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**IN THE
COURT OF APPEALS OF INDIANA**

SHANE LONG,)

Appellant-Defendant,)

vs.)

No. 49A04-0612-PC-733

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather Welch, Magistrate
Cause No. 49G01-0502-PC-28171

November 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Shane Long appeals the post-conviction court's findings that he voluntarily pled guilty and that he received effective assistance of counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

On February 20, 2005, Long and his wife Krisanna were drinking, smoking marijuana, and using cocaine. Krisanna told Long she had sex with one of his friends. Long "snapped" and threatened Krisanna with an AKS semi-automatic rifle. (Ex. 3 at 43.) He handcuffed her to the bed for several hours and slashed her back with a knife. Krisanna was unable to leave the house for the rest of the evening. The Longs' two-year-old hid in his bedroom during the confrontation, but their six-year-old witnessed it.

Long was charged with ten counts arising out of these events. He initially rejected a plea agreement, but ultimately pled guilty to criminal confinement as a Class B felony and battery as a Class C felony. At the sentencing hearing, the trial court found several aggravating circumstances: Long violated a no-contact order; he was the victim's husband; he committed the offenses within the sight or hearing of his children; and the risk he would commit another offense against the victim was great. The trial court gave some mitigating weight to his minimal criminal history and the improbability the circumstances leading up to these offenses would recur. He was sentenced to four years for battery, to be served concurrently with an aggravated sentence of thirteen years for criminal confinement.

DISCUSSION AND DECISION

1. Voluntariness of Plea

A petitioner claiming that his or her guilty plea was involuntary, and appealing from a denial of post-conviction relief, must show the reviewing court “that the evidence presented during the post-conviction proceedings is without conflict and, as a whole, leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.”

Ellis v. State, 744 N.E.2d 425, 427 (Ind. 2001) (citations omitted).

Long claims the trial court’s comments during the plea hearing constituted “judicial participation in the plea bargaining process,” which has been held to present “a high potential for coercion” and is a “special cause for concern.” *Id.* Specifically, Long asserts the trial court implied his testimony would not be credible and disparaged his defense. It did not. The record shows the trial court reminded Long of the evidence against him and told him he could not reduce his charges by arguing they were crimes of passion. The trial court informed Long his attorney could make that argument at sentencing.

Long also argues his plea was involuntary because he was told his plea would be given mitigating weight. Long had a pretrial hearing before a Judge Pro Tempore Jeffrey Marchal, who told him, “this Court . . . always shows acceptance of responsibility as a mitigating factor.” (Ex. 3 at 112-13.) However, Long did not plead guilty until a subsequent hearing before Judge Jane Magnus-Stinson. Judge Magnus-Stinson told Long his attorney could argue at sentencing that he had accepted responsibility, but she did not promise to make such a finding or to accord it substantial weight. Because Long

understood Judge Magnus-Stinson would decide his sentence, his plea was not involuntary.

Long further asserts his plea was not voluntary because counsel improperly informed him there would be no aggravating factors. When counsel expressed this view at the plea hearing, the trial court located the State's notice of aggravators and read them to Long and counsel. Counsel pointed out that one of those aggravators would be improper as a matter of law, but did not persist in advising Long that the other aggravators could not be used or proven. Long was advised there might be aggravators, and his plea was not involuntary for that reason.

The record reflects Long was properly advised of his rights and supports the post-conviction court's finding his plea was voluntary.

2. Assistance of Counsel

Long also argues his counsel was ineffective because counsel did not inform him of potential aggravating factors, did not present evidence corroborating Long's mental illness, and did not explicitly argue his guilty plea was entitled to mitigating weight. When reviewing a claim of ineffective assistance of counsel, we begin with a strong presumption counsel rendered adequate legal assistance. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002), *cert. denied* 540 U.S. 830 (2003). To rebut this presumption, Long must demonstrate two things:

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that

the deficient performance prejudiced the defense. To establish prejudice, a defendant must show 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.

Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001) (citations omitted), *cert. denied* 537 U.S. 839 (2002). Counsel is "afforded considerable discretion in choosing strategy and tactics." *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). We evaluate counsel's performance as a whole. *Woods v. State*, 701 N.E.2d 1208, 1211 (Ind. 1998), *cert. denied* 528 U.S. 861 (1999).

Long was provided adequate and accurate information about the potential aggravating factors and nevertheless pled guilty. Accordingly, Long cannot demonstrate counsel's failure to give him that information caused him prejudice.

Shortly before he committed these offenses, Long was diagnosed with bipolar disorder. He was given medications, which may not have fully taken effect at the time he committed the offenses. Long testified to these facts, and counsel argued for mitigation based on his medical condition. Counsel did not offer medical records verifying Long's diagnosis, because those records contained damaging evidence of extensive drug use beyond that mentioned in the pre-sentence investigation report. The decision whether to offer those records, which contained both positive and negative facts, was a tactical decision by counsel. We will not find counsel's performance deficient in this regard.

After the court pronounced sentence, counsel asked why it did not give mitigating weight to Long's guilty plea. The court responded, "Well you didn't argue it either."

(Ex. 3 at 104.) However, the trial court did proceed to consider it, and decided the sentence imposed was fair:

Well, he does get mitigation. He did accept responsibility. Fine, I still think thirteen is an appropriate sentence. I was not pleased with, let me put it this way. The way he responded when asked about his child, did not indicate to me a significant acceptance of responsibility of his own conduct. Rather, it showed him shifting the blame to his wife and that concerns the Court in terms of his future conduct.

(*Id.* at 104-05.) The trial court found Long's acceptance of responsibility was not complete, as he blamed Krisanna for the children's presence during the confrontation. The trial court acted within its discretion to find his acceptance of responsibility did not counterbalance the fact his children were present. Because the trial court ultimately did consider Long's guilty plea a mitigating circumstance, he was not prejudiced by counsel's failure to argue that mitigator.

Affirmed.

DARDEN, J., and CRONE, J., concur.