MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Michael P. DeArmitt
Columbus, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General

Justin F. Roebel
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Timothy N. Davis,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 20, 2023

Court of Appeals Case No. 23A-CR-766

Appeal from the Bartholomew Superior Court

The Honorable James D. Worton, Judge

Trial Court Cause No. 03D01-2010-F6-4953

Memorandum Decision by Judge Mathias
Judges Foley and Felix concur.

Mathias, Judge.

[1] Timothy Davis was convicted in Bartholomew Superior Court of Level 6 felony possession of methamphetamine and Class C misdemeanor possession of paraphernalia. The trial court ordered Davis to serve an aggregate two-year suspended sentence. Davis appeals his convictions and sentence, raising three issues for our review, which are restated as follows:

> I. Whether Davis preserved for appellate review his argument that the trial court erred when it admitted evidence obtained pursuant to a warrantless search of his tent.
>
> II. Whether Davis was denied the effective assistance of trial counsel by his counsel's failure to object at trial to the admission of that evidence.
>
> III. Whether his two-year suspended sentence for his Level 6 felony conviction is inappropriate in light of the nature of the offense and his character.

[2] Concluding that Davis has not established any error, we affirm.[1]

Facts and Procedural History

[3] On August 5, 2019, officers with the Columbus Police Department ("CPD") and the Bartholomew County Sheriff's Department ("BCSD") accompanied a Columbus Code Enforcement Officer to disperse a homeless camp in a densely wooded area on private property at the edge of Columbus city limits. The

[1] We held oral argument in this appeal on December 1, 2023, in the Mary Armstrong Little Theater at Hamilton Southeastern High School. We extend our gratitude to the school administration, faculty, and students for their kind hospitality We also thank counsel for the quality of their written and oral advocacy.

officers observed approximately six campsites and "everything from garbage, rubbish, . . . bicycles, weed eaters, chain saws" and the like. Tr. p. 86. The officers found a man later identified as Davis, who had a tent with an SUV parked next to it. The rear hatch of the SUV was open. A tarp laid across the back of the SUV and the roof of the tent. *See* State's Ex. 4, p. 21. Davis's campsite was separated from the other campsites.

[4] Davis was cooperative with the officers and acknowledged that the tent and other items at the campsite belonged to him. Davis explained that he was living in his tent and slept there three to four nights per week. CPD Officer Drake Maddix gave Davis a written "trespass warning" and told him to leave the property. Tr. p. 95. Meanwhile, BCSD Deputy Joseph Pugh was doing a "protective sweep" of the area to make sure that "nobody was hiding in any of the tents." *Id.* at 116.

[5] Deputy Pugh "stuck [his] head in [Davis's] tent," and, to do so, he had to move a net-like screen. *Id*. at 117; Ex. Vol. State's Ex. 6, p. 23. As he looked to the left, the deputy saw in plain view a "narcotic smoking device" commonly used to smoke methamphetamine and a "small plastic baggie containing a white crystalline substance" on a nightstand. Tr. p. 117. Deputy Pugh also saw mail addressed to Davis sitting on the nightstand. Officers seized those items and arrested Davis. Subsequent forensic testing established that the substance was methamphetamine "residue." *Id.* at 134.

[6] The State charged Davis with Level 6 felony possession of methamphetamine and Class C misdemeanor possession of paraphernalia. Prior to trial, Davis moved to suppress the evidence Deputy Pugh had found inside his tent.[2] At the hearing held on that motion, the trial court found that Davis had standing to challenge the warrantless search even though he was trespassing on private property. Tr. p. 61. But the court concluded that the exigencies of officer safety warranted a protective sweep of the tent, and the officers reasonably looked into the tent to make sure no one else was trespassing on private property. *Id*. at 61-62. Therefore, the trial court denied Davis's motion.

[7] Davis's jury trial commenced on February 7, 2023. Davis did not object to the admission of the evidence obtained during the warrantless search of his tent. The court specifically asked Davis if he had any objection to the admission of photographs of the paraphernalia and methamphetamine residue, and he replied that he did not. *Id*. at 118. A jury found Davis guilty as charged.

[8] The trial court entered judgment of conviction and held Davis's sentencing hearing on March 7, 2023. During the hearing, Davis did not argue for a specific sentence but requested to be placed on probation. In imposing Davis's sentence, the court considered his criminal history as an aggravating circumstance, which consisted of eight misdemeanor offenses for driving while

[2] In his motion to suppress and brief to our court, Davis only argues that the search violated the Fourth Amendment to the United States Constitution. He did not challenge the search under Article One, Section Eleven of the Indiana Constitution.

suspended, possession of marijuana, and resisting law enforcement. Fifty-eight-year-old Davis also had a significant history of juvenile delinquency adjudications. The court also found aggravating Davis's probation revocations and his failure to successfully respond to prior opportunities for treatment. The court found no mitigating circumstances. The trial court sentenced Davis to concurrent terms of two years for the Level 6 felony conviction and sixty days for the Class C misdemeanor conviction, all suspended to probation to be served in community corrections.

[9] Davis now appeals.

Failure to Preserve Error

[10] Davis first claims that the trial court erred when it denied his pretrial motion to suppress evidence. However, Davis appeals following a completed trial; therefore, the issue is properly framed as whether the trial court abused its discretion when it admitted the evidence obtained during the search of his tent. *See Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). Davis maintains that Deputy Pugh's warrantless search of his tent violated the Fourth Amendment to the United States Constitution.

[11] But Davis has waived this issue for our review. As the State points out, although Davis filed a pre-trial motion to suppress, he did not make contemporaneous objections to the admission of the methamphetamine and paraphernalia at trial. In fact, when the trial court asked Davis at trial whether he had any objection to the photographic evidence of the methamphetamine

and paraphernalia, Davis stated, "No." Tr. p. 118. Our Supreme Court has held that "we will not review claims, even for fundamental error, when appellants expressly declare at trial that they have no objection." *Taylor v. State*, 86 N.E.3d 157, 161 (Ind. 2017).

[12] The supreme court provided the rationale for this rule in *Halliburton v. State*, 1 N.E.3d 670 (Ind. 2013). In that case, the appellant challenged the admission of numerous autopsy photographs. At trial, the trial court asked Halliburton whether he objected to admission of the exhibits, and he expressly stated that he had no objection. *Id.* at 678-79. On appeal, the court observed:

> "The appellant cannot on the one hand state at trial that he has no objection to the admission of evidence and thereafter in this Court claim such admission to be erroneous." *Harrison v. State*, 258 Ind. 359, 281 N.E.2d 98, 100 (1972). Further, the doctrine of fundamental error is inapplicable to the circumstances presented here. The doctrine presupposes the trial judge erred in performing some duty that the law had charged the judge with performing sua sponte. Presumably a trial judge is aware of her own sua sponte duties. But upon an express declaration of "no objection" a trial judge has no duty to determine which exhibits a party decides, for whatever strategic reasons, to allow into evidence. "[O]nly the interested party himself can really know whether the introduction or exclusion of a particular piece of evidence is in his own best interests." *Winston v. State*, 165 Ind.App. 369, 332 N.E.2d 229, 233 (1975).

Id.

[13] Because Davis expressly stated that he had no objection to the admission of the evidence, we will not review his claims of error and fundamental error. *See Taylor*, 86 N.E.3d at 161.

Ineffective Assistance of Trial Counsel

[14] In his brief, Davis acknowledges his failure to preserve his Fourth Amendment claim for appeal, and, therefore, he argues that he was denied the effective assistance of trial counsel because his counsel did not object at trial to the admission of methamphetamine and paraphernalia.

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

[15] "[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).

[16] Davis argues that there is no apparent strategy or reason for his counsel's failure to object to the evidence, and he maintains that the prejudice to him from the admission of that evidence is obvious. Davis presents this argument on direct appeal, and therefore, there is no evidence in the record concerning trial counsel's reasons for failing to object and expressly declining to object to the admission of the methamphetamine and paraphernalia found in Davis's tent.[3]

[17] It is tempting to conclude that counsel's failure to object to admission of the methamphetamine and paraphernalia constitutes deficient performance on its

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[3] When an appeal requires factual determinations based upon evidence not in the record, the proper procedure is to request that the appeal be suspended or terminated so that a more thorough record may be developed through the pursuit of post-conviction proceedings. *Lee v. State*, 694 N.E.2d 719, 721 n.6 (Ind. 1998); *Brewster v. State*, 697 N.E.2d 95, 96 (Ind. Ct. App. 1998). This procedure for developing a record for appeal is more commonly known as the *Davis/Hatton* procedure. *See Hatton v. State*, 626 N.E.2d 442, 442 (Ind. 1993); *Davis v. State*, 267 Ind. 152, 156, 368 N.E.2d 1149, 1151 (1977). The use of the *Davis/Hatton* procedure, authorized by Indiana Appellate Rule 37, is encouraged "to develop an evidentiary record for issues that with reasonable diligence could not have been discovered before the time for filing a motion to correct error or a notice of appeal has passed." *Schlabach v. State*, 842 N.E.2d 411, 418 (Ind. Ct. App. 2006).

face.[4] Certainly an objection could have been easily made with no burden to defense counsel or his trial strategy. But the crux of Davis's argument rests on the grounds he alleges his trial counsel should have proffered for the exclusion of the evidence. In particular, Davis contends that his counsel should have presented a novel question of law, namely, whether a person camping in a tent on private property and while trespassing is entitled to Fourth Amendment protections from warrantless searches inside that tent.

[18] But the law is well settled that trial counsel does not render ineffective assistance when he does not raise novel legal arguments or seek changes in the law. *E.g.*, *Smylie v. State*, 823 N.E.2d 679, 690 (Ind. 2005); *Trueblood v. State*, 715 N.E.2d 1242, 1258 (Ind. 1999)). And, as the State correctly argues, Davis's privacy interest in a transient campsite on private property owned by someone else has not been established under either federal or Indiana law.

[19] In *Haley v. State*, 696 N.E.2d 98 (Ind. Ct. App. 1998), *trans. denied*, we addressed an issue of first impression in Indiana, namely, "[w]hether a person camping in a tent erected *in a public campground* is entitled to constitutional protection

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[4] We feel compelled to note that counsel could have easily objected to the admission of the evidence for the reasons raised in his motion to suppress and, thus, preserved the issue for appeal. Moreover, trial counsel could have raised additional arguments challenging the constitutionality of the warrantless search under Article One, Section Eleven of the Indiana Constitution. However, Davis does not present these arguments in his brief to support his claim of ineffective assistance of counsel. And we will not address those issues *sua sponte* on appeal. Davis does claim he was prejudiced by counsel's failure to preserve the suppression issue for appeal but does not make that argument under the "deficient performance" prong of the *Strickland* test. *See* Appellant's Br. at 18. Moreover, at oral argument, counsel expressly declined to argue that counsel was deficient for failing to preserve the issue for appeal.

against unreasonable search and seizure[.]" *Id.* at 100-01 (emphasis added). We held in relevant part that "the constitutional protections provided to those who rent hotel rooms should also extend to those who choose to make their 'transitory home' a tent, if they have exhibited a subjective and reasonable expectation of privacy in that tent." *Id.* at 101.

[20] Unlike Davis, the defendant in *Haley* was lawfully located at a public campground. Here, neither party has presented our court with any case addressing a trespasser's privacy interest in his or her campsite. We therefore cannot say that Davis's trial counsel rendered deficient performance when he did not present what would have been a novel question of first impression on this issue.

[21] Trial counsel chose a trial strategy, and we will not second guess counsel's strategy on appeal. And we reiterate there is no evidence establishing counsel's reasons for failing to object to the admission of the evidence.

[22] For all of these reasons, we cannot conclude that Davis's trial counsel's performance was deficient. Therefore, Davis has not met his burden of establishing that his trial counsel was ineffective.

Inappropriate Sentence

[23] Finally, Davis argues that his sentence for Level 6 felony possession of methamphetamine is inappropriate in light of the nature of the offense and his

character.[5] The trial court imposed a two-year sentence suspended to probation to be served in community corrections, which is less than the maximum sentence of two and one-half years. *See* Ind. Code § 35-50-2-7.

[24] Under Indiana Appellate Rule 7(B), we may modify a sentence that we find is "inappropriate in light of the nature of the offense and the character of the offender." Making this determination "turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence modification under Rule 7(B), however, is reserved for "a rare and exceptional case." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[25] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to "leaven the outliers," not to achieve what may be perceived as the "correct" result. *Id.* Thus, deference to the trial court's sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing compelling evidence portraying in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant's character—such as showing substantial virtuous traits or persistent examples of positive attributes.

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[5] Davis does not challenge his sentence on the Class C misdemeanor conviction.

Robinson v. State, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[26] Davis argues that the nature of the offense is "unremarkable" given the small amount of methamphetamine residue found in his tent. Appellant's Br. at 20. And we agree that there is nothing particularly notable about the nature of his offense. But Davis's character does support the sentence imposed. Davis's criminal history includes eight prior misdemeanor convictions and two prior violations of probation. On the date of the sentencing hearing, Davis had pending charges for possession of methamphetamine. Davis admitted to struggling with substance abuse.

[27] Davis has not met his substantial burden of persuading us that his less than maximum two-year sentence suspended to probation is inappropriate in light of the nature of the offense and his character. This is particularly true in this case because Davis did not argue for a specific term of sentence to the trial court but only requested that his sentence be suspended to probation.

[28] For these reasons, we conclude that Davis's sentence is not inappropriate in light of the nature of his offense and his character.

Conclusion

[29] Davis failed to preserve his Fourth Amendment claim challenging the admission of evidence obtained during the warrantless search of his tent. He also has not established that his trial counsel's performance was deficient for failing to object to the admission of the evidence under a novel theory of law.

Finally, Davis failed to meet his burden of persuading us that his two-year sentence suspended to probation is inappropriate in light of the nature of the offense and the character of the offender.

[30] Affirmed.

Foley, J., and Felix, J., concur.