

Appellant-petitioner Efren Diaz appeals the denial of his petition for post-conviction relief. Specifically, Diaz argues that the post-conviction court improperly excluded an exhibit prepared by his expert witness. In addition, Diaz contends that he did not enter a knowing, intelligent, and voluntary guilty plea and that he was denied effective assistance of trial counsel. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

Diaz was born in Mexico and communicates only in Spanish. Diaz moved to the United States in 2000 and eventually moved to Elkhart County in 2004 in search of employment. On July 7, 2004, the State charged Diaz with possession of methamphetamine with intent to deliver and dealing in methamphetamine, both as class A felonies. Diaz hired Dave Newman as his private defense counsel.

Newman met with Diaz in jail on several occasions, and each time, Newman used his own interpreter, Josephine Navarro. On at least one occasion, Newman discussed the terms of a negotiated plea agreement with Diaz, and Navarro translated this conversation. Newman also discussed the charges, the elements of the crimes, the evidence against Diaz, Diaz's rights, and possible sentences. Diaz never indicated that he did not understand the plea agreement and later testified that he understood Navarro's translation.

On January 14, 2005, Diaz pleaded guilty to both charges in exchange for the State's agreement not to charge Diaz with conspiracy. An interpreter was sworn in to translate the guilty plea hearing and on at least three occasions, Diaz stated that he could understand her translations.

On February 8, 2005, Diaz sent a letter to Newman stating that he did not understand his plea agreement. Specifically, Diaz thought that he only pleaded guilty to one offense instead of two. Newman testified that although he did not specifically remember receiving the letter, it was in his file and that whenever a client did not understand a plea agreement, he would meet with him and answer his questions

At the March 24, 2005, sentencing hearing, a different interpreter was sworn in, and Diaz stated that he understood her translations. The trial court sentenced Diaz to thirty years on the possession conviction and twenty years on the dealing conviction to be served consecutively, for an aggregate term of fifty years.

On April 22, 2005, Diaz appealed his sentence and was again represented by Newman. On December 30, 2005, this court remanded for clarification of the sentencing order. Diaz v. State, 839 N.E.2d 1277 (Ind. Ct. App. 2005). On January 20, 2006, following remand, the trial court imposed the same sentences, but ordered them to be served concurrently, for an aggregate sentence of thirty years.

On February 15, 2007, Diaz filed a pro se petition for post-conviction relief, claiming that he did not enter into his guilty plea knowingly and intelligently and that he had received ineffective assistance of trial counsel. Diaz was appointed a public defender on March 12, 2007, and on January 17, 2008, Diaz's petition was amended to include allegations that the guilty plea hearing had not been properly translated.

The post-conviction court held evidentiary hearings on March 20, 2008, and October 2, 2008. At both hearings, Diaz presented the testimony of Christina Courtright, a certified court interpreter. Courtright opined that there were three problems with the

translation of the guilty plea hearing, namely, that words were omitted or paraphrased, that some words were mistranslated, and that the interpreter had answered Diaz's questions without referring the questions back to the court. To highlight her conclusions, Courtright prepared a chart illustrating what she believed were the problems with the translation. The first column referenced the page and line number of the text in the transcript of the guilty plea hearing. The second column contained the English words spoken by the court during the guilty plea hearing. The third column contained the Spanish words spoken by the interpreter and the fourth column contained the English equivalent of what the interpreter actually said in Spanish. The chart was offered as Petitioner's Exhibit Five, but the State objected on the basis of hearsay and the post-conviction court sustained the objection.

Diaz testified that although he believed that he understood the interpreter at the guilty plea hearing, he only wanted to plead guilty to the dealing charge. Accordingly, Diaz claims that there must have been an error in the translation because he pleaded guilty to both charges.

On February 4, 2009, the post-conviction court entered findings of fact and conclusions of law in its order denying Diaz's petition for post-conviction relief. Diaz now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5);

McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 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 unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

II. Excluded Exhibit

Diaz argues that post-conviction court abused its discretion when it refused to admit Courtright’s chart. The admission or exclusion of evidence in a post-conviction proceeding is within the post-conviction court’s sound discretion, and we disturb its ruling only if it has abused its discretion. Hyppolite v. State, 774 N.E.2d 584, 600 (Ind. Ct. App. 2002). An abuse of discretion occurs when the evidentiary ruling is against the logic, facts, and circumstances presented. Kirby v. State, 774 N.E.2d 523, 533 (Ind. Ct. App. 2002). Furthermore, “[a] claim of error in the exclusion or admission of evidence will not prevail on appeal unless the error affects the substantial rights of the moving party.” McCarthy v. State, 749 N.E.2d 528, 536 (Ind. 2001).

Diaz offered Courtright’s chart to show that the translation of the guilty plea hearing was of poor quality and the State objected on the grounds that the chart was hearsay because Courtright was not present at the guilty plea hearing and did not seek to

authenticate her translation with the interpreter at the guilty plea hearing. The post-conviction court sustained this objection.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Ind. Evidence Rule 801(c); Faulkner v. Markkay of Ind., Inc., 663 N.E.2d 798, 800 (Ind. Ct. App. 1996). Hearsay evidence is inadmissible unless it meets one of the exceptions to the hearsay rule. Evid. R. 802; Faulkner, 663 N.E.2d at 800. Indiana Evidence Rule 703 carves out a narrow exception to the hearsay rule. Faulkner, 663 N.E.2d at 800. Specifically, Rule 703 states that “[e]xperts may testify to opinions based on inadmissible evidence, provided that it is the type reasonably relied upon by experts in the field.” Nevertheless, “[t]he evidence rules do not permit the admission of materials, relied upon by an expert witness, for the truth of the matters they contain if the materials are otherwise inadmissible.” Schmidt v. State, 816 N.E.2d 925, 940 (Ind. Ct. App. 2004).

Here, Courtright’s translations were based on a cassette recording of the guilty plea hearing. Courtright was not present at the guilty plea hearing, nor did she seek to authenticate her translation with the interpreter. In addition, Courtright was unable to hear various parts of the recording. Indeed, Courtright testified that although the recording was “kind of hard to hear, . . . I was able to isolate to a certain extent enough to hear the gist of what the interpreter was saying.” PCR Mar. Tr. p. 24 (emphasis added). Moreover, Diaz offered Courtright’s chart to show that the quality of the translation by the interpreter at the guilty plea hearing was poor. Consequently, we cannot say the post-conviction court abused its discretion by not admitting the chart into evidence.

Even assuming solely for argument's sake that the post-conviction court should have admitted the chart, the error was harmless. Courtright testified at both the March and October hearings that, in her opinion, the quality of the translation at the guilty plea hearing was "severely lacking." Id. at 24-25; PCR Oct. 2008 Tr. p. 9-10. In light of Courtright's testimony regarding the quality of the translation, any error in the post-conviction court's exclusion of the chart was harmless.

III. Guilty Plea

Diaz contends that the post-conviction court erred by not setting aside his guilty plea because he did not enter into it knowingly, intelligently, and voluntarily. Specifically, Diaz argues that his guilty plea must be set aside because he "was not provided with an accurate translation of the guilty plea proceedings." Appellant's Br. p. 14.

A convicted person "who can establish in a post-conviction proceeding that his plea was coerced or unintelligent is entitled to have his conviction set aside." Creech v. State, 887 N.E.2d 73, 75 (Ind. 2008). Even so, a guilty plea entered after the trial court has reviewed both the rights being waived and the necessary statutory inquiries is "unlikely to be found wanting in a collateral attack." Jefferies v. State, 744 N.E.2d 1056, 1059 (Ind. Ct. App. 2001) (quoting State v. Moore, 678 N.E.2d 1258, 1265 (Ind. 1997)).

For defendants who do not understand the English language, interpreters are "necessary to implement fundamental notions of due process such as the right to be present at trial, the right to confront one's accusers, and the right to counsel." Arrieta v.

State, 878 N.E.2d 1238, 1242-43 (Ind. 2008) (quoting Martinez Chavez v. State, 534 N.E.2d 731, 737 (Ind. 1989)). An inability to understand the language used in the guilty plea proceeding might call into doubt the voluntariness of the resulting guilty plea. See Martinez Chavez, 534 N.E.2d at 738 (stating that a defendant who does not speak English is denied due process when the accuracy of a translation is subject to grave doubt). However, it is the defendant's burden to show that he did not understand the proceedings. Garcia v. State, 271 Ind. 209, 212, 391 N.E.2d 604, 606 (1979).

In the instant case, Newman, Diaz's trial and appellate counsel, testified that he had met with Diaz on several occasions and explained the terms of the plea agreement. In addition, Newman stated that each meeting was attended and translated by Navarro, who frequently translated for Newman and who had previously translated for the St. Joseph County court system. Furthermore, Newman testified that at no point during these discussions did Diaz indicate that he did not understand the plea agreement or any other part of the conversation.

Moreover, Newman stated that following the guilty plea hearing, Newman assisted Diaz with entering into an agreement with federal prosecutors in which Diaz would give them information in exchange for immunity from federal prosecution. Diaz entered into this agreement "in the hope of receiving a better recommendation from the State of Indiana at the time of his sentence." PCR Mar. Tr. p. 52. Newman testified that he did not recall Diaz expressing any concern about his plea agreement during this meeting.

Diaz testified at the October 2, 2008, post-conviction evidentiary hearing. When asked how well he understood the interpreter at the guilty plea proceeding, he responded:

“I believe that I was understanding her, but it seems like she was saying things that were different from what the judge was saying, so I wasn’t really understanding what she was saying.” PCR Oct. Tr. p. 24. Despite this mixed response at the post-conviction hearing, Diaz stated at his sentencing hearing that he had understood the translation at the guilty plea hearing. Pet. Ex. 2 p. 3. Perhaps even more compelling, on at least three occasions at the guilty plea hearing, Diaz informed the court that he was having no difficulty understanding the translator. Pet. Ex. 3 p. 5, 8, 24.

In light of this evidence, we cannot agree with Diaz’s assertion that he did not enter into a knowing, voluntary, and intelligent guilty plea. Even if we assume that there were errors in the translation at the guilty plea hearing, the record indicates that these errors were, at most, minor deviations. See Garcia v. State, 271 Ind. at 212, 391 N.E.2d at 606 (holding that there was sufficient evidence that guilty plea was knowing and voluntary even though there was evidence of some confusion in translation because the defendant spoke Spanish with a Puerto Rican dialect and the interpreter spoke Spanish with a Mexican dialect). Consequently, this argument fails.

IV. Ineffective Assistance of Counsel

Diaz argues that the post-conviction court erred by concluding that he had failed to prove that he has received the ineffective assistance of trial counsel. Specifically, Diaz argues that his counsel failed to ensure that he understood the guilty plea.¹

¹ Diaz also argues that “[c]ounsel had a duty to ensure that the interpreter appointed by the court was qualified to provide an accurate translation of the proceedings to Mr. Diaz.” Appellant’s Br. p. 15. However, Diaz has failed to provide any citations to law or the record to support this bald assertion. We direct counsel’s attention to Indiana Appellate Rule 46(A)(8), which states that each argument “must be supported by citations to the authorities, statutes, and the Appendix or part of the Record on Appeal relied

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id.

Second, the defendant must show that the deficient performance resulted in prejudice. Id. In the context of a guilty plea, "specific facts, in addition to the petitioner's conclusory allegation, must establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea." Segura v. State, 749 N.E.2d 496, 507 (Ind. 2001).

In the instant case, the record shows that Newman met with Diaz and discussed the plea agreement, charges, possible sentence, Diaz's rights, and the evidence against him. In addition, all of this was done through an interpreter, whom Diaz admitted he could understand. PCR Oct. Tr. p. 37-39. Furthermore, Newman testified that whenever a client tells him that he does not understand a plea agreement, "I will go visit the client and – and ask them what their concerns are." PCR Mar. Tr. p. 45. Thus, after receiving Diaz's letter stating that he did not understand the plea agreement, Newman "would have gone to see him, addressed any questions that he may have had, and answer them to the

on." Therefore, the issue is waived. See Lyles v. State, 834 N.E.2d 1035, 1049 (Ind. Ct. App. 2005) (stating that "[a] party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record").

best of my ability.” Id. In light of this evidence, it is difficult to imagine what else Newman could have done to ensure that Diaz understood the plea agreement.

Moreover, Diaz has failed to show prejudice, inasmuch as the State could have charged Diaz with conspiracy in addition to the dealing and possession charges if Diaz had not entered into the plea agreement. Thus, Diaz has failed to show “an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea,” Segura, 749 N.E.2d at 507. Consequently, Diaz has failed to persuade us that he received ineffective assistance of trial counsel, and we affirm the judgment of the post-conviction court.

The judgment of the post-conviction court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.