# MEMORANDUM DECISION




APPELLANT PRO SE

Vinson Tate
Michigan City, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Courtney Staton
Deputy Attorney General
Indianapolis, Indiana

IN THE
# COURT OF APPEALS OF INDIANA

Vinson Tate,
*Appellant-Petitioner,*

v.

State of Indiana,
*Appellee-Respondent*.

October 22, 2021

Court of Appeals Case No. 20A-PC-1742

Appeal from the Allen Superior Court

The Honorable Wendy Davis, Judge

Trial Court Cause No. 02D05-1601-PC-6

**Weissmann, Judge.**

[1] Vinson Tate appeals the denial of post-conviction relief from his convictions for dealing in cocaine and possession of marijuana. Tate chiefly asserts ineffective assistance of counsel. But he fails to show that the outcome of his trial and appeal would have been any different had his attorneys acted exactly as he says they should have. Because Tate does not establish prejudice, we affirm the judgment of the trial court.

## Facts

[2] In June 2012, an undercover police officer was dispatched to an apartment complex following a call about the sale of drugs. There, the officer observed several people hop in and out of a black Suburban idling in the parking lot. Eventually, the Suburban left the parking lot, and the undercover officer followed in her unmarked vehicle. The undercover officer saw the Suburban cross the center line several times and relayed this information to a uniformed police officer, who initiated a traffic stop. The uniformed officer identified Tate as the driver and noticed marijuana residue on the console. A search of the vehicle revealed more marijuana residue and $3,000 in cash.

[3] Tate was arrested for marijuana possession and taken to jail. There, a strip search revealed a folded wad of toilet paper between his buttocks. Officers discovered 15 small, knotted bags of cocaine inside the wad, leading to charges of Class A felony cocaine possession and Class A misdemeanor marijuana possession.

[4] At a pretrial hearing, Tate's public defender (Pretrial Counsel) moved to suppress the evidence discovered as a result of the traffic stop, alleging the stop was illegal. The trial court denied the motion. Shortly thereafter, the trial court approved Tate's request to proceed pro se.

[5] At trial, Tate took the stand in his own defense and maintained that the cocaine was for personal use. He testified, "I am in no way going try to (sic) defer responsibility for the cocaine. I never have. It was found on me and I never intended on trying to deflect responsibility for it basically. But the intentions on trying to sell this cocaine is totally off the charts." Trial Tr. Vol. II, p. 366. Tate explained that he planned to take the drugs to a hotel room with a woman and just "let go." *Id.*

[6] On cross-examination, however, the State elicited the following exchange:

> Q. And your intent was to pick up this other lady?
>
> A. It was.
>
> * * *
>
> Q. And what were you going to be doing?
>
> A. Possibly ingesting drugs and alcohol and couple other things.
>
> * * *
>
> Q. Okay. How was this lady going to get this cocaine, Mr. Tate?
>
> A. I was going to give her some of mine.

*Id.* at 371-72.

[7] The jury convicted Tate of dealing in cocaine, a Class A felony, and possession of marijuana, a Class A misdemeanor. The trial court sentenced him to an aggregate sentence of 45 years, with 35 years executed and 10 years suspended to probation.

[8] Tate appealed with counsel (Appellate Counsel) in 2014. The appeal raised 7 issues, all of which we found unavailing. After we unanimously affirmed Tate's convictions, our Supreme Court denied transfer. *Tate v. State*, No. 02A05-1308-CR-447, 2015 WL 1228312 (Ind. Ct. App. 2015), *trans. denied*.

[9] Proceeding pro se, Tate filed a petition for post-conviction relief in 2018. About 2 years later, the post-conviction court denied the petition without a hearing, ruling that Tate failed to prove his claim by a preponderance of evidence. Tate now appeals, again proceeding pro se.

## Discussion and Decision

[10] Tate argues that he received ineffective assistance of counsel both pretrial and on appeal and that the post-conviction court erred in denying his petition without an evidentiary hearing. This last claim is a nonstarter: evidentiary hearings are not required in post-conviction relief proceedings where, as here, the petitioner proceeds pro se and is ordered by the post-conviction court to submit the case by affidavit. *Laboa v. State*, 131 N.E.3d 660, 664 (Ind. Ct. App. 2019); Ind. Post-Conviction Rule 1(9)(b); Appellee's App. Vol. II, p. 4.

[11] As for Tate's ineffective assistance of counsel claims, he was required to show the following to succeed: (1) counsel's performance fell below an objective

standard of reasonableness such that defendant was deprived 'counsel' as guaranteed by the Sixth Amendment; and (2) the deficiency was so prejudicial as to create a reasonable probability the outcome would have been different but for counsel's errors. *Hollowell v. State*, 19 N.E.3d 263, 268-69 (Ind. 2014). The standard for ineffective assistance of counsel is the same for trial and appellate counsel. *Ben-Yisrael v. State*, 729 N.E.2d 102, 106 (Ind. 2000).

[12] When appealing a denial of post-conviction relief, a petitioner must show the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the postconviction court to prevail. *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993)). The post-conviction court is the sole judge of the evidence and the credibility of witnesses. *Id*. The post-conviction court's judgment will be reversed only upon a showing of clear error. *Ben-Yisrayl*, 729 N.E.2d at 106. Finding that Tate was not prejudiced by either of his attorneys' alleged failures, we affirm the post-conviction court's denial of post-conviction relief.

# I. Pretrial Counsel

[13] Tate claims that Pretrial Counsel failed to:

- sufficiently investigate Tate's claim that the cocaine evidence was illegally obtained;
- object to inadmissible hearsay at the suppression hearing;
- object to the State's improper use of the collective knowledge doctrine;
- request a continuance after the State surprised them with new information at the suppression hearing;
- challenge the State's reliance on plain view doctrine; and

- challenge the erroneous outcome of the suppression hearing.

[14] Tate's claim must fail because he has not established prejudice. A trial court's ruling at a suppression hearing is preliminary, meaning it is subject to modification at trial. *Gregory v. State*, 885 N.E.2d 697, 704 (Ind. Ct. App. 2008) (citing *Joyner v. State*, 678 N.E.2d 386, 393 (Ind. 1997)). Tate therefore could have renewed these challenges leading up to and at trial. Crucially, Tate did not even object to the admission of the cocaine evidence at trial. Trial Tr. Vol. I, p. 213. Tate had the opportunity to cure any error he claims arose from the suppression hearing, but he did not take it. And although he did object to the marijuana evidence, his argument against its admissibility—that there was nothing illicit plainly observable in his car despite the officer's testimony to the contrary—amounts to a request to reweigh evidence that we will not entertain. Trial Tr. Vol. I, pp. 206-07; *Weatherford*, 619 N.E.2d at 917. Accordingly, we cannot say that Pretrial Counsel was ineffective.

## II. Appellate Counsel

[15] Tate next claims that Appellate Counsel was ineffective for failing to:

- appeal the trial court's application of collective knowledge doctrine;
- appeal based on Tate's preserved hearsay objection at trial;
- appeal the denial of Tate's right to confrontation;
- challenge the strip search that revealed the cocaine; and
- advance a claim of prosecutorial misconduct due to alleged withholding of evidence.

[16] Tate was not prejudiced by Appellate Counsel's purported missteps. Firstly, Tate's failure to object to the admission of the cocaine evidence means the issue was waived on appeal. *See Kincaid v. State*, 171 N.E.3d 1036, 1041 (Ind. Ct. App. 2021), *trans. denied*. Appellate Counsel was right not to waste ink on the issue.

[17] Secondly, none of Tate's arguments can erase his own testimony admitting to dealing in cocaine. Tate was charged with possession with intent to deliver cocaine under Indiana Code § 35-48-4-1 (2012). "Delivery" means "an actual or constructive transfer from one (1) person to another of a controlled substance . . . ." Ind. Code § 35-48-1-11. This includes handing drugs to a friend. *See Cline v. State*, 860 N.E.2d 647, 649 (Ind. Ct. App. 2007) (holding that defendant "delivered" marijuana when he passed it to his passenger to hide during a traffic stop); *Graham v. State*, 971 N.E.2d 713, 719 (Ind. Ct. App. 2012) (holding that sharing cocaine with friends constitutes "delivery"). Tate admitted in his trial testimony that he planned to share his cocaine with a woman. Trial Tr. Vol. II, pp. 371-72. Supposing the trial court excluded all of the evidence Tate challenges, Tate's admission to possessing cocaine that he intended to share remains. This testimony is sufficient to support Tate's conviction, meaning there is not a reasonable probability that the outcome would have been different.

[18] Accordingly, we affirm the post-conviction court.

Mathias, J., and Tavitas, J., concur.