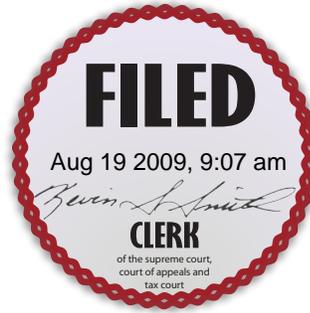


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LEON JENNINGS,)

Appellant-Defendant,)

vs.)

No. 71A05-0902-PC-106

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable J. Jerome Frese, Judge
Cause No. 71D01-9801-CF-29

August 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Leon Jennings appeals the post-conviction court's denial of his petition for post-conviction relief. Jennings raises one issue, which we restate as whether Jennings was denied the effective assistance of trial counsel. We affirm.

The relevant facts as discussed in Jennings's direct appeal are as follows:

[O]n one day in August 1997, Jennings and his wife Carol went to the residence of Jennings' nieces, twelve-year-old L-C.W. and ten-year-old [L-T.W.] After having an argument with Jennings, Carol left the residence. Jennings told L-T.W. to go upstairs and she went to the top of the stairs. Jennings then told [L-C.W.] who was sitting on the couch, to pull down her pants. Jennings inserted his penis into L-C.W.'s vagina and subsequently told her not to tell anyone about the incident. When L-T.W. came down the stairs, Jennings ran into the kitchen.

L-T.W. and [L-C.W.] did not speak to each other or to their mother about the incident until a few months later, when L-C.W. exhibited symptoms which were diagnosed as venereal warts, a sexually-transmitted disease. After a report was made to police, the State charged Jennings with child molesting as a Class A felony.

Jennings v. State, 723 N.E.2d 970, 971-972 (Ind. Ct. App. 2000).

During discovery, Jennings's trial counsel received a report by Dr. Walsh that L-C.W. was diagnosed with venereal warts in November 1997. Jennings's trial counsel shared Dr. Walsh's report with Jennings. Jennings told his counsel that he desired to be tested for the disease which caused L-C.W.'s venereal warts. Jennings was "very adamant" that L-C.W. was not going to testify against him at trial. Post Conviction Transcript at 11-12. Jennings's counsel and Jennings discussed trial strategy, and they "talked about the venereal warts and the victim not being likely to testify." Id. at 16.

Jennings's counsel anticipated that Jennings was going to testify that he did not have venereal warts. Jennings's counsel decided not to request a medical exam.

In its opening statement, the State referred to Dr. Walsh's examination of L-C.W. and stated that L-C.W.'s diagnosis of venereal warts was "consistent with sexual intercourse having been performed on [L-C.W.]" Trial Transcript at 254. In his opening statement, Jennings's attorney stated that "[t]he evidence will show that Mr. Jennings did not then, does not now, has never had venereal warts." Id. at 256. The State and Jennings stipulated as to the findings of Dr. Walsh that L-C.W. had venereal warts. L-C.W. testified that Jennings had sex with her, and L-T.W. testified that she observed Jennings "on top of [her] sister" and that "he was humping [her]." Id. at 283, 326. On the afternoon of the second day of his trial, after L-C.W. and L-T.W. had testified, Jennings elected not to testify. During closing arguments, Jennings's trial counsel argued that Dr. Walsh's diagnosis that L-C.W. had venereal warts did not demonstrate that L-C.W. had sexual intercourse with Jennings. Jennings was found guilty of child molesting as a class A felony and sentenced to forty years.

Jennings filed a direct appeal and raised two issues: (1) whether the trial court improperly refused to allow him to plead guilty to the charge; and (2) whether the trial court improperly admitted hearsay evidence of his age over timely objection. 723 N.E.2d at 972-973. We affirmed Jennings's conviction on direct appeal. Id. at 973.

On January 17, 2001, Jennings filed a petition for post-conviction relief. In his petition, Jennings alleged that he was denied the effective assistance of trial counsel and appellate counsel, that he was denied a fair trial, that he was denied his due process and equal protection rights, and that the State withheld and suppressed evidence favorable to his defense. With respect to his allegation that he was denied the effective assistance of trial counsel, Jennings argued in part: “If defense counsel had . . . his client examined by a medical doctor the outcome of the trial would have been different” Appellant’s Appendix at 22. After a hearing on October 2, 2008, the post-conviction court denied Jennings’s petition for post-conviction relief.

Before discussing Jennings’s allegations of error, we note the general standard under which we review a post-conviction court’s denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. “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.” Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

The sole issue is whether Jennings was denied the effective assistance of trial counsel.¹ 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. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh’g denied), reh’g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). 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. Id. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Grinstead v. State, 845 N.E.2d

¹ Jennings does not appeal the post-conviction court’s conclusions that his due process rights were not violated, that he was not denied the effective assistance of appellate counsel, and that the State did not suppress evidence favorable to his defense.

1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002), reh'g denied, cert. denied, 540 U.S. 830, 124 S. Ct. 69 (2003). Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. Id. at 746-747. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Id. at 747. A defense counsel's poor trial strategy or bad tactics do not necessarily amount to ineffective assistance of counsel. Crain v. State, 736 N.E.2d 1223, 1239 (Ind. 2000).

Jennings argues that his trial counsel was ineffective because: (A) trial counsel decided not to obtain a medical test “to detect the presence of the virus transmitted to [L-C.W.]” and trial counsel “offered no evidence . . . that he [Jennings] was virus free;” and (B) trial counsel made “an opening statement that he could not back up since he failed to have [Jennings] tested for this disease after he was charged with the offense.” Appellant's Brief at 5-6. We will address each argument separately.

A. Trial Counsel's Decision Not to Investigate

Jennings argues that his trial counsel was ineffective by deciding not to obtain a medical test or obtain other evidence that would determine whether Jennings “was virus

free.” Appellant’s Brief at 5-6. The State argues that Jennings’s “[t]rial counsel’s decision not to have [Jennings] tested for venereal warts five months after his act of molestation of the victim was reasonable trial strategy.” Appellee’s Brief at 4.

Jennings’s trial counsel had “a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. However, when scrutinizing counsel’s performance, we are highly deferential and avoid using hindsight to distort our evaluation of counsel’s performance. Clark v. State, 561 N.E.2d 759, 762 (Ind. 1990). A defendant must present strong and convincing evidence to rebut the presumption of competent representation of counsel. Id. We give a great deal of deference to counsel’s judgments regarding the extent and scope of investigation. Parish v. State, 838 N.E.2d 495, 500 (Ind. Ct. App. 2005), reh’g denied.

Here, Jennings has not established that his trial counsel’s decision not to obtain a medical test to investigate whether Jennings was infected with a virus was an unreasonable strategic decision. The record reveals that even if Jennings had been tested, in as early as January of 1998 when he was initially charged with child molestation, for a virus that caused venereal warts and the test showed that he did not have such a virus at that time, that fact would not have been conclusive as to whether Jennings was infected with the virus in August of 1997. Dr. Prahlow, an expert in the area of forensic

pathology, testified in his deposition that Jennings may not have been infected with the virus months after he transmitted the virus to L-C.W.

In addition, had further investigation revealed that Jennings did not have venereal warts in either August of 1997 or in January of 1998 when he was charged, that fact would not have been conclusive as to whether Jennings was infected with a virus which caused venereal warts in August of 1997. Dr. Prahlow also testified that a person does “not have to physically have warts to have the infection” and that “an asymptomatic person could end up transmitting the virus to another person.” See Defendant’s Exhibit B at 12, 15. Jennings testified that he did not understand that there is “a difference between [having] venereal warts and [having] the virus that causes it[.]” Post-Conviction Transcript at 34.

We further observe that if Jennings’s trial counsel had decided to obtain a medical test and the results of that test were positive, then the results would have supported the State’s case against Jennings by showing that Jennings was in fact infected with the virus which caused L-C.W.’s venereal warts.

We conclude that the decision by Jennings’s trial counsel not to obtain a medical test and not to perform other investigations to determine whether Jennings had venereal warts or a virus that caused venereal warts were not unreasonable decisions under the circumstances. See, e.g., Boesch v. State, 778 N.E.2d 1276, 1284 (Ind. 2002) (holding that evidence did not show that defense counsel’s investigation fell below objective

standards of reasonableness), reh'g denied; see also Parish, 838 N.E.2d at 501-502 (concluding that defense counsel's decision not to further investigate and rely solely on an alibi defense was reasonable).

Moreover, Jennings cannot demonstrate prejudice. Even assuming that a medical test would have revealed that Jennings did not have the virus which caused L-C.W.'s venereal warts, the State still had the testimony of the victim L-C.W. and her sister L-T.W., as well as the testimony of a detective with the South Bend Police Department and the published video interview he conducted with L-T.W. Based on this testimony, we conclude that Jennings has failed to demonstrate that there is a reasonable probability that, but for his trial counsel's failure to obtain a medical test or to undertake other investigations, the result of the proceeding would have been different. See, e.g., Terry v. State, 857 N.E.2d 396, 404 (Ind. Ct. App. 2006) (concluding that defendant could not demonstrate prejudice because, even assuming defendant's trial counsel performed further investigations, the State still had the testimony of other witnesses against the defendant), trans. denied. The post-conviction court's denial of Jennings's petition for post-conviction relief on this issue is not clearly erroneous.

B. Trial Counsel's Opening Statement

Jennings also argues that his trial counsel was ineffective because he made an opening statement that he could not back up during trial. Specifically, Jennings argues that his trial counsel failed to support a statement that Jennings "did not then, does not

now, has never had venereal warts” by failing to present evidence during trial that Jennings was “virus free.” See Trial Transcript at 256; Appellant’s Brief at 5. The State argues that Jennings’s “trial counsel presented no evidence on this issue because [Jennings] elected not to testify.” Appellee’s Brief at 4.

The record reveals that Jennings’s counsel anticipated that Jennings was going to testify that he did not have venereal warts. Jennings’s counsel testified that Jennings was “very adamant” and “really certain” that “the victim [L-C.W.] would not testify.” Post Conviction Transcript at 11-12, 16. Jennings and his trial counsel discussed trial strategy, and they “had the discovery, and . . . talked about the venereal warts and the victim not being likely to testify.” Id. at 16. Jennings’s counsel testified: “I think that my strategy in bringing it up in an opening statement would have been in anticipation that in all likelihood Mr. Jennings -- you know, again, that gets to be speculation -- that perhaps Mr. Jennings was going to testify to the absence of it.” Id. at 22-23. Ultimately, well after Jennings’s counsel gave his opening statement to the jury, Jennings elected not to testify.

We cannot say that the decision of Jennings’s trial counsel to respond to the State’s opening remark that L-C.W.’s venereal warts were “consistent with sexual intercourse” by stating that evidence would show that Jennings “never had venereal warts,” especially in light of the fact that he anticipated that Jennings would testify to that effect, was unreasonable. Trial Transcript at 254, 256. See, e.g., Wisehart v. State, 693 N.E.2d 23, 42 (Ind. 1998) (holding that the content of an opening statement, absent some

egregious blunder, is a matter of strategy), reh'g denied, cert. denied, 526 U.S. 1040, 119 S. Ct. 1338 (1999). Thus, we conclude that the post-conviction court's denial of Jennings's petition for post-conviction relief is not clearly erroneous.

For the foregoing reasons, we affirm the post-conviction court's denial of Jennings's petition for post-conviction relief.

Affirmed.

CRONE, J., and BRADFORD, J., concur.