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**IN THE
COURT OF APPEALS OF INDIANA**

FRED E. GORDON,)
)
 Appellant-Petitioner,)
)
 vs.)
)
 STATE OF INDIANA,)
)
 Appellee-Respondent.)

No. 45A05-1106-PC-281

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
The Honorable Natalie Bokota, Magistrate
Cause No. 45G04-1006-PC-11

December 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Fred E. Gordon (“Gordon”) appeals the denial of his petition for post-conviction relief, wherein he challenged his conviction for Murder. We affirm.

Issue

Gordon presents a single issue for review: whether he was denied the effective assistance of trial counsel.

Facts and Procedural History

On direct appeal, a panel of this Court recited the relevant facts as follows:

Sometime before September 24, 1982, Gordon purchased a truck from Roger Hilton (Hilton), who owned a car dealership. During the week preceding September 24, Gordon, who still owed money on the truck, arrived at Hilton’s trailer, located in the Black Oak neighborhood, in Gary, Indiana, and offered to pay Hilton with a gun. Hilton rejected the offer because the weapon was “a piece of junk.” (Transcript p. 360).

At approximately 8 p.m. on September 24, 1982, Gordon met Hilton at the home of a mutual friend. Hilton became angry when Gordon offered him a small amount of money as payment for the truck. Hilton told Gordon to “[b]ring the truck back and we’ll call it even, we’ll be even and we can start over.” (Tr. p. 357). After Hilton left, Gordon consumed an alcoholic beverage and became “lightly inebriated.” (Tr. p. 353). He became upset about his encounter with Hilton and announced that Hilton could not speak to him like he had and that he was going to dump the truck at Hilton’s home that night. Gordon returned to his home that night at around 9:30 p.m. He went about his usual routine and did not tell his wife about his encounter with Hilton.

At approximately 1 a.m. on September 25, 1982, Hilton’s girlfriend, Kathryn Weller (Weller), returned to Hilton’s trailer where she lived with Hilton. She noticed that a glass syrup bottle in the kitchen had shattered and observed, near the shattered bottle, a bullet hole in the wall. Weller also smelled an odor similar to that of exploded firecrackers in the trailer.

Eventually, Hilton was found dead in his yard. Although he never left his house without his shoes on, Hilton was wearing only his socks. A

coroner's report determined that he had died as a result of a hemorrhage from a gunshot wound to the hip that had severed his iliac artery. There were no injuries consistent with a struggle and no marks on his skin that would indicate that he was shot at close range.

A .45 caliber, semi-automatic carbine Volunteer Enterprises gun was located at approximately fifty feet from Hilton's body. On the kitchen floor of Hilton's trailer, detectives found two unfired .45 caliber rounds, as well as a spent .45 shell casing that had been fired from the gun. Although detectives with the Lake County Sheriff's Department found numerous weapons in Hilton's trailer, they found no other .45 caliber weapon. Because detectives found a second spent .45 caliber shell casing nearby Hilton's body, they determined that Hilton had been shot outside. This spent shell had also been fired from the suspected murder weapon. After further investigation, law enforcement identified Gordon as a suspect in Hilton's killing but, at that time, the State declined to file charges against him.

In June of 2008, a cold case investigator with the Lake County Sheriff's Department reviewed Hilton's case and determined that one witness, Jack Burkholder (Burkholder), had never been interviewed. In August of 2008, detectives interviewed Burkholder. Burkholder told the detectives that several months after Hilton's killing, Gordon had told him that he had "shot and killed somebody" over a "car and money." (Tr. p. 648).

On September 15, 2008, the State filed an Information charging Gordon with murder, a felony, I.C. § 35-42-1-1. When first interviewed after his arrest, Gordon initially denied any involvement. On September 15, 2008, Gordon gave another statement after waiving his Miranda rights in which he admitted going to Hilton's trailer in order to trade a gun for the truck he had previously purchased from Hilton. According to Gordon, Hilton rejected the offer and they became involved in a fight, struggling to gain control over the gun. Gordon stated that

[Hilton] got pissed[,] we had words and he started hitting me with the stock of the gun. I fell down and I grabbed the stock of the gun[,] [Hilton] had the barrel like a ball bat[,] ... While we were fighting I was on the ground holding the stock of the rifle[,] [Hilton] had the barrel and the gun went off and [Hilton] got shot. [Hilton] threw the gun after he was shot then [Hilton] passed out and fell to the ground[,] I went home and went to bed.

(State's Exh. 38).

On March 9 through March 12, 2009, the trial court conducted a jury trial. During the trial, Gordon's counsel presented a theory that Gordon accidentally shot Hilton. After presentation of the evidence, the jury found Gordon guilty as charged. On April 14, 2009, during the sentencing hearing, the trial court sentenced Gordon to forty years.

Gordon v. State, No. 45A04-0905-CR-280, slip op. at 1-2, (Ind. Ct. App. Dec. 22, 2009), trans. denied. Gordon's conviction was affirmed. See id.

On June 23, 2010, Gordon petitioned for post-conviction relief. The petition, as amended, alleged that Gordon's trial counsel, Catherine Trevino ("Trevino"), had performed deficiently by "failing to explain to Petitioner that by accepting the offer [of twenty years imprisonment] he would be incarcerated for ten years if he behaved well[.]" (App. 15.)

On January 11, 2011, the post-conviction court conducted an evidentiary hearing at which Trevino and Gordon testified. On April 11, 2011, the post-conviction court entered its Findings of Fact, Conclusions of Law, and order denying Gordon post-conviction relief. He now appeals.

Discussion and Decision

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment of the post-conviction court

unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error, that which leaves us with a definite and firm conviction that a mistake has been made. Id. In this review, findings of fact are accepted unless they are clearly erroneous and no deference is accorded to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

II. Analysis

On the eve of Gordon’s murder trial, the State offered a plea agreement whereby Gordon would plead guilty to Voluntary Manslaughter, as a Class B felony, and face a maximum sentence of twenty years. See Ind. Code § 35-50-2-5. Gordon rejected the State’s offer. He now contends that counsel failed to advise him of the potential for good time credit¹ to reduce his time served to ten years and that, had counsel done so, he would have pled guilty.

To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). “First, a defendant must show that counsel’s performance was deficient.” Id. at 687. This requires a showing that counsel’s representation fell below an objective standard of reasonableness and that “counsel made

¹ Indiana Code Section 35-50-6-3(a) provides that a prisoner assigned to Class I, that is, a non-credit-restricted prisoner who complies with Department of Correction rules, earns one day of credit time for each day of confinement.

errors so serious that counsel was not functioning as ‘counsel’ guaranteed to the defendant by the Sixth Amendment.” Id. “Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial,” that is, a trial where the result is reliable. Id.

The Strickland standard is applicable to ineffectiveness claims arising out of the guilty plea process. Dew v. State, 843 N.E.2d 556, 564 (Ind. Ct. App. 2006) (citing Hill v. Lockhart, 474 U.S. 52, 57-59 (1985)), trans. denied. If in fact there is a failure of counsel to convey a plea offer from the State, such amounts to a denial of effective assistance of counsel. Id. (citing Young v. State, 470 N.E.2d 70, 71 (Ind. 1984)).

Here, Gordon admits that Trevino conveyed the prosecutor’s offer of a plea bargain. He has identified no authority for the proposition that counsel was also required to explain the potential for good time credit. Nonetheless, the post-conviction court determined that counsel had not omitted such advice.

At the post-conviction hearing, Trevino testified that she had, in fact, explained the concept of good time credit to Gordon:

I told Mr. Gordon, as I tell all my clients, I explain good time credit, yes.
(P.C.R. Tr. 9.) The post-conviction court expressly found that counsel had “reviewed the plea agreement with Gordon including good time credit.” (App. 63.) We will not entertain Gordon’s claim that the review of good time credit did not take place. As previously observed, the post-conviction court is the sole judge of the credibility of witnesses. Fisher, 810 N.E.2d at 679.

Conclusion

Gordon has not established that he was denied the effective assistance of trial counsel. Accordingly, the post-conviction court properly denied Gordon's petition for post-conviction relief.

Affirmed.

BAKER, J., and DARDEN, J., concur.