MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Christopher Stanton,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

February 26, 2021

Court of Appeals Case No. 18A-PC-1694

Appeal from the Cass Superior Court

The Honorable Richard A. Maughmer, Judge

Trial Court Cause No. 09D02-1603-PC-3

Altice, Judge.

Case Summary

[1] Following his guilty plea, Christopher Stanton, pro se, appeals the denial of his petition for post-conviction relief (PCR petition). He raises two issues that we restate as:

> I. Is Stanton's argument that the search of his residence was unconstitutional available as a free-standing claim?
>
> II. Did Stanton's trial counsel provide ineffective assistance?[1]

[2] We affirm.

Facts & Procedural History

[3] On October 9, 2014, officers with the Logansport Police Department (LPD) arrived at Stanton's residence to serve an arrest warrant on him. Stanton answered the door, and the officers explained why they were there. Stanton turned around, placed his hands behind his back, and was arrested without incident. While at the open doorway, officers noticed a strong chemical odor coming from inside the residence, which they recognized as that associated with production of methamphetamine. While being handcuffed, Stanton yelled into the residence to advise someone that he was being arrested. Officers asked Stanton how many other people were inside, and Stanton said only one person,

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[1] Stanton also raises the issue that the trial court denied him his "right to dismiss [his] counsel." *Appellant's Brief* at 7. However, he did not make any argument regarding that claim to the post-conviction court and does not provide argument on appeal in support in support of this claim. Thus, that issue is waived. Ind. Appellate Rule 46(A)(8).

Nick Duncan. Stanton was placed in a police vehicle while other officers shouted to Duncan and directed him to exit, but he did not come out. Officers entered the residence and yelled to Duncan to come out. Eventually, a canine officer was called to the scene, and Duncan was located hiding in a small closet.

[4] While inside the apartment, officers saw coffee filters, lighter fluid, a glass smoking device, and a backpack with a hose coming out of it. Based upon what they saw in plain view, combined with the odor, officers sought and received a search warrant. During the execution of the search warrant, officers recovered, among other things, reaction vessels, one HCL gas generator, a funnel, and baggies containing a white powder that was later confirmed to be methamphetamine.

[5] On October 10, 2014, the State charged Stanton under Cause No. 09D02-1410-F5-31 (Cause F5-31) with Level 5 felony manufacturing methamphetamine, Level 6 felony possession of methamphetamine, Level 6 felony possession of chemical reagents/precursors with the intent to manufacture, and Class A misdemeanor possession of paraphernalia.

[6] On December 10, 2014, Stanton, by counsel, Andrew Achey, filed a motion to suppress evidence obtained during the search of Stanton's residence. Stanton asserted that the officers' entry was unlawful under state and federal constitutions because the officers had no justification for the warrantless search, no exception to the warrant requirement applied, and it was unreasonable

under the totality of the circumstances. On January 6, 2015, Stanton withdrew the motion.

[7] At some point thereafter, the State charged Stanton under Cause No. 1508-F3-8 (Cause F3-8) with, among other things, Level 3 felony robbery, stemming from acts committed at a Marsh supermarket, where at 4:30 a.m. Stanton approached an employee and handed him a note demanding all cash in the drawer and advising the employee that he had a .22 weapon with him and would shoot the employee if he did not comply with the demand.

[8] On August 3, 2015, the trial court held a hearing in Cause F5-31, and the parties advised the court that they had reached a plea agreement that disposed of the charges in both Causes. The plea agreement required Stanton to plead guilty to Level 5 felony manufacturing methamphetamine in Cause F5-31 and to Level 3 felony robbery in Cause F3-8. The State agreed to dismiss the remaining charges in Causes F5-31 and F3-8, and the State agreed to dismiss two other pending misdemeanor cases in their entirety. The plea agreement provided that Stanton would receive three years of incarceration of the Indiana Department of Correction (DOC) on the manufacturing conviction and a consecutive nine years at the DOC on the robbery conviction.

[9] On September 28, 2015, the court held a hearing where it accepted the plea agreement and sentenced Stanton accordingly. In doing so, and as relevant to this appeal, the court recognized that, in accepting the twelve-year sentence provided in the plea agreement, the court was "going against the

recommendation of [the] probation officer," who found the terms too "lenient" and opined that Stanton's criminal history, continued criminal behavior, and past failures at rehabilitation warranted a "fully aggravated" sentence. *Appellant's Appendix Vol. 3* at 101, 116. More fully, the probation officer stated in the presentence investigation report:

> This officer spoke with the State who advised that there were *some evidentiary discrepancies*, hence the reason for what I perceive to be a lenient plea. I understand the reasons for this plea, though I cannot abide by the terms due to the Defendant's criminality; it is this officer's opinion that the above agreement is not appropriate and this officer respectfully requests that the Court reject it.

Id. at 116 (emphasis added).

[10] On March 4, 2016, Stanton filed a pro se PCR petition, in which he alleged that the search of his residence was unconstitutional and that counsel was ineffective for not properly investigating his case and not pursuing the motion to suppress in light of the noted "evidentiary discrepancies" in the State's case.[2] On June 19, 2018, the court held a hearing on Stanton's petition.[3]

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[2] Stanton's petition is not in the record before us.

[3] As a preliminary matter, the State asserted at the hearing that the PCR petition and hearing was a "second bite at the same apple" for Stanton because, although the plea agreement had resolved both Cause F3-8 (robbery) and Cause F5-31 (manufacturing methamphetamine), Stanton had filed a separate PCR petition under both of those cause numbers and had moved for a change of judge in both, with one request being granted and venued to another county. *PCR Transcript* at 5. The State urged, "[W]e had this very hearing two weeks ago on this same plea agreement, these same facts, this same defense attorney, this same defendant, this same prosecutor, in front of [another judge] over in Miami County" and "I don't believe [Stanton's] entitled to postconviction relief attacking, collaterally attacking this same plea agreement in

[11] Stanton testified and presented evidence, including pro-se motions that he had filed, the search warrant issued for the search of his residence on October 9, 2014, and the incident reports completed by four LPD officers involved in his arrest and the search of his residence. One or more of the reports indicated that after officers smelled the chemical odor that they believed in their experience to be methamphetamine, and because the person inside the residence would not exit as commanded, they entered the residence as a protective sweep and as a welfare check on Duncan. During this time, they saw various items at issue in plain view suggesting possible operation of a methamphetamine lab. When Duncan refused to appear despite officers' repeated commands, they requested a canine officer for officer safety. A search warrant was then obtained and the additional items were discovered.

[12] At the hearing, Stanton urged that because he was already in the police car when police entered his home, a protective sweep was not necessary and the officers' entry was unlawful. He maintained that their entry violated his rights under both the Fourth Amendment of the United State Constitution and Article 1, Section 11 of the Indiana Constitution. He testified that he brought those concerns to the attention of Achey but "he refused to hear me out on it" and failed to pursue the motion to suppress. *PCR Transcript* at 11. Stanton also testified that he had not seen a copy of the presentence investigation report

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multiple jurisdictions in front of multiple judges." *Id.* at 6. The post-conviction court indicated that while it did not necessarily disagree with the State's position, it would proceed with the hearing on Stanton's petition.

(PSI) – where the probation officer noted the State's recognition of "evidentiary discrepancies" – until after the court accepted the plea agreement and sentenced him and, upon seeing it, he realized his attorney should have pursued the motion to suppress. *Id*. at 20. The post-conviction court then played in open court a portion of the September 28, 2015 hearing at which Stanton testified that he had received a copy of the PSI and had reviewed it with his attorney. Stanton conceded on cross-examination that he had asked Achey to obtain a plea agreement that would resolve "a bunch" of charges pending against him in four causes. *Id.* at 27.

[13] The State presented no other evidence beyond its questioning of Stanton. The State argued that, first, Stanton's guilty plea foreclosed his ability to argue about his conviction, including the lawfulness of entry into his home and admissibility of evidence seized. Second, the State asserted that, with regard to Stanton's ineffective assistance of counsel claim, Stanton had failed to show that, even if Achey's performance was deficient, the outcome would have been different. The court took the matter under advisement.

[14] On June 21, 2018, the post-conviction court issued an order denying Stanton's PCR petition. It found that Stanton waived any claim regarding an alleged illegal search by pleading guilty and, with regard to his claim of ineffective assistance of counsel:

> 19. Trial counsel did file a Motion to Suppress and Motion for Speedy Trial (motions) on 10 December 2014.

20. With consent of Stanton and counsel the suppression hearing was set for 6 January 2015 and jury trial set for 1 April 2015.

21. Both motions were lifted from the trial courts calendar at the request of Stanton and his counsel.

22. Stanton presents no other evidence related to ineffective assistance of counsel or other allegations contained in his PCR.

23. The burden of proof is on Stanton to present evidence that his relevant allegations are true by a preponderance of the evidence.

24. Stanton has not shown trial counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms.

25. Stanton has not shown there is a reasonable probability that, but for trial counsel's (alleged, none proven) errors, the result in this cause would be different.

Appellant's Appendix Vol. 3 at 4. Stanton now appeals.[4]

Discussion & Decision

[15] In a post-conviction proceeding, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. *Bethea v. State*, 983

[4] We note the extended length of time that has passed since the court's June 2018 order. The docket indicates that Stanton filed a notice of appeal in July 2018, and after multiple extensions to correct defects, his Appellant's Brief was filed and accepted on August 5, 2020. Thereafter, more months passed stemming from additional filings to obtain the record and one or more amendments to Stanton's brief. The State filed its Appellee's Brief on December 21, 2020, with the case considered fully briefed as of January 27, 2021.

N.E.2d 1134, 1138 (Ind. 2013). "When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Id*. (quoting *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004)). Appellate courts consider only the evidence and reasonable inferences supporting the judgment. *Carrillo v. State*, 982 N.E.2d 461, 464 (Ind. Ct. App. 2013). The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. *Id*. In order to prevail, the petitioner must demonstrate that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Bethea*, 983 N.E.2d at 1138. Although we do not defer to a post-conviction court's legal conclusions, we will reverse its findings and judgment only upon a showing of clear error, i.e., "that which leaves us with a definite and firm conviction that a mistake has been made." *Id*. (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)).

Challenge to Search

[16] Stanton first asserts that the officers' entry into and search of his residence was unconstitutional because, when the officers entered his apartment, Stanton was already handcuffed and in the police car. Thus, he argues, there was no need for a protective sweep or welfare check, as claimed by the officers. His claim, however, is no longer available.

[17] Stanton pled guilty, and by doing so, he "forfeit[ed] a plethora of substantive claims and procedural rights[,]" including his right to challenge the propriety of the search. *Alvey v. State*, 911 N.E.2d 1248, 1250-51 (Ind. 2009) (defendants

may not simultaneously plead guilty and challenge the evidence supporting the underlying conviction); *Norris v. State*, 896 N.E.2d 1149, 1151 (Ind. 2008) (defendant may not, in a post-conviction proceeding, contest facts that were adjudicated in his guilty plea). Accordingly, Stanton forfeited any free-standing challenge to the propriety of the search by pleading guilty.

[18] "When a judgment of conviction upon a guilty plea becomes final and the defendant seeks to reopen the proceedings, the inquiry is normally confined to whether the underlying plea was both counseled and voluntary." *Alvey*, 911 N.E.2d at 1249. Stanton makes no argument that his guilty plea was not knowing, intelligent, and voluntary, nor does he challenge the factual basis supporting the plea. Thus, the only avenue remaining to Stanton to challenge his guilty plea is his claim of ineffective assistance of trial counsel, which we address below.

Ineffective Assistance of Counsel

[19] Stanton claims that Achey provided ineffective assistance by not fully pursuing the motion to suppress. A petitioner will prevail on a claim of ineffective assistance of trial counsel only upon a showing that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the petitioner. *Bethea*, 983 N.E.2d at 1138. To satisfy the first element, the petitioner must demonstrate deficient performance, which is "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." *Id*. (quoting *McCary v. State*, 761 N.E.2d

389, 392 (Ind. 2002)). We assume that counsel performed adequately and defer to counsel's strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). We judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct and not through the lens of hindsight. *Pennycuff v. State*, 745 N.E.2d 804, 811-12 (Ind. 2001).

[20] To satisfy the second element, the petitioner must show prejudice, which is "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Bethea*, 983 N.E.2d at 1139. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009). Failure to satisfy either element will cause an ineffectiveness claim to fail. *Carrillo*, 982 N.E.2d at 464.

[21] Here, Stanton argues that the search of his apartment was unlawful (i.e., a protective sweep or welfare check was unnecessary) and suggests that the State's mention of "evidentiary discrepancies" to the probation officer effectively confirms the impropriety of the search. *Appellant's Appendix Vol. 3* at 116. Therefore, he contends that, if Achey had pursued the motion to suppress, he "would not [have] been told to sign the plea agreement," the evidence would have been suppressed at trial, and he would have been found not guilty of manufacturing methamphetamine. *Appellant's Brief* at 14. We reject his claim for several reasons.

[22] Initially, we find that the mere reference to "evidentiary discrepancies" in the PSI does not necessarily mean that the search was improper and a motion to suppress would have been granted. *Appellant's Appendix Vol. 3* at 116. The record reflects that, at the open doorway to Stanton's apartment officers smelled a chemical odor, which they recognized as that associated with the manufacture of methamphetamine. Further, Duncan was inside the residence and would not exit, raising suspicions and/or concern for Duncan's welfare. *See e.g., Holder v. State*, 847 N.E.2d 930, 939 (Ind. 2006) ("[A] belief that an occupied residence contains a methamphetamine laboratory, which belief is founded on probable cause largely on observation of odors emanating from the home, presents exigent circumstances permitting a warrantless search for the occupants' safety.")

[23] Regardless, it is well-settled that the decision regarding whether to file a particular motion is 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. *Pace v. State*, 981 N.E.2d 1253, 1258 (Ind. Ct. App. 2013). Here, Achey filed a motion to suppress, but the record is silent as to why the motion was withdrawn. Achey did not testify at the PCR hearing, and we have held that "[w]hen counsel is not called as a witness to testify in support of a petitioner's arguments, the post-conviction court may infer that counsel would not have corroborated the petitioner's allegations." *Oberst v. State*, 935 N.E.2d 1250, 1254 (Ind. Ct. App. 2010), *trans. denied*. Furthermore, at the guilty plea hearing, of which the court took judicial notice, Achey stated that he saw no

advantage to his client in going to trial. On this record, Stanton has failed to establish that the decision to withdraw the motion was not trial strategy.

[24] Lastly, Stanton conceded at the post-conviction hearing that he asked Achey to obtain a plea for him that would dispose of all four of his pending criminal cases. Achey did so. Despite the probation officer's reservations about the plea agreement's "lenient" sentence, the court accepted the plea agreement and imposed its twelve-year sentence, which was the advisory sentence for each of the two convictions served consecutively. *Appellant's Appendix Vol. 3* at 116; Ind. Code §§ 35-50-2-5, -6(b). In sum, the record does not establish deficient representation.

[25] Stanton has not demonstrated that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Accordingly, we affirm its denial of his petition for post-conviction relief.

[26] Judgment affirmed.

Mathias, J. and Weissmann, J., concur.