MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE

COURT OF APPEALS OF INDIANA

Kevin Sweat,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

December 28, 2022

Court of Appeals Case No. 22A-PC-924

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause Nos. 79D02-2103-PC-6

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Kevin Sweat (Sweat), appeals the denial of his petition for post-conviction relief.

[2] We affirm.

ISSUES

[3] Sweat presents two issues on appeal, which we restate as follows:

(1) Whether the post-conviction court erred in finding that Sweat's post-conviction relief petition was barred by the doctrine of *res judicata*; and

(2) Whether the post-conviction court properly found that Sweat's counsel was not ineffective.

FACTS AND PROCEDURAL HISTORY

[4] In 2018, under two cause numbers, the State charged Sweat with thirteen felony offenses relating to his alleged molestations of his minor daughter, C.S., and another minor child, R.S. In September of 2019, Sweat entered into a plea agreement with the State. Pursuant to that agreement, Sweat agreed to plead guilty in the two cause numbers to child molesting, as a Class A felony; child molesting, as a Class C felony; sexual misconduct with a minor, as a Level 4 felony; child seduction, as a Level 5 felony; and incest, as a Class B felony. The State agreed to dismiss the remaining charges. The agreement further provided that, while the sentences in the two different cause numbers would run consecutively, the aggregate total sentence imposed by the court "shall be forty to seventy (40-70) years."

Prior to establishing a factual basis for his guilty plea at his ensuing change-of-plea hearing, Sweat and his attorney engaged in the following conversation:

> [Attorney]: The State (inaudible) and so (inaudible) is not going to be day for day because it's credit restricted. (Inaudible) but because (inaudible) it's a mistake on my part that I had failed to tell you (inaudible).
>
> [Sweat]: So what's that mean?
>
> [Attorney]: So, what that means, is we talked about how the A felony you'll get, you would get credit for day for day. It won't be day for day. It's gonna be at a slower rate because it's a Credit Restricted Felony because of the statute. And so, it's not gonna be the day for day, it's gonna be at a slower rate. I still think we go forward with it but—
>
> [Sweat]: Is that gonna be a longer time?
>
> [Attorney]: No, I mean the length . . . everything else will stay the same, the Plea Agreement will stay the same, it's just, you remember me talking about credit time, and you earn credit time? The time (inaudible) in which you earn credit time, in that, on that [Class]A [f]elony, will be slower than day for day, and not day for day. Do you understand what I'm saying?
>
> [Sweat]: I think so. It sounds like I'll get more time.
>
> [Attorney]: (Inaudible) right and so that the time with it which you earn credit time will be at a slower rate than day for day.

> [Sweat]: Okay.
>
> [Attorney]: Okay. Do you still want to go forward?
>
> [Sweat]: Yeah.
>
> [Attorney]: Okay.

Sweat then established a factual basis for his guilty plea. The court found that Sweat had entered into the plea agreement knowingly, "freely[,] and voluntarily"; accepted the plea agreement; entered its judgment of conviction; and set the matter for a sentencing hearing.

More than two months later, Sweat filed a motion to withdraw his guilty plea. In that motion, he asserted in relevant part as follows:

> 5. Immediately prior to entering the guilty plea and establishing a factual basis, [Sweat's attorney at the hearing] advised [Sweat] that credit time [for the Class A felony] would be "slower" than day for day. [Sweat] was still not advised specifically what credit time would be earned.
>
> 6. [Sweat] accepted the Plea Agreement because he relied on [his attorney's] representation that he could become eligible for release in ten (10) years.
>
> 7. [Sweat's] belief that he would earn one day of credit for each day served was material to his decision to accept the Plea Agreement. [Sweat] would not have accepted the Plea Agreement if he had been properly advised that he would be credit restricted.

> The court held a hearing on Sweat's motion to withdraw his guilty plea, after which the court denied Sweat's motion. In reaching that decision, the court stated that credit time is not "a material element in determining . . . whether a person should plead because credit time is never guaranteed" but, rather, "is really an administrative issue" with the Department of Correction. The court also stated that Sweat's attorney at the change-of-plea hearing corrected his initial advice to Sweat on credit time prior to Sweat agreeing that he wanted to continue to proceed with the plea agreement.

Sweat v. State, Cause No. 19A-CR-3077, *slip op*. at 1-2 (Ind. Ct. App. May 22, 2020) (internal citations omitted). On direct appeal, Sweat unsuccessfully challenged his sentence and the trial court's denial of his motion to withdraw his guilty plea. For the latter issue, Sweat argued that when he pleaded guilty to the offense, he had no knowledge "of the precise contours of the credit time, if any, he might accrue against his sentence." *Id*. at 2. Contrary to his claim, we determined that:

> The record from the change-of-plea hearing makes clear that Sweat's counsel at that hearing had initially misinformed Sweat regarding credit time, telling Sweat that he would earn day-for-day credit against his sentence. However, prior to proceeding with the plea agreement, this mistake was corrected—Sweat's counsel informed Sweat that he would not earn day-for-day credit but would instead earn credit time at a "slower" rate as a credit-restricted felon. Sweat acknowledged that he understood that he would have to actually serve "more time" as a result of his attorney's clarification on credit time. Nonetheless, when asked if he still wanted to proceed on the plea agreement with the corrected understanding on credit time, Sweat stated that he did.

> We are not persuaded that, had Sweat known the precise credit restriction, i.e., six days served for one day of credit, that that would have mattered to his decision to plead guilty. Sweat pleaded guilty knowing that his credit time was going to be some measure slower than one-for-one, and he was not so concerned about the precise rate of accrual that he wanted to inquire further before continuing with his plea agreement. Indeed, as the trial court noted when it denied Sweat's motion to withdraw his guilty plea, there is no guarantee that any credit time will actually accrue against a defendant's sentence once he begins his incarceration. In other words, Sweat received the full benefit of his bargain. Accordingly, we cannot say that the trial court abused its discretion when it denied Sweat's motion to withdraw his guilty plea.

Id. at 2. (internal citations, and footnotes omitted).

[5] Sweat filed a petition for post-conviction relief petition on May 4, 2021, arguing, in part, that his trial counsel (Trial Counsel) did not give him the correct information about the consequences of being a credit-restricted felon and the rate at which he would accumulate credit time. The State responded on April 1, 2021, proposing the defenses of laches, waiver, and res judicata. On January 10, 2022, the post-conviction court held a hearing on Sweat's petition for relief. Sweat testified that his mind was "a mess" and that he did not have "adequate time to think about the plea" because it was presented on the morning of the guilty plea hearing. (Transcript Vol. II, p. 19). Sweat claimed that his understanding of how he would have earned credit time, a day for a day, a much faster rate, was based on Trial Counsel's explanation and that he

believed that he "couldn't receive more than ten actual years in [the] DOC". (Tr. Vol. II, p. 19).

[6] While Trial Counsel did not testify at the post-conviction hearing, he submitted an affidavit asserting that:

> 3. I began representing [] Sweat as a private client on approximately March 19, 2018, when I was hired to represent him in 79D01-1803-Fl -00002. My representation expanded to include representing [Sweat] in 79D02-l 81l-F4-00041 after the State filed this second case. Collectively, I represented him in these cases until the court granted my motion to withdraw from both cases during an October 23, 2019 hearing.
>
> 4. I met with [] Sweat on numerous occasions to review the discovery, discuss trial strategy and the status of plea negotiations. These conversations culminated in [] Sweat pleading guilty pursuant to a written plea agreement on September 11, 2019. At no time prior to the guilty plea hearing did I advise [] Sweat of the consequences of being a credit restricted felon.
>
> 5. In fact, I advised [] Sweat incorrectly that under the plea offer he accepted that he would earn day for day credit time, meaning the actual amount of executed time he would serve would be 50% of the total amount of executed time the court imposed against him.
>
> 6. [] Sweat expressed an understanding that the amount of time he would serve under the plea he accepted would be 50% of the amount of executed time the court imposed against him. I should have advised [] Sweat that he would serve closer to 83% of the total amount of time (l credit day for every 6 actual days served) that the [c]ourt imposed against him. I believe the actual

> amount of time he would serve incarcerated was of material importance to [] Sweat in his consideration whether to plead guilty.

(Appellant's App. Vol. II, p. 97). In a supplemental affidavit, Trial Counsel said he thought the most appropriate plan for Sweat was to plead guilty since the State had strong evidence against him. He clarified that he "made no guarantees or promises to [] Sweat regarding what his overall sentence under the plea agreement would be, outside of the range of penalties described within the plea agreement." (Appellant's App. Vol. II, p. 100).

[7] At the close of the evidence, the post-conviction court directed the parties to file their proposed findings of fact and conclusions of law thereon and took the matter under advisement. The post-conviction court denied Sweat's post-conviction petition on April 1, 2022. In particular, the post-conviction court determined that Trial Counsel did not render ineffective assistance because even though it seemed as though there was a misunderstanding before the guilty plea hearing about credit time, the record revealed that Trial Counsel clarified that misunderstanding at the guilty plea hearing. The post-conviction court also determined that while Sweat believed he would have faced a total sentence of between five and ten years, that was not a credible assertion because the "plea agreement itself and the record of the guilty plea hearing wherein Sweat was properly advised of the penalty ranges" exposed him to an overall total sentence of "212.5 years." (Appellant's App. Vol. II, p. 90). Additionally, the post-conviction court acknowledged that Sweat was satisfied with Trial Counsel's

performance at the guilty plea hearing, and that his plea was entered freely after he was informed of his rights, which supported a conclusion that Trial Counsel was not ineffective. The post-conviction court further determined that Sweat's post-conviction relief petition "could [have] otherwise be[en] resolved by the doctrine of issue preclusion" because Sweat's entire claim for ineffective assistance stemmed from the same allegations he raised in his motion to withdraw guilty plea which were both denied by the trial court and by the court of appeals. (Appellant's App. Vol. II, p. 92).

[8] Sweat now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

A. *Standard of Review*

[9]

> We observe that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. [Ind. Post-Conviction Rule 1(1)]. Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court.

Shepherd v. State, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010) (internal citations omitted), *trans. denied.*

[10] We also note that the post-conviction court here entered 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." *Little v. State*, 819 N.E.2d 496, 500 (Ind. Ct. App. 2004) (citation omitted) *trans. denied*. In this review, findings of fact are accepted unless clearly erroneous, but no regard is given to conclusions of law. *Id*.

I. *Res Judicata*

[11] Sweat contends that the trial court erred by determining that his post-conviction claim regarding Trial Counsel's ineffectiveness could otherwise be resolved by the doctrine of issue preclusion. He claims that since he raised the claim of ineffective assistance of Trial Counsel for the first time in the post-conviction proceeding, his claim is not barred. The State argues that while Sweat is "correct that he is not precluded from raising a claim of ineffective assistance of counsel [], he fails to recognize that the facts supporting his claim of ineffective assistance of counsel are subject to issue preclusion." (Appellee's Br. p. 16).

[12] As a general rule,

> when this [c]ourt decides an issue on direct appeal, the doctrine of *res judicata* applies, thereby precluding its review in post-

> conviction proceedings. The doctrine of *res judicata* prevents the repetitious litigation of that which is essentially the same dispute. A petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error. Issues that were available, but not presented, on direct appeal are forfeited on post-conviction review.

Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000)(internal citations omitted), *cert. denied*, 534 U.S. 1164 (2002).

[13] In his direct appeal, we decided both whether Sweat knowingly entered into the plea agreement because of a misunderstanding about the accrual of credit time and whether Sweat's incorrect understanding of credit time provided by Trial Counsel was of critical importance to his decision to plead guilty. *Sweat*, slip op. at 7-8. Sweat's entire post-conviction relief claim was similar to his direct appeal claims but repackaged as an in effective assistance of counsel claim. As the post-conviction court correctly found

> Sweat's entire basis for ineffectiveness stems from allegations that were previously address[ed] in his Motion to Withdraw Guilty Plea, which the trial court denied. [] A full hearing on the matter was held in which Sweat and the State participated, both of whom are the same parties in this action. A final judgment on the issue was entered and upheld by the Indiana Court of Appeals. Within that final judgment, the trial court addressed the issue of the advisement of credit time. These are the exact same issues Sweat now raises is this Post-Conviction Relief proceeding. This [c]ourt finds no basis for why it would be "otherwise unfair" under the circumstances to apply the doctrine of collateral estoppel in this matter. [] Sweat's misunderstanding about credit time was expressly clarified by his counsel in the

> underlying criminal matter and he is now precluded from relitigating the same issue in this Post-Conviction Relief proceeding.

(Appellant's App. Vol. II, p. 94). Because Sweat presented nothing but previously determined issues, his effort to redesignate and repackage it as ineffective assistance of Trial Counsel claim is barred by *res judicata*. *See Jervis v. State*, 28 N.E.3d 361, 368 (Ind. Ct. App. 2015), *trans, denied*. Accordingly, the post-conviction court did not err in determining that Sweat's post-conviction claim may rightfully be disposed of by the principles of *res judicata*.

II. *Ineffective Assistance of Trial Counsel*

[14] "To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient, and that the petitioner was prejudiced by the deficient performance." *McCullough v. State*, 987 N.E.2d 1173, 1176 (Ind. Ct. App. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)), *trans. denied*. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). The petitioner is prejudiced if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Zieman v. State*, 990 N.E.2d 53, 59 (Ind. Ct. App. 2013) (citing *French*, 778 N.E.2d at 824). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail.

French, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id*.

[15] When we consider a claim of ineffective assistance of counsel, we apply a "strong presumption . . . that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Morgan v. State*, 755 N.E.2d 1070, 1073 (Ind. 2001). "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002).

[16] Since Sweat was convicted pursuant to a guilty plea, we must consider his claims under *Segura v. State*, 749 N.E.2d 496 (Ind. 2001) *disapproved of on other grounds in Bobadilla v. State*, 117 N.E.3d 1272 (Ind. 2019). *Segura* categorizes two main types of ineffective assistance of counsel cases: (1) the failure to advise the defendant on an issue that impairs or overlooks a defense, and (2) an incorrect advisement of penal consequences. *Segura*, 749 N.E.2d at 500. The first category relates to "an unutilized defense or failure to mitigate a penalty." *Willoughby v. State*, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003), *trans. denied*. The second category relates to "an improper advisement of penal consequences" and is further split into two subcategories: (1) "claims of intimidation by exaggerated penalty or enticement by an understated maximum exposure;" or (2) "claims of incorrect advice as to the law." *Id*. Sweat's challenge on appeal falls under the latter subcategory.

> Our Supreme Court held in *Segura* that in order to state a claim for post-conviction relief under this subcategory, a petitioner may not simply allege that he or she would not have entered into a guilty plea, nor is the petitioner's conclusory testimony to that effect sufficient to prove prejudice. Rather, the petitioner must "establish, by objective facts, circumstances that support the conclusion that [trial] counsel's errors in advice as to penal consequences were material to the decision to plead. In so doing, the petitioner "must establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea." In undertaking this analysis, we focus upon whether the petitioner proffered specific facts indicating that a reasonable defendant would have rejected the petitioner's plea had the petitioner's trial counsel performed adequately.

Clarke v. State, 974 N.E.2d 562, 564-65 (Ind. Ct. App. 2012) (citing *Segura*, 749 N.E.2d at 507) (other internal citations omitted). Sweat argues that

> At the time of the guilty plea hearing Sweat was unaware of the error in [Trial] [C]ounsel's advice and was not aware that the sentence advice was erroneous. Sweat relied on [Trial] [C]ounsel's advice regarding good time credit in deciding whether to plead guilty and that erroneous advice caused him to accept a plea he otherwise would have rejected. Sweat testified that he didn't learn what credit restricted felon actually meant until after the guilty plea hearing was concluded. [Trial] Counsel's whispered comments in the middle of the hearing that the time would be "slower" did not provide Sweat with an adequate understanding of the consequences of his plea of guilty. Further, [T]rial [C]ounsel's failure to have a more complete conversation with Sweat regarding the incorrect advice prior to entering the plea did not afford Sweat the opportunity to fully consider his options of either accepting the plea or having a trial and the consequences of each decision. It was [T]rial [C]ounsel's duty to make sure Sweat was fully aware of these aspects of his case.

(Appellant's Br. p. 16). Sweat's assertion that he would not have pleaded guilty but for Trial Counsel's misadvice does not hold up to scrutiny. The trial court read the entire plea agreement during Sweat's guilty plea hearing. Additionally, Sweat was informed that he would be a credit-restricted felon due to the Class A felony child molestation charge. Sweat confirmed to the trial court that he understood the penalties associated with each charge. Furthermore, he stated that he had not been forced to plead guilty or threatened to do so. Before the factual basis for the offenses to which Sweat was pleading guilty was established, Trial Counsel conferred with Sweat. Trial Counsel acknowledged that he had not outlined what credit-restricted felon meant. When Trial Counsel clarified what that meant to Sweat and revealed that credit time would be earned at a slower rate, which would result in a longer sentence, he asked Sweat, "Do you want to go forward"? (Trial Tr. Vol. II, p. 17). Sweat responded, "Yeah." (Trial Tr. Vol. II, p. 17).

[17] Additionally, Sweat would not have been in a position to reject the plea agreement merely because Trial Counsel had provided inaccurate information about the rate at which he would earn credit time. Based on the many charges the State had filed against him in F1-2 and F4-41, Sweat would have faced a maximum sentence of 212 1/2 years had he gone to trial. That said, Sweat agreed with the State only to plead guilty to a handful of the charges, namely, Class A and Class C felony child molesting, Level 4 felony sexual misconduct with a minor, Level 5 felony child seduction, and Class B felony incest. According to the plea agreement, his sentences in F1-2 and F4-41 would be

served consecutively and the length of his sentence in both Causes would be between forty and seventy years. Sweat received a lenient sentence of forty-seven years with eight years suspended. Sweat testified at the guilty plea hearing that he was satisfied by Trial Counsel's performance and that his guilty plea was entered voluntarily.

[18] As Trial Counsel stated in his affidavit, Sweat's sentence was not guaranteed beyond the penalties set in the plea agreement. Even accounting for the misunderstanding about the accrual of credit time, Sweat's potential sentence could have been up to 212 1/2 years, and Sweat affirmed that he understood the potential penalties of each of the charges to which he was pleading guilty. For these reasons, we hold that the evidence undermines Sweat's assertions that but for Trial Counsel's misadvice about credit time before the guilty plea hearing, he suffered prejudice.

CONCLUSION

[19] Considering the undisputed evidence before us, we cannot conclude that the evidence, as a whole, leads unerringly to a decision opposite to that reached by the post-conviction court.

[20] Affirmed.

[21] Bailey, J. concurs

[22] Vaidik, J. concurs in result without separate opinion