

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Edwin D. Calligan,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 12, 2023

Court of Appeals Case No.
23A-PC-118

Appeal from the Allen Superior
Court

The Honorable Frances C. Gull,
Judge

The Honorable David M. Zent,
Judge

Trial Court Cause No.
02D05-2203-PC-18

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Edwin Calligan appeals the post-conviction court’s denial of his petition for post-conviction relief. He presents three issues for our review, which we consolidate and restate as the following two issues:

1. Whether Calligan has preserved for our review freestanding claims alleging the denial of his rights under the federal and state constitutions.
2. Whether he was denied the effective assistance of trial counsel.

[2] We affirm.

Facts and Procedural History

[3] In Calligan’s direct appeal, this Court stated the facts and procedural history as follows:

In the early morning hours of March 25, 2016, Fort Wayne Police Department Detectives Marc Deshaies (“Detective Deshaies”) and Tim Hughes (“Detective Hughes”), who were affiliated with the Gang and Violent Crime Unit, were working in a high-crime area near Foster’s Bar and Grill (“Foster’s”). Specifically, the area is known for problems with drug trafficking, violence and fights, and shots-fired incidents. At approximately 2:30 a.m., the detectives observed a group of people in a nearby parking lot that were involved in a loud, heated argument, which appeared to be on the verge of turning into a physical altercation. The individuals involved in the argument got into three different vehicles and drove off together in a processional line. The lead vehicle was a Dodge Charger (“the Charger”), which was followed by a Chevrolet Impala (“the Impala”) and an Infiniti[i] (“the Infiniti[i]”).

Detectives Deshaies and Hughes followed the vehicles, which accelerated quickly. The detectives noticed that the Charger was repeatedly swerving within its lane, and, at one point, almost struck the curb. The Charger subsequently came to a complete and sudden stop in the middle of an intersection before continuing through the intersection. Detective Deshaies, who had been trained to “pace” a vehicle to determine its speed, “paced” the cars, all of which frequently exceeded the thirty-five-mile-per-hour speed limit. (Motion to Suppress Tr. at 13). After the Infiniti turned off onto a side street, the driver of the Impala appeared to be trying to prevent the officers from moving between it and the Charger.

Concerned that the driver of the Charger was impaired, the detectives initiated a traffic stop in a residential area after managing to maneuver behind the Charger. The driver of the Charger slowed down but continued to move forward for thirty to forty feet. As the detectives walked toward the stopped Charger, it began to roll forward again. As the detectives were yelling for the car to be put in park, Calligan, the driver, leaned out the window and responded that the Charger had stopped even though the car was continuing to roll forward. When the Charger came to a complete stop, the detectives noticed two passengers and movement in the vehicle. Other officers who had heard radio communications about the Charger’s initial failure to stop immediately began arriving on the scene.

As Detective Deshaies approached the Charger and began to speak with Calligan, the detective immediately smelled the odor of alcohol emanating from Calligan. Further, Calligan’s speech was slurred, his eyes were bloodshot, and he fumbled through his wallet attempting to find his insurance card. Concerned that Calligan might attempt to drive off again, Detective Deshaies asked Calligan for the keys to the car several times. Calligan refused to comply with the detective’s request and was “incredibly argumentative.” (Motion to Suppress Tr. at 32). He subsequently removed the keys from the ignition, refused to hand

them to Detective Deshaies, and dropped them in the center console.

While Detective Deshaies was speaking with Calligan, other officers approached the front-seat passenger, who identified himself by a name that the officers immediately knew to be false. This passenger eventually had to be forcibly removed from the car after he refused to get out of the vehicle when the officers asked him to do so. An on-scene fingerprint identification revealed that the passenger had an active warrant for failing to appear in a gun case. At the same time, several females who had been in the Impala returned to the scene on foot and were loudly challenging the officers' actions and had to be physically restrained from interfering with the ongoing traffic stop.

As Detective Deshaies was checking Calligan's information, other officers asked Calligan and the rear-seat passenger to exit the car and sit on the curb a few feet behind the Charger. The men were not handcuffed. Fort Wayne Police Department Sergeant Gary Hensler ("Sergeant Hensler") searched the interior of the Charger for the purpose of officer safety and found a loaded handgun between the driver's seat and the center console. Detective Hensler then handcuffed Calligan and the rear-seat passenger.

The State charged Calligan with Level 4 felony unlawful possession of a firearm by a serious violent felon; Class A misdemeanor unlawful possession of a firearm by a domestic batterer, and Class A misdemeanor operating while intoxicated. Calligan filed a motion to suppress. At the suppression hearing, Sergeant Hensler responded as follows when asked why he had searched the car: "Well for all the reasons we already had, um, extended period of time to pull over, starting and stopping, fear of them retrieving a weapon, hiding contraband, formulating a plan, uh, the front seat passenger showing deception." (Motion to Suppress Tr. at 99). Following the hearing, the trial court

denied Calligan's motion to suppress. Before trial, the State dismissed the misdemeanor counts.

Calligan objected to the admission of the gun at trial. Also at trial, Detective Deshaies testified that he and Detective Hughes were concerned when Calligan's car kept rolling at the time of the stop. According to Detective Deshaies, "[t]ypically when we see these . . . stops that take a very long time to stop in my experience and training[,] it's because people are either trying to secret or access contraband or weapons in the car prior to being stopped." (Tr. Vol. 1 at 41-42). Sergeant Hensler testified that he had searched the vehicle for officer safety because: (1) the Charger did not stop immediately, which suggested that the vehicle's occupants might have been attempting to hide weapons or drugs; (2) the traffic stop occurred in a high crime area where there were many drug transactions and shootings; and (3) the women from the Impala were very upset over the traffic stop and could have distracted the officers or assisted the men in the Charger with committing a crime, including assaulting the officers.

Fort Wayne Police Department Detective Matthew Foote ("Detective Foote") had also been conducting surveillance in the area of Foster's. According to Detective Foote, police officers had been called to Foster's for shootings, stabbings, and fights, and there had been a killing there the previous month. When he arrived at the scene of the traffic stop, Detective Foote was concerned when the front-seat passenger gave a name that the officers knew was not his. Detective Foote further explained that "often times when somebody supplies us with a false name[,] it's to cover up criminal activity. Often times they are fugitives from justice, and that's what it ended up being in this case." (Tr. Vol. 1 at 110).

During Calligan's presentation of evidence, Tiffany Simpson ("Simpson") testified that she had been dating Calligan in March 2016. Simpson further testified that the gun in the Charger

belonged to her and that the Charger belonged to her mother, who allowed Simpson, Calligan, and other family members to drive it. Calligan was unable to drive his car at the time because “there was something major wrong with it.” (Tr. Vol. 1 at 161).

The jury convicted Calligan of Level 4 felony unlawful possession of a firearm. . . .

Calligan v. State, Case No. 18A-CR-199, 2019 WL 1412994 at *1-3 (Ind. Ct. App. March 29, 2019) (“*Calligan I*”).

[4] In his direct appeal, Calligan argued that the trial court had abused its discretion when it admitted the gun into evidence at trial. Calligan challenged that evidence under the [Fourth Amendment to the United States Constitution](#) and [Article 1, Section 11 of the Indiana Constitution](#). Calligan alleged that both the initial stop of his vehicle and subsequent search of the vehicle violated those constitutional provisions. We disagreed and affirmed his conviction.

[5] On March 28, 2022, Calligan filed a petition for post-conviction relief. The State moved to require Calligan to submit the case by affidavit, and Calligan did not object. The court granted that motion. And on December 7, the court denied Calligan’s petition. This appeal ensued.

Discussion and Decision

Standard of Review

[6] Calligan appeals the post-conviction court’s denial of his petition for post-conviction relief. Our standard of review in such appeals is clear:

“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).

Issue One: Freestanding Claims

[7] Calligan first contends that the post-conviction court erred when it denied his petition because of alleged violations of his rights under the [Fourth Amendment](#) and [Article 1, Section 11](#). However, Calligan makes these arguments for the first time in his brief on appeal.¹ It is well settled that issues not raised in a petition for post-conviction relief may not be raised for the first time on post-

¹ Calligan did not include a copy of his post-conviction petition in his appendix. However, his petition and amended petition filed in the post-conviction court, as well as his affidavit in support of his petition, are a part of the record on appeal and available to this Court through the Odyssey case management system. See [Ind. Appellate Rule 27](#).

conviction appeal. *Ind. P-C.R. 1(8)*; *Allen v. State*, 749 N.E.2d 1158 (Ind. 2001). The failure to raise an alleged error in the petition waives the right to raise that issue on appeal. *Koons v. State*, 771 N.E.2d 685, 691 (Ind. Ct. App. 2002), *trans. denied*. Accordingly, Calligan has waived these issues for our review.

- [8] Waiver notwithstanding, these freestanding claims of error are not properly before us. Post-conviction proceedings are civil proceedings that provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007). Thus, if an issue was known and available but not raised on direct appeal, the issue is procedurally foreclosed. *Id.* And if an issue was raised and decided on direct appeal, it is *res judicata*. *Id.* The issues Calligan presents in this appeal were either known and available but not raised on direct appeal or raised and decided on direct appeal, and, thus, we do not address them.

Issue Two: Ineffective Assistance of Counsel

- [9] Calligan next contends that the post-conviction court erred when it found that he was not denied the effective assistance of trial counsel.

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.*

[10] “[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).

[11] In her motion to suppress, Calligan’s trial counsel argued that the officers had initiated the traffic stop of Calligan’s car “as a pre-text to search” the car and that the stop and search violated the [Fourth Amendment](#) and [Article 1, Section 11 of the Indiana Constitution](#). PCR Ex. E.² In support, his trial counsel argued

² Calligan did not include any of his PCR exhibits in his appendix. Accordingly, we found them on Odyssey.

that officers did not have reasonable suspicion that Calligan was intoxicated; that officers did not conduct field sobriety tests or a portable breath test to determine whether probable cause existed to arrest Calligan for operating while intoxicated; that there was no need to search his car for officer safety because, while Calligan was sitting on the sidewalk near the car, there were “at least five armed police officers . . . between him and the front seat” of the car; and that officers had no probable cause to arrest Calligan, and had not arrested him, at the time they searched the vehicle. *Id.*

[12] In his petition for post-conviction relief, Calligan alleged that his trial counsel was ineffective when she did not move to suppress the evidence based on the following grounds: the arresting officer did not use the least intrusive means necessary to confirm or dispel his suspicion that Calligan was driving while intoxicated; he was arrested without probable cause; and the officers manufactured exigent circumstances to justify the search of his vehicle when they sat Calligan close to the vehicle and left him unrestrained. We address each ground in turn.

[13] In his brief on appeal, Calligan contends that the least intrusive means of determining whether Calligan was operating while intoxicated “would have been offering Calligan the opportunity to blow into a portable breath test or by administering field sobriety tests.” Appellant’s Br. at 9-10. But that is exactly what his trial counsel argued in the motion to suppress. Accordingly, Calligan has not shown that his trial counsel’s performance was deficient in this respect.

[14] Next, Calligan asserts that his trial counsel should have argued, but failed to argue, that officers lacked probable cause to arrest him. But, again, his trial counsel argued the same in the motion to suppress. Calligan's argument on this issue also fails.

[15] Finally, Calligan contends that his trial counsel should have argued that officers manufactured exigent circumstances to justify the search by leaving him to sit on the sidewalk, unrestrained, near the car. But his trial counsel argued that there was no concern for officer safety, which was the basis for the alleged exigent circumstances, because of the five armed officers standing between Calligan and the car at the time of the search of the car. Accordingly, again, Calligan has not shown that his trial counsel's performance was deficient in this respect.

[16] In sum, Calligan has not shown that his trial counsel's performance was deficient. For all these reasons, we affirm the post-conviction court's denial of Calligan's petition for post-conviction relief.

[17] Affirmed.

Vaidik, J., and Pyle, J., concur.