Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-098

MARCH TERM, 2020

In re Harold Porter*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 107-2-17 Cncv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Petitioner appeals from the civil division's orders denying his petition for post-conviction relief (PCR), in which he claimed his guilty plea to an attempted kidnapping charge was involuntary because he was misinformed regarding in-prison program eligibility that could lead to his early release. We affirm.

In 2009, petitioner was charged with aggravated assault, kidnapping, and second-degree unlawful restraint following an incident in which he allegedly attempted to drag the victim into his truck. Petitioner's first trial ended in a hung jury. A jury convicted him following his second trial, and he was given a thirty-year-to-life sentence; however, this Court reversed that conviction because trial testimony by police investigators concerning the owners of trucks similar to petitioner's did not base their testimony on personal knowledge. State v. Porter, 2014 VT 89, ¶¶ 11-18, 197 Vt. 330, overruled on other grounds by State v. Discola, 2018 VT 7, 207 Vt. 216, 184 A.3d 1177. On the eve of a third trial, in September 2015, petitioner and the State reached a plea agreement, which called for petitioner to plead guilty to attempted kidnapping and receive an eight-to-thirty-year sentence, with credit for six years already served. At the change-of-plea hearing, petitioner admitted that he assaulted the victim and tried to drag her into his truck. The court imposed the agreed-upon sentence.

In January 2017, petitioner filed a pro se PCR petition. In November of that year, after he was assigned counsel, petitioner filed an amended petition, claiming that: (1) he entered into the plea agreement based on representations by Department of Corrections (DOC) officials that he would be eligible for sex-offender programming that could lead to his release within two years; and (2) he reasonably relied upon material representations by the State, the court, and his attorney about his programming eligibility. Petitioner based his claims on the fact that in 2016, after he pled guilty and was sentenced in accordance with the plea agreement, DOC determined that there was no appropriate sex-offender program available to petitioner at that time because, after completing the same in-house sex-offender treatment program during a prior incarceration on a

groping charge, he committed more serious sex-related crimes charged in this case.[1] The parties filed cross-motions for summary judgment. In an October 2018 decision, the civil division granted the State's motion for summary judgment on petitioner's first claim, ruling that DOC was not a party to the plea agreement and could not be bound by any agreement as to specific programming decisions within its discretion. The civil division ruled, however, that petitioner's and his trial counsel's affidavits were sufficient to require a merits hearing on petitioner's second claim.

In a February 2019 decision, following a January 7, 2019 evidentiary hearing, the civil division entered judgment for the State on petitioner's claim that his plea was involuntary because of his reasonable reliance on material representations by the prosecutor, the court, and his trial counsel concerning the availability of in-house programming that could lead to his early release. The civil division rejected this claim, concluding that any reliance on statements concerning in-house program eligibility was not reasonable because petitioner was explicitly told that there were no guarantees regarding his minimum release date, he acknowledged he knew date-of-release decisions were up to DOC, and statements made by the change-of-plea court concerning the likelihood of his obtaining programming and being released early were made after he had entered his plea. The civil division further ruled that even if petitioner could establish that he reasonably relied on a material misunderstanding concerning the plea agreement, he failed to show that he was prejudiced by any such misunderstanding.

On appeal, petitioner argues that the civil division erred in concluding that the State did not breach the plea agreement and that his plea was knowing, intelligent, and voluntary, given statements from the prosecutor, his trial counsel, and the change-of-plea court recognizing he would be eligible for programming that, upon successful completion, would likely lead to his early release from prison on furlough or parole.

"The basic test of interpretation of a plea agreement is what the parties reasonably understood the agreement to be." In re Meunier, 145 Vt. 414, 420 (1985). "[P]arties to a plea agreement are bound by the express terms of the agreement"; however, "[e]ven in the absence of an express promise, misinformation regarding parole eligibility may provide a basis for a successful attack on the voluntariness of a plea." In re Blow, 2013 VT 75, ¶¶ 23-24, 194 Vt. 416 (quotations and alteration omitted); see also In re Jones, 2020 VT 9, ¶ 19 (stating that "explicit promise is not required in order for a plea to be considered involuntary"); In re Moulton, 158 Vt. 580, 584 (1992) ("Although defense counsel has no affirmative duty to provide information, misinformation regarding parole eligibility may provide a basis for a successful attack on the voluntariness of a plea."). "At a post-conviction relief hearing, petitioner has the burden of demonstrating that he entered his plea while reasonably relying on a material misunderstanding regarding his parole eligibility, and that such misunderstanding worked to his prejudice." Id. "[T]o make a valid claim on this ground, such a misunderstanding may not be based solely on a petitioner's subjective misunderstanding of the law or of counsel's statements." In re Kirby, 2012 VT 72, ¶ 14, 192 Vt. 640 (mem.). "Rather, it must be based on objective evidence which

[1] DOC's director of classification testified at the PCR hearing that DOC did not offer programming to petitioner because his sex-related criminal behavior had escalated despite having previously gone through the same programming. The director testified that it was unknown whether there would be programming appropriate for petitioner in the future but that he would be periodically reevaluated.

reasonably produced the misunderstanding." Id. (quotation omitted); see also Moulton, 158 Vt. at 584 ("To support withdrawal of the plea, the misunderstanding must be more than a subjective mistake absent some objective evidence reasonably justifying the mistake." (quotation omitted)). We review the civil division's "findings of fact for clear error, and the conclusions of law with no deference." In re Sharrow, 2017 VT 69, ¶ 11, 205 Vt. 309; see also Moulton, 158 Vt. at 585 ("The court's findings will stand on appeal unless clearly erroneous or not supported by any credible evidence."); Cunningham v. Diesslin, 92 F.3d 1054, 1060 (10th Cir. 1996) ("Whether a defendant entered a knowing and voluntary guilty plea presents a question of law which this court reviews de novo."). In reviewing a summary judgment ruling, we apply "the same standard as the trial court, upholding such a judgment when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." In re Shaimas, 2008 VT 82, ¶ 8, 184 Vt. 580 (mem.).

Before considering petitioner's claims, we examine the plea agreement, the relevant part of the change-of-plea colloquy, and testimony presented at the PCR hearing. The only terms explicitly stated in the notice of plea agreement were that defendant plead guilty to attempted kidnapping and serve an eight-to-thirty-year prison term. The critical part of the colloquy at the change-of-plea hearing is the following:

> PROSECTOR: And so we felt that, with the eight years to thirty years, that would take [petitioner] up to eighty-one years of age being supervised by [DOC]. And it's important that he understands that it's up to DOC to let him out—when they're going to let him out. That there will be programming.
>
> We did, in fact, check to make sure that the seventy percent rule did not apply; it does not apply in this case.[2]
>
> . . . .
>
> So we feel that, hopefully, he'll get the programming he needs in the time that he is in jail and that, when he is finally released, if in fact he's released, that he will be supervised closely.
>
> . . . .
>
> And Judge, I just wanted to add that I've spoken with . . . the director of VTPSA [Vermont Treatment Program for Sexual Abusers] and it's our understanding that it would take probably up to two years to do the programming, and that's why we added the extra two years to the six [that petitioner had already served].

[2] The prosecutor was referring to 28 V.S.A. § 204b, which provides that persons sentenced for violating certain sex-related offenses and determined to be high-risk offenders are "not eligible for parole, furlough, or any other type of early release until the expiration of 70 percent of his or her maximum sentence."

> COURT: Okay. And [petitioner] may well be required to go through the in-house sex-offender treatment program.
>
> DEFENSE COUNSEL: That is the VTPSA, that is correct. . . . In light of his past, I expect that that would be the twelve- or eighteen-month program. . . . Which explains the two years that [the prosecutor] is talking about.
>
> THE COURT [Speaking to petitioner]: Is that your understanding?
>
> PETITIONER: Yes, sir.

At the end of the change-of-plea hearing, after petitioner had entered his guilty plea, the court told petitioner that, as "discussed earlier," he "probably" would "be required to go through the in-house sex-offender treatment program." The court expressed its "hope" that petitioner would "take positive advantage of that," and stated that if he did, DOC "should release you in about two years, maybe a little less."

At the PCR hearing, petitioner's counsel stated that, before accepting the plea, petitioner had expressed concerns about whether he would be eligible for programming that could lead to his early release. The attorney stated he advised clients, including petitioner, that as long as they were not deemed a high-risk or a "seventy percenter," they did the programming, and they did not accumulate any major disciplinary violations while incarcerated, they would be considered for early release. The attorney noted that whether a defendant was a "seventy percenter" was important in determining whether he and the prosecutor could agree to a split sentence involving a portion of the sentence to serve and then probation, but he acknowledged on cross-examination that in this case the prosecutor was not willing to accept a split sentence and that only a split sentence would assure petitioner's early release. The attorney stated that when the prosecutor informed him that DOC was not going to "seventy percent" petitioner, he assumed that meant petitioner would be eligible for programming before he reached his minimum sentence. Two weeks after petitioner pled guilty, petitioner's attorney sent petitioner a letter reiterating that DOC had the power to extend his incarceration beyond the minimum and that there was no guarantee he would be released after serving his minimum sentence. The attorney stated that he did not "promise" or "guarantee" petitioner that he would get programming but rather told him that there was "no reason [he] shouldn't" get the programming. When asked whether he had discussed with petitioner how DOC might react to the fact that petitioner had committed sex-related offenses after having previously done the same in-house sex-offender programming, the attorney stated that he did not remember but that he knew of defendants in similar situations who were given the same programming after reoffending.

For his part, petitioner testified at the PCR hearing that his trial counsel had assured him he would be going home in two years, and that he believed going home in two years "was a guarantee." He also stated that he was concerned about being accepted into programming because he had gone through the programming before, and he acknowledged that DOC determines when to release inmates. The PCR court did not find credible petitioner's testimony that his attorney assured him he would be released after serving his minimum.

As an initial matter, we reject petitioner's contention that the State breached the plea agreement. The agreement does not contain any express terms concerning programming or release upon completion of the minimum. As noted, the only terms expressly stated in the agreement were that petitioner plead guilty to attempted kidnapping and serve an eight-to-thirty-year sentence. There is no evidence of any promise made at the change-of-plea hearing that petitioner would be released at his minimum. To the contrary, petitioner was forewarned that DOC would decide when he would be released. Moreover, none of the statements made at the change-of-plea hearing amounted to a guarantee, as a condition of petitioner's guilty plea, that he would receive programming prior to serving his minimum sentence or that he would be released in the event he participated in and successfully completed programming. Nor could petitioner's attorney, the prosecutor, or the change-of-plea court have imposed such an obligation on DOC. See Blow, 2013 VT 75, ¶ 23 ("[T]he trial court could not impose upon the DOC an obligation to recommend petitioner for parole, nor could the court mandate that the [parole] board grant it, because these functions are by law wholly within the discretion of the respective agencies."). Nor did the court impose such a term upon the State, following petitioner's entry of his plea, by expressing the hope that petitioner would engage in sex-offender programming and by opining that, if he did, he "should" be released within two years.

We now turn to petitioner's argument that he reasonably relied upon a material misunderstanding regarding program eligibility. Without question, petitioner's trial counsel, the prosecutor, and the change-of-plea court (based on the prosecutor's comments) expected that petitioner would have an opportunity to participate in sex-offender programming that, if successfully completed, could lead to petitioner's early release. And, in fact, the prosecutor had been informed that DOC would not exclude petitioner from programming based on the seventy-percent rule. But no one guaranteed that petitioner would be accepted into such programming, that he would successfully complete the programming, or that he would be released in two years even if he successfully completed the programming. Petitioner knew that only a split sentence, which the prosecutor rejected, would guarantee release at his minimum. Petitioner also knew that DOC would evaluate what, if any, programming was appropriate, and that DOC ultimately had the discretion whether to offer programming. Though his attorney told petitioner he expected programming to be available before his minimum, that advice was merely a prediction, not a guarantee or promise. See Cunningham, 92 F.3d at 1061 ("An attorney's erroneous sentence estimate or prediction of parole does not render a plea unknowingly made. A defendant's subjective understanding that he will serve less than one-half of his sentence, if it is not based upon any promise made by the defense attorney, the prosecutor, or the court, will not undermine the constitutionality of the plea or raise a question of whether the state breached its end of a plea bargain." (citation omitted)). Nor is there any evidence in the record to demonstrate that this prediction was inaccurate or mistaken at the time petitioner entered his plea. Shaimas, 2008 VT 82, ¶ 9 (rejecting petitioner's argument that PCR court erred in concluding that "because the plea was based on an accurate understanding at the time that programming would be available to [petitioner] before he reached his minimum, there was no material misrepresentation to render the plea involuntary"). Accordingly, we agree with the PCR court that petitioner could not have reasonably relied upon a belief that he was guaranteed acceptance into sex-offender programming. See Blow, 2013 VT 75, ¶ 26 ("Given the inherently imprecise nature of any prediction related to the availability of spaces in a treatment program at a future time, it would have been unreasonable . . . for petitioner to have relied on this allegedly material misunderstanding."); Shaimas, 2008 VT 82, ¶¶ 7, 9-11 (rejecting claim of involuntary plea where petitioner was advised

that programming would likely be available before he reached his minimum but change in DOC policy following sentence prevented petitioner from obtaining programming).

Petitioner's reliance on Jones, 2020 VT 9, is unavailing. In that case, petitioner's trial counsel acted incompetently by advising petitioner on whether to plead guilty without becoming aware of "established policies" that made petitioner "categorically ineligible for parole," thereby requiring him to serve a life sentence instead of being deported. Id. ¶¶ 9-10, 22-23. As discussed above, that is not the situation here, where no inaccurate information was provided to petitioner, and DOC made a discretionary decision whether to offer petitioner programming.

Because we conclude that petitioner has failed to demonstrate that he reasonably relied upon a material misunderstanding regarding his eligibility for programming and early release, we need not consider whether he was prejudiced by his plea decision.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice