MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Terrence J. Fuqua,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent,

November 30, 2021

Court of Appeals Case No. 20A-PC-2294

Appeal from the Allen Superior Court

The Honorable Wendy Davis, Judge

Trial Court Cause No. 02D06-1402-PC-29

Robb, Judge.

Case Summary and Issue

[1] Following a bench trial, Terrence Fuqua was convicted of the following: dealing in cocaine, a Class A felony; unlawful possession of a firearm by a serious violent felon, a Class B felony; possession of a controlled substance, a Class D felony; dealing in marijuana, a Class D felony; and possession of paraphernalia, a Class A misdemeanor. The trial court sentenced Fuqua to an aggregate of forty years to be served in the Indiana Department of Correction ("DOC"). On direct appeal, Fuqua challenged his convictions, and this court affirmed. *Fuqua v. State*, 984 N.E.2d 709, 718 (Ind. Ct. App. 2013), *trans. denied.* In 2014, Fuqua filed a pro se petition for post-conviction relief claiming manifest injustice and ineffective assistance of trial and appellate counsel. Following an evidentiary hearing, the post-conviction court denied Fuqua's petition. Fuqua now appeals, raising multiple issues for our review, which we consolidate and restate as whether the post-conviction court erred in denying Fuqua's petition for post-conviction relief. Concluding the post-conviction court did not err in denying Fuqua's petition, we affirm.

Facts and Procedural History

[2] We summarized the facts and procedural history of this case in Fuqua's direct appeal:

> In October 2011, Fort Wayne Detective Darrick Engelman ("Detective Engelman") interviewed Stephanie McCarter and Donald Stovall, both of whom had been arrested in connection with a cocaine dealing investigation, first separately and then

together. McCarter identified Fuqua and James Holman (a.k.a. "Petey") as her cocaine dealers and told the detective where Fuqua lived. Stovall also stated that Fuqua was his cocaine dealer. Shortly thereafter, McCarter executed a controlled buy with Holman, who was arrested as a result of that transaction.

On November 7, 2011, another Fort Wayne Detective, Darin Strayer ("Detective Strayer") received an anonymous phone tip, and the caller reported that she observed Fuqua with a large amount of cash at his residence and a hidden compartment for the money in the floor of the back bedroom. The anonymous tipster also stated that she observed an individual named Petey arrive at Fuqua's residence with a large amount of cocaine. Because Detective Engelman's desk is near Detective Strayer's, Detective Engelman overheard Detective Strayer's discussion concerning Fuqua, and the two detectives shared their separately acquired knowledge of Fuqua's activities.

The next day, the detectives drove by Fuqua's residence to perform surveillance. Fuqua had placed his trash outside near his detached garage to be collected by a garbage service, and other residents in the neighborhood had done the same. Detective Engelman quickly collected two bags of Fuqua's trash, which the detectives looked through after they returned to their office. In Fuqua's trash they found crack pipes, three empty boxes of baking soda (which they knew to be useful in processing cocaine into crack cocaine), and several plastic baggies containing a white powdery substance that tested positive for cocaine.

The detectives continued to perform surveillance of Fuqua's residence and observed activities consistent with narcotics trafficking, such as vehicles arriving at the residence and leaving after just a few minutes and the possibility of pedestrian lookouts. During one such surveillance, the anonymous informant who spoke to Detective Strayer rode with the detectives and identified Fuqua's residence, Holman, and Holman's residence.

> On November 22, 2011, Detective Strayer applied for and obtained a warrant to search Fuqua's residence. During execution of the warrant, law enforcement officers discovered significant amounts of cocaine, marijuana, scales, plastic baggies, large amounts of cash, paraphernalia and a firearm. Fuqua was charged with Class A felony dealing in cocaine, Class B felony unlawful possession of a firearm by a serious violent felon, Class D felony possession of a controlled substance, Class D felony dealing in marijuana, and Class A misdemeanor possession of paraphernalia.
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> Fuqua filed a motion to suppress all evidence seized during the execution of the search warrant arguing that the affidavit accompanying the warrant failed to state sufficient facts to establish probable cause and the trash search was not supported by reasonable suspicion. [Following a hearing,] Fuqua's motion was denied, as was his request for certification of an interlocutory order for the purposes of appeal.
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> A bench trial was held on June 14, 2012, and the trial court found Fuqua guilty as charged. Fuqua was ordered to serve an aggregate forty-year sentence in the [DOC].

Id. at 712-13.

[3] On February 28, 2014, Fuqua filed a pro se petition for post-conviction relief. Subsequently, Fuqua filed an amended petition alleging: (1) Fuqua's convictions and sentences create an extraordinary circumstance that would be a manifest injustice if not revisited and corrected; and (2) ineffective assistance of trial and appellate counsel. *See* Appellant's Appendix, Volume Two at 94, 110,

120.[1] After conducting a hearing, the post-conviction court entered findings of fact and conclusions of law denying Fuqua's petition for post-conviction relief. The post-conviction court concluded that pursuant to the doctrine of *res judicata* Fuqua cannot relitigate issues decided by this court and that Fuqua was not denied the effective assistance of trial or appellate counsel. *See id.* at 178-85. Fuqua now appeals. Additional facts will be supplied as necessary.

Discussion and Decision

I. Standard of Review

[4] Post-conviction proceedings are civil in nature and the petitioner must therefore establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). "Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal." *Turner v. State*, 974 N.E.2d 575, 581 (Ind. Ct. App. 2012), *trans. denied*. On appeal, a petitioner who has been denied post-conviction relief faces a "rigorous standard of review." *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001).

[5] To prevail, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite of that reached by the

[1] Citations to Appellant's Appendix are based on the pdf. pagination.

post-conviction court. *Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006). When reviewing the post-conviction court's order denying relief, we will "not defer to the post-conviction court's legal conclusions," however, the "findings and judgment will be reversed only upon a showing of clear error - that which leaves us with a definite and firm conviction that a mistake has been made." *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017) (citation omitted). The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

[6] The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel and mandates "that the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quotation omitted). To prevail on a claim of ineffective assistance of counsel a petitioner must demonstrate both that his counsel's performance was deficient and that he was prejudiced by the deficient performance. *See French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (citing *Strickland*, 466 U.S. at 687, 694). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* The petitioner is prejudiced if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. *French*, 778 N.E.2d at 824.

[7] When we consider a claim of ineffective assistance of counsel, we apply a "strong presumption . . . that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Morgan v. State*, 755 N.E.2d 1070, 1073 (Ind. 2001). "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002). Counsel has wide latitude in selecting their trial strategy and tactics, which we afford great deference. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). Isolated poor strategy or bad tactics do not necessarily amount to ineffective assistance of counsel. *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998). The standard for ineffective assistance of counsel is the same for both trial and appellate counsel. *Garrett v. State*, 992 N.E.2d 710, 719 (Ind. 2013).

II. Post-Conviction Relief

A. Manifest Injustice

[8] Pursuant to the doctrine of *res judicata,* issues that were raised on direct appeal are not available for post-conviction review. *Clark v. State,* 648 N.E.2d 1187, 1190 (Ind. Ct. App. 1995), *trans. denied.* Although we should be reluctant to revisit prior decisions of this court, we can do so under "extraordinary circumstances such as where the initial decision was clearly erroneous and would work manifest injustice." *State v. Huffman*, 643 N.E.2d 899, 901 (Ind. 1994) (quotation omitted).

[9] Fuqua argues that this court should revisit its previous decision because we relied on suppression hearing testimony of information *not* contained within the probable cause affidavit in affirming the trial court's admission of evidence.[2] *See* Brief of Appellant at 12. When determining whether a search warrant is supported by probable cause we consider only the evidence presented to the issuing magistrate and not *post hoc* justifications for the search. *Seltzer v. State,* 489 N.E.2d 939, 941-42 (Ind. 1986).

[10] In *Fuqua*, we stated:

> The issuance of a search warrant must be supported by probable cause. . . . In deciding whether to issue a search warrant, the issuing magistrate's task is simply to make a practical, common-sense decision whether, *given all the circumstances set forth in the affidavit*, there is a fair probability that evidence of a crime will be found in a particular place.

984 N.E.2d at 716 (citation omitted) (emphasis added). Thus, we stated the correct standard. And upon review of the direct appeal opinion, the only facts relied upon to determine whether probable cause for a search warrant existed

[2] Fuqua also argues that the omission from the probable cause affidavit that McCarter and Stovall "were arrested and faced criminal prosecution" when they gave statements against Fuqua and acted as confidential informants was a manifest injustice. Brief of Appellant at 17. However, we reiterate that because "the remaining facts set forth in the affidavit were sufficient, the omission was not material." *Fuqua*, 984 N.E.2d at 718 n.4.

are those present in the probable cause affidavit.[3] *Id.* at 716-18. Therefore, we conclude Fuqua failed to establish a manifest injustice.

B. Ineffective Assistance of Trial Counsel

[11] Fuqua argues that he received ineffective assistance of trial counsel. First, Fuqua argues that the motion to suppress trial counsel filed was inadequate because "[i]t was unreasonable for trial counsel to argue the trash as being Fuqua's trash." Br. of Appellant at 30. However, because the motion to suppress contended that the trash-pull violated the Indiana Constitution, conceding that the trash belonged to Fuqua was necessary and not deficient performance.[4] *See Peterson v. State*, 674 N.E.2d 528, 534 (Ind. 1996) (stating that defendant must show "ownership, control, possession or interest in the premises searched" to have standing to challenge a search).

[12] Second, Fuqua argues that trial counsel was "ineffective for failing to object to the testimony of the States [sic] witnesses Detectives Engelman and Strayer and the States [sic] closing statements of the information not contained within [the

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[3] Fuqua seemingly argues that including in the direct appeal opinion testimony from the suppression hearing that was not contained in the probable cause affidavit constitutes a manifest injustice. However, this argument ignores that the reasonable suspicion regarding the trash-pull was also at issue and testimony was required to establish that.

[4] Also, we have recognized that a "concession" to a particular fact or charge that is supported by overwhelming evidence may help enhance a defendant's credibility on the remaining issues at trial. *Christian v. State,* 712 N.E.2d 4, 6 (Ind. Ct. App. 1999).

probable cause affidavit]."[5] Br. of Appellant at 33. To show ineffective assistance based on counsel's failure to object, a petitioner must demonstrate the trial court would have sustained the objection. *Glotzbach v. State*, 783 N.E.2d 1221, 1224 (Ind. Ct. App. 2003).

[13] Fuqua relies on *Seltzer*, where we stated that the trial court cannot "determine the existence of probable cause by any of the State's evidence other than that which was presented to the issuing magistrate." 489 N.E.2d at 941. However, whether there was probable cause for the search warrant was not the only issue presented to the trial court. The reasonable suspicion supporting the trash-pull was also at issue. Therefore, testimony was not limited to facts contained in the probable cause affidavit. We conclude that Fuqua has failed to show that the trial court would have sustained objections to the challenged testimony if made. Accordingly, Fuqua has failed to establish that his trial counsel's performance was deficient.

C. Ineffective Assistance of Appellate Counsel

[14] Fuqua also argues that his appellate counsel was ineffective. First, Fuqua argues that appellate counsel "failed to make any mention" that only evidence presented to the issuing magistrate and not *post hoc* justifications for the search

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[5] Fuqua also argued that trial counsel's performance prejudiced him because trial counsel elicited testimony regarding the controlled drug transaction not contained within the probable cause affidavit. *See* Br. of Appellant at 37-38. However, details regarding the controlled drug buy with Holman are included in the probable cause affidavit. *See* Appellant's App., Vol. Two at 16. Fuqua's argument is moot.

should have been considered, thus "omitting a winning argument[.]"[6] Br. of Appellant at 42.

[15] Instead, appellate counsel argued that "there was no probable cause to serve [as] a basis for the search warrant as the informants relied upon were not credible." Appellant's App., Vol. Two at 53. We have stated appellate counsel's determination regarding the selection of issues and what arguments to raise is one of the most important strategic decisions made by counsel in that role. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 261 (Ind. 2000), *cert. denied,* 534 U.S. 1164 (2002). In assessing counsel's performance and the strategic decision to include or exclude certain issues, this court defers to appellate counsel's judgment unless the decision was "unquestionably unreasonable." *Id.* (citation omitted). Here, appellate counsel presented a cogent argument attacking the reliability of the informants. Therefore, appellate counsel's performance was not deficient.

[16] Further, even if appellate counsel's omission constituted deficient performance, Fuqua was not prejudiced. As stated above, on direct appeal this court only considered facts present in the probable cause affidavit and determined that it provided sufficient probable cause for a search warrant. *See Fuqua*, 984 N.E.2d at 716-18.

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[6] Fuqua believes that his appeal would have been successful if appellate counsel had made this argument; however, the fact that appellate counsel's strategy was ultimately unsuccessful does not mean that he was constitutionally ineffective. *Hinesley v. State*, 999 N.E.2d 975, 983 (Ind. Ct. App. 2013), *trans. denied.*

[17] Fuqua also argues that appellate counsel was deficient because counsel "relied on suppression hearing testimony by the States [sic] witnesses of information *not* contained within [the probable cause affidavit.]" Br. of Appellant at 42. Pursuant to Indiana Rule of Appellate Procedure 46(A)(6), the statement of facts in an appellate brief "shall describe the facts relevant to issues presented for review." One of the issues raised on direct appeal was whether there was reasonable suspicion for the trash-pull. The determination of whether there was reasonable suspicion to conduct the trash-pull would not be limited to facts only contained within the probable cause affidavit. Therefore, counsel's inclusion of facts not contained in the probable cause affidavit was not deficient.

[18] Lastly, Fuqua argues that appellate counsel's representation constituted ineffective assistance because counsel referenced that the information the anonymous caller provided police was about Fuqua. Fuqua contends:

> [Detective] Strayer testified during cross examination that at the time of the trash pull that[] he received the name Terrence from the anonymous caller during the call, but did not know if it was actually Terence Fuqua[] at that time and that [D]etective Engelman told him that[] he believed maybe it was Fuqua, so they had kind of an idea of who they thought may be there.

Br. of Appellant at 45.

[19] Fuqua's first name is Terrence. Fuqua's address was also given by the tipster. There is a reasonable inference that the tipster was referring to Fuqua when he said Terrence. Therefore, appellate counsel's references to the tipster's identification of Fuqua were not deficient nor did they prejudice Fuqua.

Conclusion

[20] We conclude the post-conviction court did not err in denying Fuqua's petition for post-conviction relief. Accordingly, we affirm.

[21] Affirmed.

Bradford, C.J., and Altice, J., concur.