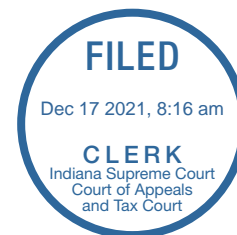


MEMORANDUM DECISION

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.



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IN THE COURT OF APPEALS OF INDIANA

David Deel,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 17, 2021

Court of Appeals Case No.
21A-PC-579

Appeal from the Orange Circuit
Court

The Honorable Steven L. Owen,
Judge

Trial Court Cause No.
59C01-2006-PC-354

Weissmann, Judge.

[1] David Deel contends his trial counsel ineffectively represented him at his trial on drug charges by failing to call a specific witness to testify. That person's statements to police implicated Deel in drug dealing and served as the basis for a search of Deel's home that uncovered methamphetamine and marijuana. As Deel, rather than his counsel, decided the person should not testify, Deel has not established that his counsel's actions were unreasonable or prejudicial. We affirm the trial court's denial of post-conviction relief.

Facts

[2] A "cooperative citizen" told an undercover detective, whom the citizen had known for 20 years, that Deel was using and dealing methamphetamine. The citizen recently had provided tips leading to the arrests of two other people. The detective, who had received other reports of Deel's drug involvement, included the citizen's statements in his successful request for a search warrant for Deel's home. The resulting search revealed twenty-eight grams of crystal meth in a drawer next to Deel's birth certificate, approximately one pound of marijuana, various paraphernalia such as digital scales and baggies, and a wallet containing Deel's Indiana photo identification card.

[3] Deel was charged with Level 2 felony dealing in methamphetamine, Level 3 felony methamphetamine possession, Level 6 felony marijuana possession, and Level 6 felony maintaining a common nuisance. The State also alleged Deel was a habitual offender. Deel unsuccessfully sought to suppress the evidence seized during the search, and the trial court admitted the evidence at Deel's jury

trial over his objection. Deel was convicted as charged except that the marijuana count was reduced to a class B misdemeanor. The trial court sentenced Deel to a total of 50 years imprisonment.

- [4] We affirmed Deel’s conviction on direct appeal in an unpublished decision, and the Indiana Supreme Court denied transfer. *Deel v. State*, No. 59A01-1704-CR-939, *slip op.* *6 (Ind. Ct. App. Jan. 31, 2018), *trans. denied*. Deel later filed a petition for post-conviction relief in which he alleged ineffective assistance of counsel based on his counsel’s failure to call the “concerned citizen” as a witness at Deel’s trial. Deel represented himself throughout the post-conviction proceedings. The court that heard his petition (PCR court) denied it after a hearing but failed to enter findings of fact and conclusions of law as required by Indiana Post-Conviction Rule 1(6). We remanded for entry of findings and conclusions, which the trial court later provided in its “Amended Order on Petition for Post-Conviction Relief and Findings of Facts and Conclusions of Law” (cleaned up). Deel appeals that judgment.

Discussion and Decision

- [5] Deel claims his trial counsel’s failure to call the “cooperative citizen” to testify at trial amounted to ineffective assistance of counsel that deprived him of his Sixth Amendment right to confront witnesses. He also appears to allege that his appellate counsel was ineffective by failing to raise various issues in his direct appeal. He fails to prove either claim.

I. Standard of Review

[6] When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Hollowell v. State*, 19 N.E.3d 263, 268-69 (Ind. 2014). To prevail, the petitioner must show the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the PCR court. *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993), *reh'g denied*. Where, as here, the PCR court entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to the post-conviction court's legal conclusions but review its factual findings for clear error. *State v. Cozart*, 897 N.E.2d 478, 482 (Ind. 2008).

II. No Ineffective Assistance of Trial Counsel

[7] The essence of Deel's claims is alleged ineffective assistance of counsel, although he asserts as collateral damage various violations of his rights to due process and confrontation of witnesses against him. To prove ineffective assistance of counsel, Deel was required to show: (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) the deficiency was so prejudicial as to create a reasonable probability that the outcome would have been different absent counsel's errors. *Hollowell*, 19 N.E.3d at 268-69.

[8] In rejecting this claim, the PCR court concluded that "[m]uch of [Deel's] argument was covered/or should have been covered in his direct appeal." Amended Order, p. 4. The court also found that "there was no evidence

presented by [Deel] that would suggest that [his trial counsel's] representation . . . was deficient" *Id.* We agree.

[9] The evidence shows Deel was responsible for the absence of the “concerned citizen” from trial. Although Deel’s counsel never learned the identity of the citizen, Deel testified at the post-conviction hearing that the citizen was Chuck Hancock, the owner of the camper where Deel possessed the drugs seized in the search. Tr. Vol. II, pp. 16-17. Trial counsel had asked Deel before trial whether he wanted to “call Chuck Hancock as a witness and [Deel] said no.” *Id.* at 14. Although the record is unclear as to when Deel learned Hancock’s identity as the “concerned citizen,” Deel did not allege in his post-conviction petition that trial counsel was ineffective for failing to investigate the citizen’s identity. Trial counsel did not act unreasonably by following Deel’s instructions to refrain from calling Hancock as a trial witness. *See Hamner v. State*, 739 N.E.2d 157, 159 (Ind. Ct. App. 2000) (ruling that party cannot invite alleged error and then use that alleged error as grounds for reversal).¹

[10] Even if that were not the case, Deel has failed to establish any prejudice from trial counsel’s failure to call the “concerned citizen” as a witness. The citizen did not testify at the post-conviction hearing, and Deel failed to present any

¹ Trial counsel shrank the probable impact of the “concerned citizen’s” statements to police by objecting to that evidence at trial. Tr. Vol. IV, pp. 48-52. In response, the trial court instructed the jury to consider the statements to explain the investigative process but not for their truth. *Id.* at 49. If trial counsel had called the “concerned citizen” as a witness, he seemingly would have opened the door to damaging evidence kept from the jury through trial counsel’s prior actions..

other evidence at the post-conviction hearing suggesting that the citizen's testimony at trial would have been helpful to him. Deel has failed in his burden of proving that trial counsel's omission was so prejudicial as to create a reasonable probability of a different outcome absent counsel's alleged errors. *See Hollowell*, 19 N.E.3d at 268-69.

III. Ineffective Assistance of Appellate Counsel Waived

[11] Deel also appears to allege that his appellate counsel was ineffective for failing to raise various issues in his direct appeal, including trial counsel's failure to call the "concerned citizen" as a witness. Appellant's Br., pp. 16-17. But Deel has waived this claim by failing to raise it in his petition for post-conviction relief or to the PCR court. *See Pavan v. State*, 64 N.E.3d 231, 233 (Ind. Ct. App. 2016) (ruling that post-conviction claims may not be raised for the first time on appeal). Regardless, Deel's appellate counsel was not ineffective for declining to challenge trial counsel's failure to call a trial witness whom Deel directed trial counsel to avoid.

[12] The judgment of the PCR court is affirmed.

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