MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jamar Banks,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

November 20, 2023

Court of Appeals Case No. 23A-PC-769

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause Nos.
02D04-2107-PC-38
02D06-2107-PC-39
02D04-2107-PC-40

Memorandum Decision by Judge Tavitas
Judges Pyle and Foley concur.

Tavitas, Judge.

Case Summary

[1] Jamar Banks pleaded guilty to four counts of sexual misconduct with a minor, Level 5 felonies. The plea agreement provided for four consecutive executed sentences of three years for a total sentence of twelve years. Banks petitioned for post-conviction relief and argued, in part, that he would not have pleaded guilty but for trial counsel's alleged deficient performance. The post-conviction court ("PC Court") denied the petition. Banks appeals and argues that the PC Court's denial of his petition was clearly erroneous. We disagree and affirm.

Issue

[2] Banks raises one issue on appeal: whether the PC Court clearly erred in finding that Banks did not receive ineffective assistance of counsel.

Facts

[3] In 2018, the State charged Banks with several offenses in three cases.[1] In Case No. 02D06-1802-F3-000013 ("Case No. F3-13"), the State charged Banks with seven counts: Count I: rape, a Level 3 felony; Count II: rape, a Level 3 felony; Count III: sexual misconduct with a minor, a Level 5 felony; Count IV: sexual misconduct with a minor, a Level 5 felony; Count V: sexual battery, a Level 6

[1] The record does not include the charging information in the three cases. We cite from the charging information available on Odyssey.

felony; Count VI: sexual battery, a Level 6 felony; and Count VII: furnishing alcohol to a minor, a Class B misdemeanor.

[4] Count I alleged that, between July 19 and 20, 2017, Banks knowingly or intentionally had sexual intercourse or performed or submitted to other sexual conduct with S.D. "when S.D. was unaware that sexual intercourse or other sexual conduct was occurring or was so mentally disabled or deficient that she could not consent . . . ." Count II alleged that Banks engaged in the same offense against A.G. when A.G. was similarly impaired. The sexual misconduct with a minor charges alleged that, between July 19 and 20, 2017, Banks was at least age eighteen and had sexual intercourse with S.D. and A.G., who were between the ages of fourteen and sixteen.

[5] In Cause No. 2D05-1808-F5-000271 ("Cause No. F5-271"), the State charged Banks with Count I: sexual misconduct with a minor, a Level 5 felony; and Count II: sexual misconduct with a minor, a Level 6 felony. Count I alleged that, between July 31, 2017, and August 1, 2017, Banks was at least age eighteen and had sexual intercourse with J.R., who was between the ages of fourteen and sixteen. Count II alleged that, between the same time frame, Banks fondled or touched J.R. with the intent to arouse or satisfy the sexual desires of J.R. or Banks.

[6] Lastly, in Cause No. 02D05-1808-F5-000272 ("Cause No. F5-272"), the State charged Banks with Count I: sexual misconduct with a minor, a Level 5 felony; and Count II: sexual misconduct with a minor, a Level 6 felony. Count I

alleged that, between November 1, 2017, and December 1, 2017, Banks was at least age eighteen and had sexual intercourse with H.G., who was between the ages of fourteen and sixteen. Count II alleged that, between the same time frame, Banks fondled or touched H.G. with the intent to arouse or satisfy the sexual desires of H.G. or Banks.

[7] Banks and his family retained Attorney Robert Gevers to represent Banks. At some point, Banks provided Attorney Gevers with unauthenticated screenshots from his cellphone purporting to be messages sent to Banks by the alleged victims. The only screenshots included in the record are messages allegedly sent from A.G. In these messages, A.G. sent photographs of herself and told Banks "I'm 16" and "im drunk . . . i wanna f**k." Conf. Ex. Vol. IV p. 29. These screenshots are undated. In the only screenshot that does contain a date, A.G. states, "im drunk . . . . come swoop." *Id*. at 31. The message appears to have been screenshotted on July 25, 2017.

[8] In January 2019, Attorney Gevers advised Banks regarding the "real possibility" that Banks would face federal charges for production of child pornography, which carried a minimum fifteen-year sentence. Tr. Vol. II p. 112. Around the same time, Attorney Gevers learned of the possibility that Banks would be charged with additional State offenses in another county.

[9] Attorney Gevers began negotiating a plea agreement with the State, and on March 1, 2019, he met with Banks and Banks's mother. Banks was chiefly concerned with the rape charges and potential federal charges. Although no

written plea agreement had been drafted at this time, Attorney Gevers explained that, if Banks pleaded guilty to the sexual misconduct charges, the State would dismiss the remaining charges and the federal government would agree not to prosecute Banks for offenses related to Banks's seized electronic devices. Attorney Gevers "made certain" that Banks and his mother understood that Banks "was facing . . . 12 years that he would serve" under the plea agreement. *Id*. at 99. Attorney Gevers spoke with Banks's father over the phone regarding the plea agreement on March 3, 2019.

[10] During a March 4, 2019 hearing, Attorney Gevers provided Banks and his mother with a written copy of the plea agreement.[2] Under the terms of the plea agreement, Banks would plead guilty to: (1) Counts III and IV: sexual misconduct, Level 5 felonies, in Case No. F3-13; (2) Count I: sexual misconduct, a Level 5 felony, in Case No. F5-271; and (3) Count I: sexual misconduct, a Level 5 felony, in Case No. F5-272. Banks would serve "consecutive," executed sentences of three years on each count. Ex. Vol. IV pp. 3,4. In exchange, the State would dismiss the remaining charges and "there [would] be no additional State or Federal charges as a result of the electronics seized from [Banks]." *Id*. at 4.

[11] Attorney Gevers did not recall how much time he spent going over the plea agreement with Banks during the March 4, 2019 hearing; however, he went

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[2] At the time, Banks's trial date was scheduled for: June 18, 2019, in Cause No. F3-13; March 12, 2019, in Cause No. F5-271; and March 19, 2019, in Cause No. F5-272.

over the plea agreement with Banks "[u]ntil [Attorney Gevers] was satisfied that [Banks] understood." Tr. Vol. II p. 100. Attorney Gevers testified that he would have explained that Banks was agreeing to serve four consecutive executed sentences of three years for the sexual misconduct offenses and "that is how . . . the sentence becomes an aggregate 12 years." *Id*. at 104.

[12] Attorney Gevers asked if Banks understood the plea agreement and if Banks had any questions. Banks did not ask any questions. Banks did not write his initials in the space provided beside each paragraph of the plea agreement; however, according to Attorney Gevers, leaving a space beside each paragraph is just the formatting practice for plea agreements. Attorney Gevers testified that defendants do not write their initials "much anymore generally." *Id*. at 102. Banks "seemed to understand and was satisfied with the plea and signed it." *Id*. at 101.

[13] Banks gave a different account of his meetings with Attorney Gevers. According to Banks, Attorney Gevers told Banks that he could not in good conscience represent Banks at trial once the possibility of federal charges arose and that, if Banks pleaded guilty, Attorney Gevers could seek a modification of Banks's sentence, under which Banks would serve only two or three years.

[14] Additionally, according to Banks, on the day of the plea agreement, Attorney Gevers provided Banks and his mother with the written plea agreement and then left them to go over it themselves. Attorney Gevers did not go through the plea agreement paragraph by paragraph or explain what "consecutive" meant.

Banks had little experience with the criminal justice system and he believed his sentences "would all run together." *Id*. at 123. Banks asked Attorney Gevers if he could have more time to go over the plea agreement, and Attorney Gevers said "something to the lines of like I don't think we can or that they are not willing to do that." *Id*. at 58. Banks "had a lot of questions, but [his] mind just didn't even think to even ask . . . ." *Id*. at 57. Banks did not want to sign the plea agreement, but he "felt like [he] had no choice but to do it at that moment," and he signed it. *Id*. at 55.

[15] The trial court proceeded to hold a hearing on the plea agreement. The trial court stated the following:

> COURT: Before I can accept your plea of guilty, I must be satisfied you understand your Constitutional Rights, that your plea of guilty is made freely and voluntarily, and that you are in fact guilty. It will therefore be necessary that I ask you certain questions and hear some evidence. **If you do not understand the questions please let me know and I will explain them to you. You may also talk to your attorney at any time.**

Ex. Vol. IV p. 14 (emphasis added). Banks indicated that he read the plea agreement and discussed it with Attorney Gevers before signing it.

[16] The trial court read the plea agreement and stated: "The two counts, being III and IV, in the F3-13 case will run consecutive to each other and all three of these cases will be run consecutive to each other." *Id*. at 18. Banks indicated that he understood. The following exchange then took place:

> COURT: Do you understand by pleading guilty pursuant to a plea agreement the Court may not, without the consent of the prosecuting attorney, reduce or suspend the sentence and impose a sentence not authorized by the plea agreement?
>
> BANKS: Yes sir.
>
> COURT: Have you received any promises, besides the plea agreement, or been given anything of value to cause you to plead guilty?
>
> BANKS: No sir.
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> * * * * *
>
> COURT: Do you feel that your plea of guilty is your own free and voluntary act?
>
> BANKS: Yes sir.
>
> COURT: Are you satisfied with your attorney and do you feel that he is properly representing you?
>
> BANKS: Yes sir.

Id. at 19-20. Banks then admitted that he had sex with the victims when he was age eighteen and the victims were ages fourteen or fifteen, and the trial court accepted the plea agreement.

[17] Banks's sentencing hearing was held on April 26, 2019. Three victims stated that Banks had nonconsensual sex with them, and two of those victims claimed that Banks drugged their drinks before having sex with them. The trial court sentenced Banks pursuant to the terms of the plea agreement. Banks claims

that he learned that his sentences would not run together after he was incarcerated.

[18] On July 23, 2021, Banks filed petitions for post-conviction relief in all three cases. He argued that Attorney Gevers's performance was deficient and that Banks did not knowingly, intelligently, and voluntarily enter into the plea agreement. The PC Court held hearings on April 1, 2022, and June 17, 2022. Banks, his mother, his father, and Attorney Gevers testified.

[19] Banks alleged that Attorney Gevers's performance was deficient because Attorney Gevers did not take depositions of the witnesses, did not go over the plea agreement with Banks, and suggested he might be able to have Banks's sentence modified after two to three years. Banks also maintained that his intent from the start was to go to trial. He testified that he would not have signed the plea agreement if he had known that his sentence would total twelve years. When asked on cross-examination if he would have gone to trial had he understood that the plea agreement provided for a twelve-year sentence, Banks answered, "I woulda hoped to discuss [a] new plea," which he would have had more time to go over. Tr. Vol. II p. 63.

[20] Regarding the charges, Banks admitted that his cellphone screenshots "would not have had any tendency to show that [he] didn't engage in sexual misconduct with the girls." *Id*. at 72. Banks, however, believed the screenshots would have undermined the victims' credibility by demonstrating that the victims lied about the rape allegations.

[21] The PC Court issued findings of fact and conclusions of law on March 8, 2023. The PC Court found "[a]t no time during the guilty plea hearing did [Banks] give any indication that he actually did not understand any of the provisions he had said he did understand." Appellant's App. Vol. II pp. 138-39. The PC Court also found that, during the sentencing hearing, two of the victims' parents referred to the length of Banks's sentence as twelve years and that Banks "expressed no surprise or disbelief" in his subsequent allocution statement. *Id.* at 139. Additionally, the PC Court found that: Attorney Gevers had a valid reason for indicating that he would withdraw his appearance if Banks proceeded to trial; Attorney Gevers discussed the plea agreement, including its twelve-year sentence, at the March 1, 2019 meeting; Attorney Gevers never promised he would be able to modify Banks's sentence; the screenshots would have, at most, only provided a defense to the rape charges; and Banks did not affirmatively state that he would have gone to trial had he known that the plea agreement provided for a twelve-year sentence.

[22] The PC Court concluded that Attorney Gevers was not ineffective and that:

> [Banks's] statements to the effect that he did not understand what "consecutive" meant, and that he expected a sentence modification that would get him out of prison in two (2) years . . . do not credibly establish that he was inadequately advised on these points, in view of the evidence to the contrary from Attorney Gevers and from [Banks's] own testimony at the guilty plea hearing. Perhaps [Banks] failed to pay sufficient attention to these points at the appropriate times, despite the Court's advisements and Attorney Gevers's best efforts to make sure he understood, and that he only later paid sufficient attention when

> other prison inmates told him the same things he had previously been told by [Attorney] Gevers and by the Court . . . —but this is no indication of deficient performance on [Attorney] Gevers's part. . . .

Id. at 147 (record citations omitted).

[23] The PC Court further concluded that, even if Attorney Gevers was ineffective, Banks suffered no prejudice. In doing so, the PC Court stated the following:

> 8. [Banks] supposedly would have taken th[e] risk of serving much more time in state and federal prison on the sole basis of evidence regarding the victims' demeanor after the rapes that he was unable to authenticate, which therefore would have been inadmissible at trial. . . . Aside from this inadmissible evidence, he acknowledges that he could have had no defense to any of the charges. . . . Under these circumstances, to reject a plea agreement for a mere twelve (12) years of executed time and go to trial cannot seriously be considered a course of action supported by "rational reasons." **Furthermore, [Banks's] own testimony gives little or no assurance that he would really have decided to reject the agreement and go to trial.** When directly asked if he would have gone to trial, [Banks] did not give an affirmative answer, but rather talked about his wish to further examine the plea agreement in more detail. . . . His reported discussions with Attorney Gevers shortly before the date of his guilty plea strongly suggests that he was considering acceptance of a plea agreement so long as the possibility of federal charges was excluded and there was no guilty plea to a charge of rape, which was true of the completed agreement. . . . [Banks] has fallen far short of establishing a reasonable probability that he would have decided to go to trial rather than accept a plea agreement providing for a 12-year aggregate executed sentence and no modification of that sentence without the prosecutor's consent.

> 9. Still less has [Banks] shown a reasonable probability that he *would have been acquitted at trial* if not for counsel's errors that affected his ability to present a defense. . . .
>
> * * * * *

Id. at 150 (italics in original, bold emphasis added, record and case citations omitted).[3] Accordingly, the PC Court denied Banks's petition for post-conviction relief. Banks now appeals.

Discussion and Decision

[24] Banks argues that the PC Court clearly erred by denying Banks's petition for post-conviction relief because Attorney Gevers's assistance was ineffective.[4] We are not persuaded.

I. Standard of Review

[25] Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *reh'g denied, cert. denied*, 141 S. Ct. 553 (2020); Ind. Post-Conviction Rule 1(1)(b). The petitioner bears the burden of establishing his claims by a preponderance of the evidence before the post-conviction court. *Id.;* P.-C.R. 1(5).

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[3] The PC Court also rejected Banks's claim that his guilty plea was not knowing, voluntary, and intelligent.

[4] Banks does not argue on appeal that his plea was not knowing, intelligent, and voluntary.

[26] When, as here, the petitioner "appeals from a negative judgment denying post-conviction relief, he 'must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision.'" *Gibson*, 133 N.E.3d at 681 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)). When reviewing the PC court's order denying relief, we will "not defer to the post-conviction court's legal conclusions," and the "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." *Bobadilla v. State*, 117 N.E.3d 1272, 1279 (Ind. 2019). When a petitioner "fails to meet this 'rigorous standard of review,' we will affirm the post-conviction court's denial of relief." *Gibson*, 133 N.E.3d at 681 (quoting *DeWitt v. State*, 755 N.E.2d 167, 169-70 (Ind. 2001)).

[27] Banks contends that the PC Court clearly erred by denying Banks's ineffective assistance of counsel claim. To prevail on an ineffective assistance of counsel claim, the petitioner must show that: (1) trial counsel's performance fell short of prevailing professional norms; and (2) the petitioner suffered prejudice as a result. *Id.* at 682 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

[28] A showing of deficient performance "requires proof that legal representation lacked 'an objective standard of reasonableness,' effectively depriving the defendant of his Sixth Amendment right to counsel." *Id.* (quoting *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007)). We strongly presume that counsel exercised "reasonable professional judgment" and "rendered adequate legal

assistance." *Id.* Defense counsel enjoys "considerable discretion" in developing legal strategies for a client. *Id.*

[29] As for the prejudice component, in the context of a guilty plea, the petitioner must demonstrate a "reasonable probability that he would have rejected the guilty plea and insisted on going to trial instead." *Bobadilla*, 117 N.E.3d at 1284. In making this showing, the petitioner "cannot simply say [he] would have gone to trial." *Id*. Rather, he must identify "special circumstances" existing at the time of the plea agreement that support "rational reasons" for why he would have made that decision. *Id.*

II. The PC Court did not clearly err because Banks was not prejudiced

[30] We conclude that Banks did not suffer prejudice regardless of Attorney Gevers's alleged errors, and we do not decide whether Attorney Gevers's performance was deficient. The allegations against Banks were serious. Even if he were not found guilty of rape, Banks faced a prison sentence far longer than the twelve-year sentence provided under the plea agreement. Attorney Gevers advised Banks of the plea agreement's twelve-year sentence several days before the guilty plea hearing, and Banks was open to pleading guilty at that time so long as the plea agreement dismissed the rape charges and provided immunity from the federal charges. At the guilty plea hearing, Banks was presented with a written plea agreement offer that did just that. Banks did not ask questions regarding any of the terms of the plea agreement before signing it. Banks then testified that he understood the plea agreement, that signing it was his own free act, and that he was satisfied with Attorney Gevers's performance.

[31] Banks relies on *Bobadilla*, 117 N.E.3d 1272, which we find distinguishable. In that case, trial counsel misadvised Bobadilla that pleading guilty would not affect Bobadilla's deportability status. *Id*. at 1277. Here, Attorney Gevers did not misadvise Banks regarding the terms of the plea agreement. Rather, the PC Court found that Banks understood the plea agreement, that it was favorable to Banks, and that Banks would not have rejected it. We cannot second-guess the PC Court's credibility assessment, nor can we reweigh the evidence. Banks has not demonstrated that he would have rejected the plea agreement, and accordingly he suffered no prejudice. The PC Court did not clearly err by denying Banks's petition for post-conviction relief.[5]

Conclusion

[32] We cannot say that Banks received ineffective assistance of counsel. The PC Court, thus, did not clearly err by denying Banks's petition for post-conviction relief. Accordingly, we affirm.

[33] Affirmed.

Pyle, J., and Foley, J., concur.

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[5] The PC Court also based its decision on the fact that Banks did not show "a reasonable probability that he *would have been acquitted at trial* if not for counsel's errors . . . ." Appellant's App. Vol. II p. 150 (emphasis in original). The PC Court cited *Segura v. State*, 749 N.E.2d 496 (Ind. 2001), for this proposition. Our Supreme Court's more recent decision in *Bobadilla*, however, disapproved of *Segura* and "rejected any categorical rules whereby the prosecution could negate a defendant's prejudice claim by pointing out that he had no viable trial defense or that the government had a particularly strong case against him." 117 N.E.3d at 1286.