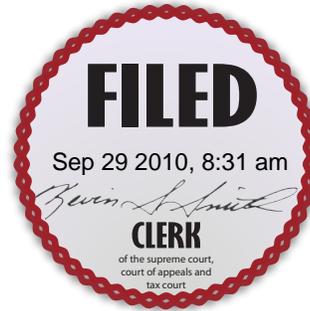


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID REYNOLDS,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 06A01-0802-PC-67

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Rebecca S. McClure, Special Judge
Cause No. 06D01-0301-PC-16

September 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

David Reynolds appeals the denial of his petition for post-conviction relief in 2007 following his 1998 conviction for three counts of child molesting as class A felonies. We affirm.

Issues

Reynolds raises two issues for our review:¹

- I. Whether trial counsel was ineffective; and
- II. Whether appellate counsel was ineffective.

Facts and Procedural History

We summarized the facts as follows in Reynolds' direct appeal:

The facts most favorable to the verdict reveal that for approximately four years, thirty-one-year-old Reynolds lived with the mother of T.J., an eight-year-old girl. T.J. is mildly mentally disabled and is in special education classes. Between June and December of 199[7], Reynolds had sexual contact with T.J. on three occasions. Reynolds made T.J. kiss and suck his penis and touched her vagina with his hands and mouth. The first incident took place in T.J.'s bedroom, the second in the living room of their home, and the third in the bedroom of T.J.'s mother. T.J. told her eight-year-old friend, A.L., about the sexual contact.

On February 10, 1998, Regina Brown, a caseworker for the Boone County Office of Family and Children (OFC), interviewed A.L. concerning allegations unrelated to the present case. During this interview, A.L. told Brown about T.J.'s conversation concerning sexual abuse by Reynolds. The same day she learned of the possibility of sexual abuse, Brown contacted T.J. at school and interviewed her. Brown audio taped the interview with T.J.

¹ Reynolds also argues the trial court erred in sentencing him. However, because this issue was available on direct appeal, Reynolds may not raise it in post-conviction proceedings as a free-standing issue. See Thompson v. State, 793 N.E.2d 1046, 1050 n.1 (Ind. Ct. App. 2003). Rather, because Reynolds also argues appellate counsel was ineffective for failing to challenge his sentence on appeal, we will consider his sentencing argument in that context. See id.

During this interview, T.J. told Brown that Reynolds had put his penis in her mouth, and that, as a result, Reynolds had “pottied” in her mouth. T.J. also told Brown that Reynolds had touched her vagina with his hand. After the interview, T.J. and her siblings were removed from school and placed in protective custody. On February 12, 1998, partially due to problems with the audiotape, Brown again interviewed T.J. and made a videotape thereof.

Reynolds v. State, No. 06A05-9910-CR-445, (Ind. Ct. App. Nov. 21, 2000), trans. denied.

The State charged Reynolds, a person at least twenty-one years of age, with three counts of child molesting as class A felonies for performing or submitting to three acts of deviate sexual conduct with T.J., a child under fourteen years of age, between the months of June through December 1997. See Ind. Code section 35-42-4-3. The following month, the State filed a motion to introduce T.J.’s audio and video-taped statements into evidence at trial pursuant to Indiana Code section 35-37-4-6, the “Protected Person” statute. Following a hearing on the motion, and over Reynolds’ objection, the trial court concluded both tapes would be admitted into evidence if T.J. testified at trial. The court also concluded Brown would be allowed to testify regarding inaudible portions of the audiotape.

Reynolds’ trial began in November 1998. T.J. was the first witness called by the State. She testified that Reynolds “made [her] put [her] mouth onto his private and he put potty in [her] mouth.” Tr. 948. She also testified that more than one time Reynolds “kissed [her] private.” Tr. 949. After T.J. testified, the State called Brown to testify regarding T.J.’s statements to her. Following her testimony, the trial court admitted the audio and video-taped statements of T.J. into evidence over Reynolds’ objection. The jury convicted Reynolds of all three counts of child molesting as class A felonies.

The trial court held the sentencing hearing in December 1998. The State argued that the victim being under twelve years of age was an aggravating factor. The State also asked the court to impose consecutive sentences. Defense counsel objected to consecutive sentences and asked the court to order Reynolds' sentences to run concurrently to each other. Specifically, counsel argued that consecutive sentences were improper because all of the crimes charged were committed within a relatively short period of time, involved the same victim, and were the same acts. Trial counsel also argued that the victim being under the age of twelve was not an appropriate aggravating factor because the victim being under the age of twelve was "part of the charge being an 'A' Felony." Tr. 1305.

At the close of the sentencing hearing, the trial court identified the following seven aggravating circumstances: 1) Reynolds had recently violated the terms and conditions of probation, and was on probation when the offense occurred; 2) Reynolds had an extensive criminal history with four prior felony convictions, including a prior child molesting conviction; 3) Reynolds is in need of correctional or rehabilitative treatment that can best be provided by commitment to a penal facility; 4) imposition of a reduced sentence or suspension of the sentence would depreciate the seriousness of the crime; 5) the victim of the crime was a mentally infirm eight-year-old with an IQ of 70; 6) the victim of the crime was less than twelve (12) years old; and 7) Reynolds was in a position of power and trust with the victim because he was her mother's live-in boyfriend and had assumed the role of father toward the victim. Appellant's App. 4.

The court found no mitigating circumstances. After finding the aggravating

circumstances outweighed the mitigating circumstances, the court sentenced Reynolds to thirty years for each of the three convictions. The court further ordered the sentences to run consecutively, for a total executed sentence of ninety years. Pursuant to Reynolds' request, the trial court appointed trial counsel to represent Reynolds on appeal.

In his direct appeal, Reynolds raised six issues, including whether the trial court erred by admitting T.J.'s audio and videotaped statements into evidence. This court found Reynolds had waived any error relating to the admissibility of T.J.'s taped statements because he failed to include the tapes in the record submitted on appeal. Reynolds, No. 06A05-9910-CR-445, slip op. at 12, 15, 16. We affirmed Reynolds' conviction in a memorandum decision. Id. In response to Reynolds' subsequent petition for rehearing, we ordered that the video and audio tapes be produced for our review. After reviewing the tapes, this court issued an Opinion on Rehearing wherein we concluded the trial court erred in admitting T.J.'s audio-taped statement into evidence because many parts of the tape were inaudible. Reynolds v. State, No. 06A05-9910-CR-445, Decision Upon Petition for Rehearing, slip op. at 3 (Ind. Ct. App. March 20, 2001). However, we concluded that the error was harmless in light of the "substantial independent evidence of Reynolds' guilt." Id. at 4. We also concluded that the trial court did not err in admitting T.J.'s videotaped interview pursuant to the Protected Person Statute, and that even if the court did err, such error would have been harmless because the contents of the interview were cumulative of T.J.'s deposition and trial testimony. Id. at 8. With that clarification, this Court again affirmed Reynolds' convictions. Id.

Reynolds filed a pro se petition for post-conviction relief in January 2003 wherein he argued trial and appellate counsel were ineffective. Reynolds also argued the trial court erred in sentencing him. The post-conviction court held a hearing on the petition in June 2007. At the hearing, Counsel testified Reynolds provided him with no credible alibi evidence. Counsel further testified he was concerned that if Reynolds testified at trial, Reynolds' criminal history would have been made known to the jury. Further, according to Counsel, Reynolds told him he did not want to testify. Lastly, Counsel testified he argued against the imposition of consecutive sentences at the sentencing hearing but did not raise this issue on appeal because he did not believe there was case law to support the argument against consecutive sentences. Counsel further explained he believed the trial court's aggravators supported the consecutive sentences and he only raised viable issues on appeal because he believed it would weaken his case to use a "shot-gun approach." PC Tr. 87. Following the hearing, the post-conviction court denied Reynolds' petition. Reynolds appeals.

Discussion and Decision

I. Standard of Review

At the outset we note that pro se appellants, such as Reynolds, are held to the same standard as trained counsel and are required to follow procedural rules. See Evans v. State, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), trans. denied. This has consistently been the standard applied to pro se litigants, and the courts of this State have never held that a trial court is required to guide pro se litigants through the judicial system. Id. One of the risks that a defendant takes when he decides to proceed pro se is that he will not know how to

accomplish all of the things that an attorney would know how to accomplish. Hill v. State, 773 N.E.2d 336, 346 (Ind. Ct. App. 2002).

We now turn to the merits of the appeal. Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). A petitioner who has been denied post-conviction relief faces a rigorous standard of review on appeal. Dewitt v. State, 755 N.E.2d 167, 170 (Ind. 2001). The post-conviction court's denial of relief will be affirmed unless the petitioner shows that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Id. We consider only the probative evidence and reasonable inferences therefrom that support the post-conviction court's determination and we will not reweigh the evidence or judge the credibility of witnesses. Bigler v. State, 732 N.E.2d 191, 194 (Ind. Ct. App. 2000), trans. denied.

Here, Reynolds argues that the trial court erred in denying his post-conviction petition because he received ineffective assistance of counsel both at trial and on appeal. The standard of review for a claim of ineffective assistance of trial counsel is the same as for appellate counsel. Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006). To prevail on a claim of ineffective assistance of counsel, the petitioner must establish the two components first set out in Strickland v. Washington, 466 U.S. 668 (1984). Specifically, the petitioner must demonstrate that counsel's performance was deficient. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). This part of the test requires the petitioner to demonstrate that counsel's

representation fell below an objective standard of reasonableness and that counsel's errors were so serious that they resulted in a denial of the right to counsel guaranteed under the Sixth Amendment of the United States Constitution. McCorker v. State, 797 N.E.2d 257, 267 (Ind. 2003). There is a strong presumption that counsel's representation was adequate. Stevens, 770 N.E.2d at 746. This presumption can be rebutted only with strong and convincing evidence. Elisea v. State, 777 N.E.2d 46, 50 (Ind. Ct. App. 2002).

To establish the second part of the test, the petitioner must demonstrate that counsel's deficient performance resulted in prejudice to the defendant. Smith, 765 N.E.2d at 585. The petitioner must show that but for counsel's unprofessional errors, there is a reasonable probability that the results of the proceeding would have been different. McCorker, 797 N.E.2d at 267. A reasonable probability for the prejudice requirement is a probability sufficient to undermine confidence in the outcome. Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006).

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. Harris v. State, 861 N.E.2d 1182, 1127 (Ind. 2007). There is therefore a strong presumption that counsel rendered adequate assistance and used professional judgment. Id. 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. Id. We now

turn to Reynolds' specific claims.

II. Ineffective Assistance of Trial Counsel

Reynolds argues trial counsel was ineffective for failing to 1) object to the admission of evidence; 2) present an alibi defense; 3) direct Reynolds to testify on his own behalf; and 4) object to the imposition of consecutive sentences.² We address each of his arguments in turn.

A. Admission of Evidence

Reynolds first argues trial counsel was ineffective for failing to object to the admission of evidence. In order to prove ineffective assistance of counsel due to the failure to object, a defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure. Wrinkles v. State, 749 N.E.2d 1179, 1192 (Ind. 2001).

Reynolds claims counsel was ineffective for "failing to properly object to the admission of audio and video tapes that were inadmissible."³ Appellant's Br. 7. However, our review of the evidence reveals Reynolds did object to the admission of both tapes. He

² Reynolds also argues that trial counsel was ineffective for "fail[ing] to file for the assistance of an expert and a private investigator." Appellant's Br. 25. However, issues not raised in a petition for post-conviction relief may not be raised for the first time on post-conviction appeal. Walker v. State, 843 N.E.2d 50, 58 n. 2, (Ind. Ct. App. 2006), trans. denied. Reynolds did not raise this issue to the post-conviction court. Therefore this claim is waived. Waiver notwithstanding, we find no error. Counsel's failure to investigate issues does not amount to ineffective assistance of counsel absent a showing of what additional information may have been garnered from further consultation or investigation and how that additional information would have aided in the preparation of the case. Coleman v. State, 694 N.E.2d 269, 274 (Ind. 1998). Here, Reynolds has made no such showing.

³ In his reply brief, Reynolds argues trial counsel was ineffective for failing to object to the tapes because there was no foundation laid for their admission. However, a party cannot raise an issue for the first time on appeal in his reply brief. State v. Friedel, 714 N.E.2d 1231, 1234 (Ind. Ct. App. 1999). Reynolds has waived this issue.

also raised the issue on direct appeal, where we concluded Reynolds had waived the issue because he had failed to submit the tapes to this court on review. On rehearing, we ordered that the audio and videotapes be produced for our review. After reviewing the tapes, we concluded that the admission of the audiotape was harmless error, and the admission of the videotape was not error. Reynolds, slip op at 4. This issue was clearly raised on direct appeal and decided adversely to Reynolds, and is therefore res judicata. See Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). It cannot now be relitigated. Sweeney v. State, 704 N.E.2d 86, 94 (Ind. 1998).

Reynolds also argues that trial counsel was ineffective for failing to object to Brown's testimony regarding T.J.'s statements to her. According to Reynolds, this objection would have been sustained if made because Brown's testimony resulted in a drum beat repetition of T.J.'s story that prejudiced the jury. For example, in Stone v. State, 536 N.E.2d 534, 541 (Ind. Ct. App. 1989), trans. denied, we reversed a conviction for child molesting because the State used multiple witnesses to produce a drum beat repetition of the child's story. Specifically, four adult witnesses testified to out-of-court statements made by the child, and at least one of the adults testified before the child took the stand. Id. at 537. The child's story was repeated a total of seven times during trial, and we concluded the child's credibility "became increasingly unimpeachable as each adult added his or her personal eloquence, maturity, emotion, and professionalism to [the child's] out-of-court statements . . . [so that the] . . . presumption of innocence was overcome long before [the defendant] got to the stand." Id. at 540.

However, the facts before us are distinguishable from those in Stone. Here, T.S. was the State's first witness and was subject to cross examination. In addition, T.S.'s statement was only repeated by Brown, whose testimony was brief, consistent with, and did not elaborate upon T.S.'s testimony. Any error in the admission of this testimony was harmless. See Surber v. State, 884 N.E.2d 856, 864 (Ind. Ct. App. 2008), trans. denied, (finding harmless error where victim was first witness to testify and was subject to cross examination, and the three witnesses who repeated the victim's statement gave brief testimony consistent with the victim's testimony). Reynolds could therefore not have been prejudiced by trial counsel's failure to object to this testimony.

B. Alibi Defense

Reynolds next argues trial counsel was ineffective for failing to present an alibi defense. The failure to present an alibi defense is not necessarily ineffective assistance of counsel. D.D.K. v. State, 750 N.E.2d 885, 890 (Ind. Ct. App. 2001). Absent a strong showing to the contrary, we normally presume counsel failed to present an alibi defense because it was not indicated by the circumstances or, if indicated, was rejected upon due deliberation. Lee v. State, 694 N.E.2d 719, 721 n. 7 (Ind. 1998). Our review of the testimony at the post-conviction hearing reveals Reynolds never provided trial counsel with any witness trial counsel considered to be a credible alibi witness. Under these circumstances, trial counsel was not ineffective for failing to present an alibi defense.

C. Direct Reynolds to Testify on His Own Behalf

Reynolds also argues trial counsel was ineffective for failing to direct him to testify on

his own behalf. The decision to testify is personal to the defendant. Daniels v. State, 741 N.E.2d 1177, 1187 (Ind. 2001). In the absence of evidence that the defendant had the desire to testify or that trial counsel prevented him from doing so, we will not presume that counsel impeded the defendant's right to decide whether or not to testify. Kimbrough v. State, 911 N.E.2d 621, 640 (Ind. Ct. App. 2009).

Despite Reynolds' argument to the contrary, the evidence that supports the post-conviction court's determination reveals Reynolds had no desire to testify and that trial counsel did not prevent him from doing so. Rather, the evidence reveals counsel explained to Reynolds that if he testified, his lengthy criminal history could substantially impair his credibility. Reynolds indicated that he understood this explanation and did not want to take the witness stand. Again, under these circumstances, trial counsel was not ineffective.

D. Sentence

Reynolds further argues trial counsel was ineffective at the sentencing hearing for failing to challenge the consecutive sentences and the aggravating factor that the victim was less than twelve years old. However, our review of the transcript of the sentencing hearing reveals trial counsel did argue that consecutive sentences were improper because the three crimes were committed within a relatively short period of time, involved the same victim, and consisted of the same acts. Trial counsel also argued the victim being under the age of twelve was not an appropriate aggravator because the victim being under the age of twelve was part of the charge being an A felony. Trial counsel was clearly not ineffective for failing to challenge Reynolds' sentence at the sentencing hearing.

III. Ineffective Assistance of Appellate Counsel

Lastly, Reynolds argues that appellate counsel was ineffective because he failed to challenge Reynolds' sentence on direct appeal.⁴ Because the strategic decision regarding which issues to raise on appeal is one of the most important decisions to be made by appellate counsel, appellate counsel's failure to raise a specific issue on appeal rarely constitutes ineffective assistance. Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999). The Indiana Supreme Court has adopted a two-part test to evaluate the deficiency prong of these claims: 1) whether the unraised issues are significant and obvious from the face of the record; and 2) whether the unraised issues are "clearly stronger" than the raised issues. Walker, 843 N.E.2d at 60. If this analysis demonstrates deficient performance by counsel, the court then examines whether the issues that appellate counsel failed to raise "would have been clearly more likely to result in reversal or an order for a new trial." Id. (citing Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997)).

Here, our review of the transcript of the post-conviction hearing reveals counsel challenged the imposition of consecutive sentences at the sentencing hearing but did not raise

⁴ Reynolds also argues appellate counsel was ineffective because he "failed to raise the issue of the defendant being shackled at trial." Appellant's Br. at 35. However, as we have previously explained, issues not raised in a petition for post-conviction relief may not be raised for the first time on post-conviction appeal. Walker, 843 N.E.2d at 58. Reynolds did not raise this issue to the post-conviction court. Therefore this claim is waived. Waiver notwithstanding, we find no error. A trial court has the discretion to order a defendant to wear restraints when it is necessary to prevent the defendant's escape, to protect those present in the courtroom, and to maintain order during the trial. Forte v. State, 759 N.E.2d 206, 208 (Ind. 2001). An order to restrain a defendant is reviewed for an abuse of discretion. Id. Reynolds has not alleged any juror knew of the shackles or was otherwise prejudiced by their presence. He has therefore not shown an abuse of the trial court's discretion. See id.

the issue on appeal because he did not believe there was case law to support an argument against consecutive sentences. He also explained he believed the trial court's aggravators supported the consecutive sentences, and that he only raised viable issues on appeal because he believed it would weaken his case to use a "shot-gun" approach. PC Tr. 87.

We further note that our review of the trial court's sentencing order reveals the trial court found seven aggravating factors, including the defendant being on probation at the time of the offense, the defendant's extensive criminal history with four prior felonies, the victim's mental infirmity as evidenced by her IQ of 70, the victim being less than twelve-years-old,⁵ and Reynolds being in a position of trust with the victim because he was her mother's live-in boyfriend and he had assumed the role of the victim's father. The trial court found no mitigating factors. The trial court found the aggravators outweighed the mitigators and imposed three thirty-year sentences for the three convictions and ordered the sentences to run consecutively.

Because the crimes in this case occurred before the 2005 amendments to the sentencing statutes were adopted, such sentences were reviewable under the presumptive sentencing scheme. See Gutermuth v. State, 868 N.E.2d 427, 432 n.4 (Ind. 2007). Under the presumptive sentencing scheme, sentencing determinations are within the trial court's discretion and we will reverse only for an abuse of discretion. Padgett v. State, 875 N.E.2d

⁵ Trial counsel argued this aggravator was not appropriate because the victim being under the age of twelve was "part of the charge being an 'A' felony." Tr. 1305. However, the statute provides that a person who performs sexual deviate conduct with a child under fourteen years of age commits a Class B felony. Ind. Code section 35-42-4-3. If the offense is committed by a person at least twenty-one years of age, the offense is a Class A felony. Thus, it is the defendant's age, and not the victim's, that elevates the offense to an "A" felony.

310, 315 (Ind. Ct. App. 2007), trans. denied. It is within the trial court's discretion to determine whether a presumptive sentence will be enhanced due to aggravating factors. Id. When the trial court does enhance a sentence, it must: 1) identify significant aggravating and mitigating circumstances; 2) state the specific reasons why each circumstance is aggravating or mitigating; and 3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating factors. Id. It is generally inappropriate for us to substitute our judgment or opinions for those of the trial judge. Id.

The trial court in this case identified significant aggravating and mitigating circumstances, stated the specific reasons why each circumstance was aggravating or mitigating, and balanced the mitigating circumstances against the aggravating circumstance to determine if the mitigating offset the aggravating factors. A challenge to this sentence was not significant or obvious from the face of the record. See Walker, 843 N.E.2d at 60. Even if it was, this issue would not have been "clearly more likely to result in reversal." Id. Appellate counsel was not ineffective for failing to challenge Reynolds' sentence on appeal.

Affirmed.

MAY, J., and BARNES, J., concur.