MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

David Pike,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

March 17, 2023

Court of Appeals Case No. 22A-PC-1663

Appeal from the Vanderburgh Superior Court

The Honorable Robert J. Pigman, Judge

Trial Court Cause No. 82D03-2001-PC-79

Memorandum Decision by Judge Kenworthy
Judges Bradford and Pyle concur.

Kenworthy, Judge.

Case Summary

[1] The State charged David Pike with several offenses in connection with a robbery. At trial, Pike's attorney did not object to the jury hearing evidence of statements Pike made to a detective during a post-arrest interview. The jury determined Pike was guilty as charged. On direct appeal, this Court held Pike had waived review of the State's use of his interview statements.

[2] Pike next petitioned for post-conviction relief, arguing his trial counsel had rendered ineffective assistance by failing to object to the State's use of his interview statements. The post-conviction court denied Pike's petition. Pike now appeals the denial of his petition for post-conviction relief. We affirm the court's judgment because Pike's counsel did not act deficiently in refusing to object, and in any event Pike was not prejudiced.

Facts and Procedural History

[3] In 2011, officers arrested Pike in connection with the violent robbery of Timothy Morton. At the Evansville Police Department, Pike spoke with Captain Andy Chandler as they both waited for Detective Keith Whitler, who was the primary detective assigned to the case. Captain Chandler later testified during a pretrial hearing he did not discuss the robbery with Pike, except to mention Morton's name in passing to see how Pike would react.

[4] Next, Detective Whitler arrived and advised Pike of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and Pike said he understood the advisement.

During the ensuing interview, Pike initially denied being at the scene of the robbery but conceded he had been present after Detective Whitler stated there was evidence contradicting his denial.

[5] The State charged Pike with robbery, a Class A felony, and aggravated battery, a Class B felony. Pike moved to suppress his statements to the officers, arguing the statements were obtained in violation of his *Miranda* rights. In particular, Pike claimed he was in custody when he spoke with Captain Chandler, prior to being informed of his *Miranda* rights. He also claimed Detective Whitler's questions during the interview were based on his pre-*Miranda* conversation with Captain Chandler. The State objected to Pike's motion, stating Captain Chandler and Pike had discussed nothing of substance related to the offenses.

[6] The trial court granted Pike's motion in part and denied it in part. The court determined any statements Pike made to Captain Chandler before being advised of his *Miranda* rights could not be presented to the jury. But the court further ruled Pike's statements to Detective Whitler after receiving *Miranda* advisements were admissible.

[7] The parties tried the case to a jury. Pike's counsel suggested during opening statements the jurors should recognize the State's case lacked "a smoking gun," and the evidence also contained "large gaps." *Trial Tr. Vol. 2* at 25.[1] Counsel

[1] The record in this case includes documents from Pike's original appeal as well as from post-conviction proceedings. We refer to documents from his direct appeal as "Tr.," and documents from post-conviction proceedings as "PCR." In addition, citations to all volumes of the trial transcript are to the .pdf pagination.

encouraged the jury to question the victim's memory of events and contended the evidence would show Pike "was nowhere in the area" when the crime occurred. *Id.* at 277.

[8] Detective Whitler testified, without objection, about Pike's post-*Miranda* statements during the interview. Pike's counsel cross-examined Detective Whitler about Pike's clothing, hairstyle, and physical condition during the interview, but he refrained from asking about Pike's statements.

[9] During closing arguments, Pike's counsel again asked the jury to consider whether Morton's memory of the attack was believable due to the injuries he had sustained. Counsel further claimed the State had brought "a circumstantial evidence case." *Trial Tr. Vol. 3* at 674. The jury concluded Pike was guilty as charged, and the trial court imposed a sentence.

[10] Pike appealed, arguing, among other claims, the trial court erred in allowing the jury to hear Detective Whitler's testimony about his interview statements, which Pike argued were obtained in violation of his *Miranda* rights. In a memorandum decision, this Court concluded Pike had waived his *Miranda* claim by failing to contemporaneously object at trial. *Pike v. State*, No. 82A01-1307-CR-321, 2014 WL 1092282, at *4 (Ind. Ct. App. Mar. 19, 2014) ("*Pike I*"). And, even if Pike had not waived his *Miranda* claim, this Court further concluded he would not have prevailed on the merits.

[11] Pike later petitioned for post-conviction relief. Among other claims, he stated his trial counsel rendered ineffective assistance by failing to object to Detective

Whitler's trial testimony about Pike's interview statements. Pike reasoned his counsel's error deprived him of appellate review of his *Miranda* claim. The post-conviction court held an evidentiary hearing and denied Pike's petition. Pike appeals.

Discussion and Decision

I. Standard of Review

[12] "Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and direct appeal." *Reeves v. State*, 174 N.E.3d 1134, 1139 (Ind. Ct. App. 2021), *trans. denied*; *see also* Ind. Post-Conviction Rule 1(1)(b)("This remedy is not a substitute for a direct appeal from the conviction and/or the sentence[.]"). "The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence." P-C.R. 1(5).

[13] A petitioner seeking review of the denial of post-conviction relief "is appealing from a negative judgment . . . ." *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). To prevail on appeal, a petitioner must show "the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court." *Garrett v. State*, 992 N.E.2d 710, 718 (Ind. 2013).

[14] The post-conviction court here issued findings of fact and conclusions of law as required by Post-Conviction Rule 1(5). The court "is the sole judge of the weight of the evidence and the credibility of witnesses." *Fisher v. State*, 810

N.E.2d 674, 679 (Ind. 2004). We accept the court's findings of fact unless clearly erroneous, but we do not defer to the court's conclusions of law. *Id.*

II. Res Judicata

[15] The State argues Pike's claim of ineffective assistance of trial counsel, which is based on his contention the admission of his interview statements at trial violated his *Miranda* rights, is barred by res judicata. In essence, the State argues the Court already decided the merits of the *Miranda* claim in Pike's direct appeal. We disagree.

[16] As a general rule, when an appellate court decides an issue on direct appeal, the doctrine of res judicata applies, thereby precluding review of the issue in post-conviction proceedings. *State v. Holmes*, 728 N.E.2d 164, 168 (Ind. 2000), *cert. denied*, 532 U.S. 1067 (2001). The "doctrine of res judicata provides that a judgment *on the merits* is an absolute bar to a subsequent action between the same parties on the same claim." *Mutchman v. Consolidation Coal Co.*, 666 N.E.2d 461, 464 (Ind. Ct. App. 1996) (emphasis added), *trans. denied*.

[17] In *Mutchman*, the parties disputed whether res judicata barred the appellant's claim regarding deeds for coal mining rights. The appellant argued a prior decision of this Court in the same case did not bar her claim, though that decision discussed the deeds. The Court disagreed, determining the prior decision's discussion of the deeds was "not dicta" but "necessarily incident" to resolving the claims in the prior appeal. *Id.* at 465. As a result, res judicata barred the appellant's claim.

[18] In *Pike I*, the Court held Pike had waived appellate review of his *Miranda* claim due to his failure to timely object at trial. The Court's subsequent discussion of the merits of Pike's claim was dicta, and not necessarily incident to the waiver ruling. As a result, unlike the outcome in *Mutchman*, the *Pike I* Court's *Miranda* discussion was not a judgment on the merits. Res judicata does not bar Pike's claim here.

III. Ineffective Assistance of Counsel Claim

[19] Pike argues his trial counsel was ineffective because Pike's counsel failed to object at trial to evidence of his interview statements to Detective Whitler, which prevented direct appellate review of Pike's *Miranda* claim. He also argues his statements to Detective Whitler were "taint[ed]" by his pre-*Miranda* discussion with Captain Chandler. *Appellant's Am. Br.* at 18.

[20] We evaluate ineffective assistance of counsel claims under the two-part test in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on his claim, Pike must show: "(1) counsel's performance was deficient . . . and (2) the deficient performance prejudiced the defense." *Conley v. State*, 183 N.E.3d 276, 282 (Ind. 2022).

[21] A petitioner proves deficient performance "by demonstrating that counsel's performance was unreasonable under prevailing professional norms." *Canaan v. State*, 683 N.E.2d 227, 229 (Ind. 1997), *cert. denied*, 524 U.S. 906 (1998). A petitioner proves prejudice by showing 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) (emphasis omitted) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perry v. State*, 904 N.E.2d 302, 308 (Ind. Ct. App. 2009), *trans. denied*.

[22] Deciding whether to object is a matter of trial strategy, and we presume counsel acted effectively in making that decision. *Gibson v. State*, 133 N.E.3d 673, 692 (Ind. 2019), *cert. denied*, 141 S. Ct. 553 (2020). 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 of the objective standard of reasonableness." *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998).

[23] Here, Pike filed with the post-conviction court his trial attorney's deposition. The attorney explained he recognized the denial of a motion to suppress needed to be "preserved at trial." *PCR Appellant's App. Vol. 2* at 58. But he also stated, "in some cases, and [Pike's] was one in particular, if I recall correctly, that I did not want to draw unnecessary attention to that issue in front of the jury" for fear of jurors becoming prejudiced. *Id.* The attorney added he thought the trial court would have overruled his objection about Whitler's testimony because the court "had already made a ruling on the issue," and he "didn't anticipate the evidence being any different at trial as [sic] it had been at the motion to suppress hearing." *Id.* Finally, the attorney stated he knew failing to object at trial could result in Pike's *Miranda* claim being subjected to the much stricter fundamental error standard of review on appeal.

[24] Under these facts, Pike's trial counsel made a considered tactical decision not to object to Detective Whitler's testimony about Pike's interview statements. The decision makes sense based on counsel's apparent trial strategy of claiming the State's case was circumstantial and had substantial evidentiary gaps. Counsel reasonably chose to avoid drawing additional jury attention to the interview, in which Pike eventually admitted he was present at the scene of the robbery. *See Benefield v. State*, 945 N.E.2d 791, 799-800 (Ind. Ct. App. 2011) (counsel did not perform deficiently by failing to object to testimony; counsel testified during the post-conviction hearing the lack of objection was strategic, specifically because he did not want to focus the jury's attention on it). The post-conviction court did not err in concluding counsel's performance was not deficient.

[25] Further, on the question of prejudice, to prevail on a claim of ineffective assistance due to failure to object, the petitioner must show a reasonable probability the trial court would have sustained the objection if counsel had raised it. *Garrett*, 992 N.E.2d at 723. Pike's *Miranda* claim fails on the merits, based on United States Supreme Court precedent. In *Oregon v. Elstad*, 470 U.S. 298 (1985), police officers suspected Elstad had committed a burglary, and they arrested him at his home. Before taking Elstad to the station, the officers asked him if he was involved in the burglary, and he stated, "I was there." *Id.* at 301. The officers next escorted Elstad to the station, where officers advised him of his *Miranda* rights, and he confessed.

[26] The trial court admitted Elstad's post-*Miranda* confession into evidence at trial, and the finder of fact determined he was guilty. Elstad argued on appeal his

conviction had been tainted by his pre-*Miranda* admission of being present at the scene, even though the trial court had excluded the admission from evidence at trial. The United States Supreme Court ultimately concluded:

> absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

Id. at 314. The Court concluded, "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary." *Id.* at 318. Elstad's initial admission, although made while in custody, was voluntary and was not a reason to suppress his post-*Miranda* confession. *Id.* at 318; *cf. Missouri v. Seibert*, 542 U.S. 600, 616 (2004) (post-*Miranda* confession should have been suppressed; evidence demonstrated officer intentionally interrogated the defendant in custody without *Miranda* advisements, extracted a confession, and then advised the defendant of *Miranda* rights before having the defendant repeat the confession, thus indicating the defendant was not free to remain silent).

[27] In Pike's case, he was in custody when he spoke with Captain Chandler. But Pike points to no evidence of coercion or incriminating statements. To the

contrary, Captain Chandler testified during the suppression hearing to mentioning Morton's name to see how Pike would react, and Pike said nothing inculpatory. And there was no evidence Captain Chandler intended to circumvent *Miranda*, unlike the officers in *Seibert*. The trial court correctly denied Pike's motion to suppress because admission of his post-*Miranda* statements did not contravene the Supreme Court's holding in *Elstad*.

[28] In sum, if Pike's counsel had objected to Detective Whitler's testimony about his post-*Miranda* statements during the interview, the trial court would have overruled the objection. *See Lee v. State*, 91 N.E.3d 978, 993 (Ind. Ct. App. 2017) (counsel was not ineffective for failing to object to admission of firearm into evidence; the defendant lacked standing to challenge search leading to the firearm's discovery, so an objection would not have been granted), *trans. denied*. Pike has failed to show he was prejudiced by counsel's failure to act, and thus he has not shown the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.

Conclusion

[29] For the reasons stated above, we affirm the post-conviction court's denial of Pike's petition for post-conviction relief.

[30] Affirmed.

Bradford, J., and Pyle, J., concur.