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**IN THE
COURT OF APPEALS OF INDIANA**

TOSHIO ROACH,)
)
Appellant-Defendant,)
)
vs.) No. 82A05-0610-PC-578
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable David D. Kiely, Judge
Cause No. 82C01-0310-FA-1117

JULY 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

GARRARD, Senior Judge

As the result of a plea bargain, Roach pled guilty to dealing in cocaine, a Class A felony, conspiracy to commit dealing in cocaine, a Class A felony, dealing in cocaine, a Class B felony, and possession of marijuana, a Class D felony. He was sentenced to forty years on each of the first two offenses, fifteen years on the third and three years on the fourth. The sentences were to run concurrently. In addition he was discharged from the remainder of his sentence in a prior offense.

He appeals from the denial of his petition for post-conviction relief contending that he received ineffective assistance of counsel at his guilty plea hearing and that no adequate factual basis was established for the conspiracy count.

A petitioner seeking post-conviction relief has the burden of proof to establish his claim. If relief is denied, he appeals from a negative judgment, and to obtain relief on appeal he must demonstrate that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Wesley v. State*, 788 N.E.2d 1247, 1250 (Ind. 2003).

Furthermore, where a petitioner contends that his attorney's advice concerning penal consequences was erroneous, in order to prevail, he must establish by an objective standard of reasonableness the probability that competent representation would have caused the petitioner not to have entered a plea and to have gone to trial. *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001) (Sullivan, J. and Shepard, C.J. concurring in result).¹

¹ The separate opinion would have required such a petitioner to additionally show the reasonable probability of a more favorable result upon trial.

In turning to the issues before us, we note that oftentimes in guilty plea proceedings based upon a plea agreement, little evidence is presented as to what all may have actually transpired. Indeed, a sufficient factual basis may be found to exist where a defendant acknowledges that he understands the nature of the crimes charged and that his plea is an admission of the charges. *Minor v. State*, 641 N.E.2d 85, 89 (Ind. Ct. App. 1994). Yet when it comes to establishing grounds for post-conviction relief, the burden imposed upon the petitioner requires that he demonstrate the existence of prejudicial error.

We find that Roach has failed to do so.

Concerning the conspiracy count he argues that it was barred by double jeopardy because only he and the confidential informant were named in that count of the information. The record fails to demonstrate that a third person was not also involved. At the guilty plea hearing Roach was asked by the court, “You were working with some other individual when you exchanged that cocaine for the marijuana and money?” Roach responded, “Yes”. Moreover, at the post-conviction hearing Roach’s prior counsel, Brinkmeyer, testified that he and co-counsel “had other information from other sources² that there were other people that were involved, which had the case gone to trial, I’m sure that they would have proceeded with the conspiracy charge, sir, and I can’t recall the gentleman’s name that we deposed, but there were a couple of people that were involved in that, that supported the Conspiracy charge”

² Roach’s trial counsel did extensive discovery prior to the guilty plea proceeding.

Roach has failed to establish that the evidence leads unmistakably and unerringly to the conclusion that the conspiracy count was necessarily subsumed by the dealing count.

Roach also argues that he received incorrect advice on the penal consequences he faced had he elected to go to trial. He claims ineffective assistance because trial counsel did not advise him of the sentencing restriction imposed by Ind. Code § 35-50-1-2 for offenses committed during a single episode.³ He argues that he accepted the guilty plea because he believed he might otherwise spend most of the rest of his life in prison. His trial counsel admitted at the post-conviction relief hearing that they did not advise Roach about the rule concerning sentencing in a single criminal episode.

Pursuant to *Segura* Roach must establish, by objective facts, circumstances that support the conclusion that counsels' errors in advice as to penal consequences were material to the decision to plead.

We conclude that he has failed to do so. Putting aside questions related to the charges in counts 2 through 4 of the information, upon conviction of the Class A felony contained in the first count he could have been sentenced for up to fifty years with aggravating circumstances. I.C. 35-50-2-4. While we are not advised of the extent of his prior criminal record, it does appear that he at least had a prior dealing offense, and trial counsel explained that they were concerned that if the case were tried and Roach was convicted his sentence would run consecutively to the remainder of his sentence on the

³ Under the statute the maximum sentence would have been 55 years.

prior conviction.⁴ The record before us does not disclose the remaining length of the sentence for the previous offense, but counsel Brinkmeyer testified at the hearing that while he could not remember the exact remainder, “it was a considerable period of time.” So it appears that the failure to address the limitations attending a single episode of criminal activity may have had little, if any, bearing on the decision to plead guilty. Had Roach been convicted after trial, he faced the potential of an enhanced penalty for a Class A felony which would be imposed to run consecutively to the remainder of the sentence which was discharged as part of the plea bargain.

In sum, we cannot say that the evidence leads unerringly and unmistakably to the conclusion that any errors by counsel in advising Roach concerning penal consequences were material to his decision to plead guilty. Indeed, it appears that other concerns of counsel were substantial and significant to the decision to plead.

No reversible error has been established.

Affirmed.

BARNES, J., and BAILEY, J., concur.

⁴ I.C. 35-50-1-2(d) would require consecutive sentences.