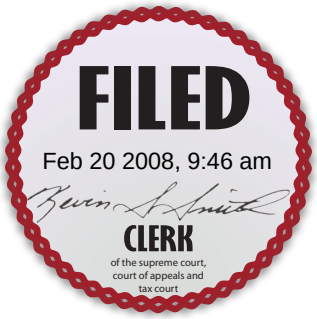

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IN THE
COURT OF APPEALS OF INDIANA

CASEY O. MACON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0709-PC-442
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George Biddlecome, Judge
Cause No. 20D03-0506-PC-14

February 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

The State charged Casey Macon with three counts of delivery of cocaine and with being an habitual offender. Macon entered a plea of guilty to delivery of cocaine as a Class A felony. He sought post-conviction relief on the ground his counsel was ineffective for failing to investigate the charges against him, which investigation would have revealed the habitual offender allegation was unfounded. The post-conviction court denied his petition. Because the habitual offender enhancement was not material to his plea agreement, we must affirm.

FACTS AND PROCEDURAL HISTORY

In November of 2000, the State charged Macon with three Class A felonies, all involving delivery of cocaine. It also charged him with being an habitual offender. He was not an habitual offender because a prior felony on which the State relied had been reduced to a misdemeanor.

In April of 2001, Macon entered into an agreement to plead guilty to one count of dealing in cocaine, a Class A felony. In exchange, the State would dismiss the habitual offender allegation and the other charges against Macon.[1] Macon's counsel did not believe he investigated the habitual offender allegation.

[1] The post-conviction court so described the plea agreement. We presume the plea agreement was reduced to writing pursuant to Ind. Code § 35-35-3-3(a), which provides no plea agreement may be made by the prosecuting attorney to a court on a felony charge except in writing and before the defendant enters a plea of guilty. Macon's appendix does not include a written plea agreement and the State did not offer a supplemental appendix.

DISCUSSION AND DECISION

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *McElroy v. State*, 864 N.E.2d 392, 395 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 204 (Ind. 2007). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id*. 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*.

Counsel's performance is presumed effective. *Stephenson v. State*, 864 N.E.2d 1022, 1031 (Ind. 2007), *reh'g denied*. A defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Id*. There is a strong presumption counsel made all significant decisions in the exercise of reasonable professional judgment. *Id*. Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. *Id*. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id*.

To show prejudice from counsel's omission or misdescription of penal consequences that attach to a plea, the petitioner must allege "objective facts" supporting the conclusion that the decision to plead was driven by the erroneous advice. *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001). A petitioner may be entitled to relief if there is an objectively credible factual and legal basis from which it may be concluded there is a

reasonable probability that, but for counsel's errors, he would not have agreed to plead guilty and would have insisted on going to trial. *Id*.

A petitioner must accordingly establish, by objective facts, circumstances that support the conclusion counsel's errors in advice as to penal consequences were material to the decision to plead. *Id*. A mere allegation to the effect is insufficient. Rather, specific facts must establish an objectively reasonable probability that competent representation would have caused the petitioner not to enter a plea. *Id*.

Macon has not made that showing. He testified at his post-conviction hearing his trial counsel told him his potential sentence could be increased by thirty years because of the habitual offender enhancement, and he asserted the enhancement played a part in his decision to plead guilty. But Macon also testified he knew when he agreed to plead guilty that an habitual offender enhancement required two prior felony convictions, and he knew his 1994 felony charge had been reduced to a misdemeanor.

Macon testified when he declined to sign the first plea offered in this case, the prosecutor filed two more charges, and Macon was then told he was facing three felonies. But, Macon testified, "I knew I wasn't habitual offender eligible." (Tr. at 38.) Macon also testified he had reviewed his presentence investigation report, which indicated he had only one prior felony, and had told the sentencing judge the report was correct. Counsel's errors in advice as to the penal consequences of Macon's plea therefore could

not have been material to his decision to plead guilty.[2] We accordingly find no error in the denial of his petition for post-conviction relief, and we affirm.

Affirmed.

RILEY, J., and KIRSCH, J., concur.

[2] Because we so find, we need not address Macon's alternative argument the State violated his due process rights by filing the unfounded habitual offender enhancement: "Because it played a significant role in his decision to plead guilty, Macon suggests the State of Indiana's decision to improperly file a habitual offender charge against him was unlawful coercion . . . ." (Appellant's Br. at 14.)