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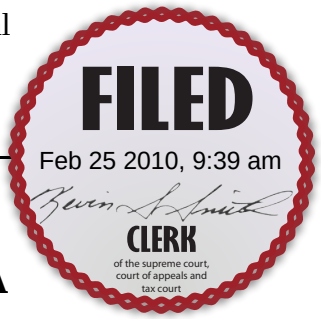

IN THE COURT OF APPEALS OF INDIANA

MICHAEL L. OTT,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 29A02-0907-PC-668
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0812-PC-107

February 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Michael L. Ott appeals the denial of his petition for post-conviction relief. The sole issue is whether he was denied his constitutional right to effective assistance of counsel. We affirm.

On May 25, 2002, Ott broke into the Fall Creek Wesleyan Church and the Holy Family Episcopal Church and stole property. On May 25, 2002, the State charged him with two counts of class B felony burglary and two counts of class D felony theft. On October 7, 2003, he pled guilty via plea agreement to the two counts of burglary. The plea agreement called for a fixed twenty-year sentence on each count, to be served concurrently, with ten years suspended, subject to five years probation. The trial court accepted Ott's plea and sentenced him pursuant to the plea agreement.

On July 14, 2008, Ott admitted to violating his probation, and the trial court revoked his probation and ordered the execution of the remainder of his sentence. On December 18, 2008, Ott filed a petition for post-conviction relief, and a hearing ensued on April 30, 2009. On June 22, 2009, the post-conviction court entered findings of fact and conclusions of law, denying his petition.

Ott now appeals the post-conviction court's denial of his petition. The petitioner in a post-conviction proceeding "has the burden of establishing grounds for relief by a preponderance of the evidence." Ind. Post-Conviction Rule 1(5); *Brown v. State*, 880 N.E.2d 1226, 1229 (Ind. Ct. App. 2008), *trans. denied*. When appealing the denial of a petition for post-conviction relief, the petitioner stands in the position of one appealing a negative judgment. *Brown*, 880 N.E.2d at 1229. Therefore, "[o]n 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.* Here, the post-conviction court entered extensive findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Id*. at 1230 (citation and quotation marks omitted).

Ott asserts that he was denied his constitutional right to effective assistance of counsel during his plea negotiations. A defendant must satisfy two components to prevail on an ineffective assistance claim. *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*. He must demonstrate both deficient performance and prejudice resulting from it. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is "representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Brown v. State*, 880 N.E.2d at 1230. We assess counsel's performance based on facts that are known at the time and not through hindsight. *Shanabarger v. State*, 846 N.E.2d 702, 709 (Ind. Ct. App. 2006), *trans. denied*. "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). Prejudice occurs when a reasonable probability exists that, "but for counsel's errors the result of the proceeding would have been different." *Brown*, 880 N.E.2d at 1230. We can dispose of claims upon failure of either component. *Id.*

The two-pronged *Strickland* test applies to ineffectiveness claims arising out of the

guilty plea process. *Dew v. State*, 843 N.E.2d 556, 564 (Ind. Ct. App. 2006), *trans. denied*. Here, Ott contends that his counsel rendered deficient performance during plea negotiations by failing to inform him of the maxim that maximum sentences are generally reserved for the worst offenders or worst offenses. *Spears v. State*, 811 N.E.2d 485, 491 (Ind. Ct. App. 2004). His plea agreement fixed his sentence at concurrent twenty-year terms for the two class B felonies, with ten years suspended, subject to five years probation. Under the applicable version of Indiana Code Section 35-50-2-5 (2002), the sentencing range for a class B felony was six to twenty years, with a ten-year presumptive sentence. Ott asserts that, had his counsel informed him of the "worst offenders" maxim, he would not have agreed to the fixed aggregate twenty-year sentence, but would have proceeded to trial instead.

In *Segura v. State*, our supreme court examined the requirements for meeting the *Strickland* test in cases involving guilty pleas, holding that

> [f]or ineffective assistance claims related to penal consequences, a petitioner must establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead. Merely alleging that the petitioner would not have pleaded is insufficient. Rather, specific 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.

749 N.E.2d 496, 507 (Ind. 2001).

At the post-conviction hearing, defense counsel admitted that he did not inform Ott of the maxim. Nonetheless, he stated that he acted according to his client's stated primary objective of minimizing the executed portion of his sentence. "Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions

deference." *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied* (2002). "[E]ven the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client." *Id.* Thus, isolated mistakes, poor strategy, inexperience, and instances of poor judgment do not necessarily render representation ineffective. *Id.* Strategies are assessed based on facts known at the time and will not be second-guessed even if the strategy in hindsight did not serve the defendant's best interest. *Curtis v. State*, 905 N.E.2d 410, 414 (Ind. Ct. App. 2009), *trans. denied*.

Ott has failed to demonstrate deficient performance by his trial counsel. First, as noted, defense counsel employed a strategy designed to limit the executed portion of Ott's sentence. We will not, in hindsight, second-guess this strategy, especially since counsel employed the strategy at Ott's behest. Moreover, Ott initialed the plea agreement indicating that his counsel properly advised him of the sentencing range, including the possibility that he could receive consecutive sentences. *See* Ind. Code § 35-50-1-2 (2002) (listing class B felony burglary among offenses for which trial court has discretion to impose consecutive maximum sentences); *see also Townsend v. State*, 860 N.E.2d 1268, 1273 (Ind. Ct. App. 2007) (stating consecutive sentences appropriate to vindicate separate acts committed against separate victims), *trans. denied*.[1] Ott also indicated to his probation officer that he understood that he faced a potential forty-year sentence. State's Ex. 6. Thus, his maximum

[1] Here, Ott committed two distinct burglaries against two separate churches four miles apart.

exposure was forty, not twenty years. As such, the maxim could be said to be inapplicable.[2]

Finally, we note that Ott has failed to demonstrate prejudice stemming from his counsel's failure to advise him regarding the "worst offenders" maxim. Instead, his claim that he would have insisted on a trial amounts to "nothing more than a naked allegation that his decision would have been affected by counsel's advice." *Segura*, 749 N.E.2d at 508. As such, he has failed to establish that he was prejudiced as a result of accepting the plea agreement. Accordingly, we affirm.

Affirmed.

RILEY, J., and VAIDIK, J., concur.

[2] We note that Ott is no stranger to the penal system. His criminal history includes nine prior convictions, seven of which were burglary- or theft-related. In addition, he admitted to his probation officer that less stringent punishments had failed "to leave a lasting impression." State's Ex. 6.