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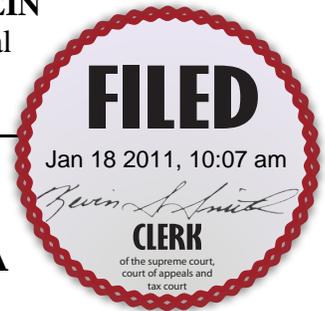
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**IN THE
COURT OF APPEALS OF INDIANA**

EDDIE G. LOVE,)
)
Appellant/Petitioner,)
)
vs.) No. 20A03-1002-PC-76
)
STATE OF INDIANA,)
)
Appellee/Respondent.)

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0602-FB-12

January 18, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner Eddie Love appeals from the post-conviction court's denial of his petition for post-conviction relief ("PCR"). Love contends that he received ineffective assistance of trial and appellate counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

The facts underlying Love's two convictions for Class B felony dealing in cocaine were related by this court in our resolution of his direct appeal as follows:

The relevant facts most favorable to the jury's verdict indicate that on February 6 and 7, 2006, a confidential informant supervised by Elkhart police conducted controlled buys of crack cocaine inside a home on Second Street. Each time, Love sold the informant \$20 worth of cocaine. The informant had known Love for six or seven months and had had contact with him "more than three, but less than 10" times prior to the controlled buys. Tr. at 61.

Love v. State, Cause No. 20A03-0703-CR-160, slip op. at 2 (Ind. Ct. App. Oct. 30, 2007), *trans. denied*. Police arrested Love without a warrant at the residence on Second Street following the second controlled buy.

On February 9, 2006, a magistrate determined that the State had probable cause to hold Love until he posted bond. On February 13, 2006, the State charged Love with two counts of Class B felony dealing in cocaine. Love's jury trial began on May 30, 2006. The next day, Love's trial was recessed until June 15, 2006, because Love's counsel had learned that ten of the twenty dollars of buy money from the February 7 controlled buy had been recovered from the residence of Brian Dandridge. Love's trial counsel moved for a mistrial, which motion the trial court denied. When trial resumed, Love called Dandridge to the stand, where he testified that he had received the ten dollars at issue from Love on February 7,

2006. The jury found Love guilty as charged, and the trial court sentenced him to eighteen years of incarceration.

On October 30, 2007, this court affirmed Love's convictions. In February of 2009, Love filed an amended PCR petition, claiming that he received ineffective assistance of trial and appellate counsel. Specifically, Love contended that his trial counsel was ineffective for failing to challenge his allegedly illegal warrantless arrest and his appellate counsel was ineffective for failing to object to alleged prosecutorial misconduct in failing to disclose that some of the buy money had been found in the possession of a person other than Love. After a hearing, the post-conviction court denied Love's PCR petition in full on January 27, 2010.

DISCUSSION

PCR Standard of Review

Our standard for reviewing the denial of a PCR petition is well-settled:

In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court.... Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law.

Hall v. State, 849 N.E.2d 466, 468, 469 (Ind. 2006) (internal citations and quotations omitted).

Ineffective Assistance of Counsel Standard of Review

Love contends that his trial counsel was ineffective for failing to challenge his

allegedly illegal warrantless arrest and his appellate counsel was ineffective for failing to object to alleged prosecutorial misconduct in failing to disclose that some of the buy money had been found in the possession of a person other than Love. We review claims of ineffective assistance of counsel based upon the principles enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984):

[A] claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694).

Because an inability to satisfy either prong of this test is fatal to an ineffective assistance claim, this court need not even evaluate counsel's performance if the petitioner suffered no prejudice from that performance. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999).

"The standard of review for a claim of ineffective assistance of appellate counsel is identical to the standard for trial counsel[.]" *Williams v. State*, 724 N.E.2d 1070, 1078 (Ind. 2000).

A. Trial Counsel

Love contends that his trial counsel should have objected to his allegedly illegal arrest, which he seems to claim was carried out without probable cause. Love contends that this alleged lack of probable cause would have necessitated the dismissal of charges against him and his release. Even if we assume, *arguendo*, that Love was illegally arrested, an objection below would not have helped him in the least:

First, “lack of probable cause is not grounds for dismissing a charging information.” *Flowers v. State*, 738 N.E.2d 1051, 1055 (Ind. 2000). Although IC 35-34-1-4 allows a court to dismiss a defective indictment or information upon a motion of the defendant, it makes no provision for dismissal for lack of probable cause. Second, “An invalid arrest does not affect the right of the State to try a case nor does it affect the judgment of conviction.” *Flowers*, 738 N.E.2d at 1055 (quoting *Felders v. State*, 516 N.E.2d 1, 2 (Ind. 1987)). The legality or illegality of an arrest is pertinent only as it affects the admission of evidence obtained through a search incident to arrest and has no bearing upon one’s guilt or innocence. *Felders*, 516 N.E.2d at 2; *see also State v. Palmer*, 496 N.E.2d 1337, 1340-41 (Ind. Ct. App. 1986).

Pond v. State, 808 N.E.2d 718, 721 (Ind. Ct. App. 2004), *trans. denied*. Love has failed to establish that he received ineffective assistance of trial counsel.

B. Appellate Counsel

1. Probable Cause for Arrest

Love contends that his appellate counsel was ineffective for failing to raise the issue of his allegedly illegal arrest on appeal. As we have previously concluded, however, such a challenge would not have helped Love in the trial court and so would not have helped on appeal.

2. Mistrial Motion

Love contends that his appellate counsel was ineffective for failing to raise the issue of alleged prosecutorial misconduct in the form of failing to disclose that the State had found some of the buy money in the possession of another. Following the presentation of evidence at trial, Love’s trial counsel learned that ten of the twenty dollars from the February 7, 2006, drug deal had been found in the possession of Dandridge. After Love’s trial counsel moved for a mistrial, the trial court denied the motion but continued the trial for fifteen days to allow

for further investigation. When trial resumed, Love called Dandridge, who testified that he had received the ten dollars from Love when the two were gambling together on February 7, 2006. Love renewed his motion for mistrial at sentencing, which the trial court again denied.

Love has failed to show that any challenge to the trial court's ruling on his motion for mistrial would have been successful on direct appeal.

We review a trial court's decision to deny a mistrial for abuse of discretion because the trial court is in "the best position to gauge the surrounding circumstances of an event and its impact on the jury." *McManus v. State*, 814 N.E.2d 253, 260 (Ind. 2004). A mistrial is appropriate only when the questioned conduct is "so prejudicial and inflammatory that [the defendant] was placed in a position of grave peril to which he should not have been subjected." *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001) (quoting *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989)). The gravity of the peril is measured by the conduct's probable persuasive effect on the jury. *Id.*

Pittman v. State, 885 N.E.2d 1246, 1255 (Ind. 2008).

Essentially, Love is arguing that the State committed a *Brady* violation, and that the alleged violation placed him in grave peril.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny apply to the State's failure to disclose evidence that is favorable to the accused and material to the accused's guilt or punishment.... Evidence is material under *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. 'A reasonable probability' is a probability sufficient to undermine confidence in the outcome."... If the favorable evidence becomes known to the defendant before or during the course of a trial, *Brady* is not implicated.

Williams v. State, 714 N.E.2d 644, 649 (Ind. 1999) (some citations omitted).

Love cannot show how the State's failure to disclose the evidence regarding the buy money placed him in grave peril. First, Love has failed to show that any *Brady* violation

occurred—the disclosure happened before the end of trial, when Love still had the opportunity to make use of it. The trial court continued trial so that Love could investigate Dandridge’s evidence, and Dandridge testified on Love’s behalf at trial. Moreover, even if the evidence in question had not been disclosed before the end of trial, it was hardly favorable to Love. Dandridge testified that he received the money from Love, which, if anything, tends to show that Love was, in fact, the person who sold the cocaine to the police. Evidence that you are in possession of drug deal buy money is not exculpatory. Love has failed to show that a challenge to the trial court’s ruling on his motion for mistrial would have been successful on direct appeal and has therefore failed to show prejudice from the failure to bring such a challenge. Love did not receive ineffective assistance of appellate counsel.¹

The judgment of the post-conviction court is affirmed.

KIRSCH, J., and CRONE, J., concur.

¹ To the extent that Love raises his *Brady* claim as a freestanding issue, we will not address it, as he may not raise a freestanding claim of error for the first time in a post-conviction proceeding and has made no claim that the issue was unavailable or unknown to him at the time of his direct appeal. *See Conner v. State*, 829 N.E.2d 21, 24-25 (Ind. 2005).