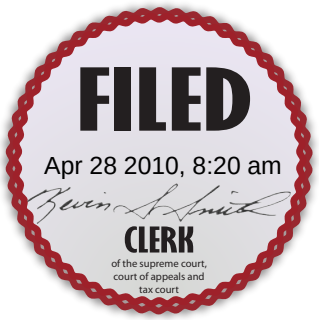

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IN THE
COURT OF APPEALS OF INDIANA

REGINALD DOSS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 45A03-0910-PC-449
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence Murray, Judge
Cause No. 45G02-0703-PC-6

April 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Reginald Doss appeals the denial of his petition for post-conviction relief. We affirm.

Issues

Doss raises two issues, which we restate as:

I. whether he received ineffective assistance of trial counsel; and

II. whether he received ineffective assistance of appellate counsel.

Facts[1]

On July 9, 10, 11, and 21, 2003, Detective Irving Givens of the Gary Police Department conducted surveillance and used a confidential informant ("CI") to purchase cocaine from Doss at room 27 in the Plaza Hotel in Gary. On July 31, 2003, Detective Givens applied for a search warrant for rooms 27 and 53 based on his surveillance and the controlled buys, and a search warrant was issued that day. That evening, prior to the execution of the warrant, Detective Givens asked a different CI to make two controlled buys at rooms 27 and 53. The CI first purchased cocaine from someone in room 53. Then the CI spoke to Doss and purchased five baggies of cocaine from him. Later that evening, Detective Givens executed the search warrant. A search of Doss, who had been in room 27, revealed a pill bottle containing several plastic baggies of an off-white rock-like substance, a plastic bag containing forty individually wrapped baggies containing an

[1] The facts are drawn in large part from our decision in Doss v. State, No. 45A03-0405-CR-227 (Ind. Ct. App. Feb. 16, 2005).

off-white rock-like substance, and $340 in cash, including money the CI had used to purchase the cocaine.

On August 2, 2003, the State charged Doss with Class A felony dealing in cocaine and Class B felony dealing in cocaine. The State later alleged that Doss was an habitual offender. Doss, by counsel, moved to suppress evidence, arguing that the search warrant was stale because it was based on transactions that occurred ten days before its issuance. The motion to suppress was denied, and a jury found Doss guilty of Class A felony dealing in cocaine and found him to be an habitual offender. On direct appeal, appellate counsel challenged the search warrant on the issue of staleness, the admission of uncharged acts, the impartiality of the trial court judge, and the amendments of the habitual offender allegation. We affirmed Doss's conviction and the habitual offender finding. Doss v. State, No. 45A03-0405-CR-227 (Ind. Ct. App. Feb. 16, 2005).

Doss then sought post-conviction relief, alleging there was an insufficient basis for the search warrant and that the search warrant was fraudulently issued. Following a hearing, at which Doss proceeded pro se, the post-conviction court denied his petition. Doss now appeals pro se.

Analysis

Doss argues that trial counsel and appellate counsel were ineffective for failing to properly challenge the search warrant. A post-conviction petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Helton v. State, 907 N.E.2d 1020, 1023 (Ind. 2009) (citing Ind. Post-Conviction Rule 1(5)). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear

error in a factual determination or error of law." Id. To establish a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel performed deficiently and the deficiency resulted in prejudice. Id. "If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient." Id.

I. Trial Counsel

Doss argues that trial counsel was ineffective for failing to challenge the affidavit used to support the search warrant in a motion to suppress. Doss claims the affidavit was insufficient because the CI was not searched after each controlled buy, the affidavit was based on hearsay from an unreliable source, Detective Givens did not see the CI go in room 27, and Detective Givens did not corroborate the CI's information by checking the guest registry. Doss also argues that trial counsel should have argued in a motion to suppress that the search warrant was not lawfully issued because it was not on file with the clerk's office in 2007.

Deficient performance is representation that falls below an objective standard of reasonableness, committing errors so serious that the defendant did not have the counsel guaranteed by the Sixth Amendment. State v. McManus, 868 N.E.2d 778, 790 (Ind. 2007), cert. denied, 128 S. Ct. 1739 (2008). Thus, we focus on the attorney's actions while remembering that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Id. In fact, there is a strong presumption that counsel rendered adequate assistance. Id.

As for Doss's arguments regarding the controlled buy, he has not established that trial counsel's decision not to include that as a basis for suppression fell below an objective level of reasonableness. In the three-page affidavit for a search warrant, Detective Givens detailed four controlled buys involving the same CI. The affidavit states that on each occasion Detective Givens discussed purchasing cocaine from a black male named "Reggie" in room 27, searched the CI, provided the CI with money, and used an audio recording device to monitor the transactions. Detective Givens observed the CI enter and exit the hotel, and the CI returned with a substance that tested positive for cocaine. On each occasion, the CI explained that he or she went to room 27, asked for "Reggie," and "Reggie" gave the CI what appeared to be cocaine in exchange for money.

In describing controlled buys, we have observed:

> A controlled buy consists of searching the person who is to act as the buyer, removing all personal effects, giving him money with which to make the purchase, and then sending him into the residence in question. Upon his return he is again searched for contraband. Except for what actually transpires within the residence, the entire transaction takes place under the direct observation of the police. They ascertain that the buyer goes directly to the residence and returns directly, and they closely watch all entrances to the residence throughout the transaction. Thus, where the controls are adequate, the affiant's personal observation of a controlled buy may be sufficient as grounds for finding probable cause. Under such circumstances, even where the informant is not reliable, a court may accept the personal observations of the attesting officer as establishing probable cause.

Methene v. State, 720 N.E.2d 384, 389-90 (Ind. Ct. App. 1999) (quoting Flaherty v. State, 443 N.E.2d 340, 341 (Ind. Ct. App. 1982) (citations and emphasis omitted).

Even if the CI was not searched after the transactions and Detective Givens did not see the CI enter room 27, we cannot say that the affidavit did not support the issuance of a search warrant and that the evidence discovered during the search would have been suppressed. Courts reviewing a motion to suppress are to focus on whether a "substantial basis" existed for a warrant authorizing a search or seizure, and doubtful cases are to be resolved in favor of upholding the warrant. Iddings v. State, 772 N.E.2d 1006, 1012 (Ind. Ct. App. 2002), trans. denied. A search warrant is presumed to be valid, and the burden is upon the defendant to overturn that presumption. Id. Based on the various controls described in the affidavit, it is clear that a substantial basis for the search warrant existed. Trial counsel was not ineffective for not raising these issues in the motion to suppress.

As for failing to challenge the hearsay and lack of corroboration of the CI's accusations, indeed, "[u]ncorroborated hearsay from a source whose credibility is unknown cannot support a finding of probable cause to issue a search warrant." Id. at 1013. Contrary to Doss's assertions, however, the search warrant was not based on uncorroborated hearsay statements of the CI. Instead, it was based on Detective Givens's observation of the four controlled buys. See Methene, 720 N.E.2d at 390. In that sense, the very nature of the controlled buys corroborated the CI's assertions that he or she had purchased drugs from Doss. Doss has not established that trial counsel's decision not to raise these issues fell below an objective standard of reasonableness.

As for the issue of the authenticity of the search warrant, Doss argues, "there is no proof that an affidavit or search warrant was filed with Judge Inga-Lewis Shannon." Appellant's Br. p. 17. Doss's argument appears to be based on the fact that in 2007 he

requested a copy of the warrant from the clerk, and the clerk responded with a fax that her office did not have any information pertaining to the search warrant. On appeal, Doss points to no other irregularity with the warrant and does not refute the fact that the warrant could have been filed with the trial court judge instead of the clerk's office, which is consistent with Detective Givens's deposition testimony. Without more, Doss has not shown that trial counsel's failure to raise this issue in a motion to suppress fell below an objective standard of reasonableness. Doss has not established that he received ineffective assistance of trial counsel.

II. Appellate Counsel

Doss also argues that appellate counsel was ineffective for failing to raise the issue of the defective affidavit and failing to challenge the authenticity of the search warrant. "The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the petitioner must show appellate counsel was deficient in performance and that the deficiency resulted in prejudice." Ritchie v. State, 875 N.E.2d 706, 723 (Ind. 2007). "When raised on collateral review, ineffective assistance claims generally fall into three basic categories: (1) denial of access to an appeal, (2) waiver of issues, and (3) failure to present issues well." Id.

Doss's claims fall into the second category. "Ineffectiveness is very rarely found in these cases because 'the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.'" Id. at 723-24 (quoting Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997), cert. denied, 525 U.S. 1021, 119 S. Ct. 550 (1998)). As such, our review is particularly deferential to counsel's strategic decision to

exclude certain issues in favor of others. Id. 724. "We first look to see whether the unraised issues were significant and obvious upon the face of the record." Id. If so, we compare the unraised obvious issues to those raised by appellate counsel, finding deficient performance only when ignored issues are clearly stronger than those presented. Id. If deficient performance by counsel is found, we turn to the prejudice prong to determine whether the issues appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial. Id.

For the reasons discussed above, we cannot say that the alleged errors with the search warrant were clearly stronger than the other issues presented on appeal. Without more, Doss has not established that appellate counsel overlooked a significant and obvious error. Doss has not shown that he received ineffective assistance of appellate counsel.

Conclusion

Doss has not established that he received ineffective assistance of trial counsel or appellate counsel. We affirm.

Affirmed.

BAILEY, J., and MAY, J., concur.