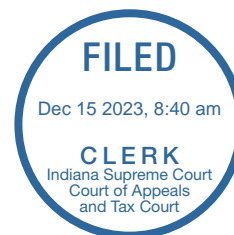


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

John Edward Sims, Jr.,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 15, 2023
Court of Appeals Case No.
23A-PC-1175
Appeal from the Marion Superior
Court
The Honorable Cynthia L. Oetjen,
Judge
The Honorable Anne Flannelly,
Magistrate
Trial Court Cause No.
49D30-1908-PC-34216

Memorandum Decision by Chief Judge Altice
Judges Weissmann and Kenworthy concur.

Altice, Chief Judge.

Case Summary

[1] John Edward Sims, Jr., appeals the denial of his petition for post-conviction relief, claiming that the post-conviction court erroneously determined that he had properly pleaded guilty to robbery, a class 3 felony, and that he had admitted to being a habitual offender. Sims also contends that his trial counsel was ineffective for permitting him to plead guilty to armed robbery because he did not admit to possessing a gun during the robbery. Sims further maintains that his trial counsel was ineffective for failing to bring to the trial court's attention—at the guilty plea hearing or at sentencing—the State's failure to present a factual basis on the habitual offender count.

[2] We affirm.

Facts and Procedural History

[3] On February 20, 2019, Sims entered into a plea agreement with the State to resolve numerous criminal charges against him. More particularly, Sims agreed to plead guilty to six counts of Level 5 felony robbery under various causes, and one count of Level 3 felony armed robbery (the F3-28470 robbery), and he admitted to being a habitual offender with respect to the F3-28470 robbery. In exchange, the State agreed to dismiss several other pending criminal charges.

- [4] The written plea agreement provided for a fixed aggregate sentence of twenty-eight years, with thirteen years executed in the Indiana Department of Correction (DOC), three years in community corrections, and twelve years suspended.
- [5] Sims acknowledged in the plea agreement that his plea of guilty constituted an admission to all facts alleged in the charging informations. During the guilty plea hearing, Sims admitted to the court that he had conferred with his counsel and had read, initialed, understood, and signed the agreement. The trial court recited the offenses to which Sims was pleading guilty, and Sims stated that he was pleading guilty to those offenses “because [he was] guilty.” *Exhibit 47*. Sims specifically acknowledged that he agreed to a sentence of seven years for the F3-28470 robbery, and to a six-year enhancement on that count for being a habitual offender. Sims also agreed to forfeit his right to appeal.
- [6] During the presentation of the factual basis on the F3-28470 robbery, Sims admitted that, during the robbery that occurred on July 9, 2017, at a Subway Restaurant in Indianapolis, he handed the cashier a note that stated, “give me the money or I will shoot you,” while he was “reaching under his shirt.” *Exhibit at 49*. The trial court accepted Sims’s guilty pleas and entered judgments of conviction.
- [7] At the sentencing hearing on March 27, 2019, Sims moved to withdraw his guilty plea to the F3-28470 robbery, claiming that he was not armed at the time

of the offense. The trial court denied the motion and sentenced Sims in accordance with the plea agreement.

- [8] On November 17, 2021, Sims filed an amended petition for post-conviction relief,¹ claiming that his guilty plea to the F3-28470 robbery should be set aside because he did not admit to being armed, that the State failed to present a proper factual basis for the habitual offender enhancement, and that his trial counsel was ineffective for failing to present these issues to the trial court prior to sentencing.
- [9] At the post-conviction hearing on May 5, 2022, Sims testified that he was “unarmed” during the F3-28470 robbery. *PCR Transcript* at 16. On the other hand, Sims also testified that he “agreed to what the plea [agreement] said” when he signed the agreement and stated that his answers to the trial court’s questions during the guilty plea hearing were truthful. *Id.* at 17. Sims did not present additional evidence at the post-conviction hearing in support of his request for relief.
- [10] Following the hearing, the post-conviction court issued a twenty-three-page order denying Sims’s request for relief. In relevant part, the findings of fact and conclusions of law provided as follows:

g. The court gave a detailed recitation of the agreed upon sentencing terms in each cause, as set forth in the plea agreement.

¹ Sims filed an original pro se petition for post-conviction relief on August 29, 2019.

The court then asked, *“Now are those the terms that you’ve agreed to in each of those cases?”* to which Sims replied, *“Yes, Your Honor.”*

h. The court properly advised Sims of all of his rights, and that he would be giving up those rights by pleading guilty. Sims’s responses showed that he understood and that is how he wished to proceed.

i. The following colloquy took place regarding defense counsel:

THE COURT: And you are here today, with Mr. Swedarsky. Have you been satisfied with the work that he has done for you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So, are you doing this of your own free will?

DEFENDANT: Yes, Your Honor.

1. The State read the following summary of the evidence for each case:

As to [the F3-28470 robbery], if this case would have gone to trial, the State of Indiana would have proven beyond a reasonable doubt that on July 9, 2017, officers were dispatched to the address of 421 N. Alabama Street in reference of a robbery of a Subway Restaurant. During the course of the investigation it was learned, that Dayanna Cordova, was the cashier there. The defendant entered and gave a note that said, “Give me the money or I will shoot you,” as he was reaching under his shirt and then received from them an amount of U.S. currency. All of which is contrary to the laws of the State of Indiana.

After the recitation of evidence for each cause number, the court asked Sims if that was truth, and each time Sims responded, “Yes, Your Honor.”

...

m. The court found that Sims understood his rights, the nature of the charges against him to which he pleaded guilty, the possible sentence and fines thereunder, and that his plea was freely and voluntarily made, and that a factual basis existed to support his plea of guilty. The court accepted the plea and entered judgment of conviction in each cause accordingly.

n. The court added the following regarding the habitual offender:

THE COURT: I just want to make sure the record is clear. Mr. Sims, did you have a conversation with your lawyer about the filing of the Habitual Offender Enhancement? Yes? Yes, I see you nodding.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. And do you feel that you’re sufficiently advised of what the State has asked that they would be proving? And you have seen the charging information?

THE DEFENDANT: Yes, Your Honor.

6. On March 27, 2019, the court conducted Sims’s sentencing plea hearing, which included the following:

a. The State and Mr. Swedarsky confirmed that they had read the presentence report and that there were no additions or corrections to be made.

b. Sims was placed under oath and initially testified:

I wanted to uh withdraw my uh plea of my uh Armed Robbery, because I never done Armed Robbery. I never had . . . a weapon, never was a pistol and uh I wanted to withdraw the plea from that. . . . I definitely do not want to plead guilty to the Level Armed Robbery uh 3, 'cause I never had a pistol. With the rest of the plea, with the Level 5, if that uh can stay I will be willing to accept that. If not, I could—I would just like to withdraw the whole plea and with the Armed Robbery Level 3, I would like to take that to speedy bench trial.

c. The court responded:

Okay. I think I understand. I will tell you that I have already accepted your plea agreement and I have already entered Judgment of Conviction. So, it was clear to me, at the time that we did the sentencing, that I had gone over with you very carefully what it was that you were admitting to and what the sentence was that you were agreeing to. That, I also talked with you about your mental status and whether you were getting your medications at the jail, and you and your attorney both, assured me that you were. So, I am not going to set aside the plea.

MR. SWEDARSKY: (defense counsel) I think that—I don't want to delve too far into it. . . . I understand that he is a little bit upset about his situation with the Court. . . . I have worked with Mr. Sims for a long time and I had thought that what we have accomplished was what he wanted and then we went forward with the plea agreement. So if he does feel that he was wrong [sic] in anyway, he does have that right to a PCR.

7. *Sims's plea agreement, paragraph 10, initialed "JS" by Sims, set forth the following: The Defendant further acknowledges that entry of a guilty plea pursuant to this agreement constitutes an admission of the truth of all facts alleged in the charge or counts to which the Defendant pleads guilty and that entry of the guilty plea will result in a conviction on those charges or counts.*

8. The charging information for count 1, armed robbery, a Level 3 felony, in cause 49G04-1708-F3-028470, omitting formal parts, read: On or about July 9, 2017, John Sims did knowingly take property, to-wit: United States currency from another person, to-wit: Dayana Cordova, by threatening the use of force, to-wit: handed her a note telling her to give him the money or he would shoot her; said act being committed while the defendant was armed with a deadly weapon, to-wit: a handgun.

9. The habitual offender charging information alleged, in substance, that on or about July 9, 2017, Sims had accumulated two prior unrelated felonies in violation of I.C. 35-50-2-8, specifically on or about July 28, 2015, in Marion County Superior Court, Criminal Division, Room 3, State of Indiana, he was convicted of failure to register as sex or violent offender, a level 5 felony under cause 49G04-1507-F5-023664, [and on or about June 11, 2013, in Marion County Superior Court, Criminal Division, Room 5, State of Indiana, John Edward Sims Jr. was convicted of Child Molesting, a Level C Felony under Cause Number 49G05-1211-FC-080035].

10. *Sims's plea agreement, paragraph 11, initialed "JS" by Sims, set forth the following: The Defendant acknowledges satisfaction with Defense Counsel's representation and competency in this matter. The Defendant believes this agreement to be in the Defendant's best interest.*

15. The Court held petitioner’s evidentiary post-conviction relief hearing on May 5, 2022. Petitioner, with counsel, presented testimony from petitioner John Sims as the sole witness.

...

17. Petitioner chose not to present post-conviction testimony or a post-conviction affidavit from Mr. Swedarsky.

...

[Sims presented a] note which said to give him all the money and that he was armed; the note was written on paper from a DOC packet that he received upon his release from prison; Sims denies that he had a gun; he also robbed the Subway at 421 N. Alabama on July 9, 2017, handing them the same note; Sims denies that he had a gun; when asked by PCR counsel if he showed the employees anything that looked like a gun or did anything with his hand to make it look like he had a gun, for either of these two robberies, Sims responded, “no sir. . . .” *On cross-examination, John Sims testified that he remembers being in court for the guilty plea hearing in these cases. Sims also testified that, when the judge asked him questions during the guilty plea hearing, his answers were true.*

Conclusions of Law

2. Claims regarding level 3 robbery: that guilty plea was not knowing, intelligent, and voluntary, and that factual basis was deficient.

The post-conviction evidence shows that Sims was properly and thoroughly advised of the rights that he was waiving during the plea hearing as required by statute and that he was not coerced or misled into pleading guilty. The post-conviction evidence also

shows that the factual basis for the level 3 felony robbery was sufficient.

During Sims's guilty plea hearing, the State presented sufficient facts about the elements of the level 3 felony robbery to allow the court to reasonably conclude that Sims was armed with a handgun. . . .

In addition, during Sims's guilty plea hearing, the court also stated that according to the plea agreement, Sims was seeking to plead guilty to five cases, including "Armed Robbery and the Habitual Sentence Enhancement, under [the F3-28470 robbery] case. Are those Counts that you are asking to admit to?" to which Sims responded, "Yes, Your Honor." A colloquy occurred thereafter:

THE COURT: Are you pleading guilty because you are actually guilty of these offenses or do you have some other reason?

SIMS: I am pleading guilty because I am guilty.

Additional post-conviction evidence confirms that Sims understood and admitted to the level 3 felony charging information, including the element of being armed with a handgun.

During his guilty plea hearing, Sims identified his signature on the plea agreement, as well as his initials throughout the plea agreement. Sims testified that he could read and write English and that he read the plea agreement with his lawyer. He also informed the guilty plea court that he was not under the influence of alcohol or illegal drugs, was not required to take medications for his mental illnesses, and felt like he knew what was going on in court that day.

Sims's unequivocal testimony and admissions during the guilty plea hearing belie his self-serving post-conviction and sentencing efforts to deny being armed with a gun during the July 9, 2017 Subway robbery.

The post-conviction evidence shows that the trial court was well within its wide discretion to find that the facts, Sims's testimony, and the State's summary of the evidence during the guilty plea hearing, established a factual basis for his plea of guilty to level 3 felony armed robbery. Petitioner has failed to prove that the factual basis was inadequate.

Also, . . . despite Sims's criticism of the factual basis, he has shown no reasonable probability of a more favorable outcome had the factual basis been different or more detailed. . . . Sims . . . offers no reasonable defense to the State's evidence showing that he was armed with a handgun. Petitioner has failed to meet his burden of proving prejudice as to his claim of an insufficient factual basis. There is also no showing that Sims's guilty plea to [the F3-28470 robbery] was anything other than knowing, intelligent, and voluntary.

These claims fail.

3. Claim of ineffective assistance of trial counsel regarding level 3 felony robbery.

Firstly, petitioner chose not to present post-conviction testimony or an affidavit from trial counsel Mitchell Swedarsky. This Court infers that Mr. Swedarsky would have testified that the factual basis for Sims's plea of guilty to level 3 robbery was not defective; that Mr. Swedarsky had read the level 3 armed robbery charging information and the plea agreement to Sims who understood the meaning of each; that Sims admitted to being armed with a handgun when he robbed the Alabama Street Subway on July 9, 2017 and that Sims admitted to every other element of level 3

armed robbery in [the F3-28470 robbery] both to Mr. Swedarsky prior to the guilty plea hearing as well to the guilty plea court; that Sims knowingly, intelligently, and voluntarily chose to enter into the plea agreement to level 3 armed robbery; and that trial counsel would not otherwise have corroborated Sims's post-conviction allegations of ineffectiveness.

This Court has already analyzed and determined supra that Sims's plea of guilty to level 3 felony armed robbery was knowing, intelligent, and voluntary, and that the factual basis for each element of the crime was adequate. Accordingly, petitioner has failed to meet his burden of proving deficient performance of trial counsel.

4. Claim that there was no factual basis for the habitual offender and that trial counsel was ineffective for failing to bring this error to the court's attention.

a. Firstly, the transcript of the guilty plea hearing shows that Sims did plead guilty to the habitual offender.

A . . . colloquy followed regarding the habitual offender:

THE COURT: I just want to make sure the record is clear. Mr. Sims, did you have a conversation with your lawyer about the filing of the Habitual Offender Enhancement? Yes? Yes, I see you nodding.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. And do you feel that your [sic] sufficiently advised of what the State has asked that they would be proving? And you have seen the charging information?

THE DEFENDANT: Yes, Your Honor.

This Court finds that the trial court conducted an appropriate and sufficient guilty plea hearing for the habitual offender except regarding the factual basis, which the Court will address next.

b. Even though Sims testified that he had a conversation with his lawyer about the filing of the habitual offender, that he felt sufficiently advised of what the State had asked that they would be proving, and that he had seen the charging information, a factual basis for the habitual offender setting forth specific predicate felony convictions is absent from the guilty plea hearing. *Accordingly, this Court finds that the factual basis for the habitual offender is deficient. However, Sims's post-conviction claim regarding the habitual offender does not end there.*

Here, Sims has failed to establish how the lack of a factual basis for the habitual offender affected his decision to admit to being a habitual offender and presents no evidence otherwise demonstrating prejudice regarding the habitual offender.

Sims's challenge to the habitual offender factual basis simply alleges that the prior predicate felonies for the habitual offender were not read into the record or presented as documentary evidence by the State during the guilty plea hearing. *Petitioner has not set forth any evidence demonstrating that there was anything untrue about the determination that he is a habitual offender. Sims has failed to prove prejudice here.* This claim fails.

c. Lastly, regarding Sims's claim that trial counsel rendered ineffective assistance when he failed to bring the factual basis deficiency to the court's attention: As petitioner chose not to present post-conviction testimony or an affidavit from trial counsel Mitchell Swedarsky, this Court infers that Mr. Swedarsky would have testified: that he had read the habitual

offender charging information in [the F3-028470 case] to Sims who understood the meaning and significance of it; that Sims admitted to Mr. Swedarsky that on or about July 9, 2017, Sims had accumulated two prior unrelated felonies in violation of I.C. 35-50-2-8, specifically on or about July 28, 2015, in Marion County Superior Court, Criminal Division, Room 3, State of Indiana, he was convicted of failure to register as a sex or violent offender, a level 5 felony under cause 49G04-1507-F5-023664; and on or about June 11, 2013, in Marion County Superior Court, Criminal Division, Room 5, State of Indiana, he was convicted of child molesting, a class C felony under cause 49G05-1211-FC-080035; and that Sims admitted to trial counsel that he had in fact committed each element of said predicate felonies for the habitual offender.

This Court has already found herein that Sims’s challenge to the lack of a factual basis for the habitual offender fails, due to his failure to prove prejudice. *Petitioner has also failed to show a reasonable probability of a more favorable outcome if trial counsel had brought the deficiency of the habitual offender factual basis to the court’s attention, either during the guilty plea or sentencing hearing. Without prejudice, Sims’s claim of trial counsel ineffectiveness with respect to the habitual offender fails, as do Sims’s challenges to the habitual offender factual basis.*

Appellant’s Appendix Vol. II at 181-204 (emphases added).

[11] Sims now appeals.

Discussion and Decision

I. Standard of Review

[12] A petitioner in a post-conviction proceeding has the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction

Rule 1(5); *Isom v. State*, 170 N.E.3d 623, 632 (Ind. 2021). When a petitioner appeals from the denial of post-conviction relief, he is appealing from a negative judgment. *Id.* Accordingly, the petitioner faces a “rigorous standard of review.” *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019). We will affirm the denial of post-conviction relief unless the petitioner shows that the evidence leads “unerringly and unmistakably to a decision opposite that reached by the post-conviction court.” *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002). In other words, the petitioner must convince this court that “there is no way within the law that the court below could have reached the decision it did.” *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013).

II. Sims’s Contentions

A. Factual Basis For the Robbery

[13] Sims argues that he is entitled to post-conviction relief because he did not admit to being armed with a deadly weapon when the State presented the factual basis regarding the F3-28470 robbery charge. Thus, Sims maintains that the factual basis was erroneous and his conviction and sentence for that offense must be vacated.

[14] An adequate factual basis for the acceptance of a guilty plea may be established in several ways: (1) by the State’s presentation of evidence on the elements of the charged offenses; (2) by the defendant’s sworn testimony regarding the events underlying the charges; (3) by the defendant’s admission of the truth of the allegations in the information read in court; or (4) by the defendant’s

acknowledgment that he understands the nature of the offenses charged and that his plea is an admission of the charges. *Oliver v. State*, 843 N.E.2d 581, 588 (Ind. Ct. App. 2006), *trans. denied*.

[15] When a petitioner requests that his guilty plea be set aside in post-conviction proceedings because of an inadequate factual basis, the standard for a sufficient factual basis to support a guilty plea is less stringent than what is required to support a conviction. *Rhoades v. State*, 675 N.E.2d 698, 701 (Ind. 1996). In other words, a factual basis for a guilty plea may be established by relatively “minimal evidence about the elements of the crime from which the court could reasonably conclude that the defendant is guilty.” *Graham v. State*, 941 N.E.2d 1091, 1098 (Ind. Ct. App. 2011).

[16] Pursuant to Ind. Code § 35-42-5-1, Level 5 felony robbery is elevated to a Level 3 felony if the defendant commits the robbery while armed with a deadly weapon. A defendant’s statement or implication that he had a weapon—without specific reference to a firearm—is evidence that he was armed. *Gray v. State*, 903 N.E.2d 940, 945 (Ind. 2009).

[17] In this case, the record shows that when the prosecutor presented the factual basis for the F3-28470 robbery charge at the guilty plea hearing, Sims admitted that while reaching under his shirt, he handed the Subway Restaurant cashier a note stating, “give me the money or I will shoot you.” *Exhibit 49*. And as discussed above, Sims acknowledged that he understood the nature of the offenses and admitted committing the offenses as charged. Sims told the trial

court that he was not under the influence of drugs or alcohol, and defense counsel informed the trial court that he believed Sims was competent. Sims initialed the plea agreement that stated, “the entry of a guilty plea . . . constitutes an admission of the truth of all facts alleged in the charge or counts to which [he pleads] guilty.” *Appellee’s Appendix Vol. II* at 5. And the State’s charging information alleged that Sims had committed the F3-28470 robbery “while . . . armed with a . . . handgun.” *Id.* at 68. In short, Sims’s testimony and admissions during the guilty plea hearing belie his self-serving post-conviction efforts to deny being armed with a deadly weapon when committing the F3-28470 robbery. Thus, we reject Sims’s claim that he was entitled to post-conviction relief on this basis.

B. Factual Basis For the Habitual Offender Determination

[18] Sims next claims that he is entitled to post-conviction relief because the State failed to present a factual basis on the habitual offender count at the guilty plea hearing. Therefore, Sims maintains that the six-year sentence enhancement on the F3-28470 robbery conviction must be set aside.

[19] Ind. Code § 35-50-2-8(a) provides that “the State may seek to have a person sentenced as a habitual offender for any felony by alleging . . . that the person has accumulated two . . . prior unrelated felony convictions.” The habitual offender statute does not establish a separate criminal offense, but rather provides the means to enhance a sentence for a charged offense. I.C. § 35-50-2-8(j). It is the factfinder’s role to determine whether a convicted defendant is a habitual offender. *See* I.C. § 35-50-2-8(h). To establish that a defendant is a

habitual offender, the State must present evidence beyond a reasonable doubt. I.C. § 35-50-2-8(b), (c), (d). The State is relieved of that burden, however, when the defendant admits to being a habitual offender. *See Thomas v. State*, 652 N.E.2d 550, 551 (Ind. Ct. App. 1995), *trans. denied*.

[20] In this case, the post-conviction court found—and we agree—that the State failed to present a factual basis in support of Sims’s status as a habitual offender. Our Supreme Court, however, has held that “prejudice must be established before post-conviction relief can be granted on grounds of failure to establish a factual basis for a guilty plea.” *State v. J.E.*, 723 N.E.2d 863, 864 (Ind. 2000). Indeed, a petitioner who challenges the propriety of his adjudication as a habitual offender may not prevail simply by putting the State to its burden of proof as though the case were being tried or appealed in the first instance. *Weatherford v. State*, 619 N.E.2d 915, 917-18 (Ind. 1993).

[21] Sims testified at the guilty plea hearing that he had reviewed the habitual offender charging information with his attorney and was aware of what the State was required to prove to establish that he was a habitual offender. Sims acknowledged that the entry of a guilty plea pursuant to the plea agreement constituted an admission of the truth of all facts alleged in the charge to which he was pleading guilty. Thus, when Sims previously informed the court that he was pleading guilty because he was guilty, it is apparent that he was admitting that the allegations listed in the habitual offender information were true. And as the post-conviction court correctly concluded, Sims failed to establish that the lack of a detailed factual basis for the habitual offender enhancement

affected his decision to admit that he was a habitual offender. In short, Sims has failed to show how he was prejudiced by the State's failure to present a factual basis with regard to the habitual offender count at the guilty plea hearing. Thus, we conclude that the post-conviction court properly rejected Sims' request to vacate the habitual offender enhancement. *See, e.g., J.E., 723 N.E.2d at 864-65* (reversal is not warranted when a defendant fails to show prejudice as a result of the State's failure to present a factual basis).

C. Ineffective Assistance of Trial Counsel

[22] Notwithstanding our conclusions above, Sims maintains that he is entitled to post-conviction relief because his trial counsel was ineffective. Specifically, Sims maintains his trial counsel was ineffective for allowing him to plead guilty to the F3-28470 robbery charge because he was not armed and that his counsel improperly permitted him to admit to being a habitual offender in light of the State's failure to present a factual basis on that count.

[23] To prevail on a post-conviction claim that the Sixth Amendment right to effective assistance of counsel was violated, the petitioner must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Wesley v. State*, 788 N.E.2d 1247, 1252 (Ind. 2003). First, a petitioner must show that defense counsel's performance was deficient. *Id.* This requires a showing that counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms. *Barber v. State*, 141 N.E.3d 35, 42 (Ind. Ct. App. 2020), *trans. denied*.

[24] Second, a petitioner must show that the deficient performance prejudiced the defense. *Id.* To satisfy the test for prejudice, the petitioner 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.* A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). The two prongs of the *Strickland* test are separate and independent inquiries. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). The failure to establish either prong will cause the claim to fail. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999).

[25] 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).

[26] In *Hill v. Lockhart*, 474 U.S. 52 (1985), the U.S. Supreme Court determined that the *Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel. *Id.* at 58. In the “context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence.” *Id.* at 58-59. On the other hand, the “second, or ‘prejudice,’ requirement,” focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea

process. *Id.* at 59. To satisfy the prejudice requirement, the defendant must establish that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial. *Id.*

[27] At the guilty plea hearing, Sims did not dispute the allegations set forth in the charging informations, and the probable cause affidavit shows that Sims threatened to shoot the cashier and he told the workers when exiting that restaurant, that he would have killed them “if [the robbery] would have taken longer.” *Exhibit Vol. 8*. In light of these circumstances, it was reasonable for Sims’s counsel to conclude that it was in his client’s best interests to plead guilty to the F3-28470 robbery. Indeed, Sims’s guilty plea to that charge was part of a more extensive agreement that resolved numerous pending cases against him in exchange for a favorable sentence, and no evidence was presented suggesting that the State would have agreed to modify the plea agreement to reduce the Level 3 felony to a lesser felony level. *See, e.g., Williams v. State*, 42 N.E.3d 107, 114 n.6 (Ind. Ct. App. 2015) (concluding that trial counsel was not ineffective for misadvising defendant that he was eligible for a habitual offender enhancement to which defendant pled guilty where defendant “benefited from his plea agreement and the specific facts d[id] not establish an objective reasonable probability that competent representation would have caused him not to enter a plea”), *trans. denied*.

[28] Finally, as the post-conviction court pointed out, Sims did not call trial counsel to testify at the post-conviction hearing about his discussion of the F3-28470 robbery and the other charges and potential sentences with Sims when the

guilty plea was negotiated. Therefore, it may be inferred that counsel would not have corroborated Sims's contentions. *See Oberst v. State*, 935 N.E.2d 1250, 1254 (Ind. Ct. App. 2010), *trans. denied*.

[29] As for the habitual offender enhancement, while trial counsel may have overlooked that the State did not set forth a factual basis regarding Sims' prior convictions during the guilty plea hearing, Sims failed to establish how he was prejudiced as a result of that oversight. Indeed, Sims acknowledged at the guilty plea hearing that he conferred with his counsel about the habitual offender count, that he examined the charging information, and that he was "sufficiently advised" about the State's burden of proof. *Transcript of Guilty Plea Hearing and Sentencing Hearing* at 6. And even more compelling, Sims has not shown that he was not a habitual offender.

[30] When considering these circumstances, Sims has failed to show that had his defense counsel brought the lack of factual basis on the habitual offender count to the trial court's attention, he would not have admitted to being a habitual offender and would have succeeded at trial. For all these reasons, Sims has failed to show that his trial counsel was ineffective, and we affirm the post-conviction court's denial of Sims's request for relief.

[31] Judgment affirmed.

Weissmann, J. and Kenworthy, J., concur.