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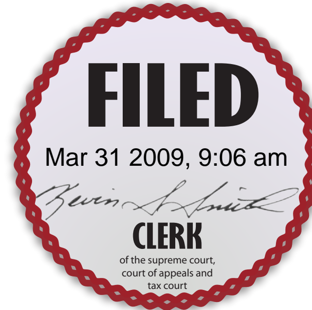

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IN THE
COURT OF APPEALS OF INDIANA

PAUL RYKARD, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0710-PC-476
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0310-FA-70

March 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Paul Rykard, Jr., pro se, appeals from the denial of his petition for post-conviction relief. Rykard presents two issues for our review:

1. Did the post-conviction court correctly conclude that Rykard received effective assistance of trial counsel?

2. Did the post-conviction court correctly conclude that Rykard's guilty plea was entered voluntarily, knowingly, and intelligently?

We affirm.

During the summer of 2003, the Fort Wayne Police received several tips regarding Rykard selling drugs from his home located at 634 Walnut Street. Police then began surveillance of Rykard's home. On three separate occasions (July 7, 2003, August 27, 2003, and October 9, 2003), police observed individuals enter Rykard's home, stay a relatively short period of time and leave. When each was stopped nearby for a traffic infraction, each possessed cocaine and each informed the police that they had purchased the cocaine from Rykard at his home. Two of the individuals specifically identified Rykard's residence as being located at 634 Walnut Street. The third individual, Delaney Hughes, identified the residence where she purchased the cocaine as being a house "on the corner of Walnut and Oakley". *Transcript of Motion to Suppress Hearing* at 16. There are houses on each of the four corners of that intersection, one being Rykard's residence at 634 Walnut Street. Two of the individuals also informed the police that Rykard kept weapons in his home.

Ultimately, Delaney Hughes agreed to cooperate with police as a confidential informant and to purchase cocaine from Rykard in a controlled-buy situation. On August 29, 2003, Hughes was subjected to a pre-buy search and her vehicle was fully searched and no

illegal contraband or substances were found. Hughes was given $100.00 in prerecorded U.S. currency. Detective Bobay followed Hughes to Rykard's residence at 634 Walnut Street, where another detective who was conducting surveillance watched as Hughes entered Rykard's residence. Approximately forty-five minutes after seeing Hughes enter the residence, Hughes exited carrying a box. Hughes walked across the street to another residence, delivered the box, and left seconds later to return to her vehicle. Hughes was then followed by an officer until she arrived at the prearranged location, where she turned over a white powdery substance that field tested positive for the presence of cocaine. Hughes explained that she entered the residence and gave Rykard the $100.00 of prerecorded U.S. currency. In response, Rykard pulled out a plate with cocaine on it and Hughes stated that everyone in the residence then "did a line," i.e., ingested cocaine. *Petitioner's Exhibit 1 - Search Warrant Affidavit* at 4. Eventually, Rykard packaged cocaine and handed it to her. Rykard then asked Hughes to deliver a box of fruit to his mother, who lived across the street, which Hughes agreed to do. After delivering the box, Hughes returned to her car and went to the prearranged location, all consistent with what was observed by police monitoring the controlled-buy situation.

On October 10, 2003, Detective Bobay submitted an affidavit for a search warrant based on and including the above information. The affidavit identified the home to be searched as "634 Walnut Street, Fort Wayne, Allen County, Indiana, which is a two-story wood framed, single family dwelling on a basement . . . ."[1] *Petitioner's Exhibit 1 - Search*

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[1] The house is wood-framed, but its exterior is brick.

Warrant Affidavit at 1. A search warrant issued based on the information contained in the affidavit was executed on October 10, 2003. During the search of Rykard's residence police discovered large amounts of cocaine and marijuana and a multitude of guns and knives, including a machine gun.

On October 17, 2003, the State charged Rykard with Count I, dealing in cocaine as a class A felony; Count II, unlawful possession of a firearm by a serious violent felon as a class B felony; Count III, dealing in marijuana as a class C felony; and Counts IV and V, receiving stolen property as class D felonies. On February 17, 2004, the State added Count VI, possession of a machine gun, a class C felony, and Count VII, application for a fixed term of imprisonment based upon Rykard's possession of a machine gun while committing a controlled substance offense. On March 15, 2004, Rykard filed a motion to suppress all evidence seized as a result of execution of the search warrant at his house. The trial court held an evidentiary hearing on Rykard's motion to suppress on April 5, 2004. The trial court denied the motion to suppress on April 20, 2004.

Thereafter, on May 4, 2004, Rykard pleaded guilty pursuant to a written plea agreement to Counts I, II, and VI, and the State agreed to dismiss the remaining charges. The plea agreement also provided sentencing was within the trial court's discretion but that the sentences imposed would run concurrently. During the subsequent guilty plea hearing, the trial court advised Rykard of the charges, of his constitutional and statutory rights, of the possible penalties, and of the terms of the plea agreement, and Rykard indicated his understanding thereof.

On June 10, 2004, after Rykard pleaded guilty but prior to his sentencing, Rykard filed a motion to withdraw his guilty plea. The State objected to the request for withdrawal. The trial court held a hearing on the motion on the date set for the sentencing hearing. At that hearing, Rykard admitted that he signed the plea agreement, but claimed that he had only ten minutes to think about it, that his attorney pressured him into signing the agreement, and that he was not in the right frame of mind. Rykard also claimed that there was a conflict of interest on the part of his trial counsel because his trial counsel was acquainted with one of the State's chief witnesses. The trial court found that Rykard had been fully advised of his rights, of the charges, and the potential penalties, and that he understood the advisements and made a voluntary, knowing, and intelligent plea of guilty. The trial court therefore denied Rykard's motion to withdraw his guilty plea and proceeded with the sentencing hearing. The trial court imposed presumptive, concurrent sentences, resulting in a total aggregate sentence of thirty years. Trial counsel, upon his motion, was relieved of any further duties in this case on June 24, 2004.

Rykard initially filed a petition for post-conviction relief on February 7, 2005, but he subsequently withdrew that petition without prejudice. Rykard again filed a petition for post-conviction relief on November 17, 2006. The post-conviction court held an evidentiary hearing on the post-conviction petition on March 19, 2007. On August 8, 2007, the post-conviction court entered findings of fact and conclusion of law denying Rykard's requested relief.

Rykard filed his notice of appeal on September 11, 2007. Following an extension of time and curing of a defect, Rykard filed his appellant's brief and appendix on March 20, 2008. On April 14, 2008, the State filed a motion to dismiss Rykard's appeal, which this court granted on May 7, 2008. Rykard filed a petition for rehearing, which this court denied on July 3, 2008. Rykard then filed a petition for transfer, and on December 16, 2008, our Supreme Court granted transfer and remanded the cause back to this court for briefing. On January 6, 2009, this court reinstated Rykard's appeal from the denial of his petition for post-conviction relief and ordered the State's brief filed within thirty days of that date.

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentence by filing a post-conviction petition. Ind. Post-Conviction Rule 1(1). Post-conviction proceedings, however, do not afford a petitioner with a super-appeal. *Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001). In a post-conviction proceeding, the petitioner must establish the grounds for relief by a preponderance of the evidence. P-C.R. 1(5); *Wesley v. State*, 788 N.E.2d 1247 (Ind. 2003). When challenging the denial of post-conviction relief, the petitioner appeals a negative judgment, and in doing so faces a rigorous standard of review. *Wesley v. State*, 788 N.E.2d 1247. To prevail, the petitioner must convince this court that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id*. We will disturb the post-conviction court's decision only where the evidence is without conflict and leads to but one conclusion and the post-conviction court reached the opposite conclusion. *Id*.

Here, the post-conviction court entered findings of fact and conclusions of law in accordance with Ind. Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "'[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.'" *Overstreet v. State*, 877 N.E.2d 144, 151 (Ind. 2007) (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (citation omitted)).

1.

Rykard argues that the post-conviction court erred in concluding that his trial counsel was not ineffective. Rykard contends he established that his trial counsel was ineffective for (1) failing to pursue an interlocutory appeal from the denial of his motion to suppress, (2) failing to appeal the denial of his motion to withdraw his guilty plea, and (3) failing to withdraw from his representation based on what Rykard claims constituted a conflict of interest on behalf of his trial counsel given the fact that his trial counsel was acquainted with one of the State's chief witnesses.

Our standard of review for claims of ineffective assistance of counsel follows:

> To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Failure to satisfy either prong will cause the claim to fail.

Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)) (internal citations omitted), *trans. denied*. We start with the presumption that counsel rendered effective assistance. *Overstreet v. State*, 877 N.E.2d 144. A petitioner must offer strong and convincing evidence to overcome this presumption. *Id*. Further, because all criminal defense attorneys will not agree on the most effective way to represent a client, "isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Harris v. State*, 861 N.E.2d 1182, 1187 (Ind. 2007).

We first address Rykard's claim that trial counsel was ineffective for failing to pursue an interlocutory appeal from the denial of his motion to suppress. In his motion to suppress, Rykard argued that the search warrant did not specifically set out the property and place to be searched, that the search warrant was based on uncorroborated hearsay, and that the information upon which the search warrant was based was stale. The trial court rejected all of these arguments, finding that the search warrant affidavit adequately identified the place to be searched, that the information obtained from the informants corroborated each other and was further corroborated by information obtained during the controlled drug-buy and by police observations, and that the information was not stale. At the post-conviction hearing, Rykard's counsel explained that he did not pursue an interlocutory appeal from the denial of the motion to suppress because such appeals are not a matter of right and are often not granted and because it was his strategy to use the specter of time and expense of an interlocutory appeal as leverage in plea negotiations.

Rykard claims that if his trial counsel had sought to appeal the denial of the defense motion to suppress, this court would have reversed the trial court's determination and ordered the evidence suppressed. Rykard's confidence in the prospect of prevailing on his claim is overly optimistic, even insofar as he claims he would have been granted the right to file an interlocutory appeal.[2] Indeed, we agree with the post-conviction court's conclusion that "[t]here is no reasonable probability that an appeal of this issue would have been successful." *Appellant's Appendix* at 28.

> In deciding whether to issue a search warrant, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). The duty of the reviewing court is to determine whether the magistrate had a "substantial basis" for concluding that probable cause existed. *Id*. at 238-39, 103 S.Ct. at 2332-33. "[S]ubstantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination" of probable cause. *Houser v. State*, 678 N.E.2d 95, 99 (Ind. 1997).

Jaggers v. State, 687 N.E.2d 180, 181-82 (Ind. 1997).

It is true that uncorroborated hearsay from a source whose reliability is unknown, standing alone, will not support a finding of probable cause to support issuance of a search

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[2] Grounds for granting a discretionary interlocutory appeal include:

> (i) The appellant will suffer substantial expense, damage or injury if the order is erroneous and the determination of the error is withheld until after judgment.
> (ii) The order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case.
> (iii) The remedy by appeal is otherwise inadequate.

Ind. Appellate Rule 14(B)(1)(c).

warrant. *Jaggers v. State*, 687 N.E.2d 180. Nevertheless, a search warrant may be based on hearsay where the supporting affidavit "contain[s] information that establishes that the totality of the circumstances corroborates the hearsay." Ind. Code Ann. § 35-33-5-2(b)(2) (West, Premise through 2008 2nd Regular Sess.); *see also Jaggers v. State*, 687 N.E.2d 180. Here, the hearsay statements of the three declarants, to the extent that they purchased drugs from Rykard at Rykard's residence, were corroborated by police observations that each of the informants arrived at Rykard's residence, entered the residence, left a short time later, and possessed drugs when stopped soon after leaving. The informants' statements also corroborated each other and were further corroborated by the circumstances of the controlled-buy.

With regard to the controlled buy, it was not so defective that it would have prevented a finding of probable cause. The only defect in the controlled buy that Rykard identifies is the fact that informant Hughes went to another residence before returning to the prearranged location after the controlled buy was complete. When Hughes arrived at the prearranged location, she adequately explained to the officers that after she completed the controlled drug buy, she delivered, at Rykard's request, a box of fruit to Rykard's mother, who lived across the street from Rykard's residence. Police observations of Hughes's movements were consistent with her explanation. Officers noted that Hughes entered the second residence and exited "seconds later", returned to her vehicle, and then met with police as planned. *Petitioner's Exhibit 1 - Search Warrant Affidavit* at 4.

Rykard also challenges reliance on hearsay statements in the search warrant affidavit taken from the second and third informants that Rykard had guns throughout his home. Contrary to Rykard's claim, the informants' statements that Rykard had guns included facts known to the informants because they had entered Rykard's home. Such facts were not easily obtained from the public domain such that they could not corroborate hearsay. Moreover, although each informant's statement about the details of Rykard's guns were different, they were not necessarily inconsistent.

Therefore, while none of the statements by themselves may have justified issuance of the search warrant, the combined statements coupled with the controlled drug buy add sufficient credibility to create probable cause for the issuance of the warrant. To be sure, each of the informant's statements corroborates each other and is further corroborated by the controlled drug buy. We further note that officers conducting surveillance of Rykard's residence observed conduct of the informants consistent with their statements, thereby adding to the credibility of the informants. Because Rykard has not shown that an appeal from the denial of his motion to suppress would have been successful, Rykard's trial counsel cannot be said to be ineffective for failing to seek an interlocutory appeal thereof. Moreover, we believe under the circumstances, trial counsel's strategy to not appeal the denial of the motion to suppress, but rather to use what leverage was left to secure a plea agreement favorable to Rykard, was clearly reasonable.

Rykard also argues that his trial counsel was ineffective for failing to appeal the trial court's denial of his motion to withdraw his guilty plea. As noted above, after pleading

guilty but prior to the court's acceptance thereof and sentencing, Rykard sought to withdraw his guilty plea. In support of his motion to withdraw, Rykard claimed that he had only ten minutes to think about the plea agreement, that his attorney pressured him into signing the agreement by telling him that if he did not sign it he would spend the rest of his life in prison, and further, that he was not in the right frame of mind.

Citing *U.S. v. Shaker*, 279 F.3d 494 (7th Cir. 2002) and *U.S. v. Merriweather*, 294 F.3d 930 (7th Cir. 2002), Rykard argues that he should have been permitted to withdraw his guilty plea without explanation because the court had not yet accepted his guilty plea when he filed his motion. Rykard maintains that counsel should have appealed the denial of his motion to withdraw on this basis.

Ind. Code Ann. § 35-35-1-4(b) (West, Premise through 2008 2nd Regular Sess.) sets forth the applicable standard when a defendant pleads guilty and then requests to withdraw his plea:

> After entry of a plea of guilty . . . , but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea . . . for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea. . . . The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea . . . whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

In *Turner v. State*, 843 N.E.2d 937 (Ind. Ct. App. 2006), this court noted:

> The "entry" of a guilty plea and the court's subsequent "acceptance" of that plea are two distinct stages of the plea process. Indeed, our supreme court has recognized for over two decades that "court permission is required to withdraw a guilty plea, even when the plea has not been accepted and the withdrawal request is based upon a protestation of innocence." *Carter v. State*, 739

> N.E.2d 126, 131 (Ind. 2000) (citing *Owens v. State*, 426 N.E.2d 372, 375 (Ind.1981)).

Id. at 941. The *Turner* court thus rejected the defendant's claim that the trial court abused its discretion when it denied his motion to withdraw his guilty plea simply because the trial court had not yet accepted his plea when he filed his motion. Rykard's argument similarly fails. Rykard was not entitled to withdraw his guilty plea simply because he filed his motion to withdraw before the trial court accepted the plea. Rykard's trial counsel was not ineffective for failing to appeal the denial of his motion to withdraw his guilty plea on grounds that the motion to withdraw was filed before the trial court accepted the plea.

Rykard also argues that his trial counsel should have appealed the denial of his motion to withdraw his guilty plea because he claims that he clearly established just reasons to support the withdrawal. Specifically, Rykard asserts that his counsel rushed him into making a decision and that his trial counsel told him he would spend the rest of his life in prison if he did not accept the plea agreement. Rykard also maintains that an alleged conflict of interest on behalf of his trial counsel justified withdrawal of his guilty plea.

Rykard has failed to establish that an appeal from the denial of his motion to withdraw his guilty plea would have garnered him the relief he sought. As noted in I.C. § 35-35-1-4, a trial court's ruling on a motion to withdraw a guilty plea is reviewed for an abuse of discretion. In determining whether a trial court abused its discretion in denying a motion to withdraw a guilty plea, a reviewing court will consider the statements made by the defendant during the guilty plea hearing to decide whether the defendant's plea was made "'freely and

knowingly'". *Brightman v. State*, 758 N.E.2d 41, 44 (Ind. 2001) (quoting *Coomer v. State*, 652 N.E.2d 60, 62 (Ind. 1995)).

A review of the guilty plea hearing demonstrates that Rykard's statements in support of his motion to withdraw contradict his statements at the guilty plea hearing. To be sure, Rykard was fully advised of his rights, the charges against him, and the possible penalties, and he clearly indicated his understanding thereof. Rykard stated that he had not been coerced into pleading guilty and that he was satisfied with his counsel's performance. With regard to Rykard's claim that he learned of an alleged conflict of interest with his attorney only after he pleaded guilty, Rykard's trial counsel testified to the contrary, explaining that he informed Rykard of his acquaintance with one of the informants against Rykard at the beginning of his representation of Rykard, i.e., as soon as he recognized Hughes's name as one of the informants identified in the search warrant affidavit. We agree with the post-conviction court that under these circumstances, an appeal from the denial of Rykard's motion to withdraw his guilty plea would not have been successful. Rykard's trial counsel, therefore, cannot be found ineffective for failing to appeal.[3]

"Rykard's final claim of ineffective assistance of counsel involves counsel's decision not to withdraw amid the storm of the conflict of interest" Rykard claims existed given that his trial counsel was acquainted with Hughes. *Appellant's Brief* at 12. An actual conflict of interest between a criminal defendant and defense counsel occurs when defense counsel, or

[3] We further note that Rykard's trial counsel withdrew from his representation of Rykard and was relieved of any further duties in the case on June 24, 2004, two weeks after the sentencing hearing.

another client represented by defense counsel, stands to gain significantly at defendant's expense. *See Williams v. State*, 529 N.E.2d 1313 (Ind. Ct. App. 1988). During the post-conviction hearing, Rykard's trial counsel explained that upon reading the search warrant affidavit, he realized that he knew one of the informants against Rykard and that he informed Rykard of such. Counsel further explained that he became acquainted with informant Hughes in the early 1990s when she worked as a waitress at a nightclub he was managing and that he was close friends with the informant Hughes's fiancé. Counsel further explained that he had represented informant Hughes in a custody or visitation matter in the middle 1990s. Counsel did not believe that the mere fact that he knew informant Hughes created a conflict of interest. Moreover, he never discussed Rykard's case with informant Hughes. Rykard failed to present any evidence to contradict his counsel's testimony and also failed to provide any evidence that his counsel's representation of him was in any way affected by his counsel's acquaintance with informant Hughes. As found by the post-conviction court, these facts do not establish a conflict of interest between Rykard and his trial counsel. Trial counsel was therefore not ineffective for failing to withdraw from the representation.[4]

In summary, Rykard has failed to establish that his trial counsel was ineffective for not appealing the denial of his motion to suppress or the denial of his motion to withdraw his guilty plea or for not withdrawing from his representation of Rykard after learning that he was acquainted with one of the State's witnesses against Rykard.

[4] During questioning of his trial counsel during the post-conviction hearing, Rykard suggested that he had asked his trial counsel numerous times to withdraw from his representation. In response to Rykard's questions, his trial counsel stated that Rykard had never asked him to withdraw from his representation.

2.

Rykard also claims that his guilty plea was not voluntarily, knowingly, and intentionally made because he was rushed into accepting the plea agreement, was misadvised as to the finality of his motion to suppress, was informed that he would receive a lengthy prison sentence if he did not accept the plea agreement, and was not advised of what he claims constitutes a conflict of interest on behalf of his trial counsel.

A review of the guilty plea hearing reveals that Rykard was fully and carefully advised of his constitutional and statutory rights, the charges against him, the possible penalties, and the terms of his plea agreement and was asked whether his decision to plead guilty was voluntary or the product of coercion or promises. Rykard clearly indicated his understanding of his rights and other advisements and affirmatively stated that his plea was voluntary. Rykard also indicated that he was happy with his counsel's representation of him. Further, as we concluded above, Rykard did not establish that he would have succeeded on appeal from the denial of his motion to suppress. With regard to the length of his sentence, his attorney properly advised him that without the plea agreement, he faced the possibility of a much longer sentence. Indeed, the terms of Rykard's plea agreement conferred a substantial benefit upon him, dismissing a class C felony and two class D felonies and providing that the sentences imposed would run concurrently. We have previously addressed Rykard's conflict of interest argument, concluding that Rykard failed to present evidence contradicting his counsel's testimony and wholly failed to establish that a conflict of interest existed. Rykard's conflict of interest claim does not support a finding that his guilty plea was not made

knowingly, voluntarily, and intelligently. Based on the record before the post-conviction court, it is clear that, despite his latter protestations, Rykard undoubtedly entered his guilty plea knowingly, voluntarily, and intelligently. Rykard has not demonstrated that the post-conviction's determination in this regard is wholly contrary to the facts and the law.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur.