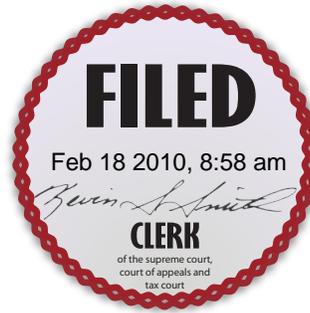


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

SUSAN K. CARPENTER
Public Defender of Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

LINDA K. HUGHES
Deputy Public Defender
Indianapolis, Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TORRAY C. STITTS,)
)
Appellant/Petitioner,)
)
vs.) No. 34A05-0910-PC-603
)
STATE OF INDIANA,)
)
Appellee/Respondent.)

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0409-PC-296

February 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner Torray Stitts appeals the denial of his petition for post-conviction relief (“PCR”), claiming ineffective assistance of counsel. Specifically, Stitts argues that his trial counsel was ineffective because he failed to present an alibi defense, to challenge the validity of the search warrant issued for Stitts’s room, and to properly object to the admission of certain evidence derived from the search of Stitts’s room. We affirm.

FACTS AND PROCEDURAL HISTORY

Our opinion in Stitts’s direct appeal instructs us as to the underlying facts leading to this post-conviction appeal:

At approximately 10:00 p.m. on January 22, 2002, Stitts called Edward Lawton, who was with Kevin Hartson, and told Lawton to pick him up at a nearby tavern in Kokomo, Indiana. Stitts, Lawton, and Hartson had agreed to rob a man named Jammeal that night. They planned for one of them to feign a sale of cocaine to Jammeal, during which the others would rob Jammeal of his money and pretend to rob the third member of their group of the cocaine. Hartson and Lawton picked up Stitts and his brother. Stitts directed Hartson to stop at a house on Taylor Street, presumably so that he could obtain the cocaine necessary for their plan.

Stitts returned to the car and told Hartson to turn right onto Jay Street. Hartson was speaking on a cellular phone with his friend Ray Charles, who was then in Pittsburgh, Pennsylvania. Charles heard Stitts’s voice over the cellular phone. Shortly thereafter, Stitts told Hartson to pull over. As Hartson began to pull over, Stitts said, “you all mother fuckers gonna break in my shit?” and shot Hartson twice in the head with a handgun, killing him. Tr. at 122.

On February 1, 2002, the State charged Stitts with murder. On February 5, 2002, the police searched behind a house at 1011 Taylor Street, found two handguns in the yard, and photographed one of them. Stitts filed a motion to suppress a cellular telephone and a notebook that the police had seized from his residence, as well as other evidence related to those items. The trial court denied Stitts’s motion. On August 8, 2002, a jury found Stitts guilty as charged. On September 6, 2002, the trial court sentenced Stitts to sixty years in the Department of Correction. He now appeals.

Stitts v. State, No. 34A02-0209-CR-772 slip op. pp. 2-3 (Ind. Ct. App. July 1, 2003).

In Stitts's direct appeal, this court affirmed the judgment of the trial court after concluding that Stitts failed to preserve his challenge to the trial court's denial of his motion to suppress for appeal, the improper admission of the photograph of a handgun found behind Stitts's residence was harmless, the prosecutor's comments during closing argument did not amount to prosecutorial misconduct, the evidence was sufficient to support Stitts's conviction, and the trial court did not abuse its discretion in imposing an enhanced sentence. *Id.* at 3-7. Stitts filed a petition for transfer, which was unanimously denied by the Indiana Supreme Court.

On September 1, 2004, Stitts filed a *pro se* PCR petition. On July 1, 2008, Stitts, by counsel, filed an amended PCR petition. The post-conviction court conducted an evidentiary hearing on Stitts's amended PCR petition on September 26, 2008. During this hearing, Stitts, by counsel, presented evidence in support of his amended PCR petition. On August 31, 2009, the post-conviction court issued an order denying Stitts's request for PCR. Stitts now appeals.

DISCUSSION AND DECISION

Post-conviction procedures do not afford the petitioner with a super-appeal. *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules. *Id.* A petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard

of review on appeal. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001); *Collier v. State*, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999), *trans. denied*.

Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from a denial of a PCR petition, a petitioner must convince this court that the evidence, taken as a whole, “leads unmistakably to a conclusion opposite that reached by the post-conviction court.” *Stevens*, 770 N.E.2d at 745. “It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law.” *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We therefore accept the post-conviction court’s findings of fact unless they are clearly erroneous but give no deference to its conclusions of law. *Id.*

Ineffective Assistance of Counsel

The right to effective counsel is rooted in the Sixth Amendment to the United States Constitution. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). “The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). “The benchmark for judging any claim

of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel's performance was deficient by demonstrating that counsel's representation "fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Id.* We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or most effective way to represent a client and therefore under this prong, we will assume that counsel performed adequately, and will defer to counsel's strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.* Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. *Reed*, 866 N.E.2d at 769. A petitioner may show prejudice by demonstrating that there is "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.*

A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams*, 706 N.E.2d at 154. Therefore, if we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the

adequacy of counsel's performance. *See Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002).

On appeal, Stitts contends that his trial counsel was ineffective because counsel failed to present an alibi defense, to challenge the validity of the search warrant, and to properly object to the admission of certain evidence.

A. Alibi Defense

Stitts contends that his trial counsel was ineffective for failing to present an alibi defense. Stitts, however, concedes that counsel is not necessarily ineffective for failing to present an alibi defense. *D.D.K. v. State*, 750 N.E.2d 885, 890 (Ind. Ct. App. 2001).

In the present case, Stitts's trial counsel averred that he considered raising an affirmative alibi defense on behalf of Stitts, but ultimately chose not to pursue an alibi defense because he did not "recall there being any quality witness to testify on [Stitts's] behalf as to be a believable alibi." Appellant's App. p. 43. Furthermore, the record reveals that trial counsel had strategic reasons why he chose not to present an alibi defense. Trial counsel averred that he "chose to attack the State's case on inefficiency of the evidence, based upon lack of quality alibi evidence and problems with the State's case." Appellant's App. p. 43. Trial counsel recalled that the murder weapon was never located, so he thought the lack of physical evidence linking Stitts to the crime was a more prudent attack. Trial counsel further recalled that at some juncture, a "mystery man" was placed in the car by one of the State's witnesses. Counsel averred that "[s]eizing upon that, [he] attempted to cast reasonable doubt as to whether the entire State's case was based upon fabrications of the State's witnesses, who were attempting to cover up for the 'mystery man's' murder of the

victim.” Appellant’s App. p. 43-44. The record clearly establishes that trial counsel considered raising an alibi defense but decided against it for strategic reasons.

Moreover, Stitts has failed to demonstrate that he was prejudiced by trial counsel’s decision not to present an alibi defense. The State presented eyewitness testimony establishing that Stitts was the shooter. In light of this testimony, we are unable to say that there is a reasonable probability undermining Stitts’s conviction that the outcome of his trial would have been different had trial counsel presented an alibi defense. *See Reed*, 866 N.E.2d at 769. Because we defer to counsel’s strategic and tactical decisions and because Stitts failed to demonstrate that he was prejudiced by trial counsel’s performance, we conclude that Stitts has failed to demonstrate that his counsel’s performance fell below an objective standard of reasonableness. *Id.* Counsel’s performance was not deficient in this regard.

Further, to the extent that Stitts claims that his trial counsel was ineffective for failing to investigate Stitts’s claimed alibi defense, we note that while a failure to investigate may constitute ineffective assistance, we apply a great deal of deference to counsel’s judgments when deciding a claim of ineffective assistance of counsel for failure to investigate. *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002) (quoting *Strickland*, 466 U.S. at 691).

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id. at 1283-84 (quoting *Strickland*, 466 U.S. at 690-91).

In the instant matter, we see no evidence that trial counsel's investigation fell below objective standards of reasonableness. Stitts has failed to show that trial counsel did not investigate his claimed alibi defense. The record establishes that trial counsel spoke with Stitts's father after learning that he may have been able to provide Stitts with an alibi but ultimately determined that he was not a credible witness.¹ Moreover, Timothy Harris, who Stitts also claims could have provided him with an alibi defense, did not come forward to provide any information about Stitts's whereabouts on the night of the shooting until two or three weeks prior to the post-conviction hearing. Nothing in the record indicates that trial counsel knew or even could have discovered that Harris could have provided Stitts with an alibi defense prior to trial. Trial counsel was not ineffective in this regard.

B. Validity of Search Warrant

Stitts next contends that trial counsel was ineffective for failing to challenge the validity of the search warrant issued for his room. Stitts claims that trial counsel was ineffective for not properly challenging the probable cause affidavit for the search warrant because the probable cause affidavit was unconstitutionally defective for failure to provide the issuing magistrate with all of the information known to the police concerning Lawton. Specifically, Stitts argues that the probable cause affidavit contained "nothing that would establish Lawton's credibility or show through other means that the information he provided

¹ Nothing in the record indicates when trial counsel was informed that Stitts's father might be able to provide Stitts with an alibi defense, and as a result, we do not believe that trial counsel's failure to speak with Stitts's father until days before the start of trial indicates that trial counsel failed to investigate Stitts's claimed alibi defense.

[was] reliable,” the affidavit misrepresents the number of times police spoke with Lawton, and the affidavit omitted one witness’s statement that she saw four individuals fleeing the vehicle. Appellant’s Br. pp. 32-33. As a result of the search, police confiscated items of clothing from Stitts’s room which they felt might have blood on them, including a black leather coat. A cellular phone and a small address book were found in a zipped pocket in the coat. The State subsequently sought and received a search warrant for the phone’s records. The phone records revealed phone conversations between Stitts and Hartson which occurred prior to the shooting.

In deciding whether to issue a search warrant, the task of the issuing magistrate when receiving a request for a search warrant is to make a common sense determination, based on the totality of the circumstances, that there is a fair probability that a particular place contains evidence of a crime. *Query v. State*, 745 N.E.2d 769, 771 (Ind. 2001) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). All that is required to establish probable cause is a probability or substantial chance of criminal activity, not an actual showing of criminal activity. *Eaton v. State*, 889 N.E.2d 297, 299 (Ind. 2008). In other words, the affidavit provides a sufficient basis of fact to permit a reasonably prudent person to believe that a search of the indicated premises will result in the uncovering of evidence of a crime. *Lundquist v. State*, 834 N.E.2d 1061, 1070 (Ind. Ct. App. 2005).

The duty of the reviewing court is to determine whether the magistrate had a “substantial basis” for concluding that probable cause existed for a warrant authorizing the search of seizure, and doubtful cases are to be resolved in favor of upholding the warrant.

Mitchell v. State, 745 N.E.2d 775, 783 (Ind. 2001) (citing *Gates*, 462 U.S. at 236-39 & n.10). In determining whether a substantial basis exists, the reviewing court, with significant deference to the magistrate's determination, must "focus on whether reasonable inferences drawn from the totality of the evidence support the determination." *Id.* (quoting *Houser v. State*, 678 N.E.2d 95, 99 (Ind. 1997)). Doubtful cases are to be resolved in favor of upholding the warrant. *Mehring v. State*, 884 N.E.2d 371, 377 (Ind. Ct. App. 2008). Additionally, we will not invalidate a warrant by interpreting probable cause affidavits in a hypertechnical, rather than commonsense, manner. *Id.*

On appeal, Stitts claims that trial counsel should have challenged the search warrant authorizing a search of his room on the basis that the probable cause affidavit failed to contain all of the material facts known to the police, misstated facts, omitted facts, and failed to establish Lawton's credibility. The Indiana Supreme Court has stressed the importance of accurately presenting all relevant information to the magistrate in order to allow the magistrate to make the neutral and detached determination regarding probable cause required by both the U.S. and Indiana Constitutions. *See Jagers v. State*, 687 N.E.2d 180, 185 (Ind. 1997). However, mistakes and inaccuracies in a probable cause affidavit for a search warrant will not vitiate the reliability of the affidavit so long as the mistakes were innocently made. *Mitchell*, 745 N.E.2d at 785. The party alleging that the mistakes were not innocent must make a substantial showing that the facts were included or omitted in reckless disregard for the truth. *Id.* (citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)).

Upon review, we conclude that Stitts failed to demonstrate that he was prejudiced by

trial counsel's alleged error. At trial, the State relied heavily on Lawton's eyewitness testimony identifying Stitts as the shooter. Lawton's eyewitness testimony regarding the shooting was independent of and unrelated to the clothing and phone records that were found following the execution of the search warrant for Stitts's room. Because the evidence of Stitts's guilt came almost exclusively from an eyewitness to the shooting, we are unable to say that the outcome of Stitts's trial would have been different but for trial counsel's failure to challenge the validity of the search warrant. *See Reed*, 866 N.E.2d at 769. Therefore, Stitts has failed to show that he was prejudiced by trial counsel's alleged error. Trial counsel was not ineffective in this regard. *See Williams*, 706 N.E.2d at 154 (providing that a petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail); *see Wentz*, 766 N.E.2d at 360 (providing that we need not address the adequacy of counsel's performance if we can resolve a claim of ineffective assistance of counsel based on lack of prejudice).

C. Suppression of Evidence

Stitts also contends that trial counsel was ineffective for failing to properly object to the admission of the records retrieved from that cellular phone which Stitts argues was improperly seized during the search of his room.² The Fourth Amendment to the United States Constitution reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no

² We note that Stitts trial counsel objected to the admission of the cellular phone records outside of the presence of the jury on the first day of trial. This objection was overruled. Trial counsel did not subsequently renew his objection to the admission of these records during trial.

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The text of Article I, Section 11 of the Indiana Constitution contains nearly identical language. *Query v. State*, 745 N.E.2d 769, 771-72 (Ind. 2001). These principles are codified in Indiana Code section 35-33-5-2 (2009), which details the information to be contained in an affidavit for a search warrant. *Id.* at 772. “Specifically, the statute provides that the affidavit must describe with particularity the ‘house or place to be searched and the things to be searched for ... alleging substantially the offense in relation thereto and that the affiant believes and has good cause to believe that ...the things as are to be searched for are there concealed...’” *Id.* (quoting Ind. Code § 35-33-5-2).

Again, in order to successfully bring a claim of ineffective assistance of counsel, the petitioner must prove both that counsel’s performance was deficient and also that he suffered prejudice as a result of the counsel’s deficient performance. *Reed*, 866 N.E.2d at 769. Failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *Williams*, 706 N.E.2d at 154. Here, we again conclude that Stitts has failed to prove that he was prejudiced as a result of trial counsel’s allegedly deficient performance. The evidence of Stitts’s guilt came almost exclusively from an eyewitness to the shooting who identified Stitts as the shooter. In light of this testimony, we are unable to say that the outcome of Stitts’s trial would have been different but for trial counsel’s failure to challenge the admission of the cellular phone records during trial. *See Reed*, 866 N.E.2d at 769. Stitts, therefore, has failed to show that he was prejudiced by trial counsel’s alleged error. Having concluded that Stitts

has failed to show that he was prejudiced by trial counsel's alleged error, we need not determine whether counsel's performance was deficient. *See Wentz*, 766 N.E.2d at 360 (providing that we need not address the adequacy of counsel's performance if we can resolve a claim of ineffective assistance of counsel based on lack of prejudice). Trial counsel was not ineffective in this regard.

In sum, we conclude that Stitts has failed to establish that he suffered from ineffective assistance of trial counsel. Trial counsel was not ineffective for failing to present an alibi defense, for failing to challenge the validity of the search warrant, or for failing to properly object to the admission of certain evidence derived from the search of Stitts's room.

The judgment of the post-conviction court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.