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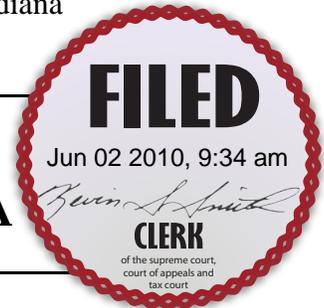
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**IN THE
COURT OF APPEALS OF INDIANA**



DALE WHYBREW,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 20A03-0909-CR-415

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0712-FA-58

June 2, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant Dale Whybrew was convicted of Class B felony Dealing in Methamphetamine¹ for which he received an aggregate sentence of fourteen years in the Department of Correction with two years suspended to probation. Upon appeal, Whybrew claims that he received ineffective assistance of trial counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

On November 28, 2007, authorities executed a search warrant at Whybrew's residence in Elkhart County. Upon entering the residence, SWAT Team commander Sean Holmes of the Elkhart County Sheriff's Department smelled a strong odor of ammonia and saw a haze in the air. Whybrew and others, including a two-year-old child, were removed from the residence.

Authorities read Whybrew his Miranda rights, after which he made incriminating statements regarding his involvement in the methamphetamine-making process. According to Indiana State Police Trooper Jason Faulstich, Whybrew described using the "crank method" for making methamphetamine and told him where to locate certain ingredients in the basement. Tr. p. 115. Shortly thereafter, Whybrew was transported to the hospital because he was suffering from back pain.

The basement of the residence contained materials involved in the manufacture of methamphetamine, including tubing; a coffee grinder; mason jars; coffee filters; a Coleman fuel can; salt; boxes and empty blister packs of pseudoephedrine; a hairdryer; lithium batteries and strippings; bottles of liquid fire, muriatic acid, and crystal drain

¹ Ind. Code § 35-48-4-1.1(a)(2)(C) (2007).

cleaner; a bag of ammonium sulfate; and numerous Ziploc bags. Two items found at the scene, a Gatorade bottle and the Coleman fuel can, were found to contain methamphetamine.

Upstairs in the residence authorities found multiple small Ziploc bags and a digital scale containing white powder, which Trooper Faulstich testified was consistent with dealing purposes. According to Trooper Faulstich, the boxes and blister packs of pseudoephedrine at the scene would yield between 7.8 and 10.9 grams of methamphetamine.

On December 3, 2007, the State charged Whybrew with Class A felony dealing in methamphetamine (Count I), alleging that he knowingly manufactured three or more grams of methamphetamine. In addition, the State charged Whybrew with Class B felony dealing in methamphetamine (Count II), alleging that he possessed methamphetamine with the intent to deliver it. During a July 6-8, 2009 jury trial, the jury found Whybrew guilty of Count II and acquitted him of Count I. The trial court entered judgment of conviction on Count II and, on August 6, 2009, sentenced him to fourteen years in the Department of Correction with two years suspended to probation. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Whybrew claims that his trial counsel rendered ineffective assistance by failing to move to dismiss the charge in Count II or set aside the guilty verdict on the grounds that Count II violated double jeopardy principles. In addition,

Whybrew claims trial counsel rendered ineffective assistance by failing to challenge his post-Miranda statements on the grounds that they were involuntary.

Ineffective assistance of counsel claims are analyzed under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000). To succeed, the petitioner must demonstrate both deficient performance and resulting prejudice. *Id.* Regarding the first part of the *Strickland* test—counsel’s performance—we presume that counsel provided adequate representation. *Allen v. State*, 749 N.E.2d 1158, 1166 (Ind. 2001). Accordingly, “[c]ounsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference.” *Id.* (quoting *Williams v. State*, 733 N.E.2d 919, 926 (Ind. 2000)). The second part of the *Strickland* test—the prejudicial effect of counsel’s conduct—requires the defendant to show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694). Failure to satisfy either part of the *Strickland* test will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

Notably, Whybrew’s ineffective-assistance-of-counsel claim is before us on direct appeal.

When the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight. It is no surprise that such claims almost always fail.

Woods v. State, 701 N.E.2d 1208, 1216 (Ind. 1998) (quoting *United States v. Taglia*, 922 F.2d 413, 417-18 (7th Cir. 1991)).

I. Double Jeopardy

Whybrew's claim that trial counsel rendered ineffective assistance by failing to move to dismiss Count II on double jeopardy grounds is based upon the false premise that jeopardy attaches with the charging information or guilty verdict. In fact, jeopardy attaches only at the point when a judgment of conviction is entered. *See Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006) ("To be sure, a defendant's constitutional rights are violated when a court enters judgment twice for the same offense, but not when a defendant is simply found guilty of a particular count."). Whybrew was convicted of Count II only. He therefore cannot be said to have been placed in double jeopardy even after judgment of conviction was entered. Accordingly, a motion by trial counsel to dismiss Count II on double jeopardy grounds would have been properly denied. *See Shields v. State*, 699 N.E.2d 636, 640 (Ind. 1998) (observing that where ineffective assistance of counsel is alleged for the failure to file a motion or to object, counsel's performance cannot be deemed deficient where no showing is made that such motion or objection would have been successful). Having shown no deficient performance, Whybrew's claim of ineffective assistance on this ground fails.

II. Involuntary Statements

Whybrew also claims that trial counsel rendered ineffective assistance by failing to move to suppress or object to certain incriminating statements he made to authorities.

According to Whybrew, his statements were involuntary. In support of this claim, Whybrew argues that he was confused and in pain from a herniated disc, causing authorities to have him transported to the hospital.

The Fourteenth Amendment of the United States Constitution incorporates the Fifth Amendment's privilege against self-incrimination. *Withrow v. Williams*, 507 U.S. 680, 689 (1993). Therefore, to be admissible consistent with those provisions, a suspect's confession must be voluntarily given. *Carter v. State*, 686 N.E.2d 1254, 1258 (Ind. 1997). Under the United States Constitution, the State must prove by a preponderance of the evidence that the defendant's confession was voluntary. *Clark v. State*, 808 N.E.2d 1183, 1191 (Ind. 2004). Under the Indiana Constitution, the State must show voluntariness beyond a reasonable doubt. *Id.*

The voluntariness of a defendant's confession is determined from the totality of the circumstances. *Washington v. State*, 808 N.E.2d 617, 622 (Ind. 2004). In turn, the "totality of the circumstances" test focuses on the entire interrogation rather than on any single act by police or condition of the suspect. *Id.* We review the record for evidence of inducement by way of violence, threats, promises, or other improper influences. *Id.* The decision whether to admit a defendant's confession is within the discretion of the trial court, and we will not reverse such decision absent an abuse of discretion. *See Carter v. State*, 730 N.E.2d 155, 157 (Ind. 2000). Upon reviewing a challenge to the trial court's decision to admit the defendant's confession, we do not reweigh the evidence but instead examine the record for substantial probative evidence of voluntariness. *Id.*

Although Whybrew indicates he was confused and in pain, the record indicates that Whybrew's statements relating to the existence and type of methamphetamine lab were fully responsive to Trooper Faulstich's questions, demonstrating his awareness of the circumstances. Similarly, while Whybrew claims to have been in pain, he points to no evidence in the record indicating that this pain interfered with his ability to speak voluntarily. Indeed, there is no evidence in the record indicating that Whybrew was in such debilitating pain that he mentioned it to authorities *before* permitting them to question him. To the contrary, Trooper Faulstich testified that he questioned Whybrew right after another officer read him his Miranda rights. Similarly, Goshen Police Officer Shawn Turner testified that Whybrew informed him of his back pain *after* making incriminating statements. Given Whybrew's delayed claims of pain, the record does not support his claim that the pain placed him in such dire straits that he could not make voluntary statements.

In any event, a person's mental or physical condition alone will not render his confession involuntary, and coercive police activity is a necessary predicate to a finding that a confession is involuntary. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986). While it has been suggested that, unlike the federal standard, the Indiana standard may not require coercive police activity, *see Hurt v. State*, 694 N.E.2d 1212, 1218 (Ind. Ct. App. 1998), *trans. denied*, Whybrew does not argue that this separate standard applies. Indeed, he analogizes his case to a federal case. Whybrew makes no claim that his statements were the product of violence, threats, promises, or other improper influence. Because Whybrew is unable to show that counsel's objection to his statements would

have been sustained, he has shown no deficient performance. *See Shields*, 699 N.E.2d at 640. Accordingly, we conclude that Whybrew's ineffective assistance of counsel claim on this ground is also without merit.

The judgment of the trial court is affirmed.

RILEY, J. and MATHIAS, J., concur.