MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Cole Hornsby,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

June 15, 2022

Court of Appeals Case No. 21A-PC-2733

Appeal from the Dearborn Circuit Court

The Honorable James D. Humphrey, Judge

Trial Court Cause No. 15C01-2103-PC-4

Crone, Judge.

Case Summary

[1] Cole Hornsby pled guilty to level 5 felony carrying a handgun without a license on school property and received a "time served" sentence, with the remaining portion suspended to probation, in accordance with his plea agreement. He subsequently petitioned for and was denied post-conviction relief (PCR). He now appeals the denial of his PCR petition, claiming that the post-conviction court erred in determining that he had not met his burden to establish that he was denied effective assistance of trial counsel. We affirm.

Facts and Procedural History

[2] In April 2018, eighteen-year-old Hornsby was a senior at East Central High School in Dearborn County. On April 17, Vice Principal Chad Swinney called Hornsby out of class and questioned him about whether he had been smoking in the bathroom. Hornsby denied smoking in the bathroom, but Swinney searched him and found a "small piece of a [marijuana] joint" in Hornsby's pocket along with a pack of cigarettes, lighters, and a can of pepper spray. Tr. Vol. 2 at 25. Swinney asked Hornsby for consent to search his truck that was parked in the school parking lot. Hornsby initially refused, but after he was permitted to speak with his father, he gave consent to search his truck. Dearborn County Sheriff's Deputy Craig Elliot had arrived at the school and was standing outside Swinney's office while Hornsby was speaking to Swinney. After Hornsby gave his consent to search, he, Swinney, Deputy Elliot, and a school resource officer walked out to the parking lot to the truck. Hornsby "hit

the unlock button" on the key fob in his pocket and then stood in front of his truck. *Id*. at 30.

[3] Deputy Elliot and Swinney opened the doors to the truck and began to search. As Deputy Elliot and Swinney were searching, two Indiana State Police troopers arrived on the scene to assist. Inside the truck, officers located a loaded Glock handgun magazine in the center console. Deputy Elliot approached Hornsby and asked, "[W]here's the gun[?]" *Id*. at 32. Hornsby replied, "[T]here is no gun." *Id*. at 33. The officers spoke for a moment, and one of the state troopers then asked, "[W]here's the keys[?]" *Id*. at 34. Hornsby understood that to mean that the officers wanted to open the locked compartment located under the center console. Although the key to the ignition that Hornsby had in his pocket was also the key to the locked compartment, Hornsby lied and said that he did not have the key to the compartment. When the trooper then ordered Hornsby to give them the key and Hornsby still refused, Hornsby was handcuffed and placed under arrest. An officer searched Hornsby and located the key. Swinney then used the key to open the locked compartment and found a loaded 9-millimeter Glock handgun inside. He also found an additional magazine, ammunition, a mason jar containing marijuana, a digital scale, and a pack of rolling papers.

[4] On April 18, 2018, the State charged Hornsby with level 5 felony carrying a handgun without a license on school property, level 6 felony maintaining a common nuisance, and class B misdemeanor possession of marijuana. Hornsby retained attorney Robert Ewbank on April 19, 2018. On February 1, 2019,

Hornsby entered into a plea agreement with the State in which he agreed to plead guilty to the handgun offense in exchange for dismissal of the other two charges as well as dismissal of unrelated additional charges for class B misdemeanor possession of marijuana and class C misdemeanor illegal possession of an alcoholic beverage filed under a separate cause. The plea agreement provided that Hornsby would receive a sentence of four years with credit for time served, and the remainder suspended to probation. The agreement further provided that Hornsby could petition to expunge his conviction six years after the date of sentencing. The trial court accepted the plea agreement and sentenced Hornsby accordingly.

[5] On March 11, 2021, Hornsby filed a PCR petition. He alleged that he received ineffective assistance of trial counsel because his counsel failed to file a motion to suppress the evidence found in his car. Following an evidentiary hearing, the post-conviction court entered its findings of fact and conclusions of law denying the petition. This appeal ensued.

Discussion and Decision

[6] "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) (citing Ind. Post-Conviction Rule 1(1)(b)), *cert. denied* (2020). "The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal." *Id*. A defendant who files a petition for post-conviction relief "bears the burden of establishing grounds for

relief by a preponderance of the evidence." Ind. Post-Conviction Rule 1(5); *Humphrey v. State*, 73 N.E.3d 677, 681 (Ind. 2017). Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment:

> Thus, the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision. In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did. We review the post-conviction court's factual findings for clear error, but do not defer to its conclusions of law.

Wilkes v. State, 984 N.E.2d 1236, 1240 (Ind. 2013) (citations and quotation marks omitted). We will not reweigh the evidence or judge the credibility of witnesses and will consider only the probative evidence and reasonable inferences flowing therefrom that support the post-conviction court's decision. *Hinesley v. State*, 999 N.E.2d 975, 981 (Ind. Ct. App. 2013), *trans. denied* (2014).

[7] Hornsby claims that he is entitled to post-conviction relief because he was denied the right to effective assistance of trial counsel guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to effective assistance of counsel.") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To succeed on an ineffective assistance of counsel claim, the defendant must satisfy the two-part test articulated in *Strickland*. *Humphrey*, 73 N.E.3d at 682. Specifically, the defendant must prove: (1) counsel rendered deficient

performance, meaning counsel's representation fell below an objective standard of reasonableness as gauged by prevailing professional norms; and (2) counsel's deficient performance prejudiced the defendant. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012) (citing *Strickland*, 466 U.S. at 687). "Although the performance prong and the prejudice prong are separate inquiries, failure to satisfy either prong will cause the claim to fail." *Baer v. State*, 942 N.E.2d 80, 91 (Ind. 2011).

[8] "The *Strickland* standard is not limited to the trial or appellate phases in criminal proceedings, but also applies when defendants allege ineffective assistance during the guilty plea phase." *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019). With respect to the deficient-performance component, there is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment. *Gibson*, 133 N.E.3d at 682. Moreover, we evaluate reasonableness from counsel's perspective at the time of the alleged error and in light of all the relevant circumstances. *Pennycuff v. State*, 745 N.E.2d 804, 811-12 (Ind. 2001). With respect to the prejudice component, the defendant shows prejudice by demonstrating there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Bobadilla*, 117 N.E.3d at 1285. A defendant cannot simply say that he would have gone to trial; he must establish rational reasons supporting why he would have made that decision. *Id.* at 1284.

[9] Hornsby contends that his trial counsel was ineffective because he failed to file a pretrial motion to suppress the handgun recovered during the search of his truck. Hornsby claims that he "would not have pleaded guilty" and would have

gone to trial and won if the gun had been suppressed. Appellant's Br. at 28. The decision of whether to file a particular motion is generally a matter of trial strategy, and, absent an express showing to the contrary, the failure to file a motion does not indicate ineffective assistance of counsel. *Glotzbach v. State*, 783 N.E.2d 1221, 1224 (Ind. Ct. App. 2003). Moreover, when a guilty plea is collaterally attacked on grounds of deficient performance by counsel, although egregious errors may be grounds for reversal, we do not second-guess strategic decisions requiring reasonable professional judgment even if the strategy or tactic, in hindsight, did not best serve the defendant's interests. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997), *cert. denied* (1998).

[10] Here, the evidence Hornsby presented at the post-conviction hearing does not lead unerringly and unmistakably to the conclusion that his trial counsel's performance fell below an objective standard of reasonableness with regard to his decision not to file a pretrial motion to suppress prior to entering into plea negotiations. At the post-conviction hearing, Ewbank testified that in cases involving a search, the "legality of that search" is "always" a potential issue that he considers. Tr. Vol. 2 at 13. However, he recalled that the probable cause affidavit indicated that Hornsby had consented to the search and that he "would've gone over that, whether or not he consented to it" with Hornsby. *Id.* at 14. Regarding his decision not to investigate the specific facts further and file a motion to suppress prior to entering into plea negotiations, Ewbank stated that, based upon his forty-three years of criminal defense experience, he believed it was generally the better strategy to wait for trial to move to suppress

evidence. He stated that "most" pretrial motions to suppress are denied, and that there was a better chance to successfully suppress evidence during trial. *Id.* at 15. He further believed that there was no reason to "show your hand[]" too early and "make the case for the State" before trial. *Id*. at 16.

[11] Ewbank further explained, "Well, what happens there is that you get locked in. And, if the case were to be appealed under interlocutory, a lot of times the Court of Appeals the [sic] does not reverse the [trial court], and then that's evidence." *Id.* at 20. In light of all the relevant circumstances, Ewbank believed that it was advisable to negotiate a plea agreement with the State. In addition to obtaining dismissal of all charges (including charges under a separate cause) except for the level 5 felony, Ewbank negotiated a very favorable sentence for "time served," with the remainder suspended to probation, and the opportunity for expungement after six years. *Id*. at 16. Ewbank stated that he advised Hornsby to accept the agreement because he feared that the State could obtain a potentially much higher sentence if Hornsby was convicted at trial due to the recent national news involving students with guns on school property and school shootings.

[12] Based upon this evidence, the post-conviction court concluded that Ewbank's decision not to file a pretrial motion to suppress was a conscious strategic decision, and that Hornsby had not met his burden to overcome the strong presumption that Ewbank's decision constituted reasonable professional judgment under the circumstances presented at the time. Accordingly, the post-conviction court concluded that Hornsby failed to show that any "deficient

representation occurred." Appealed Order at 11. On the record before us, Hornsby has not convinced us that there is no way within the law that the court below could have reached this decision. Because Hornsby cannot demonstrate that his counsel's representation fell below an objective standard of reasonableness as gauged by prevailing professional norms, his ineffective assistance of counsel claim fails.[1] Accordingly, we affirm.

[13] Affirmed.

Vaidik, J., and Altice, J., concur.

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[1] Having concluded that Ewbank's strategic decision was reasonable under the circumstances, we need not address whether Hornsby was prejudiced by Ewbank's failure to file a motion to suppress. *See Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009) (to establish prejudice, "a petitioner alleging ineffective assistance of counsel in overlooking a defense leading to a guilty plea [*e.g.*, failing to file a motion to suppress] must show a reasonable probability that, had the defense been raised, the petitioner would not have pleaded guilty and would have succeeded at trial."); *see also Moore v. State*, 872 N.E.2d 617, 621 (Ind. Ct. App. 2007) (to prevail on ineffective assistance of counsel claim based upon counsel's failure to file motion on defendant's behalf, defendant must demonstrate that such motion would have been successful), *trans. denied*. Although Hornsby goes to great lengths in his briefs in an attempt to establish that a pretrial motion to suppress the handgun would have been successful and therefore, led him not to plead guilty to the handgun offense, we note that the record before us is quite limited, and there is no way of knowing what evidence and/or legal arguments the State would have or could have introduced in response to a motion to suppress. We agree with the post-conviction court that, based upon what we do know, there were several possible exceptions to the warrant requirement that likely would have been argued by the State. Thus, obtaining successful pretrial suppression of the handgun was in no way a sure thing. In short, "on the sparse record before us, we simply do not know." *Helton*, 907 N.E.2d at 1024.