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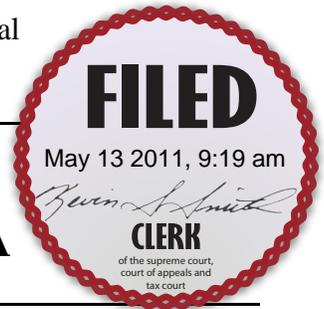
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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL O. HALE,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 43A05-1010-PC-697

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0603-FA-79

May 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Michael O. Hale (“Hale”) appeals the denial of his petition for post-conviction relief, wherein he challenged his conviction for Dealing in Cocaine, as a Class A felony.¹ We affirm.

Issue

Hale presents a single issue for review: Whether he was denied the effective assistance of trial counsel.

Facts and Procedural History

On direct appeal, the Court recited the relevant facts as follows:

The facts most favorable to the verdict reveal that on March 9, 2006, members of the Kosciusko County Drug Task Force raided the Warsaw, Indiana, apartment of Lance Patrick (“Patrick”) and Josh Hamilton (“Hamilton”), where they found cocaine. Thereafter, members of the Drug Task Force asked Patrick and Hamilton if they wanted to act as confidential informants in exchange for having their charges reduced or even dropped, and the pair agreed to do so. In order to receive such lenient treatment, Patrick and Hamilton were required to “inform on” four to five people apiece.

On March 19, 2006, Patrick, Hamilton, and Hale were at the house of Amanda Mullins (“Mullins”), a mutual friend. The group later went to a bar. Through conversations with Hale, Patrick and Hamilton learned that they would be able to purchase cocaine from him.

On March 20, Hamilton called Officer Mike Spiegle with the Drug Task Force and said that he could set up a drug transaction with Hale, and Officer Spiegle told Hamilton to arrange the purchase. Hamilton later called Hale to confirm that Hale had cocaine. Hamilton then contacted Officer Spiegle again and told him that they would be able to purchase four eight balls of cocaine from Hale.

¹ Ind. Code § 35-48-4-1.

In the meantime, Hale called Mullins and said that he was “freaked out” because Patrick and Hamilton called him wanting to do a deal. According to Mullins, she told Hale the day before that Patrick and Hamilton were informants. Hale asked Mullins to come over to his house to stop the deal from going forward.

At about the same time, Officer Spiegle and Officer Joe Mooney, who was also with the Drug Task Force, met Patrick and Hamilton at the boat ramp at Center Lake. The officers searched Patrick and Hamilton as well as the car they were driving. They then gave Hamilton \$240.00 in buy money in order to purchase two eight balls of cocaine from Hale and placed a transmitter and recording device on him. Patrick and Hamilton drove to the house where Hale lived with his grandparents, and Officers Spiegle and Mooney followed them there. Officers Spiegle and Mooney listened via the transmitter on Hamilton to the events as they occurred, while Officer Joe Stanley with the Drug Task Force conducted surveillance of the house using binoculars. Hamilton walked up to the back porch of Hale’s house and knocked on the door. When Hale came to the door, he said that he was going to search Hamilton. After patting down Hamilton, Hale stated that he did not trust Hamilton and wanted to deal with Patrick. Hamilton returned to the car, told Patrick what Hale had said, and gave Patrick the buy money. Patrick, who was not equipped with a recording device or transmitter, then went inside the house while Hamilton waited on the back porch. Hale and Patrick proceeded to Hale’s bedroom, where Patrick purchased two eight balls of cocaine from Hale. After about five minutes, Hale and Patrick came back outside, and Hale apologized to Hamilton for searching him before. At about the same time, Mullins arrived at Hale’s house. After a brief conversation, Patrick and Hamilton returned to their car, where Patrick gave the cocaine to Hamilton, and left.

Patrick and Hamilton then drove behind Lakeview Middle School, where they met back up with Officers Spiegle and Mooney. Hamilton gave the cocaine to Officer Spiegle, and, after the officers searched Patrick and Hamilton again, they were released.

Hale was arrested the next day, March 21. On that same day, the State charged him with Dealing in Cocaine as a Class A felony. In May 2006, while incarcerated at the Kosciusko County Jail awaiting trial on this charge, Hale called Patrick and tried to discourage Patrick from testifying against him at trial. This conversation was recorded and later presented to the jury at trial.

Hale's jury trial was held in July 2006, and both Patrick and Hamilton testified against Hale at trial. During Hamilton's testimony, the prosecutor asked him why Hale wanted to search him before proceeding with the deal, and Hamilton responded, "He didn't trust me so I had to go get [Patrick]." The prosecutor followed up by asking, "What did he say to you that made you believe he didn't trust you?" Hamilton replied, "Because he told me that his best friend wore a wire on him before." Defense counsel immediately objected, and the trial court struck Hamilton's response from the record. Later during Hamilton's testimony, the prosecutor asked him whether he had been threatened about his testimony at trial. Hamilton said yes and explained that Dustin Slone, who was sitting in the courtroom, called him that very morning and instructed him not to testify at trial or else he would "whip [his] a* *." After direct, cross, redirect, and recross of Hamilton was completed, the trial court, outside the presence of the jury, asked a police officer to "escort Mr. Slone to a safe place pending the filing of formal charges...." The court explained:

We have evidence in open Court that the previous witness was intimidated and threatened by a person in the Courtroom. I'm not gonna have that. That does not do Mr. Hale justice and it certainly doesn't do the witness justice, and I simply am not going to have that in this Court. So, whether or not Mr. Slone did or didn't do those charges, there's testimony, under oath, that he did threaten the witness and that, in my estimation, forms the basis for possible charges of intimidation and that is not appropriate.

At this point, defense counsel moved for a mistrial due to the "testimony of Mr. Hamilton, indicating he'd been threatened." Defense counsel explained:

We had no advance notice of that or any knowledge of it. No opportunity to interview the gentlem[a]n that allegedly made the threat to see whether there's any basis to that, and I think it was very prejudicial for the Jury to hear that and I don't know how that could be corrected. Also, during his testimony Mr. Hamilton alluded to [Hale] having been, I don't remember his exact words, but having been, I'll say, busted before or having someone wear [a wire on him].... For those reasons I ask for a mistrial. I just don't think they had [sic] any admonition or caution to the Jury can cure those things.

As for Hamilton's testimony that Hale told him his best friend had worn a wire in the past, the State responded that it did not intentionally elicit that response from Hamilton and, in fact, did not expect such an answer. The trial court denied the motion for mistrial on this ground, stating, "First of all, to the

extent the Jury picked up on it, I think it would be a harmless error, and secondly, my involvement in this case today, I didn't even pick up on it, so someone who sort of knew a little bit about what was going on missed that." As for Hamilton's testimony that Slone had threatened him that morning, the State responded:

[Hamilton] was very reluctant to come in here and I think it's relevant if he's being threatened, and he's obviously, the record would show that Dustin Slone was sitting by Michael Hale, they were conversing during the breaks, and that the Defendant has a representative here in Court to intimidate a witness, I think the Jury ought to know about that.

Defense counsel interjected that there was no evidence connecting Hale to Slone's threat to Hamilton. The trial court denied the motion for mistrial on this ground, stating:

I concur with [defense counsel that] there isn't any evidence that Mr. Hale had anything to do with what Mr. Slone may or may not have done, so I don't think that there's any indication that Mr. Hale had anything to do with the threat. My only concern was one out of caution and concern for the witness and anything relating to the threat I think was dealt with outside the presence of the Jury. I don't believe that's prejudicial and accordingly deny the motion for mistrial on that basis.

Following trial, the jury found Hale guilty as charged. Finding two aggravators – Hale's extensive criminal history and the fact that he was on parole at the time of the instant offense – and no mitigators, the trial court sentenced him to fifty years.

Hale v. State, 875 N.E.2d 438, 440-43 (Ind. Ct. App. 2007), trans. denied (footnotes and record citations omitted).

On direct appeal, Hale contended that the trial court erred in denying his motion for mistrial and that there was insufficient evidence to support his conviction. He also challenged his sentence as inappropriate. His conviction and sentence were affirmed. See id. at 446.

On April 23, 2008, Hale filed a petition for post-conviction relief. After conducting an evidentiary hearing, the post-conviction court entered its findings of fact, conclusions of law, and order denying post-conviction relief. Hale now appeals.

Discussion and Decision

Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment of the post-conviction court unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. A post-conviction court's findings and judgment will be reversed only upon a showing of clear error, that which leaves us with a definite and firm conviction that a mistake has been made. Id. In this review, findings of fact are accepted unless they are clearly erroneous and no deference is accorded to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

Effectiveness of Trial Counsel

Hale claims that his trial attorney was ineffective because he failed to: (1) seek suppression of evidence of the drug buy for lack of sufficient controls; (2) challenge the probable cause affidavit supporting Hale's arrest; and (3) timely object to Hamilton's

testimony regarding a threat against him.

To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). “First, a defendant must show that counsel’s performance was deficient.” Id. at 687. This requires a showing that counsel’s representation fell below an objective standard of reasonableness and that “counsel made errors so serious that counsel was not functioning as ‘counsel’ guaranteed to the defendant by the Sixth Amendment.” Id. “Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial,” that is, a trial where the result is reliable. Id. To establish prejudice, a “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id. Further, we “strongly presume” that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002).

Counsel is to be afforded considerable discretion in the choice of strategy and tactics. Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001), cert. denied, 537 U.S. 839 (2002). Counsel’s conduct is assessed based upon the facts known at the time and not through hindsight. State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997), cert. denied, 523 U.S. 1079

(1998). We do not “second-guess” strategic decisions requiring reasonable professional judgment even if the strategy in hindsight did not serve the defendant’s interests. Id.

Hale first alleges that counsel failed to challenge fatal irregularities in the controlled buy here, in comparison to a controlled buy as described in Mills v. State, 177 Ind. App. 432, 434, 379 N.E.2d 1023, 1026 (1978):

A controlled buy consists of searching the person who is to act as the buyer, removing all personal effects, giving him money with which to make the purchase, and then sending him into the residence in question. Upon his return he is again searched for contraband. Except for what actually transpires within the residence, the entire transaction takes place under the direct observation of the police. They ascertain that the buyer goes directly to the residence and returns directly, and they closely watch all entrances to the residence throughout the transaction.

It was originally planned that Hamilton would make the cocaine purchase. However, because of Hale’s mistrust of Hamilton, Patrick made the purchase and then handed the cocaine to Hamilton. Also, according to Hale, there was inadequate surveillance of Hale’s residence and no post-transaction search of Patrick.² Apparently, Hale believes that – had trial counsel diligently identified deviations from a typical controlled buy scenario – the evidence derived from the controlled buy would have been excluded in its entirety, as opposed to allowing the jury to determine its weight and credibility. See Hudson v. State,

² Hale describes alleged factual deficiencies in a manner favorable to his position. However, Officer (now Detective) Michael Spiegle testified at trial that he had conducted a post-transaction search of Hamilton and that Lieutenant (now Detective) Mooney had searched Patrick “again.” (Tr. 213.) Further, post-conviction evidence includes Detective Spiegel’s deposition testimony that the vehicle and both confidential informants were searched after the controlled buy, and Detective Mooney’s deposition testimony that both informants were “in sight of officers at all times” other than when they were inside and that he believed all entrances to the house were being observed by officers at the time of the purchase. (Pet. Ex. 3, pg. 40; Pet. Ex. 2, pgs. 16-17). Detective Mooney also agreed that both informants and their vehicle were searched post-transaction. (Pet. Ex. 2, pgs. 19, 22.)

462 N.E.2d 1077, 1083 (Ind. Ct. App. 1984) (observing that adequacy of controls in a police buy “goes to the weight and credibility of the evidence presented rather than to the burden of proof”). Hale does not, however, cite any authority supporting his proposition that suppression of evidence is the remedy for deviations from script.

Indeed, an allegation that a drug buy has not been sufficiently controlled to allow admission of the evidence requires the trial court to determine, within its sound discretion, whether the evidence should be admitted or excluded. Ramsey v. State, 853 N.E.2d 491, 502 (Ind. Ct. App. 2006), trans. denied. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. Id. Errors in the admission or exclusion of evidence are harmless unless they affect the substantial rights of a party. Id. Here, Hamilton expected to obtain cocaine from Hale with Patrick as a bystander; the roles were reversed at Hale’s insistence. Surveillance of Hale’s residence was not lacking.³ Under these circumstances, it would have been within the trial court’s discretion to admit controlled buy evidence, even had trial counsel lodged an objection. See id. (finding no abuse of discretion in the admission of evidence where “the jury was able to determine for itself whether there were sufficient controls in place during the buys”).

Too, Hale’s counsel did not leave the circumstances of the drug buy unchallenged. Counsel elicited Hamilton’s admission that he had not received any drugs directly from Hale

³ Hale claims that the trial record reveals that police employed lax surveillance procedures. However, it is reasonable to expect that, had trial counsel moved to suppress and prompted increased scrutiny of the procedures employed, the detectives would have testified at trial (as they later did in depositions) that visual surveillance was maintained by a group of officers from multiple vantage points.

on the day of the controlled buy. Counsel cross-examined both Hamilton and Patrick regarding a visit by Patrick to the Hale residence one day earlier. Counsel elicited Mullins' testimony that Patrick took a "black bag" of drugs⁴ with him and left it, suggesting that Patrick had opportunity to stash cocaine at Hale's residence and retrieve it during the ostensible police buy. (Tr. 177). Counsel also attempted to elicit Patrick's admission that he and Hamilton had joked about "having set up" Hale. (Tr. 161.) Ultimately, by convicting Hale, the jury chose to reject the defense theory that the cocaine was planted. Although this outcome was not the result desired by Hale, he has not demonstrated ineffective assistance in this regard.

Hale also contends that his trial counsel should have attacked the probable cause affidavit for his arrest. Without citation to supporting authority, Hale alleges that the Affidavit of Probable Cause was defective because the officer did not state facts within his personal knowledge as to the credibility of the informant.

Indiana Code Section 35-33-2-1(b) and (c) provides in relevant part:

(b) Whenever an information is filed and the defendant has not been arrested or otherwise brought within the custody of the court, the court shall issue a warrant for the arrest of the defendant after first determining that probable cause exists for the arrest.

(c) No warrant for arrest of a person may be issued until: ...

(2) a judge has determined that probable cause exists that the person committed a crime and an information has been filed charging him with a crime.

⁴ According to Mullins, the bag contained oxycontin, marijuana, and "probably a little less than" two eight-balls of cocaine. (Tr. 178.)

Indiana Code Section 35-34-1-4(a)(11) provides that a court may dismiss an indictment or information on any ground that is a basis for dismissal as a matter of law. Nonetheless, “[a]n information which is not the basis for an arrest warrant is not affected by a deficiency in the probable cause affidavit.” Schweitzer v. State, 531 N.E.2d 1386, 1388 (Ind. 1989) (citing State v. King, 502 N.E.2d 1366 (Ind. Ct. App. 1987)).

The deficiency of a probable cause affidavit is not a ground for dismissal of an information, as the probable cause affidavit is not the manner by which a defendant is charged with a crime, but rather serves to justify the pre-trial detention of a defendant based on alleged facts reasonably believed to show the defendant committed the crime. Engram v. State, 893 N.E.2d 744, 746-47 (Ind. Ct. App. 2008), trans. denied. An invalid arrest does not affect the right of the State to try a case nor does it affect the judgment of conviction. Id. at 747. Accordingly, had Hale’s counsel moved to dismiss the charging information predicated on the absence of probable cause in the affidavit, the motion would have been properly denied. See also Adamovich v. State, 529 N.E.2d 346, 348 (Ind. Ct. App. 1988) (observing, “even if the probable cause affidavit had been defective, the alleged defect would not constitute reversible error on appeal”).

Finally, Hale faults his attorney for failing to object when Hamilton testified that, earlier on the morning of trial, Dustin Slone had called him and “threatened to whip his ass” if he testified. (Tr. 124.) On direct appeal of Hale’s conviction, the Court observed that defense counsel did not timely object and provide the trial court with a chance to rule on the admissibility of the threat evidence. Hale, 875 N.E.2d at 444. Notwithstanding the waiver,

the Hale Court went on to consider the probable persuasive impact of such testimony upon the jury, and concluded:

even assuming Hamilton's testimony regarding Slone's threat was inadmissible because the State failed to connect Hale to that threat, Hale was not placed in grave peril. That is, defense counsel himself asked Hamilton if he had previously set up Slone's girlfriend, thereby permitting an inference that Slone's threat to Hamilton was not directly related to Hale but rather was related to the fact that Hamilton was an informant. In addition, there is convincing evidence of Hale's guilt. That is, evidence was presented to the jury that this was a controlled buy supervised by the Drug Task Force and that Hale called Patrick from jail and discouraged Patrick from testifying against him at trial. Hale has not shown that Hamilton's testimony that Slone threatened him had a probable persuasive effect on the jury's decision.

Id. To establish the prejudice prong of his ineffectiveness claim, it was incumbent upon Hale to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. In other words, an omission by counsel will not result in post-conviction relief for ineffectiveness where the omission "had no effect on the ultimate result of the trial." Stephenson v. State, 864 N.E.2d 1022, 1042 (Ind. 2007), cert. denied, 552 U.S. 1314 (2008).

On direct appeal, the Hale Court considered the absence of a timely objection to testimony of Slone's threat, and ultimately found the jury's decision to be reliable. Hale, 875 N.E.2d at 444. Whether the result of the proceeding, that is, conviction, would in reasonable probability have changed has already been adjudicated adversely to Hale's position and we will not revisit the matter.

Conclusion

Hale has not established that he was denied the effective assistance of trial counsel. Accordingly, the post-conviction court properly denied Hale's petition for post-conviction relief.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.