

Appellant/Petitioner Rosheen Smith appeals the denial of his petition for post-conviction relief (“PCR”), claiming ineffective assistance of counsel. Specifically, Smith argues that his counsel was ineffective because he failed to seek suppression of all of the evidence derived from the investigatory stop, and also because he failed to request that DNA testing be performed on the clothing and scissors recovered from Smith’s ex-girlfriend’s home. We affirm.

FACTS AND PROCEDURAL HISTORY

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

At approximately 12:30 a.m. on August 13, 2001, Smith approached Linda Minton as she was outside with her two dogs. Smith engaged Minton in a brief conversation, during which he told her he had been out jogging and requested a glass of water. Minton went inside her apartment to obtain a glass of water for Smith, closing the screen door behind her after she entered. Minton went into the kitchen, poured a glass of water, and as she turned to take it out to Smith, she found Smith standing there in her apartment. Minton had not invited Smith inside.

Smith grabbed Minton around the neck, picked up a pair of scissors from the kitchen table, jabbed them into her right side, and forced her into a chair in the living room. Smith then began to masturbate and forced Minton to touch his penis. Smith decided he did not want the lights on and while he went to turn them off, Minton tried to escape. Smith caught her, and a struggle ensued. Smith overpowered Minton and forced her back into the chair. Smith started to expose his penis again but then abruptly changed his mind and left.

Minton called the police to report these events. Goshen Police Officer Nemwel Campos responded to the call. Officer Campos noticed that Minton had slight cuts and abrasions on her face, as well as on her side, and she was visibly shaken. Minton described her attacker as a black male with a shaved head who was approximately five feet, six inches to five feet, eight inches tall. Additionally, Minton told the police that her attacker was wearing a red tank top and red shorts.

Officer Campos, along with other members of the Goshen Police Department, began to canvass the area for Minton’s attacker. Officer Campos

spotted an individual matching the description given by Minton but was unable to catch up with him. At approximately 3:00 a.m., Officer Daniel Young observed Smith walking in the general vicinity of Minton's apartment. With the exception that he had on different clothing than described by Minton, Smith matched Minton's earlier description. Officer Young informed Smith that he matched the description of a suspect they were looking for and asked if he would be willing to have the victim look at him to clear him of suspicion. Smith agreed to this viewing, and Officer Campos brought Minton over to determine whether she could identify Smith as her attacker. Minton informed Officer Campos that Smith looked like the person who attacked her, but she noted that he was wearing different clothing. In addition to the show-up, the Goshen Police also asked Minton to attempt to identify her attacker from a photo array later that day. Minton selected Smith's photo from the array.

Following Minton's identification of Smith as her attacker at the show-up, the police asked Smith where he lived. Smith informed the officers that he had been staying with an ex-girlfriend, Tricia Simons, at her apartment and took them there. When the police arrived at the apartment, Tricia's daughter answered the door. Tricia's daughter and her friend had been in the apartment since about ten or eleven that evening. The two told police that Smith had left the apartment right after getting off the phone with Tricia who had called to check-in during her break, which was from 12 – 12:30 a.m., and that when Smith left he was wearing a red tank top and red shorts.

The police contacted Tricia at work, after which she left work and returned to her apartment. Tricia went to her bedroom and located a red tank top and red shorts, unfolded and stuffed in her top drawer; however, Tricia told the police that she had laundered these items earlier in the day, folded them, and placed them in her second drawer. Additionally, Tricia reported that the garments she removed from the top drawer smelled of sweat. Subsequently, the police obtained a search warrant, seized the clothes, and recovered a pair of scissors in the bedroom wastebasket. Tricia informed the police that the scissors were not hers. Later, Minton identified these scissors as the ones that her attacker had taken from her kitchen table.

Based on the foregoing, the State charged Smith with Count I, Burglary Resulting in Bodily Injury as a Class A felony, Count II, Battery with a Deadly Weapon as a Class C felony, Count III, Criminal Confinement with a Deadly Weapon as a Class C felony, and Count IV, Sexual Battery with a Deadly Weapon as a Class C felony. The jury convicted Smith as charged. Following his convictions, Smith filed a motion to correct error, alleging newly discovered evidence that the prosecutor suppressed evidence favorable to the defense. In particular, Smith alleged that the prosecutor and lead detective on the case pointed out Smith to Minton on the morning of the trial and indicated that he was her attacker. In supported of these allegations, Smith tendered

affidavits from three of his friends. The trial court denied this motion. [Smith's] appeal ensued.

Smith v. State, No. 20A03-0207-CR-224 (Ind. Ct. App. May 16, 2003). Following the guilty verdict, the trial court sentenced Smith to an aggregate term of seventy years.

In Smith's direct appeal, this court affirmed the judgment of the trial court after concluding that the trial court did not err in denying Smith's motion to correct error or in permitting evidence regarding the photo array, and that the evidence was sufficient to satisfy the breaking element of the burglary charge. *Id.* Smith filed a petition for transfer, which was unanimously denied by the Indiana Supreme Court.

On March 4, 2004, Smith filed a *pro se* petition seeking post-conviction relief. On March 15, 2005, Smith, by counsel, filed a subsequent petition seeking post-conviction relief. The post-conviction court conducted an evidentiary hearing on Smith's petition on January 8, 2009. During this hearing, Smith, by counsel, presented testimony in support of his petition for post-conviction relief. On April 30, 2009, the post-conviction court issued an order denying Smith's request for post-conviction relief. Smith 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 petition for post-conviction relief, 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, Smith contends that his trial counsel was ineffective because counsel failed to seek suppression of all of the evidence derived from the investigatory stop, and also because counsel failed to request that DNA testing be performed on the clothing and scissors recovered from Smith's ex-girlfriend's home.

A. Suppression of Evidence

Smith first contends that his trial counsel was ineffective because counsel failed to seek suppression of all of the evidence derived from Officer Young's investigatory stop of Smith. Smith claims that Officer Young's investigatory stop of Smith was improper because at the time of the stop, approximately two hours had passed since the attacker had left the victim's home, and Smith was not wearing the clothes described by the victim.

An officer has the authority to stop a person for investigatory purposes if the officer has a reasonable suspicion of criminal activity. *Williams v. State*, 754 N.E.2d 584, 587 (Ind. Ct. App. 2001) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)), *trans. denied*. Reasonable suspicion is satisfied where the facts known to the officer together with the reasonable inference arising from such facts, would cause an ordinarily prudent person to believe that criminal activity has or is about to occur. *Id.* Considering the totality of the circumstances, we determine what constitutes reasonable suspicion on a case-by-case basis. *Person v. State*, 764 N.E.2d 743, 748 (Ind. Ct. App. 2002), *trans. denied*. However, reasonable suspicion must be an objective determination that is more than an inchoate and unparticularized suspicion or hunch, but it is less than proof of wrongdoing by a preponderance of the

evidence. *Id.* The reasonableness of the officer's suspicion should take into account the officer's "experience and expertise" in assessing the meaning of the existing facts and circumstances. *Carter v. State*, 692 N.E.2d 464, 467 (Ind. Ct. App. 1997).

The facts relating to the investigatory stop demonstrate that the victim gave a detailed description of the attacker to police immediately following the attack. The police saw a man matching the description near the home where Smith was staying but were unable to catch up with him. Approximately two hours later, Officer Young saw Smith walking in an alley near the victim's apartment. Smith was not wearing the red clothes worn by the attacker at the time of the attack but otherwise matched the victim's description of her attacker. Officer Young approached Smith, informed him that he matched the description of a suspect they were looking for, and asked if he would be willing to have the victim look at him to clear him of suspicion. Smith agreed. Further, with regard to the investigatory stop, Smith's trial counsel testified during the post-conviction hearing as follows:

I remember that he was stopped because he met the general description of a person -- of the person that did the -- that allegedly committed the crime, and he -- that was my understanding. And my understanding was that the -- that Rosheen voluntarily went to the -- and I think that's consistent with my memory, but again, it's -- it's been a long time. I believe Rosheen agreed to go to the police.

PCR Tr. p. 12.

These facts indicate that Smith consented to the investigatory stop. Moreover, even if Smith did not consent to the investigatory stop, the facts and circumstances surrounding the stop indicate that Officer Young had reasonable suspicion to stop Smith, who matched the

general description of the attacker and was seen walking in the general area within hours of the attack. Thus, we conclude that Smith has failed to show that the investigatory stop was improper and that any motion to suppress the evidence derived from the investigatory stop would be successful. Smith, therefore, has failed to show that he suffered prejudice as a result of his trial counsel's alleged deficient performance. Because Smith failed to meet his burden of proving that he was prejudiced by his counsel's alleged errors, we conclude that Smith's counsel was not ineffective in this regard.

B. DNA Testing

Smith next contends that his trial counsel was ineffective for failing to request that DNA testing be performed on the clothing and scissors recovered from Smith's ex-girlfriend's home. Smith claims that the absence of his DNA on the clothing and scissors recovered from his ex-girlfriend's home would "have gone a long way to contradict the identification evidence to create reasonable doubt as to Smith being the attacker." Appellant's Br. pp. 18-19. In making this claim, however, Smith acknowledges that the absence of either his or the victim's DNA on these items "would not have been 100% exculpatory in light of the victim's identification of Smith as her attacker." Appellant's Br. p. 18. In fact, DNA testing could have buttressed the State's case against Smith if his DNA had been discovered on these items. Smith's trial counsel testified at the post-conviction hearing that while he did not have any independent recollection as to why DNA testing was not done, he could only assume it was a trial strategy decision. This testimony is supported by counsel's argument at trial that the State lacked any DNA evidence linking Smith to the

attack. We defer to counsel's strategic and tactical decisions, but consider whether said decisions resulted in prejudice to Smith. *Smith*, 765 N.E.2d at 585.

Here, the victim identified Smith as her attacker within hours of the attack. The victim also testified that the scissors recovered from Smith's ex-girlfriend's home were the same scissors used by Smith during the attack. Additionally, Smith's ex-girlfriend's daughter testified that she saw Smith leave the house wearing the clothes in question, and Smith's ex-girlfriend testified at trial that the scissors found in her home did not belong to her. Given the victim's multiple identifications of Smith as her attacker, the testimony of the victim, Smith's ex-girlfriend and Smith's ex-girlfriend's daughter, as well as Smith's acknowledgement that the lack of either his or the victim's DNA on the clothing or the scissors would not have necessarily been exculpatory in light of the victim's identification of Smith as her attacker, we conclude that Smith failed to demonstrate that there was a reasonable probability that the result of his trial could have been different but for counsel's alleged error.¹ Smith's counsel was not ineffective in this regard.

In sum, we conclude that Smith's counsel was not ineffective for failing to seek suppression of the evidence derived from the investigatory stop of Smith by Officer Young or for failing to request that DNA testing be performed on the clothing and scissors recovered from Smith's ex-girlfriend's home.

The judgment of the post-conviction court is affirmed.

¹ It also seems highly probable based on this evidence that Smith's DNA may have actually be found on the clothing and the scissors.

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