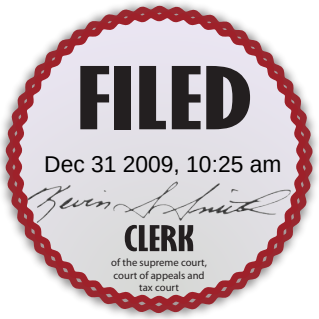


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| BRANDON SERNA, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 71A05-0905-PC-266 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0801-PC-3

**December 31, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-petitioner Brandon Serna appeals the denial of his petition for post-conviction relief, claiming ineffective assistance of trial counsel. Specifically, Serna maintains that his trial counsel should not have abandoned a previously-filed motion to suppress that challenged the validity of several warrantless searches that police officers conducted. Serna also claims that he was entitled to relief because the post-conviction court denied him the opportunity to present newly-discovered evidence at the hearing. Concluding that the post-conviction court properly denied Serna's request for relief, we affirm.

## FACTS

In January 2003, South Bend Police Officer Jamie Buford spoke to Investigator Michael Grzegorek at the Metro Homicide Unit. Investigator Grzegorek informed Officer Buford that he was looking for "Chico"—who was later identified as Serna—in connection with a homicide. PC Tr. p. 5. Officer Buford offered to assist the homicide unit by setting up surveillance at Serna's residence.

When Officer Buford arrived at the residence, he decided to search the trash bags that were sitting in the alley. At some point, Serna drove up and asked Officer Buford what he was doing. In light of the information that Investigator Grzegorek had told him about the homicide, Officer Buford displayed his badge and identified himself as a police officer. When Serna exited the vehicle, Officer Buford noticed Serna holding something in his hand. As Serna was bending down, he dropped an item on the ground that was later determined to be a cell phone. Officer Buford drew his weapon and directed Serna

to "show him his hands." Id. at 10. Officer Buford then patted Serna down for weapons, but nothing was found. Thereafter, Officer Buford asked Serna for permission to search his clothing for narcotics and Serna complied. During the search, Officer Buford seized several plastic baggies from Serna's pocket that contained cocaine. Another officer arrived at the scene and informed Serna of his Miranda[1] rights. Serna then signed a waiver form and allowed the officers to search his residence. After a handgun and ammunition were seized from the house, the officers contacted the homicide unit. Thereafter, the murder investigation was assigned to that department.

On January 7, 2003, the State charged Serna with dealing in cocaine, a class A felony, and possession of cocaine, a class C felony. Prior to trial, Serna's defense counsel filed a motion to suppress "all evidence derived as a result of the confrontation which resulted from Officer Buford's trash search on January 6, 2003." Appellant's App. p. 29.

Thereafter, the parties agreed to vacate the hearing on the motion to suppress, and the trial court set a plea hearing for June 4, 2003. Serna agreed to plead guilty to possession of cocaine as a class C felony in exchange for the dismissal of the class A felony dealing charge. The trial court subsequently sentenced Serna to four years of incarceration.

On January 9, 2008, Serna filed a petition for post-conviction relief, claiming that his trial counsel was ineffective because he did not pursue the motion to suppress. Serna

[1] Miranda v. Arizona, 384 U.S. 436, 445 (1966).

also alleged that new evidence "exists which constitutes grounds to vacate" the conviction because one of the police officers involved in obtaining a warrant for an additional search of his residence had allegedly been indicted for various criminal offenses. Id. at 27.

On September 5, 2008, the post-conviction court heard evidence on both Serna's drug case and a subsequent murder conviction.[2] Following the hearing, the post-conviction court denied Serna's request for relief, and entered the following findings of fact and conclusions of law:

Findings of Fact

> When asked why he did not pursue suppression, [defense counsel] responded:
>
> [I]n pursuit of a motion to suppress, there was probably a time where there may have been some type of compromise where, again, Mr. Serna is charged with a class A or B felony. There's a suppression issue on the table. I can't guarantee Mr. Serna or any other client an outcome in a case, and if we had the opportunity to be able to plead to a lesser offense, then that's what I would have done. Said, okay, you can plead to this which is a certainty on this C, as opposed to going to trial on the motion to suppress.
>
> Because had we gone to trial on the motion to suppress, or gone to hearing on the motion to suppress, and lost it, then whatever plea offer might have been available would have been taken away. As a general practice, that would have been no longer been available. PCR 42-43.

. . .

Conclusions of Law

[2] Serna had also filed a petition for post-conviction relief following his conviction for murder, which this court affirmed in 2004. Serna v. State, No. 71A04-0309-CR-00434 (Ind. Ct. App. Aug. 26, 2004). As the State observes, it appears that only one transcript of the hearing was prepared because the Notice of Filing of Transcript lists both lower court post-conviction cause numbers. Appellant's App. p. 7. The transcript was filed with Serna's post-conviction appeal of his murder conviction under cause number 71A03-0905-PC-214.

> [Defense counsel] did not overlook a defense. Counsel filed a Motion to Suppress. Petitioner urges this Court to evaluate the evidence presented at the post-conviction hearing regarding the search of Mr. Serna and conclude [that defense counsel] was ineffective for failing to pursue the motion to suppress. Could this court, in reviewing the circumstances surrounding the search, conclude that items seized should have been excluded? It could. Must it so conclude? No. Further, there is no guarantee the court which would have been responsible for hearing the motion to suppress when it was scheduled in 2003 would have suppressed the evidence Petitioner sought to exclude. Motions to suppress are always fact sensitive, subject not only to the events which actually happened, but also the witness' memories of those events when testifying. As Mr. Buford's conflicted testimony at the post-conviction hearing demonstrated, a witness may contradict not only other witnesses but also himself. These vagaries are the sort that counsel must weigh in advising a client.
>
> This does not appear to be a situation where counsel was unaware of the law. No evidence was presented here suggesting that [defense counsel] was unaware of either Pirtle v. State, 323 N.E.2d 634 (Ind. 1975) and its progeny regarding consents to search. There was no evidence suggesting counsel was unaware of the status of trash searches in the post Moran v. State . . . pre Litchfield v. State . . . era. Instead, the evidence presented at [the] post-conviction hearing suggested that, upon analysis of the evidence before him, [defense counsel] could not conclude with certainty that the motion to suppress would be granted.
>
> . . .
>
> There was no guarantee here that the evidence seized would be suppressed. Absent such a guarantee, the Court finds [defense counsel's] actions . . . well within the range of professional competence.

Id. at 52-56. Serna 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).

## II. Serna's Claims

### A. Ineffective Assistance of Counsel

In addressing Serna's contention that the post-conviction court erred in concluding that his 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. 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).

We note that few points of law are as clearly established as the principle that tactical or strategic decisions will not support a claim of ineffective assistance of counsel. McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Id. Moreover, even the best and brightest criminal defense attorneys may disagree on the ideal strategy or the most effective approach in any given case. Id. Thus, we afford great deference to counsel's discretion to choose strategy and tactics, and strongly presume that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. Id. In other words, 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, a petitioner alleging ineffective assistance of counsel in overlooking a defense leading to a guilty plea must show a reasonable probability that, had the defense been raised, the petitioner would not have pleaded guilty and would have succeeded at trial. Helton v. State, 907 N.E.2d 1020, 1023-24 (Ind. 2009).

As set forth above, defense counsel's testimony at the post-conviction hearing established that he and Serna discussed and weighed the various options of proceeding with the motion to suppress. Moreover, it is apparent that they concluded that it was in Serna's best interest to accept the proposed plea offer rather than risking the possibility of receiving a class A felony conviction and a lengthier sentence. Indeed, by pleading guilty to the class C felony, Serna effectively reduced the possibility of receiving a fifty-year sentence on a class A felony[3] conviction to a maximum sentence of eight years on a class C felony conviction.[4] In our view, Serna's defense counsel made a sound strategic and tactical decision to forego pursuit of the motion to suppress. Thus, Serna has failed to demonstrate that defense counsel's recommendation to accept the proposed plea offer amounted to deficient performance.

Even assuming for the sake of argument that counsel's performance was deficient for not pursuing the motion to suppress, Serna has failed to show that he would have prevailed at that hearing or at trial. Officer Buford searched Serna's trash in 2003. As Serna concedes, prior to our Supreme Court's opinion in Litchfield v. State, 824 N.E.2d 356 (Ind. 2005), a police officer did not need specific grounds or a "reasonable suspicion" before searching an individual's trash left at curbside. Appellant's Br. p. 8. Before Litchfield was decided, the police were justified in searching the trash because it is common knowledge that garbage left by the road is "readily accessible to animals,

[3] Ind. Code § 35-50-2-4.

[4] I.C. § 35-50-2-6.

children, scavengers, snoops, and other members of the public." Moran v. State, 644 N.E.2d 536, 541(Ind. 1994).

Moreover, Serna has failed to show that Officer Buford's actions or methods of searching the trash were different than any other member of the general public who examines the contents of another's trash. See id. (observing that the police did not trespass on the defendants' premises, did not cause a disturbance, and conducted themselves in the same manner as trash collectors when picking up the trash). Finally, Serna concedes that "no evidence from the trash was used against [him]." Appellant's Br. p. 10. As a result, Serna has failed to show that he suffered any prejudice in light of defense counsel's advice not to proceed with the motion to suppress regarding the trash search.

Serna also maintains that trial counsel was ineffective for failing to pursue the motion to suppress because the subsequent searches of his person and his residence were unreasonable and "no warrant would have been issued to search [his] residence without the results of the second and third warrantless searches." Id. at 11. Notwithstanding Serna's contentions, the police did not recover any evidence during the initial pat-down search. Thus, this argument is irrelevant and Serna has failed to show any prejudice on this basis. Moreover, the cases to which Serna directs us regarding the subsequent searches of his clothing and his residence are not on point because those decisions did not address the validity of a defendant's consent to search. See Florida v. J.L., 529 U.S. 266, 274 (2000) (discussion of the circumstances involving a pat-down search in response to

an anonymous tip, rather than the authority of the officer regarding a consent to search); U.S. v. Johnson, 170 F.3d 708, 720-21 (7th Cir. 1999) (observing that there was no reason for the officers to conduct a pat-down search of the defendant).

In sum, Serna has failed to show that his trial counsel was ineffective for not proceeding with the motion to suppress. Therefore, we conclude that the post-conviction court properly denied Serna's request for relief on this basis.

B. Newly Discovered Evidence

Serna next claims that the post-conviction court should have granted his request for relief because the trial court erred in not allowing him to present evidence that has been discovered since the trial. Appellant's Br. p. 11. Specifically, Serna argues that because the police officer who obtained the warrant for the subsequent search of his home was allegedly "indicted for crimes of dishonesty," he should have been granted a new trial to prove that the evidence should be suppressed. Id. at 12.

Notwithstanding this contention, Serna fails to direct us to any portion of the record where the post-conviction court presumably prevented him from offering newly discovered evidence. Thus, Serna has waived the issue. Ind. Appellate Rule 46(A)(8)(a); see also Lyles v. State, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005) (holding that a party waives an issue by failing to provide adequate citation to the portions of the record that are relied upon). Moreover, the post-conviction court stated in its ruling that Serna "proceeded to hearing on one claim: Ineffective assistance of counsel." Appellant's App. p. 49. Because Serna never attempted to offer any newly discovered evidence at the

post-conviction hearing, there was nothing for the post-conviction court to rule on. Thus, Serna's claim fails.

The judgment of the post-conviction court is affirmed.

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