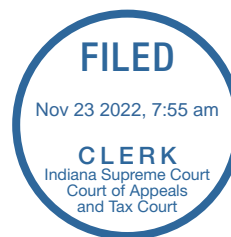


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Bryan L. Jordan,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

November 23, 2022

Court of Appeals Case No.
22A-PC-339

Appeal from the Tippecanoe
Superior Court

The Honorable Steven P. Meyer,
Judge

Trial Court Cause No.
79D02-1806-PC-23

May, Judge.

[1] Bryan L. Jordan appeals the denial of his petition for post-conviction relief.

Jordan raises two issues, which we consolidate and restate as whether the post-

conviction court erred when it denied his petition because Jordan’s trial counsel provided constitutionally ineffective assistance when he failed to seek suppression of evidence collected without a warrant. Finding no error in the post-conviction court’s determination that Jordan cannot demonstrate he was prejudiced by counsel’s decision not to move for suppression of the backpack that Jordan abandoned at the scene of his arrest, we affirm.

Facts and Procedural History

[2] When Jordan brought a direct appeal of his convictions, we set out the underlying facts of his case as follows:

On July 30, 2016, officers were dispatched to the home of Jamie Rowland on a complaint that her ex-boyfriend was attempting to enter her residence. Tippecanoe County Sheriff’s Deputy Dustin Oliver arrived at the home and observed a man in the driveway, later identified as Jordan, astride a motorcycle parked next to a car. As Deputy Oliver walked toward the residence, Jordan “got off of the motorcycle and took a backpack off of his back and placed it in the vehicle that was sitting next to the motorcycle[.]” Tippecanoe County Sheriff’s Lieutenant John Ricks arrived around the same time, but approached from a different angle. He, too, saw Jordan “open the driver’s side door and set the back pack [sic] in the driver’s seat of that passenger car.”

When the officers checked the plates of the motorcycle, the “plate returned on a blue Yamaha.” Lieutenant Ricks provided the vehicle identification number “to dispatch so that they could run it[.]” Dispatch replied the motorcycle had been reported stolen. At that point, Deputy Oliver attempted to place Jordan under arrest, but Jordan resisted. Eventually, Deputy Oliver was able to effectuate the arrest. However, during the struggle,

several items fell out of Jordan's pockets, including the keys to the motorcycle. Lieutenant Ricks asked Rowland if the backpack belonged to her but she said it did not. Lieutenant Ricks emptied the backpack and found methamphetamine, marijuana, a glass pipe, a torch, two digital scales, a baggy, a switch blade knife, and various toiletries.

Jordan v. State, 2017 WL 6419045 (Ind. Ct. App. December 18, 2017) (record citations and footnotes omitted), *trans. denied*.

[3] The State charged Jordan with Level 2 felony dealing in methamphetamine,¹ Level 4 felony possession of methamphetamine,² Class B misdemeanor possession of marijuana,³ Class C misdemeanor possession of paraphernalia,⁴ Level 6 felony auto theft/receiving stolen auto parts,⁵ Class A misdemeanor resisting law enforcement,⁶ and a habitual offender enhancement.⁷ At trial, Jordan argued the State failed to prove the items in the backpack belonged to him. Following trial, a jury found him guilty of all charges.

[4] The trial court did not enter conviction of the Level 4 felony possession of methamphetamine charge on double jeopardy grounds. The court sentenced

¹ Ind. Code § 35-48-4-1.1.

² Ind. Code § 35-48-4-6.1.

³ Ind. Code § 35-48-4-11.

⁴ Ind. Code § 35-48-4-8.3.

⁵ Ind. Code § 35-43-4-2.5.

⁶ Ind. Code § 35-44.1-3-1.

⁷ Ind. Code § 35-50-2-8.

Jordan to twenty years for Level 2 felony dealing methamphetamine and enhanced that sentence by six years based on the habitual offender enhancement. The court ordered Jordan to serve 180 days for Class B misdemeanor possession of marijuana, sixty days for Class C misdemeanor possession of paraphernalia, two years for Level 6 felony auto theft, and one year for Class A misdemeanor resisting law enforcement. The court ordered those sentences served concurrent with one another and with the Level 2 felony sentence, for an aggregate sentence of twenty-six years.

[5] Jordan filed a petition for post-conviction relief that was later amended by counsel. The petition asserted ineffective assistance of Jordan’s trial counsel, Robert Little. Little testified at the post-conviction hearing. After the hearing, the post-conviction court entered an order that contained the following pertinent findings of fact distinct from those stated in the Court of Appeals opinion quoted above:

1. The facts are derived from the Transcript of Proceedings from Cause No. 79D02-1608-F2-000021 (Plaintiff’s Ex. “A”) and the Opinion rendered by the Indiana Court of Appeals in Cause No. 79A05-1706-CR-001285, which is incorporated herein.

* * * * *

8. Police believed Jordan abandoned the backpack when he threw it into Rowland’s car.

* * * * *

10. Rowland testified that the backpack did not belong to her. She also said she had not seen Jordan with the backpack and that some of the clothing and toiletry items found in the backpack did not appear to belong to Jordan.

* * * * *

12. A jury trial was held on April 11 and 12, 2017, wherein Jordan was found guilty of all charges. Jordan was represented by attorney Robert Little.

* * * * *

15. At the hearing held on the Post-Conviction Petition, Attorney Little testified. He stated that because Jordan asserted he did not own the backpack, Little could not claim his client had a possessory interest sufficient to raise a violation of his constitutional right to be free from warrantless search and seizure. Little stated that the trial strategy was to argue that the backpack was not Jordan's and that Jordan did not know what was in the backpack.

(Appellant's App. at 84-86) (citation to Record omitted).

[6] The court's order also contained the following explanation for its ultimate denial of Jordan's petition:

Here, Jordan claims his trial counsel's failure to file a motion to suppress the evidence from the backpack resulted in ineffective assistance of counsel. Attorney Little testified that he considered a motion to suppress. But he determined that a suppression motion was not the best course of action because Jordan was denying any ownership of the backpack or knowledge of its contents. Because this was a reasonable

decision that fell within the sound discretion of his trial counsel, the Court cannot conclude Jordan received ineffective assistance in this regard.

Even if Jordan's counsel pursued a motion to suppress, Jordan cannot demonstrate a reasonable probability of success with such a motion. In order to challenge the constitutionality of a search, a defendant must have a legitimate expectation of privacy in that which is searched. *Peterson v. State*, 674 N.E.2d 528, 532 (Ind. 1996). In reviewing whether a privacy expectation exists under the Fourth Amendment, a court also looks at whether the defendant has control over or ownership in the premises searched. *Id.* Under Indiana's Constitution, a defendant must establish ownership, control, possession or interest in either the premises searched or the property seized. *Id.* at 534.

Here, the backpack was retrieved by police from a vehicle owned by Rowland, not Jordan. Although there was evidence that Rowland and Jordan were in a past relationship, they were not together at the time of the incident. He was not living at Rowland's residence where the vehicle was parked. No evidence suggests that Jordan had any ownership interest in the vehicle or the right to use it at that time. Therefore, it cannot be said that Jordan had a legitimate expectation of privacy in the vehicle from which the backpack was seized by police to support a Fourth Amendment claim. *Compare Pollard v. State*, 270 Ind. 599, 388 N.E.2d 496 (1979) (The court held that a husband had a legitimate expectation of privacy in automobile titled by his wife, absent evidence of divorce or separation). Likewise, the totality of the circumstances demonstrate that Jordan cannot show he had any ownership, control, possession or interest in the vehicle to support a claim under the Indiana Constitution.

Regarding the backpack itself, the State argues that Jordan abandoned the backpack when he threw it in Rowland's vehicle,

resulting in a forfeiture of any claim of right to privacy in the item. Indeed, it has long been held that abandoned property is not subject to Fourth Amendment protection. *Harrison v. State*, 32 N.E.3d 240, 250 (Ind. App. 2015) (omitting internal citations). The same is true under Article I, Section 11 of the Indiana Constitution. *Id.* Here, it is clear that Jordan abandoned the backpack when he saw police arrive at Rowland’s property. He threw the backpack in a car he did not own, which was parked at a residence in which he did not live. Jordan cannot now claim he had a protectable interest in the abandoned backpack.

Based upon the above, Jordan is unable to establish a reasonable probability that the [sic] he would have prevailed on a suppression motion based on a violation under the U.S. or Indiana Constitution.

(*Id.* at 88-90.)

Discussion and Decision

[7] Jordan appeals from the denial of his petition for post-conviction relief.

Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *reh’g denied, cert. denied*; Ind. Post-Conviction Rule 1(1)(b). “The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal.” *Gibson*, 133 N.E.2d at 681. “Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are *res judicata*.” *Id.* The petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id.*; P.-C. R. 1(5).

When, as here, the petitioner “appeals from a negative judgment denying post-conviction relief, he ‘must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court’s decision.’” *Gibson*, 133 N.E.2d at 681 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)).

Bell v. State, 173 N.E.3d 709, 714-15 (Ind. Ct. App. 2021). Where the post-conviction court enters findings of fact and conclusions of law in accordance with Post-Conviction Rule 1(6), we do not defer to the trial court’s legal conclusions, but we do review the post-conviction court’s factual findings for clear error. *McDowell v. State*, 102 N.E.3d 924, 929 (Ind. Ct. App. 2018), *trans. denied*. We do not reweigh the evidence or judge the credibility of the witnesses. *Id.* We consider the probative evidence and all reasonable inferences therefrom in the light most favorable to the post-conviction court’s ruling. *Id.*

[8] On appeal, Jordan challenges the post-conviction court’s determination that his trial counsel did not provide ineffective assistance.⁸ The Sixth Amendment to the United States Constitution states a defendant in a criminal prosecution is entitled “to have the assistance of counsel for his defense.” U.S. Const., Am.

⁸ In his brief, Jordan cites both the federal constitution and the state constitution, but he provides no separate analysis under the Indiana Constitution. “Where a party, though citing Indiana constitutional authority, presents no separate argument specifically treating and analyzing a claim under the Indiana Constitution distinct from its federal counterpart, we resolve the party’s claim ‘on the basis of federal constitutional doctrine[.]’” *Myers v. State*, 839 N.E.2d 1154, 1158 (Ind. 2005) (quoting *Williams v. State*, 690 N.E.2d 162, 167 (Ind. 1997)), *cert. denied*, 547 U.S. 1148 (2006). Accordingly, we analyze Jordan’s claim under only the federal constitution. *See id.* (analyzing Myers’ claim under only federal constitution).

VI. This right requires that counsel be effective. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984), *reh'g denied*. “Generally, to prevail on a claim of ineffective assistance of counsel a petitioner must demonstrate both that his counsel’s performance was deficient and that the petitioner was prejudiced by the deficient performance.” *Davis v. State*, 139 N.E.3d 246, 261 (Ind. Ct. App. 2019), *trans. denied*. Counsel is deficient if his performance falls below the objective standard of reasonableness established by prevailing professional norms. *Id.* There is a strong presumption trial counsel provided effective representation, and the petitioner must rebut that presumption with strong evidence. *Warren v. State*, 146 N.E.3d 972, 977 (Ind. Ct. App. 2020), *trans. denied, cert. denied*, 141 S. Ct. 858 (2020).

[9] “Isolated poor strategy, inexperience, or bad tactics does not necessarily constitute ineffective assistance of counsel.” *McCullough v. State*, 973 N.E.2d 62, 74 (Ind. Ct. App. 2012), *trans. denied*. “To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Davis*, 139 N.E.3d at 261 (internal citation omitted). If we determine the petitioner cannot succeed on the prejudice prong of his claim, we need not address whether counsel’s performance was deficient. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2018).

[10] Jordan argues two bases upon which his trial counsel provided ineffective assistance: (1) counsel misadvised Jordan about “the viability and consequences

of pursuing a pretrial motion to suppress” the evidence found inside the backpack, (Appellant’s Br. at 5); and (2) counsel failed to seek suppression of the evidence from the backpack “when, without this evidence, Jordan’s punitive exposure would have been significantly reduced[.]” (*Id.*) However, we need not determine whether counsel’s performance was deficient for either of those alleged reasons because Jordan cannot demonstrate he was prejudiced by his counsel’s decision not to file a motion to suppress that had no chance of succeeding.

[11] The Fourth Amendment protects citizens against unreasonable searches and seizures by generally requiring a warrant therefor. *Combs v State*, 168 N.E.3d 985, 991 (Ind. 2021). When a search or seizure occurs without a warrant, the State is required to demonstrate the circumstances met “one of the ‘well-delineated exceptions’ to the warrant requirement.” *Id.* (quoting *Osborne v. State*, 63 N.E.3d 329, 331 (Ind. 2016)). One such exception is for abandoned property, *J.B. v. State*, 30 N.E.3d 51, 54 (Ind. Ct. App. 2015), which “is not subject to protection under the Fourth Amendment.” *Hall v. State*, 975 N.E.2d 401, 405 (Ind. Ct. App. 2012). Whether property has been abandoned is “primarily a question of intent[.]” which may be inferred from “words, acts, and other objective facts.” *Id.* (quoting *State v. Machlah*, 505 N.E.2d 873, 879 (Ind. Ct. App. 1987), *trans. denied*). “Abandonment rests upon whether the defendant relinquished an interest in the property to the point that he or she no longer retained a reasonable expectation of privacy in it at the time of the search.” *J.B.*, 30 N.E.3d at 54.

[12] When police seize and then search an item, both without a warrant, then both the seizure and the search must be justified. *See Combs*, 168 N.E.3d at 991 (discussing seizure and search of a van). Accordingly, we look to see whether the circumstances entitled Jordan to have a reasonable expectation of privacy that would prohibit the seizure or the search of the backpack.

[13] The chronology of the facts relevant to both analyses follow. When Jordan saw Deputy Oliver approaching, he removed the backpack from his back, and Jordan then placed the backpack on the driver's seat of Rowland's unlocked vehicle as Lieutenant Ricks arrived. Jordan had no possessory interest in Rowland's vehicle or in the driveway where the vehicle was parked. Deputy Oliver arrested Jordan for possession of the stolen motorcycle and removed Jordan from the scene without Jordan asking anyone to retrieve the backpack from Rowland's unlocked car.⁹ Lieutenant Ricks brought the backpack to Rowland's attention, and Rowland disclaimed ownership of the backpack.¹⁰ Lieutenant Ricks then seized the backpack from Rowland's car and emptied the items from it onto the ground based on his belief that "Jordan had abandoned that property." (Ex. Vol. 3 at 117.)

⁹ This inference is supported by Deputy Oliver's testimony that he heard from Lieutenant Ricks about the drugs found in the backpack after Deputy Oliver had finished Jordan's booking at the jail. (Ex. Vol. 3 at 68.)

¹⁰ She also testified at trial that it had not been in her car when she returned from work approximately four hours earlier. (Ex. Vol. 3 at 78.) After Lieutenant Ricks took photographs of the bag and its contents, he confiscated the drugs found in the backpack, and Rowland threw away the backpack (*id.* at 82) and presumably also the clothing and toiletries, which Lieutenant Ricks testified he left at the scene. (*Id.* at 117.)

[14] We first address the seizure of the backpack. Jordan placed his backpack in Rowland’s car. On appeal, Jordan asserts he “sought to secure it” and Rowland’s car was “a place from which he likely assumed he could retrieve it.”¹¹ (Appellant’s Br. at 16.) However, the record provides no suggestion that Jordan had keys to Rowland’s car or that Rowland had given Jordan permission to use her car. *Compare Machlah*, 505 N.E.2d at 876 (Machlah had “legitimate expectation of privacy” in suitcase that he had placed in trunk of taxi in which he was riding). Instead, the record indicates Rowland and Jordan were no longer dating and Rowland called the police when Jordan arrived wanting socks and underwear from her home. Under such circumstances, Jordan has neither a reasonable expectation of privacy nor standing to challenge the search of Rowland’s car that resulted in his backpack’s seizure from the car. *See, e.g., Campos v. State*, 885 N.E.2d 590, 599 (Ind. 2008) (“In sum, we agree that ‘[w]here the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and standing to challenge the

¹¹ Jordan also asserts he put the backpack in the car “with no obvious haste in its disposal noted.” (Br. of Appellant at 16.) However, when asked about Jordan’s demeanor as he approached Jordan talking to Deputy Oliver, Lieutenant Ricks testified:

He seemed a bit nervous and I felt that he maybe was flighty. With him when he had the back pack [sic] it seemed that he wanted very badly to be separated from that back pack [sic] and him putting it in there in the car seemed--he was nervous about it, he didn’t want us around it, and he seemed to be trying to separate himself and keep us from that back pack [sic] you know--it threw up a huge red flag for me.

(Ex. Vol. 3 at 98-99.)

search of the vehicle.’”) (quoting *United States v. Rubio-Rivera*, 917 F.2d 1271, 1275 (10th Cir. 1990) (bracket in original)).

[15] Nor could Jordan have had a reasonable expectation of privacy regarding the contents of a backpack that he abandoned at Rowland’s house when he was arrested. The record indicates Jordan had been removed from the scene before Lieutenant Ricks removed the backpack from the car and emptied its contents onto the driveway. Jordan evidently did not ask anyone to retrieve the backpack before leaving the scene. Consequently, he abandoned it into Rowland’s possession (in the car), and she disclaimed it. Accordingly, Jordan abandoned the backpack and its contents, such that no Fourth Amendment protection existed. *See, e.g., J.B.*, 30 N.E.3d at 55 (Fourth Amendment would not protect handgun discarded in a yard because it had been abandoned). As Jordan did not have a reasonable expectation of privacy in the contents of the backpack he abandoned, he was not prejudiced by his attorney’s decision not to seek to suppress the backpack because any such motion would not have been successful.

Conclusion

[16] Because Jordan cannot demonstrate he was prejudiced by trial counsel’s failure to file a motion to suppress, Jordan cannot demonstrate he received ineffective assistance of counsel, and the post-conviction court did not err when it denied Jordan’s petition for relief. Accordingly, we affirm.

[17] **Affirmed.**

Riley, J., and Tavitas, J., concur.