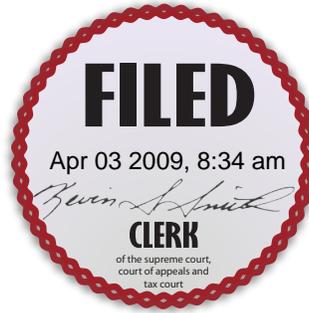


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOSEPH D. FISHER,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 20A03-0812-PC-602

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0210-FA-103

April 3, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Joseph D. Fisher appeals the denial of his petition for post-conviction relief, claiming ineffective assistance of trial counsel. Specifically, Fisher argues that his trial counsel was ineffective because he failed to argue at a hearing on a motion to suppress that the police were not authorized to stop his Sport Utility Vehicle (SUV) for a seatbelt infraction. Fisher claims that he would have prevailed on this argument, in that the drugs that were seized from his vehicle would have been suppressed. Thus, Fisher contends that he was entitled to post-conviction relief because he would not have pleaded guilty to various drug offenses if his trial counsel had raised that issue. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

On October 12, 2002, Fisher was driving his 1999 SUV when he was stopped by Officer David Clendenen of the Elkhart City Police Department. The Goshen Drug Unit had received reliable information that Fisher would be traveling through town with a large quantity of methamphetamine. Officer Clendenen stopped Fisher because he was speeding, was not wearing his seatbelt, and had made several lane changes without signaling.

Once Officer Clendenen stopped the vehicle, he radioed for assistance from a K-9 unit. As Officer Clendenen was writing Fisher a ticket for the traffic violations, another officer arrived with a drug-sniffing dog. The dog conducted an exterior sniff of the SUV and alerted to the odor of narcotics emanating from the vehicle. When Officer Clendenen asked Fisher to sit in his police vehicle, Fisher ran from the scene. However, Fisher was immediately apprehended and arrested. Thereafter, the police officers searched the SUV

and found nearly 1000 grams of methamphetamine and some other drugs. As a result, Fisher was charged with possession of over three grams of methamphetamine with intent to deliver, a class A felony.

Thereafter, the officers executed a search warrant at Fisher's residence and found additional drugs. Following the search, Fisher was charged with one count of possession of amphetamines with the intent to deliver, a class B felony.

Prior to trial, Fisher's counsel—William Cohen—filed a motion to suppress the drugs that were seized from the SUV. The motion did not challenge the validity of the initial stop of the vehicle. Rather, Fisher argued that the search was invalid and alleged that

1. Officer David Clendenen had no probable cause or reasonable suspicion to search the Defendant's vehicle.
2. Officer Clendenen was prohibited under Indiana law from asking for consent to search Defendant's vehicle during and after a traffic stop for a seat belt violation. Clark v. State, 804 N.E.2d 196, 200-01 (Ind. Ct. App. 2004).

Ex. H. The trial court denied Fisher's motion to suppress and Cohen ultimately withdrew from the case. Attorney Christopher Crawford represented Fisher beginning in 2004.

In March 2005, Fisher pleaded guilty to dealing in methamphetamine, a class A felony, and to dealing in amphetamines, a class B felony, pursuant to a plea agreement. In exchange for Fisher's guilty plea, the State agreed to dismiss two other unrelated charges and recommend a sentence cap of ten years on the amphetamine dealing count.

Ex. E. Sentencing was left to the trial court's discretion on the dealing in methamphetamine charge.

The trial court accepted the plea agreement and sentenced Fisher to a term of thirty-five years of incarceration with five years suspended to probation on the dealing in methamphetamine charge, and to ten years for dealing in amphetamines. The trial court ordered those sentences to run consecutively to each other.

Fisher filed an amended petition for post-conviction relief on July 21, 2008, claiming ineffective assistance of trial counsel.¹ Specifically, Fisher alleged that his trial counsel was ineffective because he

should have raised the issue that Officer Clendenen was prohibited from stopping Fisher for a seatbelt violation because the . . . SUV that Fisher was driving is considered a truck and, therefore, exempt from Indiana's seatbelt statute. Since Fisher could not have been stopped for a seatbelt violation, the subsequent search was illegal and the evidence obtained would have been suppressed as the fruit of an illegal search. The search was a violation of the Fourth Amendment to the United States Constitution and Article One, Section Eleven of the Indiana Constitution.

Fisher's counsel was ineffective for failing to raise this issue in the Motion to Suppress and Fisher was prejudiced because he would not have pled guilty and been convicted if the evidence was suppressed.

Appellant's App. p. 50.

Following an evidentiary hearing on August 14, 2008, the post-conviction court denied Fisher's request for relief, finding that his trial counsel was not ineffective. In relevant part, the post-conviction court's order provided that

9. The ground for Petitioner's request for relief is that his trial counsel was ineffective for failing to raise the issue in the motion to suppress filed on behalf of Petitioner that since the vehicle being driven by Petitioner was an SUV registered as a truck, Petitioner was exempt from Indiana's seatbelt law at the time he was stopped and, therefore, the stop was illegal. Petitioner contends that had the Motion to Suppress been properly litigated,

¹ Fisher initially filed a pro se petition for post-conviction relief on May 14, 2007. Appellant's App. p. 18-26.

the evidence seized during the stop would have to have been suppressed and he would not have pled guilty.

...

11. Although Petitioner correctly cites Owen v. State, 796 N.E.2d 775 (Ind. Ct. App. 2003) in support of his argument that an SUV registered as a truck was immune from Indiana's seat belt statute (Indiana Code § 9-19-10-2), it is notable that Owen was decided subsequent to the stop of the Petitioner. A contrary view of an SUV as a passenger motor vehicle is found in Price v. State, 724 N.E.2d 670 (Ind. Ct. App. 2000), which was the status of the law prior to and at the time of Petitioner's stop. In Price, the Indiana Court of Appeals analyzed this issue and noted that it is not dispositive whether a vehicle has a truck plate, but whether it was "designed, used or maintained primarily for the transportation of property." Price, 724 N.E.2d at 676. Ultimately, the legislature agreed with the reasoning of the Court in Price and amended the Indiana Code in 2007 to strike the exclusion of trucks from the definition of "passenger motor vehicle." See I.C. 9-13-2-123. For these reasons, it cannot be said that Officer Clendenen, the officer who stopped Petitioner, was without good faith in including the seat belt violation in his reasons for stopping the vehicle being driven by Petitioner, or that Petitioner's trial counsel was deficient for failing to raise the issue of the seat belt violation in the motion to suppress.

12. [E]ven if Petitioner did not violate the then tenuous seat belt law, the record clearly shows that Petitioner's failure to wear a seat belt was not the sole reason Officer Clendenen executed the stop. The record shows that the Goshen Police Department Drug Unit had reliable information from a cooperating source, along with other corroborating evidence and surveillance, that Petitioner would be coming into Goshen, Indiana and be in possession of illegal drugs. Officer Clendenen was so advised and once he observed the vehicle, he began following it. The officer observed the vehicle being driven by Petitioner make unsafe lane changes without signaling and pass other traffic at a high rate of speed. Therefore, the stop was lawful. Once Petitioner's vehicle was stopped for investigatory purpose[s], Officer Clendenen called for a canine unit to assist and, prior to the completion of the traffic stop, the canine arrived and conducted an exterior sniff of the vehicle. The canine alerted to the presence of illicit drugs which gave Officer Clendenen probable cause to search the vehicle; and, Petitioner also fled from the scene when he was asked to sit in the officer's squad car during the search. These were the issues raised by trial counsel in the motion to suppress which were addressed by the court in its Order.

13. Based on the foregoing, there is no evidence from which the court can conclude that trial counsel in this case was ineffective for failing to focus on the seat belt violation as opposed to the myriad of other issues in the motion to suppress filed on behalf of Petitioner. . . . Although Petitioner contends that had his counsel argued this issue, the evidence would have been suppressed and he would not have pled guilty, this conclusion is not supported by the evidence. . . . For all the foregoing reasons, Petitioner's ineffective assistance of counsel [claim] fails.

Appellant's App. p. 74-76. Fisher now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that a petitioner who appeals the denial of post-conviction relief faces a rigorous standard of review, as we consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. Kien v. State, 866 N.E.2d 377, 380-81 (Ind. Ct. App. 2007). In post-conviction proceedings, the petitioner bears the burden of proof by a preponderance of the evidence. Henley v. State, 881 N.E.2d 639, 643 (Ind. 2008); Ind. Post-Conviction Rule 1(5). If a petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than was reached by the post-conviction court. Ivy v. State, 861 N.E.2d 1242, 1244 (Ind. Ct. App. 2007), trans. denied. We must accept the post-conviction court's findings of fact and may only reverse if the findings are clearly erroneous. Bahm v. State, 789 N.E.2d 50, 57 (Ind. Ct. App. 2003).

II. Ineffective Assistance of Counsel

There is a strong presumption that counsel rendered adequate legal assistance. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). To establish a claim of ineffective

assistance of counsel, a defendant must demonstrate that counsel performed deficiently and the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. McManus, 868 N.E.2d 778, 790 (Ind. 2007). In other words, the petitioner must establish that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Segura v. State, 749 N.E.2d 496, 500-01 (Ind. 2001). When a claim is based on counsel's allegedly incorrect advice regarding a possible defense, the petitioner must establish that the defense likely would have succeeded at a trial. Id. at 502-04. To satisfy the prejudice prong in the guilty plea context, the petitioner must establish that there is a reasonable probability that he would not have pled guilty and would not have been convicted had he gone to trial. Id. Failure to satisfy either prong will cause the claim to fail. Henley, 881 N.E.2d at 645. Therefore, if we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. Id.

As discussed above, Fisher asserted that his trial counsel was ineffective for failing to argue that the police were not justified in stopping him for a seatbelt violation because his SUV was a "truck," and those vehicles were not subject to the seatbelt laws. Appellant's App. p. 50. Although we acknowledge that the law was somewhat unsettled at the time with regard to whether the driver of an SUV was exempt from the seatbelt statute,² we need not decide whether Fisher's counsel was ineffective for failing to

² As the post-conviction court observed in its order denying Fisher's request for relief, a panel of this court in Owen v. State, 796 N.E.2d 775 (Ind. Ct. App. 2003)—which was decided subsequent to Officer Clendenen's stop of Fisher—held that an SUV registered as a truck was immune from Indiana's seat belt statute. A contrary view of an SUV as a passenger motor vehicle is found in State v. Price, 724 N.E.2d 670 (Ind. Ct. App. 2000), which was the status of the law prior to and at the time that Fisher was stopped.

advance this argument at the suppression hearing. Indeed, the record demonstrates that the seatbelt violation was not the sole basis for the stop. Rather, Officer Clendenen also stopped Fisher's vehicle for speeding and unsafe lane change. Thus, even assuming solely for argument's sake that Officer Clendenen was not justified in stopping Fisher for a seatbelt violation, he was lawfully permitted to stop Fisher for these other infractions.³ See State v. Geis, 779 N.E.2d 1194, 1195-97 (Ind. Ct. App. 2002) (upholding the validity of a traffic stop where the defendant failed to signal before changing lanes); Lashley v. State, 745 N.E.2d 254, 258 (Ind. Ct. App. 2001) (finding a traffic stop was valid where the defendant was stopped for speeding). Additionally, it is well settled that a police officer may briefly detain a person whom the officer believes has committed an infraction or an ordinance violation. Ind. Code § 34-28-5-3; Datzek v. State, 838 N.E.2d 1149, 1154 (Ind. Ct. App. 2005).

Because Officer Clendenen could lawfully stop Fisher for committing the other infractions, a challenge to the validity of the stop based on an alleged seatbelt violation would not have resulted in the granting of the motion to suppress. In other words, even if Fisher's counsel had prevailed on that argument, the stop was nonetheless valid as a result of Fisher's commission of the other two traffic violations. As a result, Fisher cannot show prejudice as a result of trial counsel's decision not to challenge the validity

As the post-conviction court properly noted, our legislature ultimately struck the exclusion of trucks from the definition of "passenger motor vehicle." Ind. Code § 9-13-2-123.

³ Speeding and the failure to signal before changing lanes are generally class C infractions. Ind. Code §§ 9-21-5-13, -8-25, -8-49.

of the stop on the basis of the alleged seatbelt violation. Therefore, Fisher's ineffective assistance of counsel claim fails.

The judgment of the post-conviction court is affirmed.

MAY, J., and BARNES, J., concur.