



## **Case Summary**

Buzz Taylor appeals the denial of his petition for post-conviction relief. We affirm.

### **Issues**

Taylor raises two issues, which we restate as:

- I. whether he received ineffective assistance of counsel;  
and
- II. whether the post-conviction court should have set aside his guilty plea.

### **Facts**

In 2000 and 2001, Taylor was charged with several offenses in Miami County in six separate charging informations. In April 2000, then Chief Deputy Prosecuting Attorney Eric Huneryager signed the information filed under cause number 52D01-0004-DF-74 (“DF-74”). During the fall of 2000, Huneryager also appeared on behalf of the State at two hearings related to this information. On December 31, 2000, Huneryager left the prosecutor’s office and became a public defender. As a public defender, Huneryager represented Taylor on the charges alleged in the five other informations, and Bryan Michaud represented Taylor on DF-74.

At that time, Taylor also faced charges of Class A felony kidnapping and Class C felony escape in Cass County. Taylor was represented by a third attorney, Jay Hirschauer, on those charges.

While represented by Huneryager and Michaud, Taylor entered into a plea agreement resolving all of the charges in Miami County. Taylor agreed to plead guilty to

two counts of Class B felony burglary, one count of Class C felony forgery, one count of Class D felony theft, and one count of misdemeanor carrying a handgun without a license, and the State agreed to dismiss the remaining charges. The plea agreement called for twenty-year sentences on the Class B felonies, an eight-year sentence on the Class C felony, a three-year sentence on the Class D felony, and a suspended one-year sentence on the misdemeanor. Pursuant to the plea agreement, all of the sentences would be served concurrently for a total sentence of twenty years. The plea agreement contained a handwritten term stating, "Sentence concurrent to Cass County sentences on escape and/or kidnapping. Conditioned upon Cass County running concurrent with Miami County." Ex. 1.

At the June 18, 2001 guilty plea hearing in Miami County, the following exchange took place:

[Michaud]: Just for the record to clarify in terms of the plea . . . it is he [sic] understanding [sic] the parties that if Cass County does not run this matter concurrent that he has the right to come back and withdraw the plea.

[The Prosecutor]: Basically what's happened is I made this plea offer and explained to counsel that technically what they had written was an incorrect statement of law. You can't do that so they are now requesting basically the Court take this under advisement until they attempt to work the plea over in Cass County.

\* \* \* \* \*

[Trial Court]: All right. Court would accept your pleas subject to accepting the agreement and I will accept the condition that the Court take them under advisement until we determine the Cass County situation. . . .

Ex. 3. pp. 7, 10.

On October 18, 2001, Taylor was convicted and sentenced to twenty years pursuant to the Miami County plea agreement. That sentence was ordered to be served concurrent with the sentence imposed in Cass County.

That same day, Taylor entered into plea agreements on the charges pending in Cass County. Taylor agreed to plead guilty to Class A felony kidnapping in exchange for a twenty-year sentence, which was to run “concurrent with any sentence received in Miami County.” Ex. A. Taylor also agreed to plead guilty to Class C felony escape in exchange for an eight-year sentence, which was to run consecutive to the kidnapping sentence. In November 2001, Taylor was sentenced in Cass County in accordance with the plea agreements.

Taylor did not object to the imposition of the sentence in either Miami County or Cass County, nor did he file a direct appeal in either matter. On August 18, 2010, Taylor filed a petition for post-conviction relief in Miami County claiming that he received ineffective assistance of counsel based on Huneryager’s alleged conflict of interest and seeking to set aside his Miami County guilty plea based on the consecutive kidnapping and escape sentences in Cass County. The post-conviction court denied Taylor’s petition. Taylor now appeals.

### **Analysis**

“The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence.” Kubsch v. State, 934 N.E.2d 1138, 1144 (Ind. 2010). Because a petitioner appealing the denial of post-conviction

relief is appealing from a negative judgment, to prevail on appeal, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Id. Further, although we do not defer to a post-conviction court’s legal conclusions, the 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.

### *I. Ineffective Assistance of Counsel*

Taylor argues that Huneryager’s employment as a deputy prosecutor and then as defense counsel was a conflict that rendered his assistance ineffective. “To establish a post-conviction claim alleging the violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish before the post-conviction court the two components set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).” Kubsch, 934 N.E.2d at 1147. First, a defendant must show that counsel’s performance was deficient by establishing that counsel’s representation fell below an objective standard of reasonableness and that “‘counsel made errors so serious that counsel was not functioning as ‘counsel’ guaranteed to the defendant by the Sixth Amendment.’” Id. (quoting Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). A defendant must also show that the deficient performance prejudiced the defense by establishing there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. “Further, counsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” Id.

Relying on State v. Romero, 578 N.E.2d 673 (Ind. 1991), Taylor argues, “it is defacto improper for the prosecutor who handled a criminal matter (or supervised it) to later represent the defendant.” Appellant’s Br. p. 8. Romero, however, is not on point because it involved the State’s repeated objection to defense counsel’s representation on retrial because defense counsel was a former deputy prosecutor who was actively involved in the preparation of the initial murder trial. Romero, 578 N.E.2d at 674-76 (observing that the need for consent by the government agency to a former government attorney’s representation of a private client does not arise unless an attorney’s previous participation was personal and substantial).

Here, Huneryager testified at the post-conviction hearing testimony that Taylor was aware of his former employment as a deputy prosecutor and that Taylor’s first words to him were “Aren’t you [the prosecutor’s] bitch?” Tr. p. 47. Huneryager responded, “Not anymore.” Id. Unlike in Romero, although Taylor was aware of Huneryager’s role as a deputy prosecutor during the proceedings, he never objected to Huneryager’s representation.

“To establish a conflict of interest amounting to a Sixth Amendment violation, Appellant must show that counsel actively represented conflicting interests that adversely affected his performance. The mere possibility of a conflict of interest is insufficient to justify reversal of a conviction.” Coleman v. State, 694 N.E.2d 269, 273 (Ind. 1998). Our supreme court has observed, “the only cases in which the U.S. Supreme Court has applied these ‘conflict of interest’ rules are those where counsel is conflicted because he

or she is actively representing multiple parties with conflicting interests . . . .” Johnson v. State, 948 N.E.2d 331, 335 (Ind. 2011).

Taylor presented no evidence that Huneryager actively represented the State’s interests at the same time he represented Taylor. Instead the evidence shows that, after Huneryager left the prosecutor’s office, he became a public defender. Even then, Huneryager testified that he did not represent Taylor on DF-74 and that was why “Mr. Michaud was representing him under that cause.” Tr. p. 43. Regarding the two cases in which Huneryager’s name appears on the chronological case summary, Taylor does not point to any specific participation by Huneryager on those matters, and we decline to speculate as to such. Finally, even though Huneryager and Michaud jointly negotiated the plea deal, Taylor offers no argument or evidence that he was prejudiced by the alleged conflict. Taylor faced multiple felony and misdemeanor charges and secured a plea agreement calling for the dismissal of some of the charges and fixing the total sentence on the remaining charges at twenty years. The negotiated plea agreement also called for that sentence to be served concurrent with the sentence imposed in Cass County. Without more, Taylor has not established that the trial court improperly denied his petition for post-conviction relief on this basis.

## ***II. Guilty Plea***

Taylor argues that he should be permitted to set aside his guilty plea in Miami County because the sentence on the escape conviction in Cass County was ordered to run consecutive to the sentence on the kidnapping conviction in Cass County. Taylor claims he did not receive the benefit of the bargain he reached in Miami County because “Cass

County did not run its cases concurrent with Miami and ran one of them consecutive.”  
Appellant’s Br. p. 9.

The State argues that Taylor forfeited this claim by not raising the known issue immediately with the trial court or pursuing it on direct appeal. See Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000) (stating, “post-conviction proceedings provide defendants the opportunity to raise issues that were not known at the time of the original trial or that were not available on direct appeal.”), cert. denied. Although the issue was known at the time of direct appeal, Indiana Code Section 35-35-1-4(c), which neither party cites on appeal, describes the procedure for withdrawing a guilty plea after being sentenced. That statute provides:

(c) After being sentenced following a plea of guilty, or guilty but mentally ill at the time of the crime, the convicted person may not as a matter of right withdraw the plea. However, upon motion of the convicted person, the court shall vacate the judgment and allow the withdrawal whenever the convicted person proves that withdrawal is necessary to correct a manifest injustice. A motion to vacate judgment and withdraw the plea made under this subsection shall be treated by the court as a petition for postconviction relief under the Indiana Rules of Procedure for Postconviction Remedies. For purposes of this section, withdrawal of the plea is necessary to correct a manifest injustice whenever:

- (1) the convicted person was denied the effective assistance of counsel;
- (2) the plea was not entered or ratified by the convicted person;
- (3) the plea was not knowingly and voluntarily made;
- (4) the prosecuting attorney failed to abide by the terms of a plea agreement; or

(5) the plea and judgment of conviction are void or voidable for any other reason.

The motion to vacate the judgment and withdraw the plea need not allege, and it need not be proved, that the convicted person is innocent of the crime charged or that he has a valid defense.

Ind. Code § 35-35-1-4. Based on this statute, we believe Taylor's attempt to withdraw the guilty plea is properly addressed on the merits as a petition for post-conviction relief.

Nevertheless, Taylor has not established that he is entitled to relief. Relying on Epperson v. State, 530 N.E.2d 743 (Ind. Ct. App. 1988), Taylor seems to suggest that his guilty plea in Miami County was not voluntary because the Cass County sentences were ordered to be served consecutive to each other. Epperson, however, is not on point. In Epperson, the State agreed to nolle prosequi a criminal recklessness charge because the prosecutor believed the State could not produce a crucial witness and because Epperson would plead guilty to other charges. Epperson, 530 N.E.2d at 746. After Epperson pled guilty to the other charges, the State reneged on its agreement because it learned the crucial witness would cooperate. Id. We observed:

A prosecutor's failure to adhere to any promise which induced a guilty plea would constitute a breach of the plea agreement with the result that the plea loses its voluntary character. If a plea is unfairly obtained, it is not voluntary, and it violates the defendant's rights. Clearly, prosecutors should not be permitted to violate plea agreements with impunity, however, specific performance of the plea agreement is not necessarily the only or the most appropriate relief in all circumstances.

Id. at 745 (citations omitted). We concluded that the State was not justified in renegeing on a plea agreement, which the defendant negotiated in good faith, because it learned that it made a bad deal after the defendant had pled guilty. Id. at 746. We held that the appropriate remedy was to enforce the nolle prosequi provision of the original plea agreement. Id.

Here, Taylor has not alleged, let alone shown, any wrong doing by the Miami County prosecutor. In fact, the Miami County sentences were ordered to be served concurrent with the Cass County sentences as called for in the Miami County plea agreement. The fact that the two Cass County sentences were run consecutive to each other did not violate the Miami County plea agreement.

Even if we were to assume Taylor was unaware of the deals reached on the Cass County charges when he was sentenced in Miami County, the Miami County trial court had agreed to take the matter under advisement until the Cass County charges were resolved. Taylor offers no evidence that he objected to being sentenced on the Miami County charges while the Cass County charges were still unresolved.

Further, at the post-conviction hearing, Taylor testified that, when he signed the plea agreements in Cass County, he knew the agreements called for the Cass County sentences to be served consecutively. He stated that he faced sixty-five years on the Cass County charges and settled for twenty-eight years because he “was worried that if, if [he] hadn’t take that eight (8) years consecutive, then the whole, the entire plea agreements through Cass County would have been, it would have changed everything.” Tr. p. 71. Taylor also explained that he entered into the agreement calling for consecutive sentences

because Hirschauer told him he could challenge the erroneous sentence later. He described this as a “strategy” and explained that he was under the impression, “That the eight (8) years would eventually be able to get knocked off. He told me that to get my time in on the 20 do 10 and he would file for erroneous sentence and get the eight (8) years stricken.” Id. at 65, 69.

Taylor was clearly aware of the terms of the plea agreements he entered into in both counties and proceeded to plead guilty in an attempt to obtain the most-advantageous outcome. Although Taylor entered into the Cass County agreements with the hope of undermining the Miami County plea agreement at a later date, such hope does not render that guilty plea involuntary where the Miami County sentences were in fact order to be served concurrent with the Cass County sentences. The post-conviction court properly denied relief on this basis.

### **Conclusion**

Taylor has not established that he received ineffective assistance of counsel or that his Miami County guilty plea should have been set aside. The post-conviction court properly denied Taylor’s petition for relief. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.