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. 2017-169

MAY TERM, 2018

In re Paul Bryan Thibodeau O'Connor*	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 439-9-12 Wmcv
		Trial Judge: Michael R. Kainen

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

Petitioner appeals the court's order resolving cross-motions for summary judgment in this post-conviction relief (PCR) case. On appeal, petitioner argues that there were disputes of fact and that the court erred in granting summary judgment. We affirm.

The record reveals the following facts. In July 2009, the State charged petitioner with one count of aggravated sexual assault, two counts of sexual assault, and one count of lewd and lascivious conduct. The charges stemmed from allegations by petitioner's daughter that he had sexually assaulted her. Petitioner was represented by three different attorneys over the course of proceedings in the trial court. The second attorney withdrew after a dispute with petitioner. The third attorney was appointed in April 2010 and represented petitioner at trial. Following a week-long trial, the jury convicted petitioner on all counts. Petitioner was sentenced to twenty-five years to life. Petitioner appealed and this Court affirmed.

Petitioner then filed this PCR, asserting several grounds for relief including ineffective assistance of counsel. One of his ineffective-assistance claims was that counsel failed to "discuss and advise" defendant about the various pretrial plea offers. Defendant made a disclosure of an expert, proffering generally that the expert would state that trial counsel was ineffective in regard to plea negotiations. The State moved for summary judgment. In its statement of undisputed facts the State asserted that defendant's third counsel had engaged in settlement negotiations with the State, relayed all offers to petitioner, and discussed those offers with petitioner. The State also asserted that petitioner had not been interested in plea bargaining, had maintained his innocence, and had not indicated that he was willing to plead guilty. The State supported these factual assertions with deposition testimony of the third attorney. Petitioner cross moved for summary judgment. Petitioner disputed that defense counsel had fully communicated with him regarding settlement negotiations, had relayed all offers to him, and had discussed the offers and the risk associated. In support, he cited his own affidavit, which stated that he was not sure whether he received a letter from his lawyer regarding an offer from the State of fifteen-to-twenty years, but that if he had known about it and that he could get good time he "might have taken it." He also stated that he would definitely have accepted a deal that allowed him to enter a plea nolo contendere.

The PCR court considered each of petitioner's claims in detail. The only claim relevant to this appeal was petitioner's assertion that trial counsel did not fully inform him of the consequences of accepting a plea deal and in particular whether good time would affect the amount of time he would actually serve. The PCR court concluded that the undisputed evidence showed that counsel did communicate the offers made to petitioner. The court concluded that petitioner's speculation about what he would have done if a different offer had been made was insufficient to create a disputed issue of material fact. The PCR court further concluded that, in any event, petitioner had failed to demonstrate that he was prejudiced by any failure to provide him with information about the consequences of a plea deal because the undisputed facts showed that petitioner would not have accepted it. The PCR court entered judgment for the State on defendant's claims of ineffective assistance.* Petitioner filed this appeal.

On appeal, this Court reviews a grant of summary judgment de novo. In re Brown, 2015 VT 107, ¶ 9, 200 Vt. 116. Summary judgment will be granted when there are no issues of material fact and a party is entitled to judgment as a matter of law. V.R.C.P. 56(a).

A PCR proceeding is a "limited remedy" in which the petitioner "has the substantial burden of proving by a preponderance of the evidence, that fundamental errors rendered his conviction defective." In re Grega, 2003 VT 77, ¶ 16, 175 Vt. 631 (mem.) (quotation omitted); see 13 V.S.A. § 7131 (providing process for PCR challenge). To demonstrate that he was entitled to relief in his PCR based on ineffective assistance of counsel, petitioner needed to show both that "(1) counsel's performance fell below an objective standard of reasonableness, informed by the prevailing professional norms for competency; and (2) there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In re Lowry, 2013 VT 85, ¶ 8, 195 Vt. 14 (quotations omitted).

On appeal, petitioner asserts that there were disputed facts on the question of whether his attorney's plea counseling prejudiced him and therefore summary judgment was not appropriate. We do not reach the question of whether prejudice was demonstrated in this case because we conclude that the undisputed facts do not demonstrate that counsel's performance was defective.

First, it is important to determine which facts were undisputed for purposes of summary judgment. The State, supported by petitioner's attorney's deposition testimony, stated that counsel engaged in settlement negotiations with the State, communicated fully with petitioner about these discussions, relayed all plea offers to petitioner, and discussed the offers with petitioner and the risks associated. In response, defendant disputed that counsel fully communicated. In support, petitioner submitted an affidavit asserting that he could not remember whether he received information from his attorney about the plea deal, but claimed he was sure his attorney had not communicated that he would be eligible for good time. He asserted that if he had known how good time would reduce his time in jail, then he might have taken the deal. Petitioner's statement that he did not remember whether counsel communicated the offer is not enough to rebut the State's asserted fact, supported by deposition testimony, that counsel communicated the offer to petitioner. The State did not, however, rebut petitioner's assertion that his counsel did not explain the effect of good-time credit.

Next, we turn to the legal question of whether counsel's failure to explain the effect of good-time credit resulted in a performance below a reasonable standard of practice. There is a

* The PCR court granted summary judgment to defendant on his claim that he did not have an attorney for his sentence reconsideration hearing and remanded for a new hearing. On all other claims, the PCR court entered judgment for the State.

"strong presumption" that the performance of counsel "absent the distorting effects of hindsight, fell within the wide range of reasonable assistance." In re Plante, 171 Vt. 310, 313 (2000). The plea bargain stage is part of the criminal proceeding and "[c]ourts agree that the right to counsel is violated when defense counsel fails to inform a defendant of a plea offer or when counsel's incompetence results in a decision by a defendant to proceed to trial rather than plead guilty." State v. Bristol, 159 Vt. 334, 337 (1992). "Only in rare situations will ineffective assistance of counsel be presumed without expert testimony." Grega, 2003 VT 77, ¶ 16.

Petitioner's expert disclosure here stated simply that trial counsel was ineffective in failing to discuss and advise petitioner about pretrial plea offers. Petitioner's expert did not express an opinion about whether a failure to describe the effect of good-time credit amounted to ineffective assistance of counsel in this case. Moreover, the matter is not so obvious that it can be shown without expert testimony. This Court has explained that ineffective assistance might result when a defendant is provided with false information about the consequences of a plea. See Plante, 171 Vt. at 313. There are, however, no cases from this Court that place an affirmative obligation on defense counsel to explain good-time credits. See State v. Rodriguez, 990 So. 2d 600, 606-07 (Fla. Dist. Ct. App. 2008) ("While there exists case law affording a defendant relief based on misinformation with respect to a plea, we have found no cases which require that defense counsel advise a defendant of all possible reductions in prison time for which he may be entitled and, furthermore, there is no requirement that a defendant be given a specifically quantified amount of time that he is expected to serve in prison."). Indeed, other courts have held that because good-time credit does not become settled until after sentencing and is controlled by "agencies other than the trial court," an attorney's failure to inform a defendant about the availability and consequences of good-time credit is not ineffectiveness. See People v. La Pointe, 2015 IL App (2d) 130451, ¶ 85, 40 N.E.3d 72 (concluding that defendant's attorney's "allegedly substandard performance in failing to inform defendant of the day-for-day good-conduct credit available under the State's plea offer cannot support a claim of ineffective assistance"). We conclude that defendant failed to meet his burden of demonstrating that his attorney's performance fell below a reasonable standard of practice when he allegedly failed to inform him about good-time credit. Therefore, we affirm.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice