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**IN THE  
COURT OF APPEALS OF INDIANA**

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MACKLIN BROWN, )  
 )  
 Appellant-Petitioner, )  
 )  
 vs. ) No. 49A02-1103-PC-331  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Respondent. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Mark D. Stoner, Judge  
The Honorable Jeffrey L. Marchal, Master Commissioner  
Cause No. 49G06-9802-PC-18207

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**September 19, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Macklin Brown (“Brown”) appeals from the post-conviction court’s denial of his petition for post-conviction relief. The State cross-appeals the post-conviction court’s grant of Brown’s request for an extension of time in which to file his notice of appeal.

We affirm.

## **Issues**

Brown raises one issue for our review, whether the post-conviction court erred when it denied his petition for relief from his guilty plea because he received ineffective assistance of trial counsel, who advised him to accept a guilty plea without first seeking to suppress evidence obtained by the State from an inventory search of Brown’s vehicle.

The State raises one issue in its cross-appeal, whether the post-conviction court abused its discretion under Trial Rule 72(E) when it granted Brown’s request for an extension of time in which to file his notice of appeal of the denial of his petition for post-conviction relief where Brown was represented by counsel during the course of the post-conviction proceedings but was to proceed pro se upon appeal.

## **Facts and Procedural History**

On September 24, 1997, Brown was driving a vehicle in Indianapolis when Indiana State Police Trooper Dean Wildauer (“Trooper Wildauer”) and another, unnamed trooper, stopped Brown’s vehicle near the intersection of Twenty-First Street and Shadeland Road. When stopped, Brown informed Trooper Wildauer that his driver’s license had been suspended. Trooper Wildauer therefore cited Brown for driving while suspended; Brown

was not arrested at that time.

Brown had stopped his vehicle in an area with no public parking or legal street parking. Pursuant to Indiana State Police standard operating procedures, Trooper Wildauer ordered Brown's vehicle towed. Trooper Wildauer searched Brown's vehicle before it was towed away and discovered a handgun in the trunk.

Based upon Trooper Wildauer's discovery, on February 11, 1998, Brown was charged with one count of Possession of a Handgun without a License, as a Class C felony, and with one count of Possession of a Handgun without a License, as a Class A misdemeanor, and was arrested on February 23, 1998. On May 5, 1999, Brown's trial counsel advised Brown to plead guilty to the Class C felony count, Brown did so, and judgment was entered against him on June 4, 1999.

On January 26, 2010, Brown filed his petition for post-conviction relief, contending that he received ineffective assistance of trial counsel. On November 19, 2010, after the submission of affidavits and briefs from both Brown and the State, the post-conviction court denied Brown's petition.

On February 15, 2011, Brown filed a motion for an extension of time in which to file a notice of appeal of the denial of his petition. On February 17, 2011, the trial court granted Brown a thirty day extension of time. On March 16, 2011, Brown filed his notice of appeal. On March 23, 2011, the trial court granted his post-conviction counsel's motion to withdraw from representation of Brown on appeal, and Brown proceeded with his appeal pro se.

## Discussion and Decision

### Whether the Trial Court Abused its Discretion When it Allowed Brown Additional Time in which to File an Appeal

We first address the State’s contention in its cross-appeal that the post-conviction court abused its discretion when, under Indiana Trial Rule 72(E), it granted Brown additional time to file his notice of appeal from the denial of his petition for post-conviction relief. The rule states:

Lack of notice, or the lack of the actual receipt of a copy of the entry from the Clerk shall not affect the time within which to contest the ruling, order or judgment, or authorize the Court to relieve a party of the failure to initiate proceedings to contest such ruling, order or judgment, except as provided in this section. When the mailing of a copy of the entry by the Clerk is not evidenced by a note made by the Clerk upon the Chronological Case Summary, the Court, upon application for good cause shown, may grant an extension of any time limitation within which to contest such ruling, order or judgment to any party who was without actual knowledge, or who relied upon incorrect representations by Court personnel. Such extension shall commence when the party first obtained actual knowledge and not exceed the original time limitation.

Ind. Trial Rule 72(E). The purpose of this provision is to ensure “that counsel could rely on the clerk’s office to send notice and if such notice was not received, to provide an avenue through which to challenge mailing of the notice.” Taylor v. State, 939 N.E.2d 1132, 1136 (Ind. Ct. App. 2011) (quoting Markle v. Ind. State Teachers Ass’n, 514 N.E.2d 612, 614 (Ind. 1987)). We review a trial court’s decision to grant an extension of time under Rule 72(E) for an abuse of discretion, considering whether the evidence could reasonably support the conclusion reached by the trial court. Id.

Before reaching the question presented by the State—whether the trial court abused its

discretion by affording Brown an extension of time in which to file his notice of appeal in this case—we first address certain procedural facets of the State’s argument. Specifically, the State contends that Brown “waived his claim by failing to present this Court on review with an adequate record” (Appellant’s Br. at 5), directing our attention to the absence of a copy of Brown’s Trial Rule 72(A) motion in the appendix to his brief. Because, the State contends, “[o]ne can conclude that the motion was nothing more than an unsubstantiated filing” (Appellant’s Br. at 6), and because Brown did not include a copy of the motion in his appendix, his entire appeal must be dismissed.

We remind the State that it—not Brown—has sought review in its cross-appeal of the post-conviction court’s grant of an extension of time for filing a notice of appeal. It is therefore the State’s obligation—not Brown’s—to provide this Court with the appropriate record and argument on appeal to address this issue.

Here, the State did not provide copies of Brown’s motion or any response to that motion in the appendix to its brief. The State’s appendix consists of a single document, the chronological case summary (“CCS”) for this matter. The CCS reflects no opposition on the part of the State to Brown’s motion for an enlargement of time under Trial Rule 72(E). Since the State apparently did not contest Brown’s motion for an enlargement of time in which to challenge the denial of his petition for relief, and has provided no record upon which we might base our review, we conclude that the State’s cross-appeal argument as to the propriety of the post-conviction court’s grant of Brown’s motion for an enlargement of time is waived. We therefore decline to consider the State’s cross-appeal on this matter.

### Whether Brown Received Ineffective Assistance of Trial Counsel

We turn now to Brown's issue on appeal, whether he received ineffective assistance of trial counsel and is therefore entitled to post-conviction relief. Specifically, Brown contends that he received ineffective assistance of counsel because his trial attorney advised him to plead guilty without first challenging the constitutionality of the inventory search that uncovered a handgun in the trunk of his vehicle. Brown argues that he would not have pled guilty had he been advised that the inventory search was illegal.

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 the witnesses. *Id.*

Generally, to establish a post-conviction claim alleging the 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.

Here, Brown contends that his trial counsel advised him to accept a guilty plea while overlooking a defense. “A petitioner alleging ineffective assistance of counsel in overlooking a defense leading to a guilty plea must show a reasonable probability that, had the defense been raised, the petitioner would not have pleaded guilty and would have succeeded at trial.” Helton v. State, 907 N.E.2d 1020, 1023 (Ind. 2009). 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, counsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000).

In order to demonstrate that trial counsel was ineffective, the petitioner must prove that his trial counsel’s representation “fell below an objective standard of reasonableness

under prevailing professional norms.” McChristion v. State, 511 N.E.2d 297, 300 (Ind. 1987). The petitioner must overcome the strong presumption that counsel prepared and executed a defense effectively. Id. The inquiry into ineffectiveness of counsel is factually oriented, and thus we do not speculate as to what may have been the most advantageous strategy; isolated bad tactics or inexperience do not necessarily amount to ineffective assistance of counsel. Id.

Brown contends that he was advised to plead guilty without knowing that “a legitimate traffic stop of a vehicle and the search of a vehicle is a separate and distinct analysis.” (Appellant’s App. at 4.) Setting aside for the moment the merits of Brown’s attack on the search of his vehicle, Brown presented no evidence in the form of testimony or affidavit of counsel as to the basis for his trial attorney’s decision to advise a guilty plea and forego filing a motion to suppress evidence. That is to say, the inquiry into the question of ineffectiveness of trial counsel is factually oriented, yet Brown provided the post-conviction court with no evidence from which to evaluate his attorney’s performance. The only way, then, that the post-conviction court could have decided that Brown received ineffective assistance of counsel would have been to speculate as to better strategies at trial; this it could not do. See McChristion, 511 N.E.2d at 300. Thus, Brown failed to carry his burden to prove that his attorney’s advice that he accept a plea agreement rather than pursue a motion to suppress and proceed to trial constituted ineffective assistance of counsel.

Turning now to Brown’s substantive claims, in his affidavit to the post-conviction court, Brown averred:

- 13) Before I pled guilty, my attorney did not ask me if I was arrested (or not) for driving under a suspended license. Nor did my attorney ask me if I was arrested (or not) at the scene for a handgun.
- 14) Before I pled guilty, my attorney did not inform me that in order for the inventory search to be constitutional I had to be placed under arrest for driving under a suspended license.
- 15) Had my attorney told me that an arrest establishes the authority to search my vehicle, I would have rejected the plea offer. Because there was no search incident to an arrest. But rather a search incident to a citation for driving while suspended.
- 16) Moreover, had I known a legitimate traffic stop of a vehicle and the search of a vehicle is a separate and distinct analysis, I would have rejected the plea offer, requested my attorney to file a motion to suppress, and proceeded to trial.

(Appellant's App. at 3-4.) In his affidavit and briefs before this court, Brown contends that Trooper Wildauer conducted an improper inventory search of Brown's vehicle and that, if counsel had made him aware of this, he would have rejected the plea agreement and instead sought to suppress the gun Trooper Wildauer retrieved during the search and proceeded to trial.

Our supreme court recognized that inventory searches are "a 'well-defined exception to the warrant requirement'" of the Fourth Amendment in Fair v. State, 627 N.E.2d 427, 431 (Ind. 1993) (quoting Illinois v. Lafayette, 462 U.S. 640, 643 (1983)). Nevertheless, an inventory search must be reasonable, and an examination of the reasonableness of an inventory search "encompasses two overlapping sets of circumstances":

First, the propriety of the impoundment must be established because the need for the inventory arises from the impoundment. Second, the scope of the inventory must be evaluated. Where either is clearly unreasonable, the search will not be upheld. In borderline cases, however, the ultimate character of the search is often most clearly revealed when both the necessitousness of the impoundment and the scrupulousness of the inventorying are viewed together.

Id. Thus, under our standard for post-conviction relief following a guilty plea, Brown had to bear the burden of proving to the post-conviction court that he had a reasonable likelihood of success at trial of establishing that either the impoundment was improper or the search itself was not conducted according to standard police procedures.

An impoundment is proper when it is in the interests of public safety as part of a routine administrative caretaking function of the police. Id. at 431-32 (citing South Dakota v. Opperman, 428 U.S. 364, 369 (1976)). Courts assess the propriety of an impoundment based upon whether (1) “the belief that the vehicle posed some threat or harm to the community or was itself imperiled was consistent with objective standards of sound policing,” and (2) “the decision to combat that threat by impoundment was in keeping with established departmental routine or regulation.” Id. at 433. Courts look not at “whether there was an absolute need” to impound the vehicle, but whether that decision “was reasonable in light of the applicable standard.” Id. The purpose of this part of the inquiry is to “ferret[] out those impoundments which are a mere pretext for other, improper objectives,” such as impounding a car that would not otherwise be towed for the sole “desire to conduct an investigatory search.” Id. (citing 3 Wayne R. LaFave, Search and Seizure § 7.5(e), at 142 (2d ed. 1987)).

Even where an impoundment is not pretextual, for an inventory search to pass constitutional muster, it is not enough for a police officer to state that the search was performed as a routine inventory. Bartruff v. State, 706 N.E.2d 225, 228 (Ind. Ct. App.

1999). Rather, the search must have been “conducted pursuant to police department standard operating procedures.” Id. (citing Peete v. State, 678 N.E.2d 415 (Ind. Ct. App. 1997), trans. denied). Because such inventory searches are intended to protect the property of the vehicle’s owners or occupants, and fall within the public safety rather than law enforcement functions of police, it is not necessary for police to arrest one or more of a vehicle’s occupants before conducting an inventory search. See id. (finding the proffered justification for an inventory search pretextual, but nevertheless finding adequate basis for impoundment when the vehicle’s occupants were not arrested); Fair, 621 N.E.2d at 435.

Here, given the position of Brown’s vehicle and his averment that he was asked about weapons only after being told that the vehicle would be towed, we cannot conclude that Brown could have challenged the inventory search on the basis that the impoundment decision was pretextual. Moreover, because an arrest is not required before an inventory search on a vehicle may be performed, Brown’s argument fails to the extent it depends upon the proposition that the inventory search was constitutionally defective for that reason.

The only argument Brown makes that might have some tendency to establish that he had a reasonable probability of success if he sought to suppress evidence and proceeded to trial depends upon Brown’s contention that Trooper Wildauer’s inventory search itself was unconstitutional. Though Brown’s situation shares much with the facts in Bartruff, these cases are not the same. Here, Trooper Wildauer informed Brown that the vehicle would be towed, and only after this asked Brown whether there was a firearm in the vehicle: “after informing me that the vehicle was being towed, the State Trooper asked if there were any

weapons in the vehicle.” (Appellant’s App. at 3.) In Bartruff, the decision to perform an inventory search occurred only after the arresting officer made inquiries into the presence of drugs and weapons in the car and unsuccessfully attempted to obtain consent to a search and to conduct a canine sniff of the car. Bartruff, 706 N.E.2d at 229.

Brown further contends that, as in Bartruff, he could have taken personal property from the vehicle. See id. (observing that Bartruff and his passenger could have taken personal property from the car, including the handgun underneath the driver’s seat, without the arresting officer noticing the firearm). Yet there are no statements in Brown’s affidavit that tend to establish that fact. Indeed, the post-conviction court could readily have inferred that Brown might have declined to take the property in the vehicle based upon his shared ownership of the vehicle, in which case the post-conviction court may have inferred that Brown would have disclaimed any knowledge of the presence of a gun. The post-conviction court could also have inferred from Brown’s statement to Trooper Wildauer that there was no weapon in the car and that Brown knew the gun was present and, in order to avoid arrest for possession of a firearm, would have declined to take property from the car if the Trooper had invited him to do so.

Moreover, in Bartruff the State had to carry the burden of proving that its search was proper in the face of Bartruff’s motion to suppress the fruits of the search. Id. at 228. Here, upon appellate review of the denial of post-conviction relief, we may only find in Brown’s favor if the evidence before the post-conviction court could lead only to the conclusion that Brown carried his burden of proof in establishing that he would have had a reasonable

likelihood of succeeding at trial on his theory that the search was improper. Yet absent evidence of pretext strong enough to lead to the conclusion that the post-conviction court could only properly have rendered a decision in Brown's favor, we will not reverse the decision of the post-conviction court.

### **Conclusion**

The State's argument that Brown's Rule 72(E) motion was improperly granted is waived. Brown did not introduce evidence regarding his trial counsel's strategy in advising him to enter a guilty plea. Nor did he establish that the post-conviction court erred when it concluded that he did not demonstrate a reasonable probability of success at trial. We therefore affirm the post-conviction court's denial of his petition for relief.

Affirmed.

MATHIAS, J., and CRONE, J., concur.