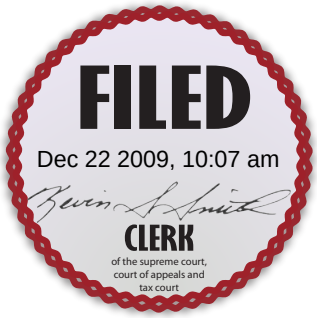

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IN THE
COURT OF APPEALS OF INDIANA

LARRY E. KUHN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 18A05-0906-PC-329
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT NO. 2
The Honorable Richard A. Dailey, Judge
Cause No. 18C02-0111-CF-78

December 22, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Larry E. Kuhn (Kuhn), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUES

Kuhn raises two issues, which we restate as:

(1) Whether his trial counsel provided ineffective assistance of counsel by failing to share a plea offer from the State with him; and

(2) Whether his trial counsel provided ineffective assistance of counsel by failing to put on a defense.

DISCUSSION AND DECISION

In Kuhn's direct appeal, we stated the relevant facts as follows:

> On November 13, 2001, the Muncie Police Department, received two calls shortly after midnight regarding a disturbance at 710 East Main. The first call came from apartment number five at 710 East Main. During trial, Officer Pease identified apartment number five as "a Conley residence." [] It is not clear whether the caller gave the dispatcher his or her name. The caller indicated that "approximately fifteen shots [were fired.] Subjects were coming out of apartment number two." [] Kathy Toukes was the second caller. She was also a resident at 710 East Main. She told the dispatcher that "she heard five shots coming from the alley behind her residence" and that "she looked out and saw a black car take off down the alley real fast and . . . someone [was] in the alley barking like a dog."[]
>
> The dispatcher advised Officer Jeffrey Pease of the Muncie Police Department that there was a report of shots fired, possibly coming from apartment number two at 710 East Main. Based on that information, Officer Pease went to 710 East Main, and upon his entry into the apartment building, saw Kuhn walking out of apartment number two. Kuhn appeared to be intoxicated. He smelled strongly of an alcoholic beverage, had poor balance, and slurred speech.

> Officer Pease advised Kuhn that he was there because tenants of the building had called and reported shooting coming from apartment number two. Officer Pease told Kuhn to turn around and put his hands on top of his head. Kuhn refused and began cursing at Officer Pease. Officer Pease "had to help [Kuhn] put his hands on top of his head." [] Officer Pease then performed a patdown search of Kuhn. Officer Pease found an air pistol in Kuhn's front waistband and a twenty-two caliber handgun in his left rear pants pocket.
>
> The State charged Kuhn with unlawful possession of a firearm by a serious violent felon as a class B felony and with being a habitual offender.[] Kuhn filed a motion to suppress the evidence of the hand gun seized as a result of the search. After a hearing, the trial judge denied Kuhn's motion. At trial, Kuhn renewed his objections to the admission of the evidence. A jury found Kuhn guilty as charged. The trial court sentenced Kuhn to thirty years in the Indiana Department of Correction.

Kuhn v. State, Case No. 18A02-0209-CR-775, Slip at 2-3 (Ind. Ct. App. June 4, 2003).[1]

On December 17, 2007, Kuhn sought post-conviction relief. On December 19, 2007, the State filed a response to Kuhn's petition. At a hearing on his petition on March 20, 2008, Kuhn did not appear, but the post-conviction court proceeded with the hearing *in absentia* and denied the petition for post-conviction relief thereafter. Kuhn appealed, and on February 12, 2009, we issued an opinion holding that the trial court erred by conducting the hearing on Kuhn's petition for post-conviction relief *in absentia* and remanded for further proceedings. *Kuhn v. State*, 901 N.E.2d 10, 13 (Ind. Ct. App. 2009).

On April 23, 2009, the post-conviction court conducted a hearing. The trial prosecuting attorney identified "Defendant's Exhibit A" as being a copy of a fax dated March

[1] We granted rehearing to address Kuhn's contention that we erred when stating that Kathy Toukes was a resident of 710 East Main. *Kuhn v. State*, Case No. 18A02-0209-CR-775, Slip op. at 2 (Ind. Ct. App. July 23, 2003), *opinion on reh'g, trans. denied*. We acknowledged this error, but affirmed our original opinion in all other respects. *Id*.

12, 2002, that she had sent to Kuhn's trial counsel conveying the State's offer of terms for a plea agreement. Kuhn's trial counsel testified at the hearing that he could not remember receiving the plea offer or sharing it with Kuhn, even though it was his standard practice and procedure to share plea offers with the defendants and had done so regularly with the approximately fifteen hundred clients he had represented over the course of his career. Kuhn's trial counsel recollected that they had determined that Kuhn had a good defense argument for the suppression of the evidence seized during the search of Kuhn and assumed that Kuhn had rejected the plea offer in order to pursue that defense. At the close of evidence, the post-conviction court denied Kuhn's petition for post-conviction relief.

Kuhn now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

The petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). Because Kuhn is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). "The post-conviction court is the sole judge of the evidence and the credibility of the witnesses." *Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction

court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

Post-conviction hearings do not afford defendants the opportunity for a "super appeal." *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. Rather, post-conviction proceedings provide a narrow remedy for collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Ross v. State*, 877 N.E.2d 829, 832 (Ind. Ct. App. 2007), *trans. denied*. This Kuhn has done by alleging that his trial counsel provided ineffective performance in violation of Article 1, Section 13 of the Indiana Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. *See* Post-Conviction Rule 1 (1)(a).

In order to demonstrate ineffective assistance of counsel Kuhn must establish both prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*; *Lee v. State*, 880 N.E.2d 1278, 1280 (Ind. Ct. App. 2008). The defendant must prove (1) his or her counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's failure to meet prevailing professional norms, the result of the proceeding would have been different. *Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *reh'g denied, trans. denied* (citing *Strickland*, 466 U.S. at 690). Essentially, the defendant must show that counsel was deficient in his or her performance and the deficiency resulted in prejudice. *Johnson*, 832 N.E.2d at 1006. Because all criminal defense attorneys will not agree on the most effective way to represent a client, "isolated mistakes, poor strategy, inexperience, and

instances of bad judgment do not necessarily render representation ineffective." *Bieghler v. State*, 690 N.E.2d 188, 199 (Ind. 1997), *reh'g denied, cert. denied*, 525 U.S. 1021 (1998). Thus, there is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id*.

II. *Communication of Plea Offer*

Kuhn first contends that his trial counsel was ineffective for failing to convey to him the plea offer by the State. Criminal defendants retain the right to counsel at all "critical stages" of the criminal process, which has been held to include "the decision to reject a plea bargain offer and plead not guilty." *U.S. ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 437 (3rd Cir. 1982). Corollary to this right is the defendant's right to be advised of a plea offer. *See id*. "[T]he decision to plead guilty is one that must be made by the defendant, and is not one in which an attorney may speak for his client without consultation." *Dew v. State*, 843 N.E.2d 556, 565 (Ind. Ct. App. 2006), *trans. denied*. Our supreme court has stated plainly that "[i]f a defense counsel failed to inform defendant of a plea offer, we would be compelled to reverse." *Curl v. State*, 272 Ind. 605, 607, 400 N.E.2d 775, 777 (1980); *see also Young v. State*, 470 N.E.2d 70, 71 (Ind. 1984) ("We agree with the Petitioner that if his attorney failed to advise him of a plea offer made by the State, he was denied the effective assistance of counsel."); *Whittle v. State*, 542 N.E.2d 981, 989 (Ind. 1989) ("Failure to convey a plea offer from the prosecutor to the defendant constitutes a denial of effective assistance of counsel."),

overruled on other grounds by Scisney v. State, 701 N.E.2d 847 (Ind. 1998). However, more recently, we explained that proof of the failure to convey a plea offer "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." *Dew*, 843 N.E.2d at 568 (citing *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986)).

Nevertheless, Kuhn has not proven that his trial counsel failed to convey the State's offer, which makes the analysis of whether Kuhn would have accepted the plea offer unnecessary. The post-conviction court found that "there is no evidence, aside from Kuhn's positive declaration, that [trial counsel] did not relay the plea offer." (Appellant's App. p. 2). At the hearing, Kuhn's trial counsel acknowledged that he could not specifically remember conveying the plea offer more than seven years earlier, but stated that it was his practice to always share such plea offers when he received them. Kuhn's trial counsel believed that Kuhn likely rejected the plea offer because of their perception that Kuhn had a good chance of success on a suppression issue, and Kuhn would have had to forego pursuing that suppression issue if he chose to accept the plea offer. Based on Kuhn's trial counsel's testimony that he likely shared the plea offer with Kuhn, but that Kuhn would have chosen to forgo that opportunity pursue a suppression of the State's evidence, we cannot say that the evidence "leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court." *Hall*, 849 N.E.2d at 469.

III. *Defense Strategy*

Kuhn also contends that his trial counsel completely failed to present a defense. Specifically, Kuhn contends that his trial counsel should have cross-examined the State's witnesses and called witnesses on his behalf.

We first note that Kuhn has not presented any evidence of facts favorable to his defense that should have been developed by his trial counsel through either cross-examination of the State's witnesses or presentation of defense witnesses. Nor has Kuhn identified any misleading or false evidence that should have been impeached during his trial. Therefore, Kuhn has not established any prejudice by the actions of his trial counsel, and his claim fails. *See Timberlake*, 753 N.E.2d at 603 (Ind. 2001).

Furthermore, Kuhn's trial counsel explained that his defense strategy was to pursue suppression of the State's evidence by contending that it was obtained by way of an illegal search. To effectuate this strategy, Kuhn's trial counsel moved to suppress the evidence prior to trial, preserved appropriate objections to the evidence when it was presented at trial, and appealed the trial court's admission of that evidence. In sum, Kuhn's trial counsel's decision to persistently seek the suppression of the State's evidence is a defense, and because of the wide latitude that we must give defense attorneys to determine the most appropriate defense

strategies, we cannot say that Kuhn's trial counsel performed deficiently. *See Bieghler*, 690 N.E.2d at 199.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err when it denied Kuhn's petition for post-conviction relief.

Affirmed.

VAIDIK, J., and CRONE, J., concur.