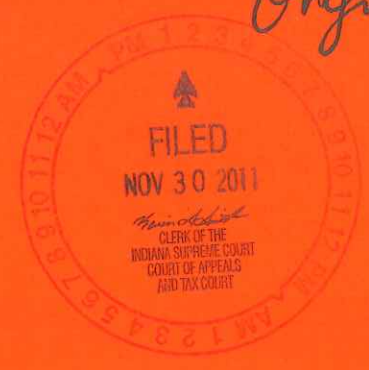


Original

ORIGINAL

IN THE

SUPREME COURT OF INDIANA



No. 69505-1201-PC-6
[Court of Appeals Cause
No. 69A05-1101-PC-113]

STATE OF INDIANA,

Appellant (Respondent Below),

v.

STEVEN RAY HOLLIN,

Appellee (Petitioner Below).

) Appeal from the Ripley County
) Circuit Court
) Cause No. 69C01-0802-PC-001
)
)
) The Honorable
) Carl H. Taul,
) Judge.

PETITION TO TRANSFER

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NOV 30 2011
CLERK OF COURTS
STATE OF INDIANA

QUESTIONS PRESENTED ON TRANSFER

I. The post-conviction court found trial counsel performed deficiently, because he made no attempt to exclude evidence of Hollin's prior auto theft convictions by demonstrating they arose from factual situations that did not indicate Hollin's lack of veracity. Did the Court of Appeals misinterpret *Fletcher v. State*, 264 Ind. 132, 340 N.E.2d 771, 774-75 (1976), by ruling that in order to exclude evidence of his convictions, Hollin was required to prove they arose from factual situations that affirmatively showed his propensity for truthfulness?

II. The post-conviction court was also the judge who presided over Hollin's jury trial. In reversing the grant of post-conviction relief, did the Court of Appeals fail to correctly apply the "clearly erroneous" standard of review and the standard for determining *Strickland* prejudice; fail to consider the cumulative prejudice caused by trial counsel's errors; and fail to accord due deference to the trial court's assessment of the probable impact of counsel's errors on the outcome of the trial?

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BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

Steven Hollin was convicted of conspiracy to commit burglary in a jury trial. Hollin testified that he did not agree with anyone to commit a burglary; his alleged co-conspirator testified that he did. The post-conviction court found Hollin's trial counsel ineffective for failing to exclude evidence of his prior auto theft convictions to impeach his credibility under Ind. Evidence Rule 609, because the convictions arose from factual situations that did not indicate Hollin's lack of veracity. The post-conviction judge, who presided over Hollin's trial, also found a reasonable probability that Hollin would have been acquitted had trial counsel used the details of the alleged co-conspirator's plea agreement, his pending legal proceedings, and the timing of his accusation of Hollin to impeach his credibility.

The State appealed from the grant of post-conviction relief, and the Court of Appeals reversed. *State v. Hollin*, No. 69A05-1101-PC-113 (Aug. 24, 2011). The Court of Appeals stated that pursuant to *Fletcher v. State*, 264 Ind. 132, 340 N.E.2d 771, 774-75 (1976), theft convictions are presumptively admissible to attack the "character" of a witness, but the presumption may be rebutted by showing the conviction arose from a factual situation which does not indicate a lack of veracity by the witness. *Slip Opinion* at 12. The Court of Appeals then found the post-conviction court clearly erred because the probable cause affidavits from Hollin's auto theft convictions, which show he stole cars, fled from police, took items from one car, and damaged two cars, failed to demonstrate his "propensity for truthfulness." *Slip Op.* at 13. The Court of Appeals also disagreed with the post-conviction court that had the additional evidence impeaching the alleged co-conspirator's credibility been presented to the jury, "the result of the proceeding would have been different." *Slip Op.* at 18.

Hollin filed a timely Petition for Rehearing, which was denied on November 4, 2011.

ARGUMENT I

Transfer should be granted because the Court of Appeals’ decision conflicts with this Court’s decision in *Fletcher v. State*, 264 Ind. 132, 340 N.E.2d 771 (1976), which holds prior theft convictions that do not indicate a lack of veracity should not be admitted to impeach the credibility of a witness.

The Court of Appeals stated that under *Fletcher v. State*, 264 Ind. 132, 340 N.E.2d 771 (1976), prior theft convictions are presumptively admissible to attack the “character” of a witness, a presumption that may be rebutted by demonstrating the conviction arose from a factual situation that does not indicate a lack of veracity by the witness. *Slip Op.* at 12. However, the Court of Appeals decided Hollin’s trial counsel could not have rebutted the presumption that his prior auto theft convictions were admissible because the circumstances of the convictions “hardly speak[] to Hollin’s propensity for truthfulness.” *Slip Op.* at 13. This reasoning conflicts with *Fletcher*, which authorizes using theft convictions to impeach the *credibility* of a witness, and does not hinge exclusion on showing that the convictions arose from factual situations that affirmatively show the witness’s propensity for truthfulness.

Transfer should be granted to ensure that Indiana trial and appellate courts apply the Indiana Rules of Evidence in the manner directed by the Indiana Supreme Court, and trial attorneys understand how to rebut the presumption that theft convictions are admissible to attack the credibility of a witness.

Fletcher and thefts “which do not indicate a lack of veracity”

Ind. Evidence Rule 609(a)(2) permits evidence of convictions for crimes “involving dishonesty or false statement” to attack the credibility of a witness. This provision reflects Indiana law prior to adoption of the Indiana Rules of Evidence as established by *Ashton v.*

Anderson, 258 Ind. 51, 279 N.E.2d 210, 216-17 (1972). *Ashton* followed the Model Code of Evidence and the Uniform Rules of Evidence in holding convictions for crimes involving dishonesty or false statement admissible to impeach the credibility of a witness. 279 N.E.2d at 216-17.

This Court held in *Fletcher* that theft was presumed to be a crime of dishonesty or false statement, but recognized that not all theft convictions involve a “lack of veracity.” 340 N.E.2d at 774. “(F)ocusing on the method of the wrongful taking, . . . some (thefts) directly correlate with the propensity of the witness for truth and veracity. In others, however, any relation between the offense and the witness’s inclination to tell the truth is tenuous or nonexistent.” *Id.* *Fletcher* also held that the term “dishonesty” as used in this context did not mean general moral depravity, but simply not telling the truth. *Id.* at 775. Finally, *Fletcher* placed the onus on “vigilant” counsel to show the court through a pretrial motion in limine, supported by affidavits, that a particular theft conviction arose from a factual situation “which do[es] not indicate a lack of veracity on the part of the witness,” and hence should not be admitted to impeach his credibility. *Id.*

The Court of Appeals has misapplied Fletcher

The Court of Appeals misstated the rule of *Fletcher*. “(T)here is a presumption that a prior conviction for theft is a crime of dishonesty and is admissible to impeach the *character* of a witness.” *Slip Op.* at 12 (emphasis added). *Fletcher* held that a theft conviction is presumptively admissible to impeach only the *credibility* of a witness, not any other aspect of his character. 340 N.E.2d at 773-75.

In addition, the Court of Appeals erroneously found that Hollin “presented no evidence at the post-conviction hearing that would support his contention that the particular facts from which his convictions arose did not indicate a lack of veracity.” *Slip Op.* at 13. In fact, Hollin submitted the probable cause affidavits from each of his auto theft convictions into evidence at the post-conviction hearing. [PCR Tr. 111-12; Ex. Vol. 656-65 (Petitioner’s Exhibits U, V, and W)]. These affidavits demonstrate that the relationship between the “method of the wrongful taking” of the vehicles and Hollin’s “inclination to tell the truth” was “nonexistent.” *Fletcher*, 340 N.E.2d at 774. Hollin did not lie to anyone; he simply took automobiles that did not belong to him. Yet according to the Court of Appeals, the probable cause affidavits not only fail to demonstrate “that his convictions arose from particular fact situations do not show a lack of veracity,” but “indicate quite the contrary.” *Slip Op.* at 13.

Hollin agrees that the probable cause affidavits show he “took vehicles that did not belong to him, fled from the police when confronted, took items from one of the cars, and caused damage to two of the cars he stole.” *Id.* But the Court of Appeals concluded that these facts “hardly speak[] to Hollin’s propensity for truthfulness.” *Id.* This conclusion indicates the Court of Appeals has misinterpreted *Fletcher*. Under Rule 609(a)(2) and *Fletcher*, Hollin was not required to show that the facts of his prior convictions affirmatively demonstrated his propensity for truthfulness before they could be excluded. Rather, he was only required to show that they did *not* indicate a propensity for *untruthfulness*.

The Court of Appeals appears to be equating “dishonesty or false statement” with moral turpitude or general bad character. *Fletcher* made it clear these are two different concepts. “‘(A)ll crimes have some element of dishonesty in the broad sense of moral depravity.’ The word dishonesty as used in *Ashton* was not used in such a broad sense, and our holding here

should not be considered as granting approval for such a reading.” 340 N.E.2d at 775 (quoting *Mayes v. State*, 318 N.E.2d 811, 825 (Ind. Ct. App. 1975) (Buchanan, J., dissenting)). There is no question that the facts of Hollin’s auto theft convictions may indicate some unfavorable character traits. But any relation between these offenses and Hollin’s “inclination to tell the truth is tenuous or nonexistent.” *Fletcher*, 340 N.E.2d at 774.

Where the evidence against a defendant is far from overwhelming, as was the case here, and the determination of the jury depends in large part on assessing and weighing the credibility of witnesses, it is paramount that the defendant be protected from evidence which has only the effect of reflecting unfavorably on his character.

Camm v. State, 812 N.E.2d 1127, 1138 (Ind. Ct. App. 2004), *trans. denied* (citations omitted).

The Court of Appeals has misinterpreted this Court’s opinion in *Fletcher*. As a result, the Court of Appeals was mistaken when it found the post-conviction court’s conclusion, that trial counsel’s failure to use the *Fletcher* procedure to prevent his client’s credibility from being improperly impeached constituted ineffective assistance, to be clearly erroneous.

ARGUMENT II

Transfer should be granted because the Court of Appeals failed to correctly apply the “clearly erroneous” standard of review and the standard for determining *Strickland* prejudice; failed to consider cumulative prejudice; and failed to defer to the trial judge’s assessment of the probable impact of counsel’s errors on the outcome of the trial.

The Court of Appeals correctly stated that an appeal by the State from the grant of post-conviction relief is determined under the “clearly erroneous” standard, a review that neither reweighs the evidence nor determines the credibility of witnesses, but considers only the

evidence and reasonable inferences supporting the judgment. *Slip Op.* at 8. However, the Court did not correctly apply this standard of review. Instead, it reweighed the evidence, considered evidence and inferences that did not support the judgment, and failed to discuss significant evidence that did support the judgment. The Court of Appeals also correctly stated that in order to grant relief for ineffective assistance of trial counsel, the post-conviction court was required to find a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. *Slip Op.* at 9 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). However, the Court did not correctly apply this prejudice standard. Instead, it reversed the judgment of the post-conviction court because it was "unable to agree" that the "result of the proceeding would have been different." *Slip Op.* at 18. In addition, the Court failed to evaluate the cumulative prejudice resulting from trial counsel's errors. Finally, the Court of Appeals failed to accord due deference to the post-conviction judge, who also presided over the trial, regarding the probable impact of counsel's deficient performance on the outcome of Hollin's trial.

Transfer should be granted because the Court of Appeals has significantly departed from accepted law and practice regarding appellate review of an order granting post-conviction relief on the basis of ineffective assistance of trial counsel.

Prejudice caused by failing to adequately impeach alleged co-conspirator's credibility

The post-conviction court, the same judge who presided over Hollin's trial, found Hollin was prejudiced by trial counsel's failure to adequately impeach the credibility of Vogel, who testified that he was Hollin's co-conspirator. [Appellant's Appendix, p. 137-38]. Specifically, the post-conviction court found that counsel failed to show the jury: (1) Vogel had not pled guilty to conspiracy to commit burglary, a class B felony, in this case; (2) the benefits Vogel

enjoyed as a result of his guilty plea in this case (facing a possible 23-year sentence, he pled guilty to a class D felony that would be reduced to a misdemeanor upon successful completion of probation, and was sentenced to time served); (3) Vogel was facing a class C felony and petitions to revoke his probations in both this case and a prior theft case at the time he testified; and (4) most significantly, Vogel never implicated Hollin until the prosecutor visited him in jail after the class C felony and probation revocations were filed. [Appendix at 117-21, 128-31].

The Court of Appeals “was unable to agree with the post-conviction court that, had this additional impeachment evidence been presented to the jury, the result of the proceeding would have been different,” because the jury knew Vogel pled guilty in this case, had pled guilty to a prior theft charge, and had changed his story to implicate Hollin after pleading guilty. *Slip Op.* at 18. Expressing skepticism of Hollin’s explanation for entering the house but not taking anything, the Court reiterated that it “fail[ed] to see” how further impeachment of Vogel “would have resulted in a different result.” *Id.*

This is not a proper application of the “clearly erroneous” standard of review. The Court of Appeals reweighed the evidence and relied on its own appraisal of the credibility of Hollin and Vogel. The Court failed to consider significant evidence that supported the judgment. For example, while the jury knew Vogel “pled guilty” in this case, they were led to believe he pled guilty to conspiracy to commit burglary and was serving an executed sentence. [Appendix at 120, 128]. And while Vogel did not implicate Hollin until after pleading guilty, it was only after being incarcerated for a class C felony charge and two petitions to revoke his probations that he accused Hollin. [Ex. Vol. 252-60]. The Court of Appeals also failed to consider that Vogel insisted he only pled guilty “to get it behind” him because he now had a daughter that he “didn’t have back then” [Ex. Vol. 154]; the prosecutor falsely claimed Vogel had nothing to gain by

lying because his case was “over and done with” [Ex. Vol. 318, 345]; the prosecutor and lead detective repeatedly told the jury they had instructed Vogel to just “tell the truth” [Ex. Vol. 255, 257-58, 347]; and the prosecutor argued, “I think it is true because Mr. Vogel had no reason to come in here and lie about it” [Ex. Vol. 360].

In addition, the Court of Appeals appears to have improperly applied the *Strickland* prejudice standard. It twice indicated it did not believe further impeachment of Vogel *would have produced* a different result. The correct standard is whether there is a *reasonable probability* that the result would have been different, a much lower bar. *See Strickland*, 466 U.S. at 693-94 (result of trial can be rendered unreliable “even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome”).

The Court of Appeals also failed to address the post-conviction court’s determination that the cumulative effect of multiple instances of counsel’s deficient performance caused such prejudice to Hollin that a new trial was required. [Appendix at 138]. Instead, it dismissed the prejudicial effect of each category of deficient performance individually, without making any assessment of their cumulative effect. It is well established that errors by counsel that may not individually cause sufficient prejudice to prove ineffective representation can add up to ineffective assistance when their prejudice is considered cumulatively. *Pennycuff v. State*, 745 N.E.2d 804, 816-17 (Ind. 2001).

Finally, the Court of Appeals failed to accord due deference to the assessment of prejudice by the post-conviction court, the same judge who presided over the trial.

In our review of the State’s claim that the post-conviction court’s findings are clearly erroneous, we are cognizant that Judge Gifford, who presided in both the original trial and the post-conviction hearing, was in an exceptional position to

assess not only the weight and credibility of the factual evidence, but also the probable impact of the alleged juror misconduct, including whether it deprived the defendant of a fair trial.

State v. Dye, 784 N.E.2d 469, 477 (Ind. 2003). Here, Judge Taul presided over both the trial and the post-conviction hearing. He was in a superior position to assess the weight and credibility of the evidence, particularly the trial testimony of Hollin and Vogel, and determine there was a reasonable probability of a different verdict absent trial counsel's deficient performance. The Court of Appeals effectively substituted its own judgment regarding the evidence and credibility of witnesses for that of the post-conviction court. See, e.g., *Fisher v. State*, 810 N.E.2d 674, 679 (Ind.2004) (post-conviction court is sole judge of weight of evidence and credibility of witnesses).

Prejudice caused by inadmissible details regarding Hollin's prior convictions

The post-conviction court also found Hollin was prejudiced by counsel's failure to prevent the State from using inadmissible details regarding his prior auto theft convictions, particularly the State's repeated invitations for the jury to discredit his testimony and infer his guilt because he had been released from jail just seven days before his arrest. [Appendix at 122-24, 136-38].

The Court of Appeals decided Hollin was not prejudiced by counsel's failure to object to admission of the details of his prior convictions, and the post-conviction court's contrary conclusion was clearly erroneous, because "we concluded in Hollin's direct appeal that the admission of his prior convictions was *not* fundamental error[.]" *Slip Op.* at 16 (original emphasis). This is an improper basis for determining prejudice. First, the inadmissible details regarding Hollin's prior convictions were not considered in his direct appeal. See Ex. Vol. 553-84 (Pet. Ex. G [Brief of Appellant]); Ex. Vol. 619-20 (Pet. Ex. J [direct appeal opinion]).


Second, when a claim of ineffective assistance of counsel is based on a failure to object, and that error was advanced as fundamental error on direct appeal, a finding that the error did not rise to the level of fundamental error does not determine whether the error resulted in prejudice sufficient to establish ineffective assistance. *Benefield v. State*, 945 N.E.2d 791, 804 (Ind. Ct. App. 2011).

CONCLUSION

For the foregoing reasons, Steven Hollin respectfully requests that this Court grant transfer and affirm the judgment of the post-conviction court.

Respectfully submitted,

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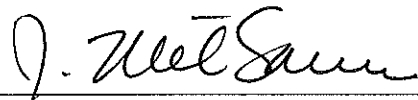
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CERTIFICATE OF SERVICE

I hereby certify that I have, this 30th day of November, 2011, served upon Greg Zoeller, Attorney General of Indiana, pursuant to Ind. Appellate Rule 24(C)(1), by personal service to his office at IGCS, 5th Floor, 302 W. Washington Street, Indianapolis, Indiana, 46204, two (2) copies of the above and foregoing **PETITION TO TRANSFER** filed in the Supreme Court of Indiana in the above-captioned cause of action.

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