ATTORNEYS FOR APPELLANT:

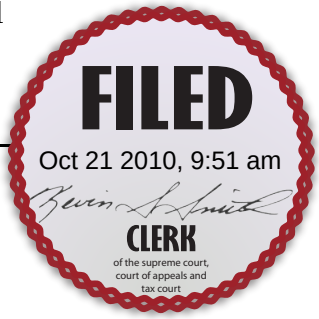
SUSAN K. CARPENTER
Public Defender of Indiana

HOPE FEY
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana



IN THE COURT OF APPEALS OF INDIANA

GARY PARSONS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 82A04-1003-PC-196
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
The Honorable Kelly E. Fink, Magistrate
Cause No. 82C01-0307-FA-786; Cause No. 82C01-0608-PC-6

October 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Gary Parsons ("Parsons") appeals the post-conviction court's denial of his petition for post-conviction relief. He raises one issue for our review, whether the post-conviction court erred in concluding that Parsons did not receive ineffective assistance of counsel when his attorney did not inform him of an offer for a plea agreement in the week before trial.

We affirm.

Facts and Procedural History

We excerpt the following facts from Parsons's direct appeal:

> On July 14, 2003, Evansville police officers went to Defendant and Diana Frazier's house in Vanderburgh County to serve a warrant on Frazier and to investigate an anonymous tip that methamphetamine was being sold at the house. Detective Minto, who was not in uniform, knocked on the front door, while the other officers stood off to the side of the house. Defendant answered the door. Detective Minto asked if Frazier was there. Defendant responded that she was, and Detective Townsend who was in uniform came up to the porch. Defendant called for Frazier, and then stepped back from the door. The officers entered Defendant's residence. As the officers were placing Frazier in custody, they observed marijuana and marijuana seeds on the living room coffee table.
>
> Detective Minto asked if anyone else was in the house. Frazier indicated that there was no one else in the house. However, the officers heard voices from the back of the house and conducted a protective sweep. Detective Minto found two other people in the kitchen, and observed a handgun in the kitchen. The officers glanced into the bedroom just off the kitchen where they saw paraphernalia and narcotics. Defendant and Frazier did not give the officers consent to further search the house.
>
> Minto obtained a search warrant while the other officers stayed with Defendant and Frazier. During the subsequent search of the house, officers recovered 50.86 grams of methamphetamine, 2.07 grams of marijuana, scales, baggie corners, and marijuana smoking paraphernalia.

> The State charged Defendant with dealing in methamphetamine and possession of marijuana. Defendant filed a motion to suppress the results of the search. That motion was denied after a hearing by the trial court. Defendant filed a motion in limine seeking to exclude the evidence recovered during the search. That motion was also denied before trial. Defendant objected to the admission of the evidence recovered during the search of his house at trial. These objections were overruled. The jury convicted Defendant of the charges, and this appeal ensued.

Parsons v. State, 82A05-0409-CR-479, slip op. at 2-3 (Ind. Ct. App. Apr. 21, 2005), trans. denied.

Dennis Vowels ("Vowels") represented Parsons for a portion of the case. Sometime between December 4, 2003, and Vowels's withdrawal on January 22, 2004, Parsons was offered a plea agreement, which would leave Parsons with a Class C felony conviction for a term of eight years. After he withdrew, Vowels was replaced as counsel for Parsons by Sonny Reisz.

Reisz and Parsons discussed accepting the plea agreement, but opted instead to pursue a motion to suppress the results of the search; this was unsuccessful. At least one other plea agreement for a Class C felony plea with an open term was discussed. It was the established policy of the Drug Enforcement Division, of which Deputy Prosecutor Timothy Fox ("Fox") was a member, to revoke all plea offers if a defendant failed in a motion to suppress evidence from a search. This rendered unavailable any plea offers made before the denial of Parsons's motion to suppress.

Sometime about a week before the trial, Fox verbally extended another plea offer to Parsons through Reisz. The offer would have required Parsons to plead guilty to a Class B

Felony with open sentencing terms. Parsons had told Reisz that he wanted work release if at all possible, and a Class B conviction would not afford this to him, though a Class C conviction would. Reisz, acting for Parsons, rejected the plea.[1] Because Parsons was charged with a Class A felony for distribution with a Class C felony lesser included offense for possession, Reisz hoped to elicit testimony from co-defendant Diane Frazier ("Frazier") that the quantity of methamphetamine found at Parsons's house was intended for their consumption and not for sale. Because Frazier agreed to testify against Parsons in exchange for a plea agreement, this strategy was unsuccessful.

On August 4, 2006, Parsons filed his petition for post-conviction relief. After an extensive period of investigation, Parsons's amended petition was filed on April 24, 2009. A hearing on Parsons's petition was held on June 19, 2009, which was continued to and concluded on July 22, 2009. On February 5, 2010, the post-conviction court entered its Findings of Fact, Conclusions of Law and Judgment, which denied Parsons's petition.

This appeal followed.

Discussion and Decision

Parsons alleges that he was denied effective assistance of counsel because Reisz failed to inform him of Fox's verbal offer of the Class B plea agreement shortly before trial. The petitioner in a post-conviction proceeding bears the burden of establishing the grounds for

[1] We note that Reisz's testimony indicates that he does not recall a plea offer being extended at this time, though he acknowledges a discussion of a purported plea offer during the sentencing hearing. The post-conviction court's findings and conclusions determine that "Petitioner has not proven by a preponderance of the evidence that Mr. Reisz acted unreasonably by failing to advise Petitioner of a plea offer or that there was a reasonable probability that Petitioner would have accepted an open plea offer to a class B felony." (App. 140.) We take this to mean that the trial court did conclude that an offer had been extended, and we proceed as such.

relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). 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 of the post-conviction court unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. 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. In this review, findings of fact are accepted unless they are clearly erroneous and no deference is accorded to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. Id.

Generally, to establish a post-conviction claim alleging the violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient." Id. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." Id. "Second, a defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial," that is, a trial where the result is reliable. Id. 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." Id. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id. Further, counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000).

Strickland sets forth the general test for ineffective assistance of counsel. We have adapted Strickland and this State's case law in addressing the question of ineffective assistance of counsel in the context of counsel's failure to convey a plea offer to a defendant in Dew v. State, 843 N.E.2d 556 (Ind. Ct. App. 2006), trans. denied. Dew viewed favorably and adopted the approach of the U.S. Seventh Circuit Court of Appeals in Johnson v. Duckworth, 793 F.2d 898 (7th Cir. 1986). See Dew, 843 N.E.2d at 565. The standard set forth in Dew is that

> [i]n the ordinary case criminal defense attorneys have a duty to inform their clients of plea agreements proffered by the prosecution, and that failure to do so constitutes ineffective assistance of counsel under the sixth and fourteenth amendments…. Nevertheless, it does not relieve a defendant of the burden of establishing by a preponderance of the evidence … that counsel acted unreasonably by failing to inform him of the plea offer and that, but for counsel's actions, there was a reasonable probability that he would have accepted the plea offer.

Id. at 568 (citations and quotations omitted).

The Johnson case "was not 'typical'" because Johnson "considered himself incompetent when the plea offer was made." Id. at 568 (citing Johnson, 793 F.2d at 902). Dew's case was also not typical, but this favored his appeal from a denial of post-conviction

relief. Id. at 569. Dew was tried before a jury. The jury was deadlocked and a mistrial declared. Before that first trial, Dew had considered and rejected a guilty plea. Id. at 558. Leading up to Dew's second trial, Dew's attorney failed to give him notice of a plea offer or to communicate with Dew at all. Id. at 559. As a result of a change in strategy after speaking with the jurors in the first trial, the State planned to call witnesses not involved in the first trial. Dew's attorney had also failed to interview these new witnesses. Dew was then convicted at the second trial. Id. at 569.

During the hearing for his post-conviction petition, Dew testified that had his attorney informed him of the new witnesses and of the plea offer, he would have accepted the offer and entered into a plea agreement. Id. at 570-71. We observed that "Dew's testimony highlights the consequences of counsel's failure to inform him about the State's second plea offer." Id. at 571. We then concluded that "there is a reasonable probability that, but for his counsel's actions, Dew would have accepted the State's plea offer" and that the trial court's denial of Dew's petition for post-conviction relief was clearly erroneous. Id.

Applying the standard adopted in Dew here, we do not believe that the post-conviction court's denial of Parsons's petition was clearly erroneous. The post-conviction court concluded, despite Reisz's inability to remember any plea offer the week before the trial, that Reisz failed to convey a plea offer to Parsons in the week before the trial, and the record (particularly Fox's testimony) supports this conclusion. That Reisz failed to convey this information does not end the inquiry. Parsons must also have demonstrated by a preponderance of the evidence that Reisz's failure to inform him of the plea offer was

unreasonable and that there is a reasonable probability that, had Reisz so informed him, he would have accepted the plea. See Dew, 843 N.E.2d at 568.

Here the trial court concluded that Reisz's testimony was "compelling in that Mr. Reisz indicated that the defendant did not want to plead to a Class B felony because the defendant would have no opportunity to be sentenced to work release," which could only occur with a Class C felony conviction. (App. 140.) The pre-trial offer made by Fox was for a Class B felony plea with open terms on sentencing. Reisz's strategy after denial of the motion to suppress was to pursue a conviction for a Class C lesser included offense of the Class A charge because the Class C conviction would allow Parsons access to work release. This strategy failed, as Parsons's co-defendant reached a plea agreement with the State in exchange for her testimony against Parsons.[2]

Refusal of the Class B felony plea offer is consistent with the broader conduct of Parsons's defense. Parsons refused two Class C plea offers to pursue the motion to suppress. Reisz testified that, based upon his conversations with Parsons, Parsons wanted work release if at all possible, and pursuing a conviction for the Class C lesser included offense rather than accepting the Class B plea offer was consistent with Parsons's expressed desire for work release.

Given Parsons's previously expressed wishes for work release if at all possible and the

[2] To the extent that Parsons and the State ask us to second-guess the post-conviction court by evaluating the credibility of testimony or reweighing evidence, we must decline to do so. See Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). In his reply brief, Parsons also asks us to review the reasonableness of Reisz's advice to pursue a conviction for the lesser included offense at trial. Because no new issues may be raised in a reply brief, Ind. Appellate Rule 46(C), we do not review this argument here.

existence of a viable strategy to obtain a work release-eligible conviction at trial, the evidence introduced at the hearing does not lead us to the inevitable conclusion that Parsons would probably have accepted the pre-trial plea offer if Reisz had informed him of it. Reisz did refuse the Class B plea offer on Parsons's behalf without informing Parsons of its existence. But Parsons has not demonstrated that the post-conviction court's conclusion that Reisz's decision was reasonable was clearly erroneous.

Affirmed.

RILEY, J., and KIRSCH, J., concur.