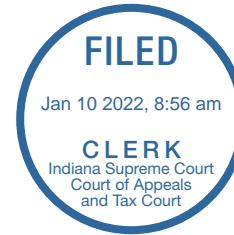


MEMORANDUM DECISION

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

Kenneth Kee,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

January 10, 2022

Court of Appeals Case No.
21A-PC-849

Appeal from the Floyd Superior
Court

The Honorable Maria D. Granger,
Judge

Trial Court Cause No.
22D03-1704-PC-7

Bailey, Judge.

Case Summary

- [1] Kenneth Kee (“Kee”) appeals the denial of his petition for post-conviction relief, which challenged his convictions for two counts of Dealing in Methamphetamine, as Level 4 felonies.¹ He presents the sole issue of whether he is entitled to post-conviction relief because he was denied the effective assistance of trial counsel. We affirm.

Facts and Procedural History

- [2] On direct appeal, the facts and procedural history were recited as follows:

In February 2015, Devan Philpott (“Philpott”) was arrested for possession of methamphetamine by the Clarksville Police Department. Philpott asked to become a confidential informant, and he was released from custody. On February 23, 2015, he was interviewed by Indiana State Police Detective Barry Brown (“Detective Brown”). Philpott identified Kee as his dealer, and Detective Brown arranged a controlled buy between Philpott and Kee.

Philpott and Kee agreed to meet at a Meijer store in New Albany. Philpott was given \$500 in buy money and told to make the exchange in the Meijer parking lot. Philpott’s person and vehicle were searched, and he was equipped with a recording device.

¹ Ind. Code § 35-48-4-1.1.

When Kee arrived, Philpott went inside the Meijer store with him. Eventually, they went into a store bathroom where Kee left two baggies of methamphetamine in a stall. Philpott retrieved the baggies as directed. He then gave Kee \$500: \$240 for the two baggies of methamphetamine and \$260 for a prior debt.

Next, Kee instructed Philpott to meet him at a gas station in New Albany where he would give him more methamphetamine. At the gas station, Kee threw another baggie into Philpott's vehicle. Later testing revealed that the combined weight of the three baggies of methamphetamine was 1.94 grams.

Law enforcement officers arranged a second controlled buy on February 27, 2015. Once again, before the buy, the officers searched Philpott's person and vehicle. Philpott was given \$260, and he was equipped with a recording device. This time, Philpott met Kee in the driveway of Kee's residence. Kee gave Philpott three baggies containing methamphetamine in exchange for \$260. Later testing revealed the baggies contained a total of 1.59 grams of methamphetamine.

Kee was subsequently charged with two counts of Level 4 felony dealing in methamphetamine. The State also alleged that Kee was a habitual offender. Kee filed a speedy trial request, which was granted and trial was set for May 26, 2015. The State later requested a continuance under Criminal Rule 4(D) and argued that certain evidence from the State Police Lab could not be obtained before the trial date. Kee objected to the continuance. After a hearing was held on the motion, the trial court granted the motion and continued the trial to August 25, 2015.

Prior to trial, Kee again filed a motion for discharge arguing that he had been denied his right to a speedy trial. The court denied the motion, and Kee's four-day jury trial commenced on August 25, 2015. He was found guilty as charged on the dealing counts.

On August 31, 2015, the habitual offender phase of trial was held, and the jury determined that Kee was a habitual offender. At the sentencing hearing held on November 6, 2015, the trial court ordered Kee to serve an aggregate twenty-year sentence.

Kee v. State, No. 22A05-1512-CR-2151, 2016 WL 6807626, slip op. at 1 (Ind. Ct. App. Nov. 17, 2016). On direct appeal, Kee raised issues concerning whether his right to a speedy trial was violated, whether he was prejudiced when a police officer was allowed to testify that he knew Kee prior to his arrest because of other narcotic investigations, and whether the State presented sufficient evidence to prove the weight of the methamphetamine. *See id.* Kee's convictions were affirmed. *Id.* at 5.

- [3] On April 13, 2017, Kee filed a pro-se petition for post-conviction relief, which was subsequently amended with assistance of counsel in December of 2019. On December 14, 2020, and January 8, 2021, a post-conviction hearing was conducted. On April 7, 2021, the post-conviction court entered its order denying Kee post-conviction relief. He now appeals.

Discussion and Decision

Standard of Review

- [4] Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by

a preponderance of the evidence. *Id.* We accept the post-conviction court’s findings of fact unless they are clearly erroneous, but we do not defer to its conclusions of law. *State v. Hollin*, 970 N.E.2d 147, 151 (Ind. 2012). We may not reweigh the evidence or assess the credibility of the witnesses. *Id.* at 150.

Effectiveness of Trial Counsel

[5] Kee contends that he was denied effective assistance of counsel because counsel did not adequately protect Kee’s right to confront a witness against him, specifically, Philpott. Kee’s theory of defense was that Philpott lacked credibility, partially due to his drug use and partially due to his personal motivations; that is, his testimony could potentially eliminate a romantic rival and also garner favorable treatment on a pending criminal charge. Ultimately, the jury learned that Kee and Philpott had been involved with the same woman, and that Philpott was facing a criminal charge in Clark County. But Kee now contends that trial counsel should have elicited more detailed testimony from Philpott; specifically, the personal relationship should have been explored in more depth, and counsel should have more thoroughly challenged Philpott as to his expectation of a benefit for testifying. He further contends that, although counsel attempted to exclude Philpott as a witness, the eve-of-trial attempt was untimely and constitutes deficient performance.

[6] Philpott was deposed before trial but his attorney objected to several questions asked by defense counsel, asserting that some questions were irrelevant and that Philpott wished to assert his Fifth Amendment right against self-incrimination rather than answer others. Kee’s private counsel withdrew for health reasons,

and Kee was appointed a public defender. The State filed a motion seeking a hearing to determine what questions Philpott would be required to answer. At a hearing, the deputy prosecutor identified ten questions to be asked in the State's case-in-chief, and defense counsel proposed that all certified questions and the State's ten questions be asked of Philpott. Philpott's attorney argued that Philpott's Constitutional rights would preclude Kee from receiving responses to some questions. The parties agreed to informally conduct broader discovery, but defense counsel also filed a Motion for Full Preservation of Federal and State Grounds for Trial Objections.

[7] One week before trial, defense counsel filed a Motion to Compel Response by the Confidential Informant. One day before trial, defense counsel moved to exclude Philpott as a witness. On the second day of trial, the trial court denied Kee's motion to exclude Philpott as a witness but granted Kee's motion to compel a response. After an additional hearing at which Philpott's counsel, defense counsel, and the deputy prosecutor appeared, the trial court determined that Philpott need not answer questions about a drug raid conducted at his residence or identify who initially approached him to serve as a confidential informant. Kee's counsel also withdrew several proposed questions.

[8] At the post-conviction hearing, Kee's first trial counsel testified that Philpott's deposition had been "pretty difficult" because his attorney had "pretty much objected to every question I asked." (P-C.R. Tr. Vol. II, pg. 38.) Counsel explained that she had sought to explore in more depth Philpott's relationship with Janna Chandler ("Chandler"), who had in the past been romantically

involved with both Kee and Philpott. Counsel had also wanted to explore whether Philpott's drug addiction was so serious that his ability to follow sting operation instructions had been impaired. Counsel observed that Philpott had stopped at a Dairy Queen in the midst of a controlled buy; he and Kee had walked around a store at some length; and a third party had been present on one occasion. According to counsel, the conduct of the controlled buys "didn't seem all neat and tidy." (*Id.* at 49.)

[9] Appellate counsel testified that trial counsel's "acquiescence to the procedure of how to handle the confidential informant's deposition and testimony" had precluded him from alleging that Kee's right of confrontation had been unduly restricted. (*Id.* at 54.) In the opinion of appellate counsel, cross-examination of Philpott had been "perfunctory"; Philpott had not been "seriously challenged" about the benefit he was to receive; and Philpott was angry and had a "deep bias" against Kee that might have been more fully explored. (*Id.* 60-62.)

[10] Effectiveness of counsel is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in *Strickland*. *Id.* To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. *Dobbins v. State*, 721 N.E.2d 867, 873 (Ind. 1999) (citing *Strickland*, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687; *see also Douglas v. State*, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant demonstrates 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.” *Strickland*, 466 U.S. at 694; *see also Cook v. State*, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the *Strickland* test are separate and independent inquiries. *Strickland*, 466 U.S. at 697. Thus, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.” *Id.*

[11] We “strongly presume” that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). Counsel is to be afforded considerable discretion in the choice of strategy and tactics. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). Counsel’s conduct is assessed based upon the facts known at the time and not through hindsight. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997). We do not “second-guess” strategic decisions requiring reasonable professional judgment even if the strategy in hindsight did not serve the defendant’s interests. *Id.* In sum, trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside the objective standard of reasonableness. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998).

[12] As previously observed, the defense theory was that Philpott was an unreliable witness lacking credibility. To this end, defense counsel sought an order to exclude Philpott as a witness, and, failing that, sought to discredit Philpott’s

testimony. Trial counsel strenuously cross-examined Philpott, attacking the methodology of the controlled buy, challenging Philpott's veracity, and eliciting Philpott's admissions to past drug history and sexual involvement with Chandler. Kee deems the motion too late and the cross-examination of Philpott too little. But he develops no corresponding argument with citation to relevant authority such that he might persuade this Court that the trial court would likely have excluded Philpott as a witness had the motion only been made earlier.

[13] As to omitted cross-examination questions, Kee's argument lacks specificity, with one notable exception. He is persuaded that his counsel could have elicited from Philpott some admission that he was, in fact, receiving a benefit for his testimony. Kee testified at the post-conviction hearing that he had been personally informed by Philpott that Philpott's criminal charge in Clark County was dismissed because of his testimony in Kee's trial. Kee seems to believe that his counsel could have caused the jury to learn of this outcome in advance. Defense counsel did not ignore this line of questioning; indeed, in cross-examining Philpott, counsel repeatedly addressed whether there was an expected potential benefit.² But Philpott testified repeatedly that he had not been promised anything for his testimony. Ultimately, however, Philpott

² Notwithstanding the trial court's ruling that Philpott did not have to disclose how he came to be a confidential informant, defense counsel asked Philpott whether he had been arrested, whether he "volunteer[ed] to become a confidential informant," whether he could "make his legal problems go away," and whether being a confidential informant "made his legal problems better." (Tr. Vol. III, pgs. 37-38.)

admitted that he had been arrested and it was possible that his legal problems could “go away.” (Tr. Vol. III, pg. 38.)

[14] The jury was not kept in the dark as to Philpott’s legal jeopardy or personal entanglements. Chandler testified that she had been in off-and-on relationships with Philpott and Kee. According to Chandler, her relationship with Philpott had ended because of his drug use and he had tried to commit suicide as a consequence of the breakup. Philpott also admitted to involvement with Chandler, although he did not describe her as a girlfriend. When defense counsel inquired as to “how deep” the relationship was, Philpott responded, “evidently it was not that deep.” (*Id.* at 30.)

[15] Moreover, the jury heard abundant evidence bearing upon Philpott’s fitness as a confidential informant and witness. Philpott admitted to drug use before and after the controlled buys; he reluctantly admitted to being drug addicted in the past; he testified that he no longer considered himself to be drug addicted at the time of trial. There was also testimony from Detective Brown that he would no longer use Philpott as a confidential informant because he had come to believe that Philpott removed a tracking device from his vehicle and falsely reported it to be stolen. But defense counsel’s efforts to undermine Philpott’s version of events was made quite difficult by the fact that the State had audio and video recordings which, in substantial part, corroborated Philpott’s testimony.

[16] Kee suggests that trial counsel’s acquiescence during the out-of-court hearings related to Philpott’s deposition somehow prevented appellate counsel from

raising an issue as to denial of the right of confrontation. But an undeveloped bald assertion will not support post-conviction relief. Counsel was not necessarily obliged to pursue a defense to the extent that Kee deems desirable in hindsight. Trial counsel's efforts and strategy, although they did not ultimately achieve the result desired by Kee, were not so unreasonable as to constitute ineffective assistance of counsel. *See Badelle v. State*, 754 N.E.2d 510, 539 (Ind. Ct. App. 2001) (deciding in relevant part that, when trial counsel's efforts were "more than adequate" to support a chosen defense, counsel's decision not to seek out additional witnesses was a judgment call within the wide range of reasonable assistance), *trans. denied*.

Conclusion

[17] Kee did not demonstrate his entitlement to post-conviction relief.

[18] Affirmed.

Mathias, J., and Altice, J., concur.