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IN THE
COURT OF APPEALS OF INDIANA

ROBERT W. PENROD,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0702-PC-132
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Scott A. DeVries, Master Commissioner
Cause No. 49F14-9801-CM-15955

July 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Robert W. Penrod ("Penrod") appeals the denial of his petition for post-conviction relief. We affirm.

Issue

Penrod raises the issue of whether the post-conviction court erred in denying his petition for relief based on its findings that Penrod was advised of his Boykin[1] rights and subsequently knowingly, voluntarily, and intelligently entered a plea of guilty, and that he received effective assistance of counsel.

Facts and Procedural History

On January 31, 1998, Penrod was charged with Operating a Vehicle While Intoxicated, as a Class A misdemeanor,[2] and Public Intoxication, as a Class B misdemeanor.[3] On May 6, 1998, Penrod pled guilty to the operating charge pursuant to a plea agreement. In exchange, the State agreed to dismiss the public intoxication charge. Penrod also agreed to a sentence of 365 days in jail with 363 days suspended, probation for 365 days, the suspension of his driving privileges for 180 days and a $200 alcohol countermeasure fee. The document detailing the plea agreement also contained an "Advisement and Waiver of Rights" section that reviewed the impact of pleading guilty, providing in part:

> 9. You have the right to a public and speedy trial by jury; the right to confront and cross-examine witnesses against you; the right to subpoena witnesses at no

[1] These rights include the privilege against compulsory self-incrimination, trial by jury, and the right to confront one's accusers. See Boykin v. Alabama, 395 U.S. 238, 243 (1969).

[2] Ind. Code § 9-30-5-2(b).

[3] I.C. § 7.1-5-1-3.

> cost; the right to require that the State prove you guilty beyond a reasonable doubt at a trial at which you do not have to testify, but in which you may testify if you wish; and the right to appeal any decision made by the Judge. By pleading guilty you will give up and waive each and every one of these rights.
>
> 10. Your guilty plea has been made knowingly and voluntarily and no promises, threats or force have been used to make you plead guilty.
>
> 11. Notice of your conviction will be sent to the Bureau of Motor Vehicles and will count toward you being a Habitual Traffic Violator. Further, if you operate a vehicle while intoxicated within 5 years of the date of this conviction, you may be charged with a Class D felony. This will count toward you being a Habitual Substance Offender. . . .
>
> 13. You have been given the opportunity to read the Probable Cause Affidavit and Information filed in this case and the facts contained in it are true and constitute a factual basis for your plea.

Appellant's Appendix at 10. Above Penrod's signature on the "Advisement and Waiver of Rights" form, it reads: "I hereby CERTIFY that I have READ the above statements, UNDERSTAND each paragraph and wish to WAIVE and hereby do WAIVE each and every RIGHT contained in those paragraphs." Id. The trial court accepted Penrod's guilty plea and imposed his sentence accordingly.

On May 8, 2006, Penrod filed his petition for post-conviction relief asserting that the record of the guilty plea hearing was destroyed, resulting in no record showing that his plea was made knowingly, voluntarily and intelligently or that his counsel adequately advised him of his rights or that there was a sufficient factual basis for the trial court to accept his guilty plea. On August 4, 2006, the post-conviction court held the hearing and subsequently issued its order denying the requested relief along with its findings of fact and conclusions of law. Additional facts regarding the post-conviction hearing will be provided as needed.

Due to the absence of any reference on the court docket to the post-conviction court's order, Penrod filed a petition for permission to file a belated notice of appeal, which was granted. This appeal ensued.

Discussion and Decision

Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Walker v. State, 843 N.E.2d 50, 56 (Ind. Ct. App. 2006), reh'g denied, trans. denied, cert. denied, 127 S. Ct. 967 (2007). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On 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. Upon reviewing a petition for post-conviction relief, we may consider only the evidence and reasonable inferences supporting the judgment of the post-conviction court. Culvahouse v. State, 819 N.E.2d 857, 860 (Ind. Ct. App. 2004), trans. denied.

The post-conviction court in this case entered findings of fact and conclusions of law. A post-conviction court's findings and judgment will be reversed only upon a showing of clear error, that is, error that leaves us with a definite and firm conviction that a mistake has been made. Id.

A. Validity of Guilty Plea

First, Penrod asserts that he did not knowingly, voluntarily and intelligently enter his

guilty plea. The essential foundation for his claim is that the record of the guilty plea hearing has been destroyed, leaving no factual basis that Penrod was advised of his Boykin rights.

The post-conviction court found that Penrod established that the transcript of the guilty plea hearing no longer exists. The evidence presented to support his claim that he was not advised of his Boykin rights was testimony from the Deputy Prosecutor who served in the relevant court at the time of Penrod's conviction, testimony from Penrod, and two affidavits, one from his trial counsel and one from the magistrate who presided over the guilty plea hearing. None of these individuals who participated in the guilty plea hearing remembered whether or not the magistrate reviewed the rights Penrod waived by pleading guilty.

In Hall v. State, our Supreme Court held that "[a] petitioner who pursues a claim for post-conviction relief challenging a plea of guilty on the ground that he was not advised of his Boykin rights is not entitled to relief solely because the guilty plea record is lost and cannot be reconstructed. Rather, the petitioner has the burden of demonstrating by a preponderance of the evidence that he is entitled to relief." Hall v. State, 849 N.E.2d 466, 467 (Ind. 2006).

Here, Penrod's only evidence offered to prove that he was not advised of his Boykin rights was that the record of the guilty plea hearing no longer exists and his testimony that he did not recall the trial court judge advising him of his rights and that his attorney did not review the paragraph of the plea agreement detailing the rights waived. Penrod has not presented any evidence demonstrating that the trial court in fact did not advise him of his rights. Rather, he simply argues that there is no record of the plea hearing and none of the

participants at the hearing, himself, his attorney, the prosecutor, or the trial court judge, specifically remembers what was said at the hearing that occurred eight years ago. This evidence does not establish that Penrod was not advised of his rights, but rather that the record cannot be reconstructed. Without more, Penrod has not established by a preponderance of the evidence that he is entitled to relief.

B. Ineffective Assistance of Counsel

Next, Penrod asserts that he is entitled to post-conviction relief because he was denied effective assistance of counsel due to his attorney never explaining the terms of the plea agreement to him.

Effectiveness of counsel is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in Strickland. Id. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. Dobbins v. State, 721 N.E.2d 867, 873 (Ind. 1999) (citing Strickland, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687; see also Douglas v. State, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see also Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the Strickland test are separate and independent

inquiries. Strickland, 466 U.S. at 697. Thus, "[i] f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Id.

Moreover, under the Strickland test, counsel's performance is presumed effective. Douglas, 663 N.E.2d at 1154. A petitioner must present convincing evidence to overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690; Broome v. State, 694 N.E.2d 280, 281 (Ind. 1998).

Where the appellant claims that ineffective assistance of counsel caused the appellant to plead guilty, the appellant must show that there is a reasonable probability that he would have been found not guilty had he gone to trial on the charge. Toan v. State, 691 N.E.2d 477, 479 (Ind. Ct. App. 1998).

Penrod claims "had he known he was entering a plea of guilty and was giving up all his rights, he would have changed his decision and would not have proceeded with a guilty plea." Appellant's Brief at 11. In making this assertion that the lack of an explanation caused him to plead guilty, Penrod was required to show that there was a reasonable probability that he would have been found not guilty had there been a trial. Penrod did not submit any such evidence. In fact, the record is completely devoid of the facts of the incident leading to Penrod's arrest. Without such evidence, Penrod's claim of ineffective assistance of counsel fails.

Based on the foregoing analysis, the post-conviction court did not err in denying Penrod's petition for post-conviction relief.

Affirmed.

SHARPNACK, J., and MAY, J., concur.