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IN THE
COURT OF APPEALS OF INDIANA

DANIEL J. EMERY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 52A04-0607-PC-385
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Rosemary Higgins Burke, Judge
Cause No. 52C01-0605-PC-1
52C01-0008-CF-69

November 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Daniel Emery appeals the denial of his petition for post-conviction relief ("PCR petition"), which challenged his convictions for two counts of Class B felony burglary and an habitual offender enhancement. We affirm.

Issue

Emery raises multiple issues, which we consolidate and restate as whether the post-conviction court properly concluded that Emery received effective assistance of trial counsel.

Facts

On August 21, 2000, Emery burglarized a home in Miami County. Three days later he burglarized a home in the same community. Emery had previously worked for each of the homeowners. Emery and an accomplice took jewelry and over ten thousand dollars in cash, in fifty and one-hundred dollar bills, from the first home. They took handguns and over sixty thousand dollars in cash and certificates of deposit from the second home. Emery used some of the cash to buy a motorcycle and various household appliances. He put the remainder of the cash and stolen goods in a rented storage facility.

On August 25, 2000, Ricky Johnson, a co-worker of Emery's, reported to local police that Emery told him he had "done a job" over the weekend and needed to know if Johnson knew anyone who wanted to buy jewelry. App. p. 20. Johnson also reported that Emery claimed to have ten thousand dollars in cash. Johnson explained to police that he came forward because he felt it was the right thing to do.

After speaking with Johnson, police observed the vicinity of the Emery residence and noted that several large empty boxes were discarded outside the home. One box for a new twenty-five inch television was thrown out near the street. Officers looked in the box and discovered several receipts for cash transactions that totaled to over eight hundred dollars for bill payments or purchases on August 21, 2000. The denominations of the payments appeared to be only fifty or one-hundred dollar bills.

Police applied for a search warrant for the Emery residence. A probable cause hearing was held on August 28, 2000. The trial court found that the information provided by Johnson corroborated the officers' observations of the Emery residence and issued the search warrant. Police executed the search warrant the same day. Upon questioning, Emery admitted to his involvement in the burglaries of both homes and took police to the storage facility.

On December 21, 2001, Emery pled guilty without a plea agreement to two counts of Class B felony burglary and he admitted to being an habitual offender. The trial court sentenced Emery to fifteen years on each count, with the sentences to run consecutively. The trial court added a fifteen-year enhancement for Emery's habitual offender status, with five years suspended.

Emery filed a direct appeal challenging his sentence. This court affirmed his sentence. Emery v. State, No. 52A05-0503-PC-153 (Ind. Ct. App. Dec. 21, 2005). On May 10, 2006, Emery unsuccessfully attempted to file a PCR Petition. The trial court dismissed the petition without a hearing, and Emery appealed to this court. This court remanded the cause on December 21, 2006, and directed the trial court to hold a hearing

on Emery's PCR petition. The hearing was held on January 17, 2007. The post conviction court denied Emery's petition and this appeal followed.

Analysis

A petitioner appeals a negative judgment when appealing the denial of post-conviction relief. Cornelious v. State, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), trans. denied. We will not reverse such a judgment "unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court." Id. Where, as here, the post-conviction court enters findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule (1)(6), we will reverse only upon a showing of clear error, which only occurs if we are left with a definite and firm conviction that a mistake has been made. Hall v. State, 849 N.E.2d 466, 469 (Ind. 2006).

Emery contends his trial counsel was ineffective by failing to move to suppress evidence. Specifically, Emery maintains that the warrantless trash search outside his residence was illegal and the search warrant used later was invalid because the informant's reliability was not established. He argues that the evidence obtained should have been suppressed and his counsel failed by not presenting this defense and initiating a suppression proceeding. To the extent that Emery argues the search itself was illegal, we will not review this issue outside the context of the ineffective assistance claim. "In post-conviction proceedings, complaints that something went awry at trial are generally congnizable only when they show deprivation of the right to effective counsel or issues

demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002).

Claims of ineffective assistance of counsel are reviewed under the two-part test set out by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). A defendant must demonstrate not only that counsel performed below an objective standard of reasonableness, but also that the deficient performance resulted in prejudice. Id. We will presume that counsel provided adequate assistance and will defer to his or her strategic decisions. Terry v. State, 857 N.E.2d 396, 403 (Ind. Ct. App. 2006), trans. denied. Given this presumption, a defendant must present "strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense." Oliver v. State, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), trans. denied.

Regarding the prejudice element of the test, the defendant must show "a reasonable probability (i.e. a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." Reed v. State, 866 N.E.2d 767, 769 (Ind. 2007). In his pro se PCR petition Emery does not explicitly claim that he pled guilty because of erroneous advice of trial counsel. Rather, Emery seems to contend that had counsel made the appropriate pretrial motions, he would have proceeded to trial and won. "A showing of prejudice to upset a guilty plea requires a showing of a reasonable probability of a result of not guilty." Segura v. State, 749 N.E.2d 496, 506 (Ind. 2001).

Emery argued to the post conviction court that the search of his trash was illegal in light of State v. Neanover, 812 N.E.2d 127 (Ind. Ct. App. 2004), and that his trial counsel should have moved to suppress the evidence from that trash pull. The Neanover case was decided four years after Emery pled guilty. Counsel for Emery was not expected to anticipate or effectuate changes in the law and cannot be considered ineffective to failing to anticipate such changes. See Trueblood v. State, 715 N.E.2d 1242, 1258 (Ind. 1999) cert. denied; Williamson v. State, 798 N.E.2d 450, 454 (Ind. Ct. App. 2003), trans. denied, (reasoning that counsel's strategic decisions are judged by available precedent at the time). Moreover, the facts in Neanover indicated that the trash was pulled from the landing area of a three-story apartment building; it was not in the trash service area or near the curb like the boxes in Emery's case. Emery had no expectation of privacy for articles left near the curb. Officers testified the boxes and garbage searched were near the curb and set apart from the other boxes and garbage strewn about the property. Indiana also did not require reasonable suspicion prior to a trash pull until 2005. See Litchfield v. State, 824 N.E.2d 356, 364 (Ind. 2005) (holding that a "requirement of a reasonably articulable suspicion" is necessary before law enforcement engages in a trash pull). Considering these facts and the state of the case law in 2000, we decline to find that counsel for Emery failed to meet a reasonably objective standard by not filing a motion to suppress on the basis of the trash search.

Emery also argues that any information from the informant, Ricky Johnson, was unreliable because Johnson was not established as credible witness. At the PCR hearing, Emery seemed to contend that the statements by Johnson were akin to statements of a

confidential informant and could not establish probable cause. In his brief before this court, Emery contends Johnson's statements were unsupported hearsay and that Johnson was only speaking to police "to collect the crime stopper reward." Appellant's Br. p. 8. Again, Emery contends his attorney should have filed a motion to suppress any evidence obtained.

There are generally two types of informants, professional informants and cooperative citizens. Washburn v. State, 868 N.E.2d 594, 599 (Ind. Ct. App. 2007). Our supreme court has noted that concerned citizen informants are generally to be considered reliable in the absence of incriminating circumstances, but that ultimately the totality of the circumstances test controls. Kellems v. State, 842 N.E.2d 352, 356 (Ind. 2006). Ricky Johnson was a concerned citizen and co-worker of Emery's. He came to the police station, presented identification, cooperated in interviews, and gave a sworn statement. He described a conversation with Emery regarding "the job," the stolen jewelry, Emery's home, and their work schedule. He also described certain items, lawnmowers, and vehicles Emery recently purchased that did not seem to match the pay available at their place of work.

In considering the issuance of a warrant, the magistrate or judge is assigned the task of making "a common sense determination, based on the totality of the circumstances, that there is a fair probability that a particular place contains evidence of a crime." Houser v. State, 678 N.E.2d 95, 99 (Ind. 1997). Where a warrant is sought based on hearsay information, the sworn statement or affidavit must either:

> 1. contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or
>
> 2. contain information that establishes that the totality of the circumstances corroborates the hearsay.

Helsley v. State, 809 N.E.2d 292, 295 (Ind. 2004) (citing Ind. Code § 35-33-5-2(b)).

Johnson's sworn statement contained information that corroborated officers' observations of the Emery residence and the findings of the trash pull. Information provided by one of the burglary victims established additional facts that corroborated the hearsay, including the denominations of the stolen cash and that Emery had recently been inside the home and knew they would be out of town. Johnson came voluntarily to police and cited a concern for his fellow citizens. Given the totality of these circumstances and the nature of the informant, Emery cannot establish that his trial counsel should have pursued a motion to suppress or that such a motion would have succeeded.

Emery has not shown that his counsel's performance fell below an objective standard of reasonableness. We find no clear error and will not reverse the post conviction court's denial of Emery's PCR petition.

Conclusion

Emery did not meet his burden of establishing that received ineffective assistance of trial counsel. The post-conviction court properly denied his PCR petition. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.