

# United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted November 23, 2020

Decided December 1, 2020

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 20-1883

JIMMY L. NAVE, JR.,  
*Petitioner-Appellant,*

*v.*

WARDEN OF WABASH VALLEY  
CORRECTIONAL FACILITY,  
*Respondent-Appellee.*

Appeal from the United States District  
Court for the Southern District of Indiana,  
Terre Haute Division.

No. 2:19-cv-00051-JRS-DLP

James R. Sweeney II,  
*Judge.*

## ORDER

Jimmy Nave has filed a notice of appeal from the denial of his 28 U.S.C. § 2254 petition and a request for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, we DENY the request for a certificate of appealability.

// Appendix A. //



the other side of the vehicle. Nave did not immediately leave the vicinity and stood face-to-face with Derrickson briefly until he began to walk away and leave the mall area. Derrickson noticed that Nave had something dark in his hand but was unable to identify what it was. Derrickson later identified Nave as the man he had seen in Clark's car.

As a result of this incident, Clark was visibly shaken. Although she initially told the police she was unhurt, she in fact had a bleeding wound on her face and later developed bruises on her face and hands.

On February 22, 2013, the State charged Nave with Class A felony kidnapping and Class B felony attempted carjacking. On June 24, 2013, a bench trial was held. Nave testified and admitted that he had gotten into Clark's car, but claimed that he did so only to confront her because she had backed into his vehicle. The trial court rejected Nave's version of events and found him guilty as charged.

At a sentencing hearing held on July 1, 2013, the trial court vacated the Class B felony conviction on double jeopardy grounds and sentenced Nave only on the Class A felony conviction. .... The trial court then sentenced Nave to thirty-eight years, with three years thereof suspended to probation.

*Nave v. State*, 998 N.E.2d 1001, 2013 WL 6236765, \*1-2 (Ind. Ct. App. Dec. 3, 2013) ("*Nave I*").

Mr. Nave sought transfer to the Indiana Supreme Court which was denied.

Following his direct appeal, Mr. Nave filed a petition for post-conviction relief in state court. As relevant here, he asserted that both his trial and appellate counsel provided ineffective assistance of counsel in several respects. *See* dkt. 8-2 at 9; *Nave v. State*, 2018 WL 4275432, at \*3-5 (Ind. Ct. App. Aug. 29, 2018) ("*Nave II*"). The trial court denied Mr. Nave's petition following a hearing, and the Indiana Court of Appeals affirmed. *Id.* at \*5. The Indiana Supreme Court denied Mr. Nave's petition to transfer. Dkt. 7-9 at 11.

Mr. Nave next filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 with this Court alleging that trial counsel was ineffective for (1) failing to object to his warrantless arrest, and (2) failing to object to Robert Derrickson's in-court identification of him.

## II. Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody “in violation of the Constitution or laws . . . of the United States.” 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) directs how the Court must consider petitions for habeas relief under § 2254. “In considering habeas corpus petitions challenging state court convictions, [the Court’s] review is governed (and greatly limited) by AEDPA.” *Dassey v. Dittmann*, 877 F.3d 297, 301 (7th Cir. 2017) (en banc) (citation and quotation marks omitted). “The standards in 28 U.S.C. § 2254(d) were designed to prevent federal habeas retrials and to ensure that state-court convictions are given effect to the extent possible under law.” *Id.* (citation and quotation marks omitted).

A federal habeas court cannot grant relief unless the state court’s adjudication of a federal claim on the merits:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

“The decision federal courts look to is the last reasoned state-court decision to decide the merits of the case, even if the state’s supreme court then denied discretionary review.” *Dassey*, 877 F.3d at 302. “Deciding whether a state court’s decision ‘involved’ an unreasonable application of federal law or ‘was based on’ an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner’s federal claims, and to give appropriate deference to that decision[.]” *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018) (citation and quotation marks omitted). “This

is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion." *Id.* "In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.*

"For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102. "The issue is not whether federal judges agree with the state court decision or even whether the state court decision was correct. The issue is whether the decision was unreasonably wrong under an objective standard." *Dassey*, 877 F.3d at 302. "Put another way, [the Court] ask[s] whether the state court decision 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Richter*, 562 U.S. at 103).

### III. Discussion

Mr. Nave alleges that trial counsel rendered ineffective assistance of counsel. To succeed on a claim that trial counsel was ineffective, a petitioner must show that counsel's performance was deficient and prejudicial. *Maier v. Smith*, 912 F.3d 1064, 1070 (7th Cir. 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 689–92 (1984)). Deficient performance means that counsel's actions "fell below an objective standard of reasonableness," and prejudice requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

The last reasoned opinion at issue here is the Indiana Court of Appeals' decision affirming the denial of Mr. Nave's petition for post-conviction relief. The Indiana Court of Appeals correctly articulated the *Strickland* standard in Mr. Nave's post-conviction memorandum decision. *Nave II*, 2018 WL 4275432 at \*2. Mr. Nave complains about two aspects of trial counsel's performance. The Court will address each in turn.

**i. Probable Cause Affidavit**

Mr. Nave contends that his trial counsel provided ineffective assistance by failing to challenge the probable cause affidavit issued after his warrantless arrest. "[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). Mr. Nave challenges two statements in the affidavit and alleges that without these statements there was no probable cause to issue the warrant.

The Indiana Court of Appeals summarized the contents of the affidavit as follows:

[T]he probable cause affidavit stated that Ruth Clark described her assailant as an African-American male wearing "dark clothing, dark knit cap and dark jacket." She further stated the assailant left the scene by walking to the north corner of the mall. Similarly, Robert Derrickson described the suspect as an African-American male wearing "Blk [sic] cap, leather looking coat, dark pants possibly work pants." He told the officer the suspect walked north around the mall.

Next, the affidavit indicates Nave arrived at Manie Vive's garage to ask for a ride. Vive described Nave's clothing to the officer and gave the officer Nave's name. The clothing was "the same described by the victim and witness." Vive told the police Nave said he had just come from the mall.

Another officer went to Nave's residence and saw a "similar looking male" walk up to the home. The male identified himself as Nave's brother, Chris Nave. Chris told the officer that Nave had called him to say he was "in trouble."

*Nave II*, 2018 WL 4275432, at \*3 (record citations omitted).

The Court of Appeals concluded that this information "would warrant a reasonable person

to believe that Nave was the person who attacked Clark,” so trial counsel was not ineffective for not filing a motion to suppress that would not have been granted. *Id.*

The Court agrees. “To determine whether an officer had probable cause for an arrest,” the reviewing court “‘examine[s] the events leading up to the arrest, and then decide[s] whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.’” *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)) (internal quotation marks omitted). Whether probable cause exists “depends on the totality of the circumstances.” *Maryland*, 540 U.S. at 371. The Indiana Court of Appeals reasonably concluded that the information included in the affidavit supported a finding of probable cause.

Further, the Court disagrees with Mr. Nave’s argument that the detective lied or presented misleading evidence in the affidavit. Dkt. 2 at 3; dkt. 11 at 3. Mr. Nave challenges the veracity of two statements: (1) “The suspect was later identified as Jimmy Lee Nave after he went to Manies [sic] Garage and asked for a ride,” and (2) “Manie Vive described Nave’s clothing as being the same described by the victim and witness.” As the Seventh Circuit has explained:

“A warrant request violates the Fourth Amendment if the requesting officer knowingly, intentionally, or with reckless disregard for the truth, makes false statements in requesting the warrant and the false statements were necessary to the determination that a warrant should issue.” *Knox v. Smith*, 342 F.3d 651, 658 (7th Cir. 2003). We have said that a “reckless disregard for the truth” can be shown by demonstrating that the officer “entertained serious doubts as to the truth” of the statements, had “obvious reasons to doubt” their accuracy, or failed to disclose facts that he or she “knew would negate probable cause.” *Beauchamp v. City of Noblesville, Ind.*, 320 F.3d 723, 743 (7th Cir. 2003).

*Betker v. Gomez*, 692 F.3d 854, 860 (7th Cir. 2012). Neither of the statements challenged by Mr. Nave were false, just incomplete. With respect to the first statement, shortly after the attack occurred, Samuel Morgan, an acquaintance of Mr. Nave’s from high school, gave Mr. Nave a ride

to Mr. Vive's mechanic shop from the Long John Silver's where Mr. Morgan and his girlfriend, Sarah Aynes worked. Tr. 88-92. The police went to the Long John Silver's after the attack because it was adjacent to the mall, and Ms. Aynes told officers her boyfriend had just given a black male a ride. Tr. 17. Mr. Vive was also familiar with Mr. Nave from working on Mr. Nave's family's cars. Tr. 101. Mr. Nave told Mr. Vive he needed help with his car because he had hit a woman's car in the mall parking lot. Tr. 103. Mr. Vive drove by the mall, and Mr. Nave pointed out the car where the police were. Tr. 103-05. Mr. Vive told Mr. Nave he should talk to police and let the insurance company handle the accident, but he declined. Tr. 105. After Mr. Vive dropped Mr. Nave off, he received a phone call from his shop telling him the police wanted to speak with him about Mr. Nave, so he went to the police station and provided a statement. Tr. 105. The fact that the affidavit did not specify who first identified Mr. Nave by name to the police (presumably Mr. Morgan or Mr. Vive) does not make the statement a lie. The affiant did not show reckless disregard for the truth, nor did he withhold facts that would have negated a finding of probable cause. Rather, the details omitted from the affidavit but testified to at trial bolster the finding of probable cause.

Mr. Nave quibbles with the second statement—"Manie Vive described Nave's clothing as being the same described by the victim and witness"—because the affidavit did not include Mr. Vive's description of Mr. Nave's clothes. But Mr. Vive testified at trial that Mr. Nave wore a black beanie, black jacket, and black jeans, which was similar to the description of Mr. Nave's clothes that Ms. Clark and Mr. Derrickson had provided to police. Tr. 106-07. Again, the affiant did not lie, he just did not draft the affidavit with the level of clarity that Mr. Nave argues was necessary.

In summary, the Indiana Court of Appeals correctly concluded that there was enough information in the affidavit to support a finding of probable cause, and therefore trial counsel did



not perform deficiently for failing to challenge it. Habeas relief is not warranted on this basis.

**ii. In-Court Identification**

Mr. Nave next challenges trial counsel's effectiveness for failing to object to Mr. Derrickson's in-court identification of him. Mr. Derrickson was the mall employee who approached Ms. Clark's car after he heard her muffled screams. Mr. Derrickson testified that he had gotten "a good look" at Mr. Nave after Mr. Nave exited Ms. Clark's car. Tr. 65. A detective showed Mr. Derrickson a photo line-up the day of the attack, but he did not identify any suspect. Tr. 73-74. The detective told Mr. Derrickson during that interview that the pictures in the lineup were "not the greatest" due to using an older system to print the pictures and told Mr. Derrickson that he might show him another lineup with clearer pictures later. Dkt. 8-5 at 10-11. Several days later—after Mr. Derrickson had seen a news article with Mr. Nave's name and picture—the detective went to his workplace and showed him another lineup. Tr. 68-69, 74. Mr. Derrickson selected Mr. Nave's picture in the second lineup. Tr. 66. The first photo lineup was not preserved, but Mr. Nave argues that the court must presume that he was in the first lineup and that it was only through the detective's suggestiveness that Mr. Derrickson was able to select him in the second lineup.

The Seventh Circuit has "held that a 'witness's identification violates a defendant's right to due process when the identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Lee v. Foster*, 750 F.3d 687, 691 (7th Cir. 2014) (quoting *United States v. Recendiz*, 557 F.3d 511, 524 (7th Cir. 2009)). "Due process will only prohibit evidence when it 'is so extremely unfair that its admission violates fundamental conceptions of justice.'" *Id.* (quoting *Perry v. New Hampshire*, 565 U.S. 228, 237) (2012)). Further, an identification procedure may be unduly suggestive yet still reliable and,

therefore, admissible. *Id.* at 692. Several factors to determine reliability should be considered:

(1) the opportunity of the witness to observe the criminal at the time of the crime (or prior to the identification); (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the time of the identification; and (5) the length of time between the crime and the identification.

*Id.* (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)). A witness's inconsistencies are generally relevant to his credibility, not the admissibility of his testimony. *Id.*

As noted in the appellate opinion, Mr. Derrickson testified that he got a good look at Mr. Nave because Mr. Nave stood face-to-face with him outside the car before walking away. Mr. Derrickson described Mr. Nave as being about 6' and 180 pounds, and Mr. Nave is 5'11" and 170 pounds. *Compare* dkt. 8-5 at 10 *with* dkt. 7-1 at 1. Mr. Derrickson selected Mr. Nave's picture only ten days after the crime. While he did not select a picture from the first line-up, that was explained by the detective's concern about the poor picture quality. Mr. Nave's trial counsel highlighted the fact that Mr. Derrickson identified Mr. Nave only after he saw his picture in the newspaper. Tr. 69. Weighing the reliability factors, Mr. Derrickson's identification of Mr. Nave was sufficiently reliable. If Mr. Nave's trial counsel had objected to Mr. Derrickson's in-court identification, the objection would not have been sustained. Thus, the Indiana Court of Appeals correctly recognized that trial counsel's performance could not have been deficient if the unraised objection would not have been sustained. *See Jones v. Brown*, 756 F.3d 1000, 1008-09 (7th Cir. 2014) ("If evidence admitted without objection is, in fact, admissible, then 'failing to object to that evidence cannot be a professionally 'unreasonable' action.'" (quoting *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001))).

Further, even if counsel had successfully objected to the in-court identification, Mr. Nave would have been unable to prove the prejudice prong of *Strickland*. Mr. Nave admitted to police

that he was in Ms. Clark's car, and he testified as such at trial. Mr. Derrickson's identification of Mr. Nave was not the evidentiary linchpin needed to convict Mr. Nave because he identified himself. Therefore, Mr. Nave cannot show a reasonable probability that suppressing Mr. Derrickson's testimony would have changed the outcome of trial. *Strickland*, 466 U.S. at 694.

In summary, the Indiana Court of Appeals' determination that the identification was admissible and therefore trial counsel did not render ineffective assistance for failing to object to it was a reasonable application of *Strickland*. Habeas relief is not warranted on this basis.

#### **IV. Certificate of Appealability**

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, the prisoner must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In deciding whether a certificate of appealability should issue, "the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck*, 137 S. Ct. at 773 (citation and quotation marks omitted).

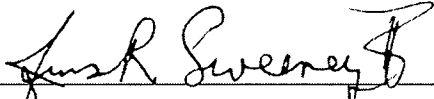
Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts requires the district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Here, no reasonable jurist could disagree that Mr. Nave's claims are barred by 28 U.S.C. § 2254(d) or are otherwise without merit. A certificate of appealability is therefore denied.

**V. Conclusion**

Mr. Nave's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied**, and a certificate of appealability shall not issue. Final judgment in accordance with this decision shall issue.

**IT IS SO ORDERED.**

Date: 2/12/2020

  
\_\_\_\_\_  
JAMES R. SWEENEY II, JUDGE  
United States District Court  
Southern District of Indiana

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In the  
**Indiana Supreme Court**

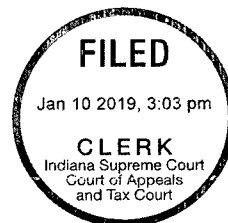
Jimmy Nave, Jr.,  
Appellant(s),

v.

State Of Indiana,  
Appellee(s).

Court of Appeals Case No.  
48A04-1708-PC-02007

Trial Court Case No.  
48C04-1412-PC-44



**Order**

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 1/10/2019.

A handwritten signature in black ink, appearing to read "Loretta H. Rush".

Loretta H. Rush

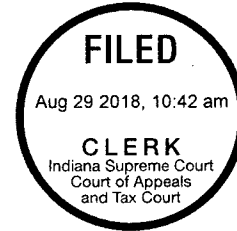
Chief Justice of Indiana

All Justices concur.

"Appendix C."

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



### ATTORNEY FOR APPELLANT

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## IN THE COURT OF APPEALS OF INDIANA

Jimmy Nave, Jr.,  
*Appellant-Petitioner,*

v.

State of Indiana,  
*Appellee-Respondent.*

August 29, 2018

Court of Appeals Case No.  
48A04-1708-PC-2007

Appeal from the Madison Circuit  
Court

The Honorable David A. Happe,  
Judge

Trial Court Cause No.  
48C04-1412-PC-44

**Sharpnack, Senior Judge.**

### Statement of the Case

[1] Jimmy Nave, Jr., appeals the denial of his petition for post-conviction relief.

We affirm.

"Appendix D."

## Issue

- [2] Nave raises two issues, which we consolidate and restate as: whether the post-conviction court erred in rejecting his claims of ineffective assistance of trial counsel and appellate counsel.

## Facts and Procedural History

- [3] The facts of Nave's criminal case are as follows:

On February 16, 2013, Ruth Clark, who was eighty-one years old at the time, left a shopping mall in Madison County and returned to her car in the mall parking lot. After Clark entered her car and sat in the driver's seat, a man later identified as Nave entered the back seat of her car, reached around Clark's seat, grabbed her by the face and mouth, and held a six-to-eight-inch knife to her neck. Clark was unable to move her arms due to this restraint by Nave but still attempted to call for help. Nave told her to "shut up" and ordered her to "drive." Tr. p. 31.

Fortunately for Clark, Robert Derrickson, a mall employee who was in the parking lot at the time, heard Clark's muffled screams and responded. Derrickson saw Nave in Clark's car with his hand over her mouth. Derrickson went to the car and asked Nave, "what [is] going on[?]" Tr. pp. 56-57. When Nave saw Derrickson, he exited the other side of the vehicle. Nave did not immediately leave the vicinity and stood face-to-face with Derrickson briefly until he began to walk away and leave the mall area. Derrickson noticed that Nave had something dark in his hand but was unable to identify what it was. Derrickson later identified Nave as the man he had seen in Clark's car.

As a result of this incident, Clark was visibly shaken. Although she initially told the police she was unhurt, she in fact had a bleeding wound on her face and later developed bruises on her face and hands.

On February 22, 2013, the State charged Nave with Class A felony kidnapping and Class B felony attempted carjacking. On June 24, 2013, a bench trial was held. Nave testified and admitted that he had gotten into Clark's car, but claimed that he did so only to confront her because she had backed into his vehicle. The trial court rejected Nave's version of events and found him guilty as charged.

*Nave v. State*, Cause No. 48A02-1307-CR-632, \*1 (Ind. Ct. App. 2013), *trans. denied*.

- [4] Nave appealed, claiming the evidence was insufficient to sustain his kidnapping conviction and that his sentence was inappropriate. A panel of this Court affirmed the trial court's judgment. *See id.*
- [5] In 2014, Nave filed a petition for post-conviction relief. The post-conviction court held an evidentiary hearing on January 20, 2017 and denied the petition on June 7, 2017. This appeal followed.

## Discussion and Decision

### I. Standard of Review

- [6] Post-conviction proceedings are civil proceedings in which the petitioner must prove claims by a preponderance of the evidence. *Hampton v. State*, 961 N.E.2d 480, 491 (Ind. 2012). When appealing from the denial of a petition for post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Campbell v. State*, 19 N.E.3d 271, 274 (Ind. 2014). "As such, the petitioner faces a rigorous standard of review." *Wesley v. State*, 788 N.E.2d 1247, 1250 (Ind. 2003). To prevail on appeal, the petitioner must show



that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Campbell*, 19 N.E.3d at 274.

- [7] The post-conviction court issued findings of fact and conclusions thereon pursuant to Indiana Post-Conviction Rule 1(6). We review the post-conviction court's factual findings for clear error, but we review questions of law de novo. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Davison v. State*, 763 N.E.2d 441, 444 (Ind. 2002).

## **II. Sixth Amendment Right to Effective Assistance of Counsel**

- [8] Nave claims his trial counsel made unreasonably deficient choices that resulted in him being found guilty. To demonstrate a violation of the Sixth Amendment right to effective assistance of counsel, a petitioner must prove the two components of the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Passwater v. State*, 989 N.E.2d 766, 770 (Ind. 2013). The petitioner must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance was prejudicial. *Bethea v. State*, 983 N.E.2d 1134, 1138 (Ind. 2013). A petitioner demonstrates prejudice by establishing a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 1138-39. We afford great deference to counsel's discretion to choose strategy and tactics. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). Further, we

strongly presume that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Id.*

### ***1. Probable Cause for Arrest***

[9] Nave first argues his trial counsel should have moved to suppress all evidence obtained from his warrantless arrest because he believes there was no probable cause. As a result, he claims the arrest violated his federal and state constitutional protections against unreasonable search and seizure, and if counsel had filed a motion to suppress, the motion would have been granted.

[10] The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[11] Article one, section eleven of the Indiana Constitution contains similar language:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

[12] In Indiana, a police officer may arrest a person without a warrant if the officer has “probable cause to believe the person has committed or attempted to commit, or is committing or attempting to commit, a felony . . . .” Ind. Code §

35-33-1-1 (2005). When a person is arrested without a warrant, the following procedure applies:

(a) At or before the initial hearing of a person arrested without a warrant for a crime, the facts upon which the arrest was made shall be submitted to the judicial officer, ex parte, in a probable cause affidavit. In lieu of the affidavit or in addition to it, the facts may be submitted orally under oath to the judicial officer. If facts upon which the arrest was made are submitted orally, the proceeding shall be recorded by a court reporter, and, upon request of any party in the case or upon order of the court, the record of the proceeding shall be transcribed.

(b) If the judicial officer determines that there is probable cause to believe that any crime was committed and that the arrested person committed it, the judicial officer shall order that the arrested person be held to answer in the proper court. If the facts submitted do not establish probable cause or if the prosecuting attorney informs the judicial officer on the record that no charge will be filed against the arrested person, the judicial officer shall order that the arrested person be released immediately.

Ind. Code § 35-33-7-2 (1982).

[13] An officer filed a probable cause affidavit after Nave's arrest. Nave claims that the facts and circumstances, as set forth in the probable cause affidavit, do not establish probable cause for his arrest. Probable cause to arrest exists when, at the time of the arrest, the officer has knowledge of facts and circumstances that would warrant a reasonable person to believe that the suspect has committed the criminal act in question. *Clark v. State*, 808 N.E.2d 1183, 1192 (Ind. 2004). The amount of evidence necessary to meet the probable cause requirement is determined on a case-by-case basis. *Id.* It is grounded in notions of common

sense, not mathematical precision. *Id.* Probable cause requires only a fair probability of criminal activity, not a prima facie showing, and may be established by evidence that would not be admissible at trial. *Lamagna v. State*, 776 N.E.2d 955, 958 (Ind. Ct. App. 2002). Information received from witnesses can serve as the basis for probable cause to arrest an individual. *Decker v. State*, 19 N.E.3d 368, 373 (Ind. Ct. App. 2014), *trans. denied*.

[14] In the current case, the probable cause affidavit stated that Ruth Clark described her assailant as an African-American male wearing “dark clothing, dark knit cap and dark jacket.” Appellant’s App. Vol. 2, p. 6. She further stated the assailant left the scene by walking to the north corner of the mall. Similarly, Robert Derrickson described the suspect as an African-American male wearing “Blk [sic] cap, leather looking coat, dark pants possibly work pants.” *Id.* He told the officer the suspect walked north around the mall.

[15] Next, the affidavit indicates Nave arrived at Manie Vive’s garage to ask for a ride. Vive described Nave’s clothing to the officer and gave the officer Nave’s name. The clothing was “the same described by the victim and witness.” *Id.* Vive told the police Nave said he had just come from the mall.

[16] Another officer went to Nave’s residence and saw a “similar looking male” walk up to the home. *Id.* at 7. The male identified himself as Nave’s brother, Chris Nave. Chris told the officer that Nave had called him to say he was “in trouble.” *Id.*

[17] The foregoing evidence from the probable cause affidavit would warrant a reasonable person to believe that Nave was the person who attacked Clark. Clark, Derrickson, and Vive described his clothing, and Vive knew Nave's name. Nave argues that the affidavit contains inconsistencies and uncorroborated hearsay, but the State was not obligated to provide proof beyond a reasonable doubt in the affidavit. Under these circumstances, Nave's counsel did not perform deficiently by failing to file a motion to suppress because the motion would not have been granted.

## ***2. In-Court Identification and Due Process of Law***

[18] Nave argues his trial counsel rendered ineffective assistance by failing to object to Robert Derrickson's in-court identification of Nave as the person who attacked Clark. "[T]o prevail on a claim of ineffective assistance due to the failure to object, the defendant must show an objection would have been sustained if made." *Overstreet v. State*, 877 N.E.2d 144, 155 (Ind. 2007).

[19] Nave argues Derrickson's in-court identification was improper because the process through which Derrickson originally identified Nave for the police was unduly suggestive. "There is a degree of suggestiveness which is inherent in all in-court identifications; the practical necessity of having the appellant sit at the defendant's table with defense counsel naturally sets him apart from everyone else in the courtroom." *Jeter v. State*, 888 N.E.2d 1257, 1266 (Ind. 2008). Nevertheless, a defendant's Fourteenth Amendment due process right may be violated by the admission of identification evidence that is the product of

unduly suggestive procedures. *Young v. State*, 700 N.E.2d 1143, 1146 (Ind. 1998).

- [20] We must consider the facts surrounding the pretrial procedure, including the manner and form in which the police asked the witness to attempt the identification and the witness's interpretation of their directives, and whether officials singled out the defendant as the suspect they most had in mind either by their attitude displayed toward appellant or by the physical constitution of the photo array or corporeal lineup. *Brooks v. State*, 560 N.E.2d 49, 55 (Ind. 1990). Whether a particular identification procedure rises to a level of suggestiveness that constitutes reversible error must be determined from the context of the case. *Jeter*, 888 N.E.2d at 1266. Inconsistencies in identification testimony affect the credibility of the witness, not the admissibility of the identification. *Harris v. State*, 619 N.E.2d 577, 581 (Ind. 1993).
- [21] Derrickson testified at Nave's criminal trial. He stated that when he approached Clark's car and yelled, Nave got out of the car on the other side and "kind of stood there" before walking away. Tr. Transcript Vol. 1, p. 57. Derrickson agreed that he had gotten "a good look" at Nave after the attack and identified him in court as the perpetrator. *Id.* at 65.
- [22] Detective Scott Sanderson interviewed Derrickson on February 16, 2013, after the attack. Derrickson agreed that he could possibly identify Clark's attacker. The detective showed Derrickson a photographic lineup, saying "Just take your time and look and tell me if you see anybody that looks like that person. And if

you don't know, you just don't know. That's fine, too." PCR Tr. Vol. 3, p. 10. The State did not preserve the lineup, and the record does not indicate whether a picture of Nave was included in the lineup. Derrickson was unable to identify anyone as the attacker.

[23] Detective Sanderson told Derrickson the lineup "isn't good" and that he wanted to find "a lot clearer photo." *Id.* He offered to create another lineup, "a better one maybe." *Id.* at 11. The detective stressed, "So if you don't really know a hundred percent, I mean, I don't want you to just pick." *Id.*

Derrickson agreed he would review a "better photo lineup" later. *Id.*

[24] On February 26, 2013, Detective Sanderson presented a different photographic lineup to Derrickson. He identified Nave as the attacker. At Nave's trial, Derrickson testified about his inability to identify anyone in the February 13, 2013 lineup and his identification of Nave in the February 26, 2013 lineup.

[25] Nave argues we must presume that his photograph was included in the first photo array because the State failed to preserve the array. Reply Br. p. 6 (citing *Loomis v. Ameritech Corp.*, 764 N.E.2d 658 (Ind. Ct. App. 2002), *trans. denied*). Even if Nave is correct, any inconsistencies between Derrickson's reactions to the February 13 and February 26 lineups would be relevant to his credibility, not to the admissibility of Derrickson's identification of Nave. Further, Detective Sanderson never singled out Nave as a suspect or implied that a suspect was included in the February 13, 2013 lineup. To the contrary, the

detective stressed that he was interested only in Derrickson's honest, accurate response regardless of the result.

- [26] Nave claims that during Detective Sanderson's February 13, 2016 presentation of the photographic lineup, the detective specifically pointed out Nave's photograph to Derrickson. We disagree with Nave's reading of the record. After Derrickson indicated he would be willing to review another photographic lineup on a later occasion, Detective Sanderson stated as follows:

This one here was really kind of a spur of the moment thing, and I thought if somebody got a really great look at somebody, they might have been able to tell. I knew it would probably be a little difficult. When you came out of the mall, before that incident, you don't remember ever seeing this guy anywhere (inaudible) when you seen [sic] him today at all?

PCR Tr. Vol. III, p. 11. We are obligated to review the post-conviction record in the light most favorable to the judgment, and we read Sanderson's question as a general question rather than as pointing to a specific picture in the photographic lineup.

- [27] To summarize, we conclude the pretrial identification procedures were not unduly suggestive, and the trial court's admission of Derrickson's in-court identification of Nave as the attacker did not violate Nave's right to due process of law. *See Harris*, 619 N.E.2d at 581 (witness's change of mind in description of suspect went to credibility, not to admissibility of identification). Nave's trial counsel did not render ineffective assistance in failing to object to the in-court identification because the objection would have been overruled.



### ***3. Appellate Counsel***

[28] Nave argues he received ineffective assistance of appellate counsel for failing to challenge the probable cause for his arrest and for failing to challenge Derrickson's in-court identification of him as the suspect. Claims of ineffective assistance of appellate counsel are governed by the two-part *Strickland* test discussed above. *Carter v. State*, 929 N.E.2d 1276, 1278 (Ind. 2010). We have already determined that Nave did not receive ineffective assistance of trial counsel on the issues of probable cause and in-court identification. Accordingly, his claims of ineffective assistance of appellate counsel on these issues must also fail.

### **Conclusion**

[29] For the reasons stated above, we affirm the judgment of the post-conviction court.

[30] Affirmed.

Kirsch, J., and Crone, J., concur.

State of Indiana       )  
                                  )  
County of Madison    )

SS:

In the Madison Circuit Court

Div. 4               2017 Term

Cause No. 48C04-1412-PC-000044

JIMMY LEE NAVE, JR.,  
Petitioner,

VS.

STATE OF INDIANA  
Respondent.

(Underlying case No. 48C04-1302-FA-000409)

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING POST-  
CONVICTION RELIEF**

Comes now the Court, upon consideration of the Petition for Post-Conviction Relief filed herein. Having considered the evidence and submissions of the parties, the Court now finds and orders as follows (Where convenient, some conclusions of law may be included in the findings of fact section, and vice versa):

**FINDINGS OF FACT**

1. On February 22, 2013, Respondent State of Indiana charged Petitioner under cause number 48C04-1302-FA-000409 with Kidnapping, a class A felony, and Attempted Carjacking, a class B felony.
2. On February 22, 2017, Attorney John Reeder was appointed to represent Petitioner, and did in fact represent him through his trial and sentencing.
3. On June 12, 2013, Petitioner filed a Motion to Waive Jury Trial. A hearing was held on that motion on June 13, 2013, and the Court granted that request.

"Appendix E."

**Findings of Fact, Conclusions of Law, and Order Denying Post-Conviction Relief**

4. A bench trial was held on June 18, 2013. At the conclusion of evidence, the Court found Defendant guilty as charged.

5. Sentencing was held on July 1, 2013. The Court concluded on double jeopardy grounds that conviction and sentence could not stand on both counts, and therefore vacated the conviction under Count II, Attempted Carjacking. For Count I, Kidnapping as a class A felony, the Court sentenced Petitioner to a 38-year commitment to the Indiana Department of Correction. 35 years of this sentence were executed and ordered to be served at the Indiana Department of Correction, and the remaining three were suspended, to be served on probation.

6. Petitioner exercised his right to appeal, and the Court appointed attorney Thomas Godfrey to perfect the appeal, which he did. On appeal, Petitioner argued that the evidence was insufficient to support his conviction, and that his sentence was inappropriate. Ultimately, the Indiana Court of Appeals affirmed his conviction and sentence in a unanimous decision.

7. This Court has taken notice of the Indiana Court of Appeals' opinion in 48A02-1307-CR-000632.

8. On December 17, 2014, Petitioner through counsel filed his petition for post-conviction relief. His petition alleged that he had received ineffective assistance of trial and appellate counsel, in that:

- a. Trial counsel failed to:
  - i. challenge the probable cause affidavit,
  - ii. object to Petitioner's arrest, and the detention, statements, and evidence derived from that arrest
  - iii. challenge misleading statements in the probable cause affidavit,

Findings of Fact, Conclusions of Law, and Order Denying Post-Conviction Relief

iv. object to the in-court identification of Petitioner by State's Witness

Robert Derrickson as unduly suggestive.

v. move to suppress trial testimony,

vi. adequately investigate the case, and

b. Appellate counsel failed to raise the foregoing issues on appeal.

9. On December 19, 2014, the State filed its response, raising several affirmative defenses.

10. On January 20, 2017, the Court conducted an evidentiary hearing on the petition. Witnesses were sworn, and evidence was heard and concluded. The appellate record was admitted by stipulation of the parties. Petitioner testified. A transcript of Robert Derrickson's testimony was admitted.

11. At the conclusion of the evidentiary hearing, the Court took the matter under advisement.

12. Facts related to Petitioner's alleged errors of trial counsel are discussed below:

- a. Trial counsel failed to challenge the probable cause affidavit; failed to object to Petitioner's arrest, and the detention, statements, and evidence derived from that arrest; and trial counsel failed to challenge misleading statements in the probable cause affidavit.

Petitioner asserts that Detective Sanderson was untruthful in paragraph 4 of the affidavit.

That paragraph states:

The suspect was later identified as Jimmy Lee Nave after he went to Manies (sic) Garage and asked for a ride. Manie Vive (sic) described Nave's clothing as being the same described by the

**Findings of Fact, Conclusions of Law, and Order Denying Post-Conviction Relief**

victim and witness. Nave told Vive (sic) that his car was stranded at the Mounds Mall by MCL and told Vive (sic) he left the scene after hitting another vehicle.

Petitioner's Hearing Exhibit 2, Appellant's Appendix Vol. I of II, p.14. Witness Robert Derrickson did give a detailed description of the clothing of the person he saw by the mall. Petitioner's Hearing Exhibit 1, p. 6. That description included a black cap, black leather-like coat, and dark cotton work pants. Manuel Vives testified at trial that he knew Petitioner Jimmie Lee Nave, Jr., through his father and working on the family's vehicles, and that when Vives gave Nave a ride shortly after the crime, that Nave was wearing a black jacket, black hat, and black jeans. Petitioner's Hearing Exhibit 2, Transcript of Evidence, Vol. I, part A, pp. 101-102,106-107. The minor discrepancies between their descriptions are well within the bounds of witnesses' individual perceptions and memory, and do not undermine the Court's confidence that they were both describing Nave. The Court finds that no reckless or intentional falsity has been demonstrated in the probable cause affidavit.

After consulting with trial counsel, Nave testified at his trial. While he disputed what happened inside the car, Nave acknowledged in his testimony that he had gotten into the victim's car, encountered a bystander outside the car that the Court finds to have been Robert Derrickson, and that he had gotten a ride with Manuel Vives. Petitioner's Hearing Exhibit 2, Transcript of Evidence, Vol. I, part B, pp. 137-139. Petitioner's testimony corroborated that the facts and conclusions in the probable cause affidavit were accurate.

The arrest in this case was warrantless (Petitioner's Hearing Exhibit 2, Appellant's Appendix Vol. I of II, p.2) so there can be no error related to the issuance of the arrest warrant, as alleged in paragraph 9(A)(3) of the Petition for Post-Conviction Relief. The Court does find that

**Findings of Fact, Conclusions of Law, and Order Denying Post-Conviction Relief**

the facts alleged in the probable cause affidavit did establish probable cause for Nave's detention for Carjacking and Kidnapping. Had trial counsel moved for Nave's release due to a lack of probable cause, moved to suppress statements due to arrest in the absence of probable cause, or moved to suppress other evidence due to his warrantless arrest, these motions would have been denied.

- b. Trial counsel failed to object to the in-court identification of Petitioner by State's Witness Robert Derrickson as unduly suggestive.

Petitioner argues that Witness Robert Derrickson's in-court identification was unduly suggestive because Derrickson had failed to pick Nave out of a photo array before trial, and identified him at trial only after seeing him seated in the Courtroom as the accused. The Court finds that an objection to Robert Derrickson's in-court identification of Nave would not have been sustained. The earlier failure to identify a witness can certainly be considered by the trier of fact in assessing the weight to give identification testimony, but does not bar a witness from testifying. The Court does not find anything more suggestive about the in-court identification of Nave than in any other case where a witness is asked to identify a defendant who is seated at a counsel table. Also, in light of Nave's decision to testify and admit that he was the person in the victim's car at the time of the offense, Nave has shown no harm from Derrickson's identification.

- c. Trial counsel failed to move to suppress trial testimony related to the issues above, and failed to adequately investigate the case

Because the Court finds no errors related to the probable cause affidavit, arrest or in-court identification, counsel did not perform below prevailing professional norms in failing to move to suppress evidence related to these topics. Petitioner has failed to clearly allege and prove in what

**Findings of Fact, Conclusions of Law, and Order Denying Post-Conviction Relief**

way trial counsel failed to adequately investigate. Trial counsel conducted significant cross-examination of the State's witnesses, led Petitioner ably through his testimony, and presented a closing argument that demonstrated command of the evidence.

13. Petitioner claims he received ineffective assistance of appellate counsel failed to raise the foregoing issues on appeal. Appellate counsel did not raise Petitioner's allegations of error committed by trial counsel. However, Petitioner has not demonstrated that an error was present, preserved for review, and had a reasonable chance of success on appeal if raised.

**CONCLUSIONS OF LAW**

1. Petitioner has alleged that his attorneys provided ineffective assistance during his trial and appeal.

2. Claims of ineffective assistance of counsel are evaluated according to the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, a petitioner must show that his lawyer's performance fell below prevailing professional norms, and that this deficient performance resulted in prejudice to him. *Danks v. State*, 733 N.E.2d 474, 485 (Ind.Ct.App. 2000). If there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different, then prejudice is established. *Id.*

3. Petitioner has failed to meet his burden to prove that his trial and/or appellate counsel performed below prevailing professional norms, and failed to prove that he was prejudiced by their representation. No ineffective assistance of either trial or appellate counsel has been proven by Petitioner.

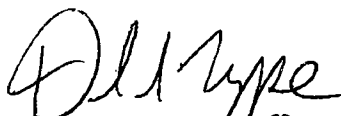
Findings of Fact, Conclusions of Law, and Order Denying Post-Conviction Relief

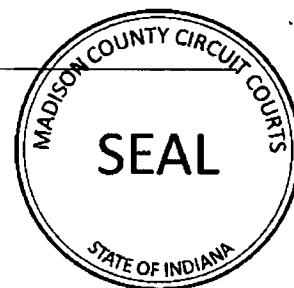
4. The facts and the law are with Respondent and against Petitioner.

THEREFORE, IT IS ORDERED that the Petition for Post-Conviction Relief filed in this action is denied. Petitioner's conviction and sentence entered in 48C04-1302-FA-000409 remain as previously ordered.

June 7, 2017

Date

  
CP  
David A. Happe, Judge  
Madison Circuit Court 4



CP

Distribution:

RJO  
File  
Petitioner, by counsel  
Respondent, by counsel



United States Court of Appeals  
For the Seventh Circuit  
Chicago, Illinois 60604

December 22, 2020

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 20-1883

JIMMY L. NAVE, JR.,  
*Petitioner-Appellant,*

*v.*

WARDEN OF WABASH VALLEY CORRECTIONAL  
FACILITY,  
*Respondent-Appellee.*

} Appeal from the United States  
District Court for the Southern  
District of Indiana, Terre Haute  
Division.

} No. 2:19-cv-00051-JRS-DLP  
James R. Sweeney II, *Judge.*

Order

Petitioner-Appellant filed a petition for rehearing on December 18, 2020. Both of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

// Appendix F //