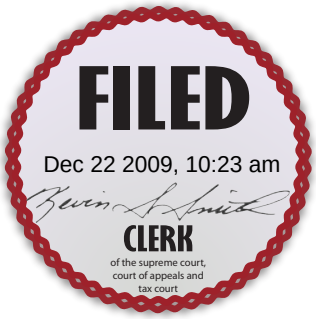

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IN THE
COURT OF APPEALS OF INDIANA

ERIC TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 75A05-0903-CR-159
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Kim Hall, Judge
Cause No. 75C01-0706-FB-9

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Eric Taylor appeals his convictions, after a jury trial, of dealing in methamphetamine, a class B felony, and possession of methamphetamine, a class D felony.

We affirm.

ISSUE

Whether Taylor was denied his right to effective assistance of counsel when his trial attorney did not file a motion to suppress evidence.

FACTS

At approximately 3:00 a.m. on June 27, 2007, Jeffrey Beavers – a repossession agent – drove to the Oak Street residence of Angela Ramirez to repossess her Escape SUV. In his tow truck, he first drove past the residence to verify that the SUV was parked there. Ramirez's daughter was near the front window of the house and saw the tow truck. She went to her mother's bedroom and informed Taylor and Ramirez. In the meantime, Beavers had turned the tow truck around at the end of Oak Street. When he came back by the residence, Taylor was standing in the doorway. Beavers continued past and at the end of the block, turned onto another road. When he saw Taylor driving the SUV behind him, he stopped the tow truck in the middle of the road. Taylor backed up the SUV and drove away.

A few minutes later, Beavers saw that the SUV was back in the Ramirez driveway. Beavers was aware that a day or so before, another repossession agent had attempted to

repossess the SUV; he was "threatened" by a man "acting crazy" and left. (Tr. 37, 38). Therefore, Beavers called the Starke County Sheriff's Department to ask their assistance in maintaining the peace during his repossession of the SUV at the Oak Street residence. Beavers met Deputies Bradley and Ferguson at a convenience mart, and the three drove to the Ramirez residence. The SUV was gone. Deputy Bradley drove away, looking for the SUV, and within a short distance saw Taylor driving it toward the Ramirez residence. The deputy followed him, and Taylor stopped the SUV at the residence.

Taylor exited the SUV, and the officers explained that Beavers was present to repossess it. Deputy Bradley asked him whether he had any personal belongings inside that he wanted to remove, and Taylor responded in the negative. Deputy Ferguson "patted him down, due to the threats that he had made to the wrecker operator, and he was released." (Tr. 61). The deputies told Taylor that he was free to go.

Taylor moved quickly away from them, vaulted over the fence in front of the house, jogged down the driveway on the right side of the house, and then reappeared -- crouched down behind a tree on the left side of the house, "kind of peeking around" it. (Tr. 62). The deputies thought this was "kind of odd behavior and not knowing who he was, . . . decided to see if [they] could find out . . . where he was going and who he was." (Tr. 63). At this time, Deputy Bradley noticed "tin foil . . . foilies" lying "at the edge of the driveway by the road."[1] *Id.* The deputies started to walk down the driveway (on the right side of the house), and then separated – Deputy Ferguson going to the left around

[1] Deputy Bradley testified that "foilies" were "little pieces of aluminum foil" which "have burn marks on them" and are "commonly known" to be "use[d] to smoke . . . methamphetamine." (Tr. 64).

the house, and Deputy Bradley going to the right. The driveway ends at a large shed, only feet from the back right corner of the house. Deputy Bradley walked between the shed and the corner of the house and met Ferguson in the back yard. Taylor had disappeared.

The deputies saw "a burn pit" in the back yard, and Deputy Bradley noted "a glass jar type thing on top . . . that had coffee filters and a white granular substance in it." (Tr. 63). Remembering the foilies he had seen earlier near the front of the driveway, Deputy Bradley suspected "a meth lab." (Tr. 64). Nevertheless, the deputies "were still trying to locate where [Taylor] was." (Tr. 65). He saw that the shed "door was open," and looked inside. (Tr. 66). He saw "items used to manufacture methamphetamine," specifically: "hot pans, . . . exhaust fans, . . . coffee filters, . . . salt, cans of Coleman gas," and "a pop bottle" with "a hole in the top and . . . a hose that comes of that," *i.e.*, an "HCL generator." *Id.*

The deputies moved back to the street, and Deputy Ferguson stayed to secure the scene while Deputy Bradley arranged to meet with a prosecutor to seek a search warrant. A warrant was obtained, and the clandestine lab team conducted a search of the residence and shed – recovering numerous items associated with the manufacture and use of methamphetamine. Identification and documents belonging to Taylor were also found in the shed and master bedroom. Further, a spoon found in the master bedroom under the bed, a digital scale found under the pillow on the bed, and some coffee filters all tested positive for the presence of methamphetamine.

Taylor was located and arrested. The State charged Taylor with several offenses: (1) dealing in methamphetamine, a class B felony (manufacturing); (2) dealing in methamphetamine, a class C felony (possession with intent to deliver); (3) possession of methamphetamine, a class D felony; (4) possession of precursors with intent to manufacture, a class D felony; and (5) maintaining a common nuisance, a class D felony.

A jury trial was held on January 14 – 16, 2009. At trial, Taylor's defense was that the meth lab was operated by Ramirez, who was addicted to metathamphetamine, and he had simply fallen in love with her and occasionally stayed overnight at her residence. Ramirez testified that shortly before they were arrested on the morning of June 27, 2007, Taylor had confessed to her "that he had a meth lab in the shed." (Tr. 123). According to Ramirez, she knew nothing about the meth lab until then; and although she "had heard" that Taylor "was using" meth, she had never seen him do so. (Tr. 143). Ramirez admitted that she had pleaded guilty to child neglect, a class C felony, for "having [her] children around an area where a meth lab was," and to maintaining a common nuisance, a class D felony, for "having a place where a meth lab was, or where drug use was occurring." (Tr. 126). The jury returned verdicts finding Taylor guilty of only two counts: dealing in methamphetamine, a class B felony (possession with intent to deliver); and possession of methamphetamine, a class D felony.

DECISION

Taylor argues that he "received ineffective assistance because his attorney failed to file a motion to suppress the evidence seized in violation of the Fourth Amendment of

the United States Constitution and Article 1, Section 11 of the Indiana Constitution." Taylor's Br. at 8. Taylor reminds us that the deputies had no search warrant, and he asserts that they "had no "probable cause, or even reasonable suspicion that Taylor was committing, or had committed, a crime," when they "left the driveway and around" the residence. *Id.* Taylor asserts that the deputies engaged in "a fishing expedition" based solely on the fact that "Taylor looked 'odd' behind the tree," and argues that their "entry into the backyard" was "impermissible without first obtaining a search warrant."[2] *Id.* Therefore, he concludes, had his "trial attorney filed a motion to suppress the evidence seized subsequent to the warrantless search, the motion would have been granted and the evidence excluded at trial." We disagree.

To establish a claim for ineffective assistance of counsel, a defendant must satisfy two prongs: first, the defendant must demonstrate that counsel performed deficiently; second, the defendant must demonstrate that prejudice resulted. *State v. McManus*, 868 N.E.2d 778, 790 (Ind. 2007) (citing *Strickland v. Washington*, 466 U.S. 688, 687 (1984)). These two prongs present independent inquiries, either of which may be sufficient for disposing of a claim. *Id.* Thus, if we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009) (citing *Strickland*, 466 U.S. at 697). In order to prove prejudice stemming from ineffective assistance, a defendant must show

[2] Taylor also argues that "it was not permissible for the police officers to enter the shed." *Id.* His version of the facts states that the "officers [went] inside the shed," *id.* at 5, but his references to the trial testimony for this fact do not support the assertion. Deputy Bradley testified that the shed door was open and he looked in, but not that he or Deputy Ferguson entered the shed. (Tr. 66, 84).

a reasonable probability that but for counsel's unprofessional errors, the result of his criminal proceeding would have been different. *Id.* (citing *Strickland*, 466 U.S. at 694).

Taylor first cites to *Divello v. State*, 782 N.E.2d 433 (Ind. Ct. App. 2003), *trans. denied*, for the proposition that his federal and Indiana constitutional rights were violated when the officers "left the driveway." Taylor's Br. at 10. In *Divello*, officers knocked at a residence to investigate an anonymous tip of illegal activity; receiving no answer, they crossed through the backyard of that property and through the gate of a privacy fence into the neighboring property, where the odor of marijuana was detected -- leading to the issuance of a search warrant. We held that "after receiving no answer, [the officers] should have left, "having no information justifying further intrusion." *Id.* at 438. Unlike in *Divello*, the officers' initial encounter with and subsequent observation of Taylor's strange behavior created reasonable suspicion sufficient to lead to their conclusion that further investigation was warranted.

Taylor also cites to *Lundquist v. State*, 834 N.E.2d 1061 (Ind. Ct. App. 2005). In *Lundquist*, officers were at a location responding to two 911 calls regarding Lundquist's alleged participation in a domestic disturbance. When they went to Lundquist's home to talk with him, they received no response at the front door and walked around the house. They "noticed plants that appeared to be marijuana growing near the house." *Id.* at 1069. We held that although the deputy "invaded the curtilage of Lundquist's residence, his intention in doing so was not to search for marijuana, but merely to find Lundquist," whom they reasonably believed to be "hiding on the property." *Id.* We noted that unlike

Divello, this was not the investigation of an anonymous tip but a response to two 911 calls concerning a domestic disturbance. We further noted the deputies' reasonable belief that Lundquist was hiding on the property, and we found that they had "a legitimate reason for remaining on the property" after their fruitless knock at the front door. *Id.* Hence they "legitimately invaded the cartilage of his property in an attempt to find him." *Id.*

Taylor argues that here, the deputies simply "went to the residence as a courtesy to the repossession agent, not investigating any possible criminal activity." Taylor's Br. at 11. The record establishes, however, that the deputies were informed that Beavers was authorized "to repossess a vehicle from Angela Ramirez," and that an earlier attempted repossession was unsuccessful after a "male" had "threaten[ed]" the repossession agent. (Tr. 56). Clearly, when Taylor appeared driving the SUV to the residence, he was not Ramirez. Thus, the deputies did not know who he was or where he lived. Further, when told he could leave, Taylor moved quickly away, vaulted a fence in front of the house, jogged down the driveway on the right side of the house, and then reappeared – crouched down behind a tree on the left side of the house and peeking around it. "Before [the deputies] walked into the driveway," Deputy Bradley noticed the foilies "at the edge of the driveway by the road." (Tr. 63). Foilies commonly indicate the smoking of methamphetamine. Thus, at the time the deputies were in the driveway, they had already observed evidence which indicated the use of methamphetamine, and they had

encountered an unknown man engaged in extremely bizarre behavior in the early morning darkness moving around a house without any lights on inside.

An exception to the Fourth Amendment warrant requirement for a seizure is an investigatory stop based on reasonable suspicion. *Campos v. State*, 885 N.E.2d 590, 597 (citing *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968)). "Reasonable suspicion exists where the facts known to the officer, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe that criminal activity has or is about to occur." *Id.* (quoting *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999)). A *Terry* stop may include a request to see identification and information necessary to confirm or dispel the officer's suspicions. *Hardister v. State*, 849 N.E.2d 563, 570 (Ind. 2006).

We find that the facts observed by the officers would cause an ordinarily prudent person to believe that criminal activity had occurred or was about to occur, and that a brief interaction with Taylor was necessary in order to dispel their suspicions. Thus, we do not find that if Taylor's counsel had moved to suppress the evidence based on the Fourth Amendment, the motion would have been granted.

With respect to Article 1, Section 11, the analysis requires examination of the facts of each case and whether police conduct is reasonable in light of the totality of the circumstances. *Grier v. State*, 868 N.E.2d 443, 444 (Ind. 2007). We consider "reasonableness based on the facts of each case," giving the Indiana constitutional provision "a liberal construction to angle in favor of protection for individuals from

unreasonable intrusions on privacy." *Holder v. State*, 847 N.E.2d 930, 940 (Ind. 2007). We also consider citizen concerns for "safety, security, and protection from crime." *Id.* Thus, citizen concerns about safety, security, and protection allow tolerance of "some intrusions upon privacy . . . so long as they are reasonably aimed toward those concerns." *Id.* Accordingly, the totality of the circumstances requires consideration of both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search or seizures. *Id.*

Here, we find that in light of the same facts considered above as to the deputies' knowledge and their observations of Taylor's strange behavior and the presence of foilies, the minimal intrusion of the deputies -- proceeding into the backyard and looking in the open door of the shed, in order to locate him and make inquiry of him – was reasonable. Therefore, we do not find that if Taylor's counsel had moved to suppress the evidence based on Article 1, Section 11, the motion would have been granted.

Taylor has failed to establish that if his counsel had moved to suppress the evidence, he would not have been convicted of the two criminal offenses. Therefore, he has failed to establish prejudice, and his claim that his trial counsel was ineffective must fail.

Affirmed.

MAY, J., concurs.

KIRSCH, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

ERIC TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 75A05-0903-CR-159
	)	
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

KIRSCH, Judge, *dissenting*.

I respectfully dissent.

Here, the sheriff's deputies, presumably armed and in uniform, were at Taylor's premises for the sole purpose of assuring that there was no breach of the peace during a self-help repossession of a motor vehicle. I believe that they went far beyond such purpose and significantly aided and assisted the repossession agent in carrying out the repossession of the vehicle. When the vehicle was not at the residence, the deputies searched for it. When they spotted the vehicle, they followed it back to Taylor's

residence. When Taylor returned to his residence, the deputies blocked the vehicle with their sheriff's cars and approached Taylor and explained that the repossession agent was there to repossess the vehicle. They then patted Taylor down and asked if he wanted to remove anything from the vehicle. They then told Taylor that he was free to leave.

Taylor then went on to his premises and observed what was going on while standing behind a tree. The deputies determining that Taylor was acting "odd" and having noticed some tin foil at the edge of the driveway by the road decided to investigate further and went onto Taylor's premises. They had no information tying Taylor to the tin foil, and Taylor's actions, while they may have been odd, did not in any way give them reasonable grounds for suspicion that criminal activity was afoot, much less probable cause that Taylor was engaged in criminal activity. Their entry onto the property was violative of both the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Indiana Constitution.

In its brief, the State makes no claim that the search of the premises was justified. Rather, it asserts that Taylor was not prejudiced by his counsel's failure to file a motion to suppress because his counsel adopted a strategy at trial that Ramirez, not Taylor, was responsible for the meth lab. Such an argument ignores that had a motion to suppress been granted, no trial strategy would have been necessary. Taylor was indeed prejudiced.

I would hold that the deputies engaged in an unconstitutional search of Taylor's premises, that trial counsel was ineffective in failing to raise such a claim, that Taylor was prejudiced as a result, and that his conviction should be reversed.