

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Rocky L. Truex,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 24, 2021

Court of Appeals Case No.
20A-PC-1596

Appeal from the Jay Circuit Court

The Honorable Brian D.
Hutchison, Judge

Trial Court Cause No.
38C01-2001-PC-1

Altice, Judge.

Case Summary

[1] Rocky L. Truex appeals the denial of his petition for post-conviction relief, claiming that his trial counsel was ineffective for failing to timely object to certain evidence that was admitted at trial, including drugs and contraband that law enforcement officers seized from his residence.

[2] We affirm.

Facts and Procedural History

[3] On June 1, 2018, the Jay County Sheriff's Department obtained an arrest warrant for Amy Doublin in an unrelated matter. After receiving an anonymous tip through social media that Doublin was living with Truex in his mobile home, a confidential informant corroborated that tip. The Sheriff's Department received additional information that Truex was manufacturing methamphetamine and storing chemicals in an outdoor shed on his property.

[4] Later that day, Deputies Tyler Hartzell and Brad Wendel arrived at Truex's home to execute the arrest warrant. Deputy Hartzell went to the front door, while Deputy Wendel stood near the rear exit. When Deputy Wendel walked behind the residence, he noticed a tool shed on the premises and alerted Deputy Hartzell that he saw Truex walk out the back door of the residence. Truex was apprehended and detained.

[5] Deputy Hartzell walked toward the back door of the residence, and Truex volunteered that Doublin was in one of the bedrooms. As Deputy Hartzell approached the doorway, he detected the odor of burnt marijuana and saw

Doublin and another individual inside. Doublin identified herself, walked outside, and Deputy Hartzell arrested and handcuffed her. After ordering another individual to step outside the residence, Deputy Hartzell “walked through the home to [e]nsure there were no other subjects that [he] had not made contact with[,] to secure the scene for the preservation of evidence[,] and for officer safety.” *Transcript Vol. II* at 14. While performing this protective sweep, Deputy Hartzell observed “in plain view two corner cut plastic bags containing a white . . . powder residue” sitting on top of a digital scale. *Appendix Vol. II* at 34. Deputy Hartzell knew from his experience in law enforcement that plastic corner cut bags are commonly associated with dealing and manufacturing methamphetamine.

[6] After securing the residence, Deputy Hartzell obtained and executed a search warrant for Truex’s residence and outbuilding later that day. Once inside, the officers seized various devices that are commonly used to smoke methamphetamine, baggies, and a pie plate that contained suspected methamphetamine. The officers also found lithium batteries and nasal decongestants containing pseudoephedrine, both of which are used to manufacture methamphetamine.

[7] Truex told the officers that the shed door was padlocked and directed them to a key ring. The officers opened the shed and observed a can of Coleman camp fluid, a Coleman stove, drain cleaner, and lye, all of which are indicative of methamphetamine production. Also discovered was a device used to grind

pseudoephedrine tablets into powder. The white powder substances seized from the residence tested positive for methamphetamine.

[8] Truex was arrested and charged with manufacturing methamphetamine, a Level 3 felony; dealing in methamphetamine, a Level 3 felony; and possession of methamphetamine, a Level 5 felony. On September 5, 2018, Truex filed a motion to suppress the evidence that was seized from his residence and shed. Truex argued that the law enforcement officials were unlawfully on his property when they arrested Dublin. Therefore, he claimed that the subsequently-issued search warrant for his residence and shed was invalid and that all evidence seized pursuant to the search warrant violated his rights under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Following a hearing on November 18, 2018, the trial court denied Truex's motion to suppress.

[9] At a jury trial that commenced on May 8, 2019, Truex's counsel did not object to the admission of the drugs and paraphernalia that were seized. Truex's counsel subsequently acknowledged that he "inadvertently neglected to make a contemporaneous objection to the admission of the contraband [into] evidence." *Appendix Vol. II* at 47.¹

¹ Although a defendant may move to suppress evidence prior to trial, he must reassert his position at trial contemporaneously with the introduction of the evidence to preserve the error for appeal. *Carter v. State*, 754 N.E.2d 877, 881 n.8 (Ind. 2001); *Lundquist v. State*, 834 N.E.2d 1061, 1067 (Ind. Ct. App. 2005). If a timely objection is not raised, the challenge to the admission of the evidence is waived. *Jenkins v. State*, 627 N.E.2d 789, 797 (Ind. 1993).

[10] Following the presentation of evidence, the jury found Truex guilty of Level 6 felony possession of methamphetamine and not guilty of manufacturing methamphetamine.² Following the verdict, Truex admitted to having a prior conviction and pleaded guilty to an elevated possession of methamphetamine charge as a Level 5 felony. Truex was subsequently sentenced to five years of incarceration.

[11] Truex initiated a direct appeal, and on November 11, 2019, this court granted Truex's motion to stay the appeal, allowing him to petition for post-conviction relief. Thereafter, on January 27, 2020, Truex filed a petition for post-conviction relief, claiming that his trial counsel was ineffective for failing to timely object to the admission of the evidence that was seized during the search. The post-conviction court scheduled an evidentiary hearing on July 6, 2020, at which counsel for both parties appeared and stipulated to the admission of the following evidence: (1) the affidavit of probable cause for the search warrant; (2) the chronological case summary; (3) the transcript of all proceedings in the case; and (4) an affidavit from Truex's trial counsel.

[12] On August 4, 2020, the post-conviction court entered findings of fact and conclusions of law and denied Truex's request for relief. The court determined that "assuming, without finding, that trial counsel's performance was deficient,

² At some point, the State dismissed Count II, dealing in methamphetamine.

[Truex] has failed to show that trial counsel failed to raise an objection that the trial court would have been required to sustain.” *Appellant’s Appendix Vol. II* at 46-47.

[13] Truex now appeals.

Discussion and Decision

I. Standard of Review

[14] 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). 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 Truex is appealing the denial of post-conviction relief, he is appealing from a negative judgment. Therefore:

[Truex] 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, [Truex] must convince this Court that there is *no* way within the law that the court below could have reached the decision it did.

Wilkes v. State, 984 N.E.2d 1236, 1240 (Ind. 2013) (emphasis in original)

(citations and quotation marks omitted).

[15] We generally review the post-conviction court’s factual findings for clear error, neither reweighing the evidence nor judging the credibility of witnesses. *Hinesley v. State*, 999 N.E.2d 975, 981 (Ind. Ct. App. 2013), *trans. denied*. Here, the post-conviction court made its ruling on a paper record, and thus we are reviewing the same information that was available to the post-conviction court. In such cases, this court owes no deference to the lower court’s findings. *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005), *trans. denied*. Therefore, we review the denial of Truex’s post-conviction petition *de novo*. *Id.*

B. Truex’s Claims

[16] Truex asserts that the law enforcement officers were unlawfully on his property when arresting Dublin. As a result, Truex claims that the issuance of the search warrant was improper and, therefore, his trial counsel rendered deficient performance and was ineffective when counsel failed to object to the evidence that was seized from his residence.³

[17] We evaluate a claim of ineffective assistance of counsel under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). Under the *Strickland* test, the defendant must

³ Although Truex suggests that the officers’ conduct violated his rights under Article 1, Section 11 of the Indiana Constitution, he has not presented any argument regarding the propriety of the search separate and distinct from the U.S. Constitution. Thus, the issue is waived, and we only address Truex’s arguments as to alleged violations in accordance with the Fourth Amendment. *See Wilkins v. State*, 946 N.E.2d 1144, 1147 (Ind. 2011).

demonstrate (1) that counsel’s performance was deficient based on prevailing professional norms; and (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

[18] In assessing whether counsel’s performance was deficient, we note that counsel is “afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference.” *Pruitt v. State*, 903 N.E.2d 899, 906 (Ind. 2009). There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018), *cert. denied*. A defendant must offer strong and convincing evidence to overcome this presumption. *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). Isolated poor strategy, inexperience, or bad tactics does not necessarily constitute ineffective assistance. *Hinesley*, 999 N.E.2d at 982.

[19] As for the prejudice prong of the *Strickland* test, a defendant must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Middleton v. State*, 72 N.E.3d 891, 891 (Ind. 2017) (citation omitted). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 891-92 (quoting *Strickland*, 466 U.S. at 694). To demonstrate prejudice as a result of trial counsel’s failure to object to the admission of evidence, a petitioner must show that an objection would have been sustained by the trial court and that he was prejudiced by his counsel’s failure. *Mays v. State*, 719 N.E.2d 1263, 1265-66

(Ind. Ct. App. 1999), *trans. denied*. Failure to satisfy either prong of the *Strickland* test will cause the claim to fail, and most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002).

[20] Truex acknowledges that the pivotal question is whether the officers were justified in making their initial entry onto his property. If they were not, then the evidence seized during the search was inadmissible under the “fruit of the poisonous tree” doctrine, which bars the admissibility in a criminal proceeding of evidence obtained in the course of unlawful searches and seizures. *Johnson v. State*, 32 N.E.3d 1173, 1177 (Ind. Ct. App. 2015), *trans. denied*. “The doctrine . . . [bars] not only evidence directly obtained, but also evidence derivatively gained as a result of information learned or leads obtained during an unlawful search or seizure.” *Id.* (quoting *Hanna v. State*, 726 N.E.2d 384, 389 (Ind. Ct. App. 2000)).

[21] We note that for purposes of the Fourth Amendment, “an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” *Payton v. New York*, 445 U.S. 573, 603 (1980); *Stickrod v. State*, 108 N.E.3d 385, 388 (Ind. Ct. App. 2018), *trans. denied*. If police officers have the authority to enter the residence, they also have authority to walk around the curtilage. *Carpenter v. State*, 974 N.E.2d 569, 573 (Ind. Ct. App. 2012), *trans. denied*. Once properly on the curtilage, the officers could notice things in plain view. *Id.*; *see also Edmond v. State*, 951 N.E.2d 585, 588-89 n.3,

591 n.6 (Ind. Ct. App. 2011) (the odor of burning marijuana indicates that a crime has been or is being committed).

[22] While Truax asserts that the police officers were unlawfully on his property, it was established that the police officers held the reasonable belief that Doublin—the subject of the arrest warrant—was living at Truex’s residence. And when the officers arrived, Truex informed them that Doublin was inside. The officers’ initial entry onto Truex’s property was justified and did not violate Truex’s Fourth Amendment rights. *See Stickrod*, 108 N.E.3d at 388; *Carpenter*, 974 N.E.2d at 573.

[23] Additionally, when Deputy Hartzell smelled the marijuana, performed the protective sweep of the residence, and saw the suspected methamphetamine in plain view, probable cause was established for the issuance of the search warrant, and the subsequent execution of the warrant was proper. *See Johnson*, 32 N.E.3d at 1177-78. Thus, the trial court did not err in admitting evidence that the officers seized from the residence or shed pursuant to the search warrant, and Truex has failed to show that a proper objection would have led to the exclusion of the evidence.

[24] In sum, Truex has failed to show that he was prejudiced by trial counsel’s failure to object and he does not prevail on his ineffective assistance of counsel claim. Thus, the post-conviction court properly denied Truex’s request for relief.

[25] Judgment affirmed.

Mathias, J. and Weissmann, J., concur