

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.

ATTORNEY FOR APPELLANT:

CHARLES W. LAHEY
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



STEPHEN HARVEY,
Appellant-Petitioner,

vs.

STATE OF INDIANA,
Appellee-Respondent.

)
)
)
)
)
)
)
)
)
)

No. 92A03-1008-PC-469

APPEAL FROM THE WHITLEY CIRCUIT COURT
The Honorable James R. Heuer, Judge
Cause No. 92C01-0910-PC-112

April 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner Stephen Harvey appeals from the post-conviction court's denial of his petition for post-conviction relief ("PCR"). We reorder and restate his claims as follows:

- I. Whether the post-conviction court improperly denied Harvey's claim that he received ineffective assistance of trial counsel;
- II. Whether the post-conviction court improperly denied Harvey's claim that his guilty pleas to Class B felony robbery and Class B felony criminal confinement and his admission to being a habitual offender were not knowing, intelligent, and voluntary; and
- III. Whether the post-conviction court improperly denied Harvey's claim that his admission to being a habitual offender was based on a charge that had been dismissed and should therefore be set aside.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 14, 2003, Harvey and Tamika Reid robbed an Aldi store in Columbia City and bound and gagged two employees with duct tape. Police learned that two persons fitting the descriptions of the robbers given to them by the employees rented a room at the Lees Inn in Columbia City the night of August 14. Columbia City Police Detective Timothy Longenbaugh obtained a copy of Harvey's driver's license from Lees Inn employee Lisa Smither and used Harvey's photograph in an array, from which the Aldi employees identified him as the robber. Smither also provided Detective Longenbaugh with a copy of the room receipt that contained Harvey's name and current address. On August 21, 2003, the State charged Harvey with Class B felony robbery and Class B felony criminal confinement and alleged him to be a habitual offender. On

October 16, 2003, Harvey was arrested in South Bend and transported back to Whitley County.

On October 20, 2003, Detective Longenbaugh was contacted by the South Bend Police Department, who told him that Reid was in custody and had admitted to, *inter alia*, committing the Columbia City Aldi robbery with Harvey. Reid's mother had apparently contacted South Bend Police regarding her daughter's involvement in the robbery. In an October 21, 2003, interview with police, Reid detailed how she and Harvey checked into the Lees Inn, had dinner, and then robbed the Aldi. There is no indication that Reid knew that Harvey had been arrested for or charged with the Aldi robbery, had previously been chosen from a photo array by the Aldi employees, or that he was even a suspect.

On May 4, 2004, Harvey pled guilty to Class B felony robbery and Class B felony criminal confinement. Harvey also admitted that day to being a habitual offender by virtue of a conviction for a Class C felony burglary for which he was sentenced on May 17, 1996, and a conviction for a Class D felony theft committed on May 23, 1996. In fact, Harvey had pled guilty to committing Class D felony fraud on May 23, 1996, not theft. Additionally, the plea agreement provided that in exchange for Harvey's guilty plea, the State would not prosecute one Shalena Wright for perjury based on statements she had made during a deposition. Wright had claimed in a deposition that she and Harvey had been together on the night of the Aldi robbery.

In 2009, Harvey filed a PCR petition, alleging that he had received ineffective assistance of trial counsel because his trial attorney Nikos Nakos did not file a motion to suppress the evidence police obtained from the Lees Inn; that his guilty pleas were not

made knowingly, intelligently, and voluntarily because he was unaware of the suppression issue and because of the allegedly improper threat of prosecution against Wright; and that his admission to being a habitual offender was invalid because he did not actually have the prior conviction for theft that he admitted to having.

DISCUSSION AND DECISION

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).

I. Whether Harvey Received Ineffective Assistance of Counsel

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). Similarly, we need not evaluate the question of prejudice if trial counsel's performance was not deficient.

Harvey contends that his trial counsel was ineffective for failing to file a motion to suppress all of the evidence obtained from the Lees Inn and all other evidence obtained as a result. Harvey makes essentially the same argument in the context of a claim that his guilty pleas were not intelligently made due to his trial counsel's failure to inform him of the suppression issue, so we address them together. In *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001), the Supreme Court created two categories of ineffective assistance of counsel claims relating to guilty pleas, applying different treatments to each respective category depending on whether the ineffective assistance allegation related to (1) a defense or failure to mitigate a penalty, or (2) an improper advisement of penal consequences. See *Willoughby v. State*, 792 N.E.2d at 560, 563 (Ind. Ct. App. 2003), *trans. denied*. For claims falling under the first category, a petitioner must establish a reasonable probability that a more favorable result would have obtained in a competently run trial. *Segura*, 749 N.E.2d at 507. In other words, the petitioner must show a reasonable probability that a conviction would not have occurred but for counsel's error.

Id. at 503. Of course, Harvey must first establish that Nakos committed an error, *i.e.*, that the motion to suppress that was not filed would have been meritorious.

A. Fourth Amendment

The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” “The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.” *Schmerber v. California*, 384 U.S. 757, 767 (1966). “Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure.” *Callahan*, 719 N.E.2d at 434. “In cases involving a warrantless search, the State bears the burden of proving an exception to the warrant requirement.” *Id.* (citing *State v. Farber*, 677 N.E.2d 1111, 1116 (Ind. Ct. App. 1997)).

Hotel guests enjoy the same constitutional protection against unreasonable search and seizure as do occupants of private residences. *Norwood v. State*, 670 N.E.2d 32, 35 (Ind. Ct. App. 1996). *Norwood* and similar cases, however, apply only to searches of hotel rooms. The question before us is whether the information Harvey voluntarily provided to Lees Inn upon registration could be obtained without a search warrant under the Fourth Amendment. The United States Supreme Court “consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979). The United States

Supreme Court “has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.” *U. S. v. Miller*, 425 U.S. 435, 443 (1976). Harvey points to no authority suggesting that the above passages are no longer good law, and our research has revealed none. A motion to suppress evidence on the basis that it violated the Fourth Amendment would not have properly been granted, so Nakos’s performance was not deficient in this regard.

B. Article 1, Section 11

Article I, Section 11, of the Indiana Constitution provides that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

The Indiana Supreme Court has noted that

[w]hile almost identical in wording to the federal Fourth Amendment, the Indiana Constitution’s Search and Seizure clause is given an independent interpretation and application. *Mitchell v. State*, 745 N.E.2d 775, 786 (Ind. 2001); *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999); *Moran v. State*, 644 N.E.2d 536, 540 (Ind. 1994). To determine whether a search or seizure violates the Indiana Constitution, courts must evaluate the “reasonableness of the police conduct under the totality of the circumstances.” *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005) (citing *Moran*, 644 N.E.2d at 539). “We believe that the totality of the circumstances requires consideration of both the degree of intrusion into the subject’s ordinary activities and the basis upon which the officer selected the subject of the search or seizure.” *Id.* at 360. In *Litchfield*, we summarized this evaluation as follows:

In sum, although we recognize there may well be other relevant considerations under the circumstances, we have explained reasonableness of a search or seizure as turning on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizens' ordinary activities, and 3) the extent of law enforcement needs.

Id. at 361.

Myers v. State, 839 N.E.2d 1146, 1153 (Ind. 2005).

Here, police knew that a robbery had taken place and had learned that two persons closely fitting the description of the robbers had taken a room at the Lees Inn the day of the Robbery. It was reasonable to conclude that information relevant to the investigation would likely be found at the Lees Inn. Moreover, the police request for a copy of Harvey's information had no effect whatsoever on his ordinary activities. Harvey was almost certainly unaware that the request had even taken place. The needs of law enforcement were great: police were investigating a recently-committed armed robbery where the victims were bound and gagged with duct tape, and the suspects had not yet been apprehended. Finally, we would add one consideration to the *Litchfield* considerations that we find relevant in this case, which is that the information in question was voluntarily given to the Lees Inn by Harvey. Nobody, much less an agent of the State, forced Harvey to surrender the information. Under the circumstances, police acted reasonably. We cannot conclude that an Article I, Section 11 motion to suppress would have properly been granted. Harvey did not receive ineffective assistance of trial counsel

due to a failure to file a meritless motion to suppress, and his trial counsel's failure to advise him of such a meritless motion did not render his guilty pleas unintelligent.

II. Knowing, Intelligent, and Voluntary Guilty Plea

Harvey contends that his guilty pleas were not knowing, intelligent, and voluntary because the State improperly coerced him by threatening to prosecute Wright for perjury. A guilty plea entered after the trial court has reviewed the various rights that a defendant is waiving and has made the inquiries called for by statute is unlikely to be found wanting in a collateral attack. *Cornelious v. State*, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006). “However, defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for relief.” *Id.* (quoting *Moore*, 678 N.E.2d at 1266). In assessing the voluntariness of a plea, we review all of the evidence before the post-conviction court, including testimony given at the post-conviction hearing, the transcript of the petitioner's original sentencing, and any plea agreements or other exhibits that are a part of the record. *Id.* at 357-58. “It is true that a bargained plea, motivated by an improper threat, is to be deemed illusory and a denial of substantive rights.” *Daniels v. State*, 531 N.E.2d 1173, 1174 (Ind. 1988) (citing *Champion v. State*, 478 N.E.2d 681, 683 (Ind. 1985)). “At the moment the plea is entered, the State must possess the power to carry out any threat which was a factor in obtaining the plea agreement which was accepted.” *Id.*

Harvey is apparently arguing that the State had no legitimate basis to prosecute Wright for perjury, rendering improper any threat to do so. The record, however, clearly indicates that the State had a good-faith basis for investigating Wright for perjury. At the

hearing on Harvey's PCR petition, Harvey even admitted on the stand that Wright had lied in her deposition. Even if the State's investigation of Wright influenced Harvey's decision to plead guilty, it did not amount to improper coercion.

III. Whether Harvey's Admission to Being a Habitual Offender is Invalid

The State concedes that Harvey admitted to being a habitual offender by virtue of two prior unrelated convictions, one of which did not actually occur. As previously mentioned, Harvey admitted to a December 13, 1996, conviction for theft when, in fact, he was only convicted of fraud on that date. To prevail on a post-conviction challenge to a habitual offender finding, Harvey must demonstrate that he is, in fact, not a habitual offender under Indiana law, not simply that the factual basis failed to prove that he is. *See Weatherford v. State*, 619 N.E.2d 915, 917-18 (Ind. 1993) (in a post-conviction challenge to a habitual offender finding, the petitioner "must demonstrate that he was not an habitual offender under the laws of the state[,]” not just that the factual basis used to establish his guilt was erroneous). Harvey has failed to even claim that he is not a habitual offender, much less point to any evidence to this effect. Indeed, Harvey admitted at his PCR hearing that he had, in fact, been convicted of fraud instead of theft on December 13, 1996. That fraud conviction, along with the unchallenged prior burglary conviction, provide the two necessary prior unrelated felony convictions. *See* Ind. Code § 35-50-2-8 (2003). Harvey's admission to being a habitual offender need not be set aside in this post-conviction proceeding.

The judgment of the post-conviction court is affirmed.

BAKER, J., and MAY, J., concur.