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IN THE COURT OF APPEALS OF INDIANA

TERRIE L. JAMES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0701-PC-69
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William E. Young, Judge
Cause No. 49G20-9406-PC-069309

September 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Terrie James appeals the denial of his petition for post-conviction relief ("PCR petition"), which challenged his convictions for Class A felony dealing in cocaine and Class C felony possession of cocaine. We affirm.

Issue

James raises two issues which we consolidate and restate as whether the post-conviction court properly concluded that his trial counsel was not ineffective.[1]

Facts

During a routine traffic stop on June 4, 1994, officers discovered cocaine in the possession of one of the vehicle's occupants. A man in the car, Charles "Chuckie" Davis, offered information to police regarding the seller of the cocaine. Davis told officers he had previously purchased cocaine from a man named "Terry"[2] who lived in a townhouse with his girlfriend Diane. Supp. R. p. 44-47. Following a search of the townhouse, officers identified this seller as defendant Terrie James. Davis reported seeing cocaine and cash inside the residence. He also told officers he was a user of cocaine.

At the officers' suggestion, Davis paged James. Davis identified the return caller as James and officers monitored the call during which Davis discussed the sale of

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[1] James also argues the trial court erred in denying the PCR petition on a res judicata basis. The State does not seek affirmance on that basis and we do not consider it here, but rather we consider the validity of the trial court's conclusion regarding ineffective assistance.

[2] Officers initially spelled defendant's first name Terry, but we will use the correct spelling, Terrie, hereafter.

cocaine. Davis made a controlled buy from Terrie. Davis then rode with officers and pointed out James and Diane's townhouse.

Officer James Wilkinson completed an affidavit to request a search warrant for the residence. Before submitting the affidavit to a judge, dispatch notified Officer Wilkinson that the address number on the townhouse was 3709 and not 3707 as he originally noted in the affidavit. Officers executed the search warrant at 3:55 a.m. on June 5, 1994. They recovered cocaine, two handguns, a pager, and $11,126.75 in cash.

On June 6, 1994, the State charged James with Class A dealing in cocaine and Class C possession of cocaine. James's counsel moved to suppress the evidence recovered from his residence contending it was the result of an insufficient warrant and the execution of the warrant violated the knock and announce rule. The trial court denied the motion and then denied the motion to reconsider the issue at the start of trial. Trial counsel did not timely object during the trial to the introduction of the evidence.

A jury convicted James on September 29, 1997. He appealed to this court contending among other things, that his motion to suppress should have been granted. On March 13, 2001, a panel of this court affirmed James's conviction and did not reach the suppression issue, instead stating it had been waived because his attorney did not timely object to the introduction of the evidence at trial. James v. State, No. 49A04-9911-CR-507, slip. op. at 5. (Ind. Ct. App. May 13, 2001). James filed a PCR petition on December 21, 2005. The trial court denied his petition and this appeal followed.

Analysis

A petitioner appeals a negative judgment when appealing the denial of post-conviction relief. Cornelious v. State, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006) trans. denied. We will not reverse such a judgment "unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court." Id.

James contends that trial counsel was ineffective because counsel failed to preserve the suppression issue for appeal by not objecting to the introduction of the evidence. He contends the evidence recovered during the search was inadmissible because the probable cause affidavit was inadequate and the search warrant was unreasonably executed. To support this contention, James argues the probable cause affidavit did not establish the reliability of confidential informant, did not establish that contraband would be found on the premises, and failed to establish the location of the premises. James also contends that officers failed to reasonably knock and announce their presence, making the execution of the warrant illegitimate.

Claims of ineffective assistance of counsel are reviewed under the two-part test set out by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). A defendant must demonstrate not only that counsel performed below an objective standard of reasonableness, but also that the deficient performance resulted in prejudice. Id.

We will presume that counsel provided adequate assistance and will defer to his or her strategic decisions. Terry v. State, 857 N.E.2d 396, 403 (Ind. Ct. App. 2006) trans.

denied. Given this presumption, a defendant must present "strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense." Oliver v. State, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), trans. denied. Regarding the prejudice element of the test the defendant must show "a reasonable probability (i.e. a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." Reed v. State, 866 N.E.2d 767, 769 (Ind. 2007).

We first consider whether trial counsel's failure to object constituted a failure to perform at a reasonable standard. At the PCR hearing, trial counsel admitted she did not make a timely objection to the admission of the evidence at trial. As the original appellate opinion also points out, during a break in the trial, counsel noted for the record that she did not timely object and requested the court consider a continuing objection. She admits to intending to timely object but forgetting to do so, so clearly this inaction was not a strategic decision, and we cannot treat it as such.

However, James must also prove but for the failure to object the outcome would have been different. Nothing in the record demonstrates that an objection contemporaneous with the introduction of evidence would have changed the outcome of the proceeding. The trial court judge had denied the motion to suppress and refused to reconsider it despite a second request. James contends that had his trial counsel timely objected the issue would have been properly preserved and his conviction would have been overturned on appeal. He contends the insufficiencies in this affidavit are similar to

those in a 2004 case in which we reversed a conviction on the basis of a faulty probable cause affidavit. See Merritt v. State, 803 N.E.2d 257 (Ind. Ct. App. 2004).

We note, however, that trial counsel is not held to the standards of future law or changes in the law. Strickland instructed that a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689, 104 S.Ct. at 2065. Counsel for James was not expected to anticipate or effectuate changes in the law. See Trueblood v. State, 715 N.E.2d 1242, 1258 (Ind. 1999), cert. denied; Williamson v. State, 798 N.E.2d 450, 454 (Ind. Ct. App. 2003), trans. denied, (reasoning that counsel's strategic decisions are judged by available precedent at the time). The sufficiency of the affidavit must be decided based on the law at the time of trial and not on later case law.

In considering the issuance of a warrant, the magistrate or judge is assigned the task of making "a common sense determination, based on the totality of the circumstances, that there is a fair probability that a particular place contains evidence of a crime." Houser v. State, 678 N.E.2d 95, 99 (Ind. 1997). The role of a reviewing court is to determine whether a substantial basis existed for the warrant authorizing the search and doubtful cases are to be resolved in favor of upholding the warrant. Id. at 98. The court must "focus on whether reasonable inferences drawn from the totality of the evidence support the determination." Id. at 99.

The affidavit at issue here stated:

> Detective James Wilkinson swears or affirms that he believes, and has good cause to believe that a controlled substance to wit cocaine an extract of coca, the possession of which is unlawful is being kept, used and sold from the residence located at 3709 Green Ash Ct, Indpls Marion County Ind. And said residence is under the control of a Terry B/M LNU and a Diane B/F LNU.
>
> This affiant bases his belief on the following information that within the past 72 hours of June 4, 1994 a confidential credible and reliable informant came personally to the affiant and stated that within the past 72 hours of June 4, 1994 he/she was personally at the [sic] 3709 Green Ash Ct. Indpls Marion County In. and observed in the possession of Terry B/M (LNU) and Dianne B/F (LNU). Said informant was further told by Terry B/M (LNU) and Dianne B/F (LNU) that the substance they had in their possession was in fact cocaine, an extract of coca, and was for sale. Said informant is known personally by this affiant to be a past user of cocaine an extract of coca and knows cocaine an extract of coca by its appearance and the manner in which it is package for sale. Said informant is reliable in that information provided by the informant in the past has resulted in one seizure of a controlled substance with arrests pending. Informant has also in the last 72 hours of June 4, 1994 has had conversation with Terry B/M (LNU) reference [sic] purchasing cocaine. The conversation was monitored by this affiant. Said informant is confidential in that revealing the identity of the informant could directly endanger the life of the informant and would destroy any future use of the informant.
>
> Based upon the above information, I am requesting a search warrant be issued for the residence located at 3709 Green Ash Ct Indpls. Marion County Indiana said residence is described as a two (2) story townhouse that is green trimmed in yellow with red front door and the numbers 3709 affixed to the front. Said residence consists of a living room, dining area, kitchen, bedroom(s), and bathroom. I request this search to include all rooms, closets, drawers, shelves, and personal effects contained therein and thereon where cocaine an extract of coca may be concealed. I further request this search to include the person(s) of Terry B/M LNU and Diane B/F (LNU).

Supp. R. p. 44-47.

Although it is true this affidavit is based on hearsay from the informant, that alone does not mean the affidavit is insufficient. All that is required by Indiana law is that the affidavit either "contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished" or "contain information that establishes that the totality of the circumstances corroborates the hearsay." Houser, 678 N.E.2d at 100 (citing Ind. Code § 35-33-5-2(b)). The affidavit here establishes that Davis had been used successfully as an informant in the past, that the informant was familiar with cocaine, and that the informant had previously been inside the residence to be searched and had seen cocaine in the residence. The informant identified the suspect and his girlfriend by first name. The affidavit states that the suspect and his girlfriend were in control of the residence to be searched. The affidavit provides first name identification of the suspects, states that they are in control of the residence, and states that they sold drugs from inside the residence. Considering the totality of these circumstances, there is little doubt a reviewing court would declare the warrant here had a sufficient basis.

Even if affidavit was technically deficient, evidence does not have to be suppressed if officers relied on a warrant in good faith. The good faith exception to the exclusionary rule provides that if the police relied on the warrant in objective good faith, then the exclusionary rule does not require that the evidence be suppressed. Hensley v. State, 778 N.E.2d 484, 488-89 (Ind. Ct. App. 2002) (citing I.C. § 35-37-4-5). Essentially, the officers responsible for executing the warrant are expected to have a reasonable

knowledge of what the law prohibits. The facts here do not indicate that a reasonable officer would have any reasons to doubt the validity of the warrant or the affidavit that supported it. James does not establish a lack of good faith on the part of the officers who executed the warrant. Thus, he cannot prove evidence recovered under the warrant should have been suppressed and also that he was prejudiced by counsel's failure to timely object to the evidence.

Regarding any challenges to the execution of the warrant and the knock and announce rule, testimony indicated one of the executing officers knocked on the door with a fist and yelled "police department." Supp. R. p. 105. Additional testimony indicated that while the officers approached the home, a car alarm began to sound. The officers used a ram to enter the residence within ten to fifteen seconds of the knock.

Although police must give inhabitants a reasonable opportunity to respond once they knock and announce, "this requirement need not be adhered to blindly regardless of the particular circumstances encountered by authorities at the time the search is being conducted." Willingham v. State, 794 N.E.2d 1110, 1114 (Ind. Ct. App. 2003) (citing State v. Dusch, 289 N.E.2d 515, 517 (Ind. 1972)). When asked about challenging the reasonableness of the knock and announce here, trial counsel testified at the PCR hearing that "the law in that area is kind of up in the air so I wasn't sure how good of an issue that was. . ." Tr. p. 15. In light of cases such as Willingham, James has failed to persuade us that trial counsel's assessment of this issue was unreasonable. We defer to trial counsel's strategic decision on this issue.

Counsel's failure to object to the admission of evidence during trial was not prejudicial to James because there is not a reasonable probability that the result of the proceeding would have been different had counsel objected. Further, we find that James did not overcome the presumption of effective counsel regarding trial counsel's assessment of any challenges to reasonableness of the knock and announce.

Conclusion

The post-conviction court properly concluded that James received effective assistance of counsel. We affirm the denial of post-conviction relief.

Affirmed.

KIRSCH, J., and ROBB, J., concur.