

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.

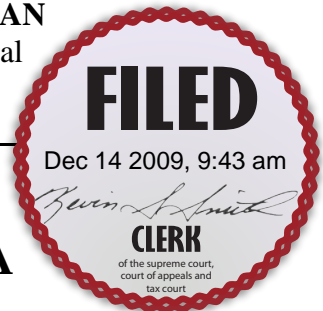
APPELLANT PRO SE:

**KEITH C. JENKINS**  
Carlisle, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**GEORGE P. SHERMAN**  
Deputy Attorney General  
Indianapolis, Indiana



---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

KEITH CORTEZ JENKINS, )

Appellant-Petitioner, )

vs. )

No. 82A01-0903-PC-118

STATE OF INDIANA, )

Appellee-Respondent. )

---

APPEAL FROM THE VANDERBURGH SUPERIOR COURT  
The Honorable Robert J. Pigman, Judge  
Cause No. 82D01-0101-CF-47

---

**December 14, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-petitioner Keith Cortez Jenkins appeals the denial of his petition for post-conviction relief, claiming ineffective assistance of trial counsel. Specifically, Jenkins argues that his trial counsel was ineffective because he: 1) failed to ask the trial court to disregard a self-reported domestic battery incident that was included in the pre-sentence investigation report; 2) failed to call two witnesses to testify on his behalf at trial; 3) did not object to the admission of a tape recording of an alleged drug deal that occurred on December 26, 2000; and 3) failed to object to the admission of a map showing the location of the residence where the drug deals transpired. Concluding that Jenkins has failed to show that his trial counsel was ineffective, we affirm the denial of his petition for post-conviction relief.

#### FACTS

On December 5, 2000, Evansville Police Department Detectives gave a confidential informant (C.I.) \$300 in “buy money” and drove him to a residence where Jenkins was selling crack cocaine. Tr. p. 5-6, 34-35, 47, 63. The house is located within 1000 feet of a public park.

The C.I. purchased the drugs, returned to the vehicle, and handed the cocaine to the police officers. On December 22, 2000, and December 26, 2000, the police gave the C.I. \$200 and \$220 in additional buy money. The C.I. purchased cocaine again from Jenkins on both occasions. The C.I. was supplied with a transmitting device, and all three transactions were audiotaped.

Subsequent laboratory tests revealed that the substance the C.I. purchased from Jenkins on each occasion was cocaine. The cocaine that was purchased in the initial transaction weighed 1.42 grams, the drugs purchased in the second weighed 1.72 grams, and the cocaine that Jenkins sold to the C.I. in the third transaction weighed 1.39 grams. As a result of these transactions, Jenkins was charged with three counts of dealing in cocaine within 1000 feet of a public park, a class A felony.

Prior to trial, Jenkins purportedly told his trial counsel that he wanted William Toller and James Buford to testify on his behalf. According to Jenkins, both men would testify that he never “set up a crack house,” as the State had alleged, and that “drugs were sold from the residence even after he was arrested.” Appellant’s Br. p. 10. Jenkins’s trial counsel did not speak to Buford because he had “disappeared after being present one day at trial and could not be located.” P.C. Tr. p. 8. Trial counsel was also not able to locate Toller.

Following a jury trial on July 17, 2001, Jenkins was found guilty as charged on two counts and acquitted on the remaining count. During the sentencing hearing, the presentence report indicated that a domestic battery charge had been filed against Jenkins, but its disposition was unknown. When the trial court asked Jenkins about the presentence report, he made no comment about the domestic battery case. After the trial court identified various aggravating circumstances, which included prior felony and misdemeanor convictions, Jenkins was sentenced to forty-five years on each count, to be served concurrently. Jenkins appealed his sentence to this court, and we affirmed the trial

court's judgment in all respects. Jenkins v. State, No. 82A01-0109-CR-00345 (Ind. Ct. App. May 17, 2002).

On June 2, 2008, Jenkins filed an amended petition for post-conviction relief,<sup>1</sup> claiming that his trial counsel was ineffective for the reasons set forth above. Following an evidentiary hearing on January 20, 2009, the post-conviction court determined that Jenkins's trial counsel was not ineffective, denied his request for relief, and entered findings of fact and conclusions of law. Jenkins now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

We initially observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

---

<sup>1</sup> Jenkins filed his initial petition for post-conviction relief on January 28, 2008.

## II. Jenkins's Claims—Ineffective Assistance of Counsel

In addressing Jenkins's claim that the post-conviction court erred in concluding that trial counsel was not ineffective, we note that when evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998). Finally, if a claim of ineffective assistance of counsel can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

### A. Domestic Violence Charge

Jenkins first argues that his trial counsel was ineffective because he did not ask the trial court to disregard some “inaccurate information” regarding a domestic battery case that was included in the pre-sentence investigation report. Appellant’s Br. p. 6. Jenkins claims that he directed his counsel to ask the trial court to correct some of the information in the pre-sentence report regarding that charge, but that counsel failed to do so. As a result, Jenkins claims that the information prejudiced him because it served as a basis for enhancing his sentence.

We first note that, although Jenkins contends that he discussed the matter with his trial counsel prior to the sentencing hearing, counsel testified at the post-conviction hearing that he had no recollection of such a conversation. PC Tr. p. 10-14. Moreover, Jenkins’s claim is belied by the fact that when the trial court inquired about the pre-sentence report, Jenkins made no comment about an alleged domestic battery charge. Id. at 152.

Moreover, Jenkins has failed to show any prejudice with regard to this issue because the pre-sentence report indicated that the disposition of the case was unknown. Id. at 12. Indeed, it is unlikely that the trial court attributed any significance to that charge when compared with Jenkins’s criminal history, which includes three prior felony convictions and several misdemeanor convictions. Tr. p. 61. Finally, we did not mention the domestic battery charge when reviewing Jenkins’s challenge to the reasonableness of the sentence on direct appeal. Jenkins, slip op. at 9. As a result, we conclude that the

post-conviction court properly concluded that Jenkins's trial counsel was not ineffective on this basis.

### B. Failure to Call Witnesses

Jenkins next argues that his trial counsel was ineffective for failing to call Toller and Buford to testify at trial on his behalf. Jenkins maintains that their testimony would have established that he had not "set up a crack house" at the residence, and that "drugs were sold from the residence even after he was arrested." Appellant's Br. p. 10. Moreover, Jenkins contends that because he went to the residence to sell drugs only at the C.I.'s request, he argues that Toller and Buford's testimony would have established a defense under Indiana Code section 35-48-4-16<sup>2</sup> and his convictions could have been reduced to class B felonies.

Trial counsel testified at the post-conviction hearing that he attempted to locate Toller, but was unable to do so. PC Tr. p. 8. Moreover, trial counsel testified that he was not able to speak to Buford because Buford disappeared after the first day of trial. *Id.* In light of these circumstances, Jenkins has failed to show that his trial counsel rendered deficient performance by not calling Buford and Toller to testify.

Moreover, even assuming that Jenkins's trial counsel was able to establish deficient performance with regard to this issue, his contention that he "could not just walk in [the] residence every day and sell drugs," *id.* at 22, is belied by the fact that the

---

<sup>2</sup> This statute provides a partial defense to the charge of dealing cocaine within 1,000 feet of a public park, permitting defendant to avoid being convicted of a class A felony under Indiana Code section 35-48-4-1(b)(3)(B)(ii) if the transaction occurred within 1,000 feet of a public park at the request or suggestion of a law enforcement officer or an agent of a law enforcement officer.

evidence presented at trial showed that Jenkins was at the house almost every day, with no prompting by the police or the C.I. Detective Cliff Simpson conducted surveillance of the house “almost every day” from the end of August through January. Tr. p. 66. During that time, Detective Simpson saw “Jenkins coming and going from [the residence] almost every single day.” Id. Moreover, Detective Simpson saw Jenkins use a key to enter the house on several occasions. Id. Detective Simpson also observed “up to twenty people” coming and going from the house, and, based upon his experience, believed that this level of vehicular and foot traffic was consistent with selling narcotics. Id.

In light of this evidence, we cannot say that there was a reasonable probability that, had trial counsel been able to locate Toller and Buford and offer their testimony at trial, the fact finder would have found that Jenkins was at the residence because of law enforcement. Rather, Detective Simpson’s testimony established that Jenkins was at the house everyday on his own accord.

Finally, Jenkins asserts that if Buford and Toller had testified that he did not live at the location of the drug deals, the trial court would not have concluded at the sentencing hearing that he had set up a “crack house.” Appellant’s Br. p. 10. However, as we observed in Jenkins’s direct appeal, “[g]iven that Jenkins had unlimited access to the residence, and that several of his associates from East St. Louis were also present when the confidential informant purchased drugs there, it was reasonable for the trial court to infer that Jenkins had ‘set up’ a crack house in Evansville.” Jenkins, slip op at 7 n.3.



Following this rationale, we conclude that Jenkins has failed to show that trial counsel was ineffective on this basis.

### C. Recording of Drug Transaction

Jenkins next argues that his trial counsel was ineffective for failing to object to the admission of the taped drug transaction that occurred on December 26, 2000. Specifically, Jenkins contends that trial counsel should have objected because the evidence showed that Detective Simpson did not “connect Jenkins’ voice to the buy tape.” Appellant’s Br. p. 10.

Contrary to Jenkins’s claims, the evidence shows that before the drug transactions took place, Detective Simpson spoke with Jenkins for thirty minutes and, as a result, was familiar with Jenkins’s voice. Tr. p. 63, 75. When the first tape was played at trial, Detective Simpson identified Jenkins’s voice for the jury. Id. at 63. Detective Simpson further testified that Jenkins’s voice was present on all three recordings. Id. Thus, because Detective Simpson identified Jenkins’s voice on the first tape that was played to the jury, it was not necessary for him to do so again when the third tape was played because the jury would also have been familiar with Jenkins’s voice. As a result, Jenkins’s claim that his trial court rendered deficient performance by failing to object to the admission of the third tape fails.

Additionally, even assuming that Jenkins could demonstrate that the State failed to lay an adequate foundation for admission of the third tape, he cannot show prejudice as a result of trial counsel’s lack of objection. More specifically, even if trial counsel had

objected, and the trial court sustained the objection, the State would have had the opportunity to question Detective Simpson further, and he would have again identified Jenkins's voice for the jury. As a result, Jenkins's claim fails.

#### D. Admission of Map

Finally, Jenkins argues that his trial counsel was ineffective because he failed to object to the admission of a map that shows the location of the residence where the drug deals occurred and its proximity to a public park. Specifically, Jenkins argues that the map was "altered," and the State presented inadmissible hearsay evidence to establish "who had prepared the map or who had placed the circle on the map." Appellant's Br. p. 11.

Jenkins directs us to Sparkman v. State, 722 N.E.2d 1259, 1263 (Ind. Ct. App. 2000), where it was determined that a surveyor's map was improperly admitted into evidence because it did not "evinced the requisite trustworthiness to remain within the public records exception to hearsay under" Indiana Evidence Rule 803(8). In Sparkman, the trial court admitted the map into evidence absent any testimony about the contents of the map or how it was prepared. Id.

In this case, the Evansville City Engineer (Engineer) testified that his office had prepared the map and used a software program known as AutoCAD in determining the 1,000 foot radius around the park. Tr. p. 103. The Engineer also testified that he relies on similar maps on a daily basis in carrying out his professional responsibilities. Id.

Although Jenkins does not challenge the trustworthiness of the original map, he claims that the inclusion of the 1,000-foot radius that was drawn on the map rendered it untrustworthy. However, Jenkins did not offer any evidence at the post-conviction hearing calling into question the manner in which the map was prepared. Moreover, Jenkins assumes that if his counsel had objected to the map and the trial court sustained the objection, its admission into evidence would have necessarily been barred. However, had Jenkins objected, the State would have been afforded the opportunity to pose additional questions to the Engineer regarding the map's preparation and accuracy. See Mullins v. State, 646 N.E.2d 40, 48 (Ind. 1995) (observing that "had objection been made to the lack of a proper foundation in this case, such foundation could then have been supplied").

In this case, because Jenkins did not offer any evidence at the post-conviction hearing challenging the map's accuracy, he has failed to demonstrate that the prosecutor could not have presented additional evidence to lay a foundation for the map's admissibility if an objection had been made. As a result, Jenkins has not established the requisite prejudice regarding the lack of objection by trial counsel, and his claim of ineffective assistance of counsel on this basis fails.

The judgment of the post-conviction court is affirmed.

BAILEY, J., and ROBB, J., concur.

