## MEMORANDUM DECISION





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# IN THE COURT OF APPEALS OF INDIANA

Matthew Olsen,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

December 11, 2023

Court of Appeals Case No. 23A-PC-1246

Appeal from the Montgomery Circuit Court

The Honorable Samuel A. Swaim, Special Judge

Trial Court Cause No. 54C01-2004-PC-310

**Memorandum Decision by Judge Mathias**
Judges Riley and Crone concur.

**Mathias, Judge.**

[1] Matthew Olsen pleaded guilty in the Montgomery Circuit Court to Level 4 felony serious violent felon in possession of a firearm and was ordered to serve seven years in the Department of Correction. Olsen subsequently filed a petition for post-conviction relief, alleging that his trial counsel was ineffective for failing to file a motion to suppress the evidence obtained when law enforcement officers executed search and arrest warrants at his home. The post-conviction court denied Olsen's petition, and he appeals.

[2] Concluding that Olsen has not convinced us that he was subjected to the ineffective assistance of trial counsel, we affirm.

## Facts and Procedural History

[3] On April 3, 2019, at approximately 10:15 a.m., Kelly Short and her minor child reported to a law enforcement officer that Olsen, who is a serious violent felon, was in possession of firearms at his residence. Short also told the officer that Olsen was not "mentally right" and had flipped out the day before. Appellant's App. Vol. 2, p. 134; Ex. Vol. p. 93. She stated that, on the evening of April 2, Olsen had called Short foul names and threatened to burn the house down and destroy his and Short's personal belongings. Olsen also had threatened to run his truck into her vehicle and into the house. Short also described the firearms Olsen possessed and informed the officer that she had seen him carrying a muzzleloader through the house. Finally, Short reported that Olsen was a daily marijuana user and that she and her child had seen marijuana in the house on April 2.

[4] On April 3, Montgomery County Sheriff's Department deputy Jennifer Griffith applied for an arrest warrant for Olsen for the offenses of Level 4 felony serious violent felon in possession of a firearm and misdemeanor possession of marijuana. The deputy also requested a search warrant for Olsen's home, garage, and truck. Montgomery Superior Court Judge Peggy Lohorn found probable cause and issued the requested warrants.

[5] A SWAT Team proceeded to Olsen's home to execute the warrants. As they arrived, the officers observed Olsen in the area near his driveway and garage. Olsen had a 9mm handgun in his right hand. He refused to lay the gun down and pointed it at a law enforcement officer. An officer then shot Olsen in his right arm, which caused Olsen to drop the handgun near the steps between the garage and doorway to the residence. Olsen retreated into his garage and then ran into his house. Law enforcement officers recovered the handgun from the garage floor and proceeded to enter the home. The officers then arrested Olsen.

[6] The law enforcement officers searched Olsen's home and recovered additional firearms and illegal substances. The officers also discovered a security system, which they removed from the home. The officers requested and obtained a search warrant to access the security footage. The footage showed Olsen carrying a handgun in his right hand outside his garage and pointing it several directions before he was shot by the law enforcement officer. An Indiana State Police Officer met with Olsen while he was in the hospital recovering from his injuries. The officer read Olsen his *Miranda* rights, and Olsen agreed to answer

the officer's questions. Olsen admitted that he had possessed a loaded 9mm Ruger pistol.

[7] Thereafter, the State charged Olsen with Level 4 felony serious violent felon in possession of a firearm and with being a habitual offender. Olsen agreed to plead guilty to the Level 4 felony, and in exchange, the State agreed to dismiss the habitual offender allegation. On October 28, the trial court accepted Olsen's plea and ordered him to serve seven years executed in the Department of Correction.

[8] On April 14, 2020, Olsen filed a pro se petition for post-conviction relief alleging ineffective assistance of trial counsel. The State Public Defender was later appointed to represent Olsen and he amended his petition on October 4, and December 1, 2022. In his petition, Olsen alleged that his trial counsel was ineffective for failing to file a motion to suppress the evidence law enforcement officers obtained during the execution of the arrest and search warrants. Olsen argued that the warrants were not supported by probable cause.

[9] The post-conviction court held an evidentiary hearing on March 31, 2023, and later issued written findings of fact and conclusions of law denying Olsen's petition. The court concluded that his trial counsel's performance was not deficient when counsel failed to file a motion to suppress because the warrants were supported by probable cause. *Id.* at 139. In the alternative, the court concluded that, even if probable cause did not exist, the law enforcement officers obtained the evidence in good faith. Finally, the court noted that,

"[r]egardless of the validity of the search warrant," the officers observed Olsen in possession of a firearm when they arrived at his residence, which evidence is sufficient to support Olsen's conviction for possession of a firearm by a serious violent felon. *Id.* at 140. Therefore, "[t]here is no reasonable probability that had this matter gone to trial, that there would have been an outcome other than a conviction of Mr. Olsen." *Id.* at 141.

[10] Olsen now appeals.

## Standard of Review

[11] Olsen appeals the post-conviction court's denial of his petition for post-conviction relief. Our standard of review is well-settled.

> "The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence." *Campbell v. State*, 19 N.E.3d 271, 273-74 (Ind. 2014). "When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Id.* at 274. In order to prevail on an appeal from the denial of post-conviction relief, a petitioner must show that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993). Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (internal quotation omitted).

*Humphrey v. State*, 73 N.E.3d 677, 681-82 (Ind. 2017).

## Discussion and Decision

[12] Olsen claims he was denied the effective assistance of trial counsel when counsel failed to file a motion to suppress the evidence obtained during the law enforcement officers' execution of the arrest and search warrants.

> When evaluating an ineffective assistance of counsel claim, we apply the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009). To satisfy the first prong, "the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002) (citing *Strickland*, 466 U.S. at 687-88). To satisfy the second prong, "the defendant must show prejudice: a reasonable probability (i.e.[,] a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id.* (citing *Strickland*, 466 U.S. at 694).

*Humphrey*, 73 N.E.3d at 681-82. Failure to satisfy either of the two prongs will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

[13] "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002). Counsel has wide latitude in selecting trial

strategy and tactics, which we afford great deference. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). We "will not speculate as to what may have been counsel's most advantageous strategy, and isolated poor strategy, bad tactics, or inexperience does not necessarily amount to ineffective assistance." *Sarwacinski v. State*, 564 N.E.2d 950, 951 (Ind. Ct. App. 1991) (citation omitted).

[14] We also observe that a "petitioner alleging ineffective assistance of counsel in overlooking a defense leading to a guilty plea must show a reasonable probability that, had the defense been raised, the petitioner would not have pleaded guilty and would have succeeded at trial." *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009). Further, "'[t]o prevail on an ineffective assistance of counsel claim based upon counsel's failure to file motions on a defendant's behalf, the defendant must demonstrate that such motions would have been successful.'" *Moore v. State*, 872 N.E.2d 617, 621 (Ind. Ct. App. 2007) (quoting *Wales v. State*, 768 N.E.2d 513, 523 (Ind. Ct. App. 2002), *trans. denied*). While "[i]t is certainly the case that in some circumstances a claim of ineffective assistance of counsel can be established by showing a failure to suppress evidence," the petitioner bears the burden of proof at his post-conviction evidentiary hearing. *Helton*, 907 N.E.2d at 1024. As such, it is incumbent on the petitioner—not the State—to show that "there was a reasonable probability of insufficient evidence if a suppression motion had been granted." *Id.* at 1025.

[15] In this case, had Olsen gone to trial, he would not have succeeded in defeating the Level 4 felony serious violent felon in possession of a firearm allegation even if the evidence obtained inside his house had been suppressed. As the State

observes in its brief, "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."[1] *See California v. Ciraolo*, 476 U.S. 207, 213 (1986); Appellee's Br. at 17. Before proceeding to Olsen's home, the officers knew that Olsen was a serious violent felon. When they arrived at his home for the purpose of executing the warrants, the officers observed Olsen outside of the front of his home in the area near his driveway and garage. Olsen had a 9mm handgun in his right hand. He refused to lay the gun down and pointed it at a law enforcement officer. Therefore, the officers had probable cause to arrest Olsen based on their own observations of Olsen's conduct outside his home.

[16] The officers witnessed Olsen's possession of a firearm outside of his home, and no reasonable jury would have disregarded that evidence at a trial. Accordingly, Olsen cannot establish that it is reasonably probable that he would have prevailed at trial if his trial counsel had filed a motion to suppress the evidence the officers found inside his home and on his surveillance system. Because Olsen has not shown that that he was prejudiced by trial counsel's failure to file a motion to suppress the evidence obtained during the law enforcement officers'

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[1] Olsen argues that the State waived this argument because it did not raise the argument to the post-conviction court. However, evidence to support the argument was elicited at the post-conviction hearing, the State argued that the officers saw Olsen standing outside his home on his driveway while possessing a firearm, and the trial court cited this rationale in its order denying Olsen's petition. Tr. pp. 15, 26, 49-50, 52-53; Appellant's App. Vol. 2, p. 141. Furthermore, the State raised the argument in its post-hearing memorandum to the trial court. *Id.* at 131-32.

execution of the arrest and search warrants, he cannot prevail on his claim of ineffective assistance of trial counsel. We therefore affirm the trial court's order denying his petition for post-conviction relief.

[17] Affirmed.

Riley, J., and Crone, J., concur.