In the Indiana Supreme Court

Tyre Bradbury,
Appellant,

v.

State of Indiana,
Appellee.

Supreme Court Case No.
21S-PC-441

Court of Appeals Case No.
20A-PC-620

Trial Court Case No.
71D08-1801-PC-2

Order on Rehearing

This matter comes before the Court on the petition for rehearing that Tyre Bradbury ("Bradbury") filed on November 1, 2021, and the parties' briefing on the petition.

Being duly advised, the Court grants Bradbury's petition in part and modifies its original majority opinion, issued October 1, 2021, as follows:

> To so hold would open the door to every unfavorable verdict being challenged and/or overturned on ineffective of assistance of counselgrounds. Accordingly, because we find that Bradbury's counsel's performance was not deficient, we decline to address the prejudice prong under *Strickland*. *See Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) ("To prevail on an ineffective assistance of counsel claim, one must show **both** deficient performance and resulting prejudice") (emphasis added); *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) ("Failure to satisfy either prong will cause the claim to fail.").
>
> ~~We also find no prejudice here. Tendering the lesser included instruction would have given the jury another option to convict Bradbury.As the State correctly notes, Bradbury was unlikely to be acquitted of a lesser charge in light of the evidence that the shooting was not just reckless, but intentional, as well as Bradbury's own repeated admissions of responsibility. As such, he was not prejudiced by counsel not seeking a lesser included instruction.~~

Slip op. at 7.

Further, Justice Goff modifies his separate opinion as follows:

> In ~~concluding~~ arguing that Bradbury was<u>n't</u> ~~not~~ prejudiced by counsel's failure to request a lesser-included instruction, the ~~Court~~ State cites ~~"~~Bradbury's ~~own repeated~~ admissions of involvement in the shooting ~~responsibility~~" and points to ~~"~~evidence that "the shooting was not ~~just~~ merely reckless"~~,~~ but intentional.~~"~~ Appellee's Br. at 19–20.~~*Ante*, at 7.~~

Dissent at 6.

> Still, the ~~Court~~ State insists that, given Bradbury's "repeated admissions of responsibility, a jury would have had little difficulty finding him guilty of a lesser offense" and he "still may have received a significant sentence because he was also facing a criminal gang enhancement." Appellee's Br. at 16 (record citations omitted). ~~"[t]endering the lesser included instruction would have given the jury another option to convict Bradbury." Ante, at 7.~~ But it's no answer to ~~insist~~ suggest "that a defendant may be better off without ~~such an~~[a lesser-included] instruction." *Keeble v. United States*, 412 U.S. 205, 212 (1973). . . . But if given the option to convict on a lesser-included offense with a substantially reduced sentence (even with a criminal-gang enhancement), the jury may well have chosen that option.
>
> The ~~Court's~~ State's suggestion also conflicts with the "basic notion that juveniles are different from adults when it comes to sentencing and are generally less deserving of the harshest punishments." *State v. Stidham*, 157 N.E.3d 1185, 1188 (Ind. 2020).

Id. at 7.

Additionally, it has come to the Court's attention that the original majority opinion contains typographical errors on page 5 of the slip opinion. Specifically, the underlined words below were inadvertently omitted from the original opinion:

> . . . Further, the standard of review requires that we affirm unless "there is no way within the law that the court below could have reached the decision it did." *Stevens*, 770 N.E.2d at 745.
>
> Further, as for prejudice, Bradbury "must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Wilson*, 157 N.E.3d at 1177. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Slip op. at 5.

Contemporaneous with the entry of this Order, the Court is filing its Opinion on Rehearing reflecting these changes.

Done at Indianapolis, Indiana, on 2/7/2022.

FOR THE COURT

Loretta H. Rush
Chief Justice of Indiana

All Justices concur, except Rush, C.J. and Goff, J., who vote to grant rehearing in full for the reasons expressed in the dissent to the opinion on rehearing.