial court. He stated that he was not

[1] Ind. Code §§ 35-41-5-2 (conspiracy), 35-42-2-1.5 (aggravated battery).

coerced into pleading guilty and that he was doing so of his own free will. The trial court informed Kubelsky of the statutory penalty range for his offense. Kubelsky indicated that he understood the constitutional rights he was waiving by pleading guilty and that he had the right to appeal the sentence imposed by the trial court. When asked if he was satisfied with the services of Attorney Sauce, Kubelsky said that he was. The State then read the factual basis for the plea. When Kubelsky disputed some of the details of the factual basis, the following colloquy occurred:

> THE COURT: Here's what I don't want. I don't want you to think that you just have to say certain things to get this over with. You, you have to know in your own mind, that you are guilty of this crime. And if you are not willing to admit to the elements of the crime as they are charged under the law, then I cannot accept this plea agreement. They have made specific allegations that you agreed to punish her to the extent that it would result in serious bodily injury, both as to the degree of the injury and how the injury would be inflicted. Do you agree with what the State has said?
> THE DEFENDANT: Yes, Your Honor.
> THE COURT: How do you now plead to the crime of conspiracy to commit aggravated battery, as a Class B felony, guilty or not guilty?
> THE DEFENDANT: Guilty.

Ex. p. 19. The trial court accepted the open plea agreement and sentenced Kubelsky to serve sixteen years in the Indiana Department of Correction.

Kubelsky did not pursue a direct appeal. However, in May 2007, he filed a petition for post-conviction relief. Kubelsky alleged that his trial counsel failed to show him material evidence, told him that his guilty plea was likely to result in a suspended sentence or a sentence whose executed portion was served on house arrest or through community corrections, failed to investigate the case, failed to maintain contact with him, failed to file certain pre-trial motions, coerced him to plead guilty, and failed to secure "certain strategic options" by requesting that all pre-trial delay based upon the State's

failure to timely provide discovery be attributed to the State. Appellant's App. p. 81. Kubelsky also contested the propriety of his sentence.

At the post-conviction hearing, Attorney Sauce testified that he viewed the videotape of Kubelsky's dealings with the undercover officer in its entirety with Kubelsky. Regarding whether Attorney Sauce advised Kubelsky that he would receive a certain sentence, Attorney Sauce's testimony was as follows:

> Q. Did you counsel [Kubelsky] that he would receive . . . [other options for placement such as Community Corrections] based on his suspendability in this case?
> A. I would never have counseled any client that he would receive anything.
> Q. Did you counsel him that you thought it was in his best interest to plead open to the B felony?
> A. Considering the evidence that [the State] had against us, uh, David and I made the decision that it was in his best interest to plead open. I don't make those decisions for my clients, counsel.

Tr. p. 23-24.

> Q. Uh, and did you specifically tell [Kubelsky] that he would receive a fully suspended sentence or a suspended sentence in part with him being placed on Community Corrections or house arrest for any executed portion?
> A. That is a long question. But if I understand it, uh, I would have not told any client, nor have I ever told them what specific sentence they would get. I would have counseled David on a range of different things that he could possibly get. And I thought that a sentencing expert was appropriate in this case to do background and recommendations and testing on David, and we did that.

Id. at 29.

> Q. And, again, you did not specifically advise him that he would receive any particular outcome, is that correct?
> A. No. Never have. Never would.

Id. at 37. Attorney Sauce also testified that he did not coerce Kubelsky into pleading guilty. Following a hearing, the post-conviction court entered findings of fact and

conclusions of law denying relief. Kubelsky now appeals the post-conviction court's denial of relief based on his ineffective assistance of counsel claim.[2]

Discussion and Decision

Kubelsky contends that the post-conviction court erred in denying his petition for post-conviction relief. In a post-conviction proceeding, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Henley*, 881 N.E.2d at 643. The reviewing court will not reverse the judgment unless the petitioner shows 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. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. *Id.* at 644. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

---

[2] Kubelsky does not appeal the improper sentencing issue, which the post-conviction court concluded was improperly raised:

> [Kubelsky] did not seek direct appeal of his sentence despite having been advised by both the trial court and counsel that he retained the right to do so. Post-conviction relief is not the proper forum to raise sentencing issues. *Collins v. State*, 817 N.E.2d 230, 233 (Ind. 2004). Instead, "the proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to file an appeal under P-C. R. 2." *Id.* As [Kubelsky] has done neither, he is not entitled to relief under a P-C. R. 1 petition.

Appellant's App. p. 34.

We review ineffective assistance of counsel claims under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*. To prevail, the petitioner must demonstrate both that his counsel's performance was deficient and that he was prejudiced by that deficient performance. *Id.*

Because Kubelsky was convicted pursuant to a guilty plea, we must analyze the prejudice prong under *Segura v. State*, 749 N.E.2d 496 (Ind. 2001). *Segura* categorizes two main types of ineffective assistance of counsel cases. *Smith v. State*, 770 N.E.2d 290, 295 (Ind. 2002). In the first type, the defendant alleges that his lawyer has impaired or overlooked a defense or failed to mitigate a penalty. *See Segura*, 749 N.E.2d at 499. When a post-conviction claim of ineffective assistance of counsel relates to an impaired or overlooked defense, the prejudice from that impaired or overlooked defense must be measured by evaluating the probability of success of that defense at trial. *See Willoughby v. State*, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003) (citing *Segura*, 749 N.E.2d at 499), *trans. denied*. When it relates to the failure to mitigate a penalty, the prejudice from that failure must be measured by determining "whether the utilization of the opportunity to mitigate a penalty likely would produce a better result for the petitioner." *Id.*

In the second type of ineffective assistance of counsel case, the defendant alleges that his lawyer has incorrectly advised him as to penal consequences, either with promised leniency or incorrect advice as to the law. *Segura*, 749 N.E.2d at 504. In order to prove prejudice due to incorrect advice as to penal consequences, the petitioner may not simply allege that he would not have pled guilty. *Id.* at 507. The petitioner must

instead "establish, by objective facts, circumstances that support the conclusion that [trial] counsel's errors in advice as to penal consequences were material to the decision to plead." *Id.* "[S]pecific 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.

I. Guilty Plea

Kubelsky first contends that his trial counsel was ineffective for concealing the videotape from him, improperly advising him of the likely sentence he would receive, and otherwise coercing him to plead guilty.

Regarding whether Attorney Sauce concealed the videotape from Kubelsky, the post-conviction court made the following finding:

> 28. Sauce obtained both audio and video surveillance tapes which depicted Petitioner discussing matters with undercover police officers. Counsel reviewed the video tape in its entirety with Petitioner at the Marion County Jail. In counsel's opinion, the undercover video surveillance was incriminating and very damaging to the defense.

Appellant's App. p. 23. Regarding whether Attorney Sauce improperly advised Kubelsky of the likely sentence he would receive, the post-conviction court made the following findings:

> 32. Although he does not have a specific recollection of advising Petitioner of the penalties involved with the plea, as a matter of routine counsel would have advised Petitioner of the penalty range he faced and told him that he faced a maximum sentence of twenty years.

> 33. Sauce would never guarantee to a client that he would receive a certain sentence in an open plea situation and did not do so in this case. He does not recall if Petitioner ever asked him what sentence he thought the trial court would impose.
>
> * * * * *
>
> 42. The Court does not find that trial counsel promised Petitioner that he would receive a certain sentence if he pled guilty. Rather, counsel properly advised Petitioner of the sentencing range he faced.

Id. at 23, 25. Regarding whether Attorney Sauce otherwise coerced Kubelsky into pleading guilty, the post-conviction court made the following findings:

> 9. Petitioner confirmed that he was not forced or coerced in any manner to obtain his guilty plea. No one offered Petitioner anything of value to plead guilty and he pled guilty freely and voluntarily.
>
> * * * * *
>
> 41. The Court does not find that trial counsel coerced, forced or unduly pressured Petitioner into pleading guilty.

Id. at 18 (citations omitted), 25. Kubelsky offered conflicting accounts of these details, but the post-conviction court declined to find his testimony credible:

> 39. Petitioner attempts to paint a different version of counsel's representation. At the evidentiary hearing, Petitioner testified that Sauce made only a single jail visit to see Petitioner and did not review the videotape in its entirety with Petitioner. Petitioner testified that he was coerced into telling the trial court that he was satisfied with his trial counsel's performance. He said he thought Sauce would come up with a "magical, secret, undercover plea agreement" which would permit him to go home. He claimed that he was "oppressed to agree" with the plea agreement and felt "psychologically raped" into agreeing with the facts of the case as read by the prosecution during the guilty plea hearing. In sum, Petitioner maintained that he was coerced into pleading guilty.
> 40. The Court does not find Petitioner's testimony to be credible. The Court rejects the factual claims made by Petitioner and affords his testimony no weight.

Id. at 24. To the extent that the testimony of Attorney Sauce and Kubelsky differed, it was within the province of the post-conviction court to decide whom to believe and which details were important. In short, Kubelsky asks us to reweigh the evidence and reassess witness credibility, which we may not do. The post-conviction court's findings are not clearly erroneous.

Even if the post-conviction court was inclined to believe Kubelsky rather than Attorney Sauce, Kubelsky has failed to show prejudice. In terms of his claim of promised leniency, Kubelsky offers only a bare allegation that he would not have pled guilty; he has not proffered specific facts indicating that a reasonable defendant would have rejected the plea had Attorney Sauce not promised a lenient sentence. In terms of his claim of not being permitted to view the videotape, Kubelsky has not shown how the videotape would affect his probability of success at trial. He has merely pointed to the opinions of his post-conviction counsel, his family, and his former employer that the videotape was not damaging to his case. Notably, he did not even introduce the videotape into evidence for the post-conviction court to review. There is no showing other than the self-serving testimony of Kubelsky that he would not have pled guilty had he been given effective assistance of counsel. Accordingly, the post-conviction court properly denied Kubelsky post-conviction relief on the ineffective assistance of counsel claims he contends prevented him from entering a knowing and voluntary guilty plea.[3]

[3] Kubelsky's first brief hedges the arguments regarding his guilty plea as ineffective assistance of counsel claims. Appellant's Br. p. 5. That is, that his trial counsel provided ineffective assistance of counsel, which in turn prevented him from entering a knowing and voluntary guilty plea. Regarding the voluntariness of the plea, no citations to authorities or statutes are included. In contrast, Kubelsky's reply brief changes his claim from ineffective assistance of counsel to the voluntariness of his plea: "To be clear, Kubelsky's principle contention, any allegations made in Kubelsky's Petition for Post Conviction Relief notwithstanding, is that Kubelsky's plea could

II. Failure to File Motions

Kubelsky next contends that his trial counsel's inaction deprived him of his right to a speedy trial under Indiana Criminal Rule 4. At the outset, we note that Kubelsky did not request a speedy trial under Indiana Criminal Rule 4(B).[4] Additionally, we note that our Supreme Court has determined that "the right to have a trial expeditiously cannot exist or be enforced apart from the right to trial, and any claim of a denial therof is waived upon a plea of guilty." *Branham v. State*, 813 N.E.2d 809, 811 (Ind. Ct. App. 2004) (citing *Wright v. State*, 496 N.E.2d 60, 61 (Ind. 1986)). That is, a guilty plea acts as a waiver of the right to a speedy trial. Here, as Kubelsky has entered a guilty plea, he has waived his right to a speedy trial.

Kubelsky does not discuss Indiana Criminal Rule 4(B) in his brief, but instead directs us to Indiana Criminal Rule 4(A), which provides in pertinent part:

> No defendant shall be detained in jail on a charge, without a trial, for a period in aggregate embracing more than six (6) months from the date the criminal charge against such defendant is filed, or from the date of his

---

not have been knowing and voluntary . . . ." Appellant's Reply Brief p. 3. Again, no citations to authorities or statutes are included regarding the voluntariness of the plea.

First, we note that "[n]o new issues shall be raised in the reply brief." Ind. Appellate Rule 46(C). Kubelsky did not "raise" the issue of voluntariness by merely including the words "knowing and voluntary" in his original brief. Second, voluntariness is distinct from ineffective assistance of counsel. *State v. Moore*, 678 N.E.2d 1258, 1266 (Ind. 1997), *reh'g denied*. Voluntariness focuses on whether the defendant knowingly and freely entered a guilty plea, while ineffective assistance turns on the performance of counsel and resulting prejudice. *Id.* While we recognize that these two issues are often commingled, in this case, Kubelsky fails to present a cogent argument concerning the voluntariness of the plea. Ind. Appellate Rule 46(A)(8)(a).

However, even assuming Kubelsky cogently raised the issue of voluntariness in his original brief, his claim still does not pass muster. A guilty plea constitutes a waiver of constitutional rights, and, therefore, the trial court must evaluate the validity of every plea before accepting it. *Davis v. State*, 675 N.E.2d 1097, 1102 (Ind. 1996). A defendant's guilty plea is not valid unless it is knowing, voluntary, and intelligent. *Id.* As far as the guilty plea being voluntary and intelligent, the trial court found that Kubelsky was not coerced and that he understood his rights, the nature of the charge for which he was pleading guilty, and the possible sentence and fines. Ex. p. 20. As far as the guilty plea being knowing, the post-conviction court determined that Attorney Sauce viewed the videotape in its entirety with Kubelsky and never assured Kubelsky that he would receive a specific sentence.

[4] Indiana Criminal Rule 4(B)(1) provides: "If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion . . . ."

> arrest on such charge (whichever is later); except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar . . . . Any defendant so detained shall be released on his own recognizance at the conclusion of the six-month period aforesaid and may be held to answer a criminal charge against him within the limitations provided for in subsection (C) of this rule.

Kubelsky also notes that Marion County's local rules for criminal cases require the State to furnish discovery to the defendant within twenty days of the initial hearing, and that failure to comply with discovery may result in the exclusion of evidence. Appellant's Br. p. 12-13. Specifically, Kubelsky argues that because he was charged on August 16, 2005, and the last discovery was not provided to him until January 4, 2006, Attorney Sauce should have taken one of two actions. He should have requested that all delay be attributed to the State and then moved to discharge the case under Indiana Criminal Rule 4(A). In the alternative, he should have moved to exclude the discovery.

To prevail on an ineffective assistance of counsel claim based upon trial counsel's failure to file motions on a defendant's behalf, the defendant must demonstrate that such motions would have been successful. *Danks v. State*, 733 N.E.2d 474, 489 (Ind. Ct. App. 2000), *trans. denied*. A trial court is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. *State v. Montgomery*, 901 N.E.2d 515, 523 (Ind. Ct. App. 2009), *aff'd on reh'g*, 907 N.E.2d 1057 (Ind. Ct. App. 2009). It therefore must be given wide discretionary latitude in discovery matters, and absent clear error and resulting prejudice, we will not overturn. *Id.* Continuance is usually the proper remedy if a remedial measure is warranted. *Id.* Exclusion of evidence and even the dismissal of charges are

also sanctions within the arsenal of the trial judge if the State fails to afford the defense access to evidentiary materials as ordered. *Id.* (citing *Robinson v. State*, 450 N.E.2d 51, 52 (Ind. 1983)). In determining whether dismissal is proper, we must consider whether the breach was intentional or in bad faith and whether substantial prejudice resulted. *Id.*

Kubelsky is mistaken in his belief that he could have been discharged under Indiana Criminal Rule 4(A). First, the record in this case does not show whether any of the continuances were requested by the State, and thus, it is unclear that Attorney Sauce would have even been successful in charging each resetting to the State. Even if the continuances could have been attributed to the State, Kubelsky has failed to show prejudice. Kubelsky states that he was "otherwise deprived of certain strategic options that may have otherwise been available," Appellant's Br. p. 14, but he fails to specify what these strategic options are. More importantly, even assuming the continuances could have been attributed to the State, the case would not have been dismissed under Indiana Criminal Rule 4(A). Under the terms of Indiana Criminal Rule 4(A), the remedy for its violation is the defendant's release from jail on his own recognizance, after which he is still liable to be tried within the time limits of Indiana Criminal Rule 4(C).[5]

Regarding the exclusion of evidence, Attorney Sauce testified that the prosecution acted in good faith in turning over discovery as it became available. Even assuming the

---

[5] Indiana Criminal Rule 4(C) provides:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar . . . . Any defendant so held shall, on motion, be discharged.

Kubelsky pled guilty in May 22, 2006, months after the one-year deadline of August 16, 2006, had passed.

State acted in bad faith, Kubelsky has failed to show prejudice. Kubelsky received the last of the discovery in January 2006. He pled guilty in May 2006. Given that he had months to review and evaluate the discovery, we cannot say that Kubelsky was prejudiced.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.