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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL N. NEWSOM,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0907-PC-673
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 5
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0411-PC-197663

April 15, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Michael N. Newsom (Newsom), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUE

Newsom presents two issues for our review, which we consolidate and restate as the following issue: Whether he received ineffective assistance of trial and appellate counsel.

FACTS AND PROCEDURAL HISTORY

In our memorandum decision considering Newsom's direct appeal, we stated the following facts:

> In August 2004, Newsom, who was then nineteen years old, met thirteen-year-old S.L. through conversations that took place in an Internet chatroom. At some point, S.L. told Newsom that she was fourteen. On October 22, 2004, Newsom and S.L. went to an Indianapolis Kmart to purchase a Polaroid camera and some cigarettes. Thereafter, they engaged in sexual intercourse according to S.L. Newsom then took two photographs of S.L. One photo showed S.L.'s exposed breasts and the other showed her vaginal area. S.L. then took some photos of Newsom. One of the photographs showed Newsom holding his erect penis. When S.L. returned home, her sister found the photographs.
>
> Thereafter, Newsom was charged with four counts of child molesting and one count of child exploitation. Prior to trial, Newsom filed a motion in limine seeking to exclude the two photographs that were taken of him by S.L. Following a hearing, the trial court denied the motion with respect to the photographs. At Newsom's jury trial that commenced on April 11, 2005, the trial court noted Newsom's objection to the admission of the photographs. In the end, the jury found Newsom guilty of child exploitation and not guilty on three counts of child molestation. The remaining count was dismissed.
>
> At the sentencing hearing, the trial court found as mitigating factors that Newsom attempted to involve himself with someone who was at least fourteen

> years old and his relatively young age. The trial court identified two aggravating factors: the commission of the crime while Newsom was on probation and the existence of two prior criminal convictions. Newsom's criminal history included a juvenile battery adjudication and a previous child molestation conviction. After weighing the above factors, the trial court imposed an executed sentence of eight years.

Newsom v. State, Case No. 49A02-0505-CR-411, slip op. at 2-3 (Ind. Ct. App. Dec. 28, 2005) (footnotes omitted). On appeal, Newsom argued that (1) the trial court erred in permitting certain photographs of Newsom as evidence, (2) the State presented insufficient evidence, and (3) he had been improperly sentenced. We affirmed the judgment of the trial court.

On October 18, 2006, Newsom filed a petition for post-conviction relief, and amended that petition on December 4, 2006. On December 3, 2008, the post-conviction court conducted a hearing on Newsom's petition. On June 16, 2009, the post-conviction court found that both Newsom's trial and appellate counsels provided effective assistance of counsel and denied his petition.

Newsom now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

The petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). Because Newsom is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no

way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

Post-conviction hearings do not afford defendants the opportunity for a "super appeal." *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. Rather, post-conviction proceedings provide a narrow remedy for collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Ross v. State*, 877 N.E.2d 829, 832 (Ind. Ct. App. 2007), *trans. denied*. This Newsom has done by alleging that his trial and appellate counsels provided ineffective performance in violation of Article 1, Section 13 of the Indiana Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. *See* Post-Conviction Rule 1 (1)(a).

In order to demonstrate ineffective assistance of counsel Newsom must establish both prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*. *Lee v. State*, 880 N.E.2d 1278, 1280 (Ind. Ct. App. 2008). The defendant must prove (1) his or her counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's failure to meet prevailing professional norms, the result of the proceeding would have been different. *Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *reh'g denied, trans.*

denied (citing *Strickland*, 466 U.S. at 690). Essentially, the defendant must show that counsel was deficient in his or her performance and the deficiency resulted in prejudice. *Johnson*, 832 N.E.2d at 1006. 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." *Bieghler v. State*, 690 N.E.2d 188, 199 (Ind. 1997), *reh'g denied*, *cert. denied*, 525 U.S. 1021 (1998). Thus, there is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id*.

II. *Effectiveness of Counsel*

Newsom contends that his trial counsel was ineffective because he failed to object to Final Instruction No. 21D, which instructed the jury on the elements of the crime of child exploitation. Specifically, Newsom contends that his trial counsel was ineffective for failing to object to the omission of language regarding the intent to satisfy or arouse the sexual desires of any person.

Indiana Code section 35-42-4-4(b) provides in pertinent part: "A person who knowingly or intentionally . . . photographs . . . any performance or incident that includes sexual conduct by a child under eighteen (18) years of age . . . commits child exploitation, a Class C felony." "Sexual conduct" is further defined, in pertinent part, as the "exhibition of

the uncovered genitals intended to satisfy or arouse the sexual desires of any person." I.C. § 35-42-4-4(a).

Final Instruction No. 21D stated as follows:

> The crime of Child Exploitation, a [C]lass C felony with which the Defendant is charged in [C]ount 5, is defined as follows:
>
> A person who knowingly or intentionally photographs a performance or incident that includes sexual conduct by a child under the age of eighteen (18)[]years, commits Child Exploitation a [C]lass [C] felony.
>
> To convict the Defendant the State must prove each of the following elements beyond a reasonable doubt:
>
> 1. The [D]efendant, Michael Newsom
>
> 2. knowingly or intentionally,
>
> 3. photographed a performance or incident that included sexual conduct, namely, the exhibition of uncovered genitals of a child under eighteen (18) years of age,
>
> 4. that is, [S.L.]
>
> If the State fails to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty.
>
> If the State does prove each of these elements beyond a reasonable doubt, you may find the Defendant guilty of Child Exploitation, a Class C felony charged in Count 5.

(Petitioner's Exhibits p. 99).

Comparing Final Instruction No. 21D to Indiana Code section 35-42-4-4 it is apparent that the instruction utilized only part of the definition of "sexual conduct," omitting the language "intended to satisfy or arouse the sexual desires of any person." By doing so,

Newsom's argument implies, the jury instruction may have led the jury to believe that it could convict him even if he had photographed S.L.'s genitals for a reason other than to satisfy or arouse someone's sexual desires.

Since Newsom bears the burden of proof and must demonstrate prejudice he must prove that there is a reasonable probability that the jury did find that he had photographed S.L.'s genitals for a reason other than sexual satisfaction or arousal, but nevertheless convicted him of child exploitation because the jury was misled by the jury instruction. We find such a scenario doubtful.

We first note that the omitted language was missing not from the portion of the statute defining the elements of the crime, but from the portion of the statute defining an operative phrase of one of those elements: "sexual conduct." That an act of "sexual conduct" would be for the intended purpose of satisfying or arousing sexual desires is assumed by the operative phrase itself. Newsom presented no evidence to the post-conviction court that he had photographed S.L.'s genitals for a legitimate reason.

We must also note that the charging Information filed by the State was read for the jury, which included the following language for Count V:

> On or between August 27, 2004 and October 25, 2004, Michael Newsom, did knowingly or intentionally photograph a performance or incident that included sexual conduct, that is: the exhibition of the uncovered genitals *intended to satisfy or arouse the sexual desires of any person*, by a child under eighteen (18) years of age, that is: [S.L.], thirteen (13) years of age[.]

(Petitioner's Exhibits p. 86) (emphasis added). Therefore, the jury was presented with the full language of the definition of "sexual conduct" as applicable to the State's charge against

Newsom. In *Price v. State*, 591 N.E.2d 1027, 1029 (Ind. 1992), our supreme court concluded that a jury instruction on attempted murder which erroneously omitted a directive that the State must prove the intent to kill was cured by the fact that the jury had been read the charging information which included the phrase "*with the intent to kill*." (Emphasis in original). Likewise, the reading of the charging Information here, which fully defined "sexual conduct" relevant to the charge against Newsom, cured any error which may have been caused by the omission in Final Instruction No. 21D.

For these combined reasons we conclude that Newsom has not proven any prejudice due to his trial counsel's failure to object to Final Instruction No. 21D. For these same reasons, Newsom has not proven any prejudice stemming from his appellate counsel's failure to argue that the trial court committed fundamental error by giving the jury Final Instruction No. 21D.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err when denying Newsom's petition for post-conviction relief.

Affirmed.

VAIDIK, J., and CRONE, J., concur.