

Aubra Ferguson appeals from the post-conviction court's (PCR court) denial of his petition for post-conviction relief following his conviction for five counts of class A felony Kidnapping,¹ and one count of class D felony Resisting Law enforcement.² Ferguson raises two issues for our review, which we consolidate and restate as follows: Did the PCR court err by finding that Ferguson failed to establish his claim of ineffective assistance of trial counsel?

We affirm.

The factual summary supporting Ferguson's convictions follows:

[O]n January 10, 2001, Warrick County Sheriff's Deputy Marvin Bruce stopped Ferguson after he learned that Ferguson failed to return a vehicle that he had been test-driving to an automobile dealership. Deputy Bruce followed Ferguson to the dealership and into the office. Deputy Bruce then contacted a police dispatcher and was informed that there were outstanding arrest warrants for Ferguson in both Vanderburgh and Posey Count[ies].

When Ferguson was questioned about the warrants, he drew a pistol and pointed it at Deputy Bruce. Deputy Bruce then took cover in a hallway and attempted to fire a shot at Ferguson. However, as Ferguson began to run, Deputy Bruce's handgun jammed. As a result, Ferguson was able to escape through a back window of the dealership.

Nearly twenty-five officers arrived at the scene and joined in the chase. Canine units, a SWAT team, and a helicopter were also summoned. Ferguson eventually entered the residence of Sherry Schafer and pointed his gun at her in the presence of her six-year-old and four-year-old grandchildren. However, Ferguson left the premises when Schafer refused to assist him. Deputy Bruce then spotted Ferguson in a field, whereupon Ferguson again pointed his pistol at him. Ferguson ignored all orders to stop and drop his weapon, and a police . . . dog then mistakenly jumped on Deputy Bruce as he attempted to fire a shotgun at Ferguson. At that point, Ferguson was able to escape around the corner of a building.

¹ Ind. Code Ann. § 35-42-3-2 (West, Westlaw current through 2010 2nd Reg. Sess.).

² Ind. Code Ann. § 35-44-3-3 (West, Westlaw current through 2010 2nd Reg. Sess.).

Ferguson then entered a beauty salon, still armed with his handgun. At the time, the owner of the business, Barb Jamerson, two employees, Katie Ott and Danna Boyles, and two customers, Jason Graulich and Marilyn Stephens, were inside. Ferguson took all five of them hostage and grabbed Ott, who was six months pregnant, by her arm and directed her to another room in the building. Stephens was over sixty-five years old and was on oxygen, but Ferguson left the tank behind when he ordered her to the back room. A hostage negotiator was called to the scene, and eventually Ferguson released all five individuals—one by one—following a five-hour standoff.

Appellant's Appendix at 102-03. Ferguson had been using methamphetamine at the time these events occurred.

Ferguson was charged with eleven felonies and one enhancement. At Ferguson's initial hearing, the trial court appointed counsel to represent him and advised Ferguson as follows:

Now I have explained to you the maximum and minimum penalties. Because most of these are alleged to have occurred on the same date, most likely the law would require only that they would run concurrent with one another. So, the maximum period of total confinement you would be facing is fifty years in prison and the least is paying the costs of the action. If there was some reason that the law provided that they would run at separate time, they run consecutive to one another and you multiplied all of the Class A's together and gave the maximum sentence for them, . . . you have six Class A felonies and that would be three hundred years and you have a Class B Felony, which is Count number nine and that is ten years in prison with aggravating circumstances increasing it to twenty . . . mitigating reducing it to six. That is on Count number nine. Okay. So, you are looking at . . . a possible . . . three hundred and thirty-two years as maximum . . . by adding them all together.

PCR Exhibit Volume 1, page 6. The charging information was amended twice and each time the trial court advised Ferguson about the range of penalties he could receive.

Ferguson's trial counsel, Charles Martin, began negotiating a plea bargain. Martin advised Ferguson that if he were convicted at trial, he could face a seventy- or eighty-year

sentence, and that it could possibly be more than a one-hundred-year sentence. Martin told Ferguson that the trial court could order the sentences to be served consecutively instead of concurrently. Ferguson agreed to plead guilty to each count in exchange for the State's dismissal of a use of a firearm and habitual offender charges. The plea agreement also called for a fifty-year cap on sentencing with at least thirty years to be served in the Department of Correction.

At the August 1, 2002, guilty plea hearing, the trial court found that Ferguson understood the nature of the charges against him and the possible sentence, that a factual basis existed for the plea agreement, that the plea was made freely and voluntarily, and took the plea under advisement. A sentencing hearing was scheduled for October 10, 2002.

On September 10, 2002, Ferguson, who was still represented by Martin, filed a pro se motion to withdraw his guilty plea. In that motion, Ferguson claimed that he did not knowingly or intentionally kidnap or attempt to kidnap anyone, and that his plea was entered into under duress and coercion by his attorney. Ferguson further claimed that he was not satisfied with Martin's representation and that Martin had a conflict of interest because he was the county attorney as well.

At a hearing held on October 3, 2002, Martin withdrew his representation of Ferguson and stated that he believed it was in Ferguson's best interest to enter into the plea agreement he had negotiated. Ferguson maintained his position that he wished to withdraw his plea. The trial court granted Ferguson's motion and appointed Mark McConnell to represent him.

McConnell negotiated a second plea agreement whereby Ferguson would plead guilty to five counts of class A felony kidnapping and one count of class D felony resisting law

enforcement in exchange for the dismissal of the other counts. Sentencing was left to the trial court's discretion. On April 25, 2003, the trial court accepted the plea agreement and imposed an aggregate sentence of seventy-three years.

Ferguson filed a motion to correct error, which the trial court denied. On July 21, 2003, Ferguson's counsel took a direct appeal from his sentence, which this Court affirmed in a memorandum decision. On October 20, 2004, Ferguson filed a pro se petition for post-conviction relief, which was amended after the State Public Defender was appointed to represent him. The PCR court held an evidentiary hearing on the petition and took the matter under advisement before denying the amended petition on August 2, 2010. Ferguson now appeals.

Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000), *cert. denied* (2002); *Wieland v. State*, 848 N.E.2d 679 (Ind. Ct. App. 2006). The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl v. State*, 738 N.E.2d 253. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals from a negative judgment. *Fisher v. State*, 878 N.E.2d 457 (Ind. Ct. App. 2007). The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the PCR court. *Id.* We will disturb a PCR court's decision as

being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the PCR court has reached the opposite conclusion. *Wright v. State*, 881 N.E.2d 1018 (Ind. Ct. App. 2008). The PCR court is the sole judge of the weight of the evidence and the credibility of witnesses. *Lindsey v. State*, 888 N.E.2d 319 (Ind. Ct. App. 2008). We accept the PCR court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Fisher v. State*, 878 N.E.2d 457.

We analyze claims of ineffective assistance of trial counsel according to the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *Sada v. State*, 706 N.E.2d 192 (Ind. Ct. App. 1999). First, the petitioner is required to show that, in light of all the circumstances, the identified acts or omissions of counsel were outside the wide range of professionally competent assistance. *Id.* A petitioner makes this showing by demonstrating that counsel's performance was unreasonable under prevailing professional norms. *Id.* Second, the petitioner is required to show adverse prejudice as a result of the deficient performance, that is, but for counsel's deficient performance, the result of the proceedings would have been different. *Id.* We will find prejudice where the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unjust or unreliable. *Id.* It is not necessary to determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.*

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the petitioner to overcome that presumption. *Id.* A petitioner must show more than

isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience; the defense as a whole must be inadequate. *Id.*

Ferguson argues that the PCR court erred when it concluded that he failed to establish that his trial counsel rendered ineffective assistance by misinforming him as to the maximum sentencing exposure he faced. Ferguson contends that if he had been properly informed he would not have withdrawn his first plea agreement, which provided for a fifty-year cap on sentencing.

Our Supreme Court has determined that trial counsel's incorrect advice as to penal consequences falls into two categories: (1) claims of promised leniency and (2) claims of incorrect advice as to the law. *Segura v. State*, 749 N.E.2d 496 (Ind. 2001). Claims falling in the second category are based on the contention that the range of penal consequences was undervalued. *Id.* A petitioner making this claim is required to establish, by objective facts, circumstances that support the conclusion that trial counsel's erroneous advice as to penal consequences were material to his or her decision to plead. *Willoughby v. State*, 792 N.E.2d 560 (Ind. Ct. App. 2003). An assertion that a petitioner would not have pleaded guilty had the correct advice been given is insufficient to prove the claim. *Id.* Specific facts, in addition to the claim, must establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea. *Id.*

The situation in this appeal presents a different twist in the argument. Ferguson is claiming that he would have pleaded guilty under the first plea agreement negotiated by Martin had he not incorrectly believed that fifty years was his maximum sentencing exposure. He asserts that because of the mistaken belief, he withdrew the first guilty plea,

entered into the second plea agreement, and was sentenced to an aggregate term of seventy-three years. While attacking Martin's performance in terms of misinformation about the maximum sentencing exposure, he seeks to have the plea negotiated by Martin, but withdrawn by him, reinstated because of its more favorable sentencing provision. His motion to withdraw his guilty plea makes no reference to sentencing, but instead includes his claim that he was withdrawing it because he was innocent.

At the hearing on Ferguson's petition, he argued that the sentencing information he received undervalued his sentencing exposure. Ferguson testified that he wished to withdraw his plea because he believed that a sentence of fifty years was the most he could receive had his case proceeded to trial. Martin testified that he explained the maximum potential sentence to Ferguson and that his sentence could be about seventy or eighty years, perhaps as high as one hundred years or more. Martin also discussed with Ferguson that the trial court could order his sentences to be served consecutively instead of concurrently. The PCR court also had before it the transcript of the trial court's advisement of the sentencing range, which informed Ferguson that he faced penal consequences in excess of three hundred years. Ferguson offered as proof of his claim the statements of the court-appointed specialists and their account of Ferguson's reason for withdrawing the first guilty plea, i.e., that fifty years was the maximum sentence he could receive.

Our review of the record leads us to the conclusion that the trial court was required to make a determination regarding the credibility of the witnesses and found Martin's testimony, coupled with the transcript of trial court's advisement of Ferguson at his initial hearing, to be more reliable. We cannot say that the PCR court's finding is clearly erroneous,

as the PCR court is in the best position to determine the credibility of witnesses. We conclude that the PCR court correctly found that Ferguson has failed to meet his burden of establishing his claim.

Likewise, we can find no error in the PCR court's conclusion that Ferguson would have withdrawn his plea regardless of the correctness of his trial counsel's advice on the law. As previously mentioned, Ferguson claimed in his motion to withdraw his guilty plea that he did not commit the offenses of kidnapping or attempted kidnapping. In other words, he supported his motion to withdraw his guilty plea on the basis of his claim of innocence. We agree with the PCR court's findings and conclusion thereon in this regard.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.