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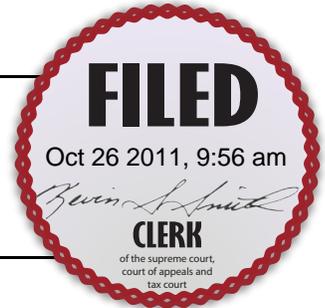
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**IN THE  
COURT OF APPEALS OF INDIANA**

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CHESTER LLOYD, )  
 )  
Appellant-Petitioner, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Respondent. )

No. 79A02-1105-PC-520

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APPEAL FROM THE TIPPECANOE SUPERIOR COURT  
The Honorable Thomas H. Busch, Judge  
Cause No. 79D02-0810-PC-8

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**October 26, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Pro-se Appellant-Petitioner Chester Lloyd (“Lloyd”) appeals the denial of his petition for post-conviction relief, which challenged his convictions following his plea of guilty to two counts of Sexual Misconduct with a Minor, as Class B felonies.<sup>1</sup> He presents the sole issue of whether he was denied the effective assistance of counsel.<sup>2</sup> We affirm.

### Facts and Procedural History

On November 1, 2004, the State charged Lloyd with six counts of Sexual Misconduct with a Minor, five as Class B felonies and one as a Class C felony, two counts of Contributing to the Delinquency of a Minor, as Class A misdemeanors,<sup>3</sup> and two counts of Furnishing Alcoholic Beverages to a Minor, as Class B misdemeanors.<sup>4</sup> The State also pursued a habitual offender allegation. Lloyd was initially found incompetent to stand trial; however, after treatment at Logansport State Hospital, he was deemed competent to stand trial. Lloyd v. State, No. 79A02-0704-CR-356, slip op. at 2 (Ind. Ct. App. Mar. 18, 2008), trans. denied.

On November 9, 2006, Lloyd and the State entered into a plea agreement, whereby Lloyd agreed to plead guilty but mentally ill to two counts of Sexual Misconduct with a Minor, as Class B felonies, in exchange for the dismissal of the remaining charges and the habitual offender allegation. The plea agreement left sentencing to the discretion of the trial

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<sup>1</sup> Ind. Code § 35-42-4-9(a).

<sup>2</sup> Lloyd articulates several other issues, but waives review by wholly failing to address those issues in the argument portion of his brief. Nonetheless, we observe that freestanding fundamental error claims are not reviewable in a post-conviction proceeding. Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002).

<sup>3</sup> Ind. Code § 35-46-1-8.

<sup>4</sup> Ind. Code § 7.1-5-7-8.

court. On March 27, 2007, the trial court conducted a sentencing hearing. “Although the parties had agreed in the plea agreement that Lloyd would plead guilty but mentally ill, he ultimately entered pleas of guilty to the two counts of Sexual Misconduct with a Minor.” Id. He received an aggregate sentence of thirty years (twenty years for one Class B felony and ten years for the second Class B felony, to be served consecutively).

On direct appeal, Lloyd challenged his sentence as inappropriate and claimed that the trial court had abused its sentencing discretion. In particular, Lloyd contended that the trial court failed to consider his mental illness as a mitigator and gave improper weight to aggravators. Slip op. at 3. A panel of this Court concluded that the trial court had abused its sentencing discretion by failing to accord some mitigating weight to Lloyd’s mental illness, but ultimately determined that the sentence was not inappropriate. Id. at 5-6. The sentence was affirmed. Id. at 7.

On September 29, 2008, Lloyd filed a Petition for Post-Conviction Relief, alleging that his guilty plea was involuntary as it was a product of his trial counsel’s coercion and misrepresentation, and further alleging that the trial court had abused its discretion by failing to consider Lloyd’s mental illness as a mitigating factor. On December 27, 2010, Lloyd filed a motion to proceed pro se. On the following day, the post-conviction court ordered Lloyd to submit affidavits in support of his petition for relief. Lloyd timely complied.

On April 18, 2011, the post-conviction court entered its Findings of Fact, Conclusions of Law, and Order denying Lloyd post-conviction relief. This appeal ensued.

## Discussion and Decision

Lloyd contends that the post-conviction court improperly denied his petition for relief, because “trial counsel did not prepare a defense in this cause” and “not even the most obvious issue was raised, nor did counsel protect the rights of the appellant by the most basic means (protect and honor the terms of the plea).” Appellant’s Brief at 2. He asserts that his counsel was ineffective for failing to present a defense of mistake of fact as to the victims’ ages, and for failing to ensure that his plea was entered as guilty but mentally ill as opposed to guilty.

A petitioner appealing from the denial of post-conviction relief stands in the position of one appealing from a negative judgment. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). On appeal, we will not reverse unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. Id.

Ineffectiveness of counsel claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must show both deficient performance and resulting prejudice. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). A deficient performance is a performance which falls below an objective standard of reasonableness. Id. Prejudice exists when a claimant shows “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694.

Segura v. State, 749 N.E.2d 496, 504 (Ind. 2001) addresses the appropriate showing required by a defendant upon a review of a claim of ineffective assistance of counsel following a guilty plea. There are two permissible categories of claims: (1) an unutilized defense or failure to mitigate a penalty, or (2) an improper advisement of penal consequences. Willoughby v. State, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003), trans. denied. When a post-conviction allegation of ineffectiveness relates to trial counsel's failure to raise a defense or mitigate a penalty, Segura requires that the prejudice from the omitted defense, or failure to mitigate a penalty, be measured by (1) evaluating the probability of success of the omitted defense at trial or (2) determining whether using the opportunity to mitigate a penalty would likely produce a better result for the petitioner. Id. In order to set aside a conviction because of an attorney's failure to raise a defense, a petitioner who has pled guilty must establish that there is a reasonable probability that he or she would not have been convicted had he or she gone to trial and used the omitted defense. Id. (citing Segura, 749 N.E.2d at 499 and State v. Van Cleave, 674 N.E.2d 1293 (Ind. 1996)).

Lloyd makes no assertion that he received incorrect advice as to the penal consequences of his decision to plead guilty; rather, he complains that his attorney failed to undertake his defense and secure mitigation of his penalty. Thus, arguably the first Segura category is implicated.

Lloyd pled guilty after specific advisement that he would be giving up his right to a trial and his right to call witnesses on his behalf. A plea of guilty constitutes a waiver of the right to trial. Gosnell v. State, 439 N.E.2d 1153, 1155 (Ind. 1982). Accordingly, Lloyd's

decision to plead guilty foreclosed counsel's ability to continue with trial preparations or develop a defense. Indeed, although Lloyd now claims that he had a viable defense as to mistake of fact, he admitted at his guilty plea hearing that one victim had told him that she was fifteen years of age. Lloyd has not shown a reasonable probability of acquittal had the defense of mistake of fact been used. As such, he has not demonstrated deficient performance by counsel due to alleged failure to pursue an obvious defense.

Additionally, Lloyds's bald assertion that counsel "caus[ed] an increased penalty on the appellant," Appellant's Brief at 2, does not satisfy the requisite proof required by Segura. Lloyd appears to assume that, had his plea been entered as guilty but mentally ill as opposed to guilty, he would have been entitled to a mitigated sentence. However, Indiana Code Section 35-36-2-5 states that a court accepting a defendant's plea of guilty but mentally ill shall sentence the defendant in the same manner as a defendant found guilty of the offense. Evidence of the defendant's mental illness is then considered at sentencing. Our Supreme Court has directed our state's trial courts to, at a minimum, carefully consider on the record what mitigating weight, if any, to accord to any evidence of mental illness. Weeks v. State, 697 N.E.2d 28, 30 (Ind. 1998). However, a guilty but mentally ill defendant is not automatically entitled to any particular credit or deduction from his otherwise aggravated sentence simply by virtue of being mentally ill. Id. Here, in particular, a separate panel of this Court has previously concluded, "based on [its review of] the totality of the circumstances," that Lloyd received a sentence that is not inappropriate. Lloyd, slip op. at 6-7.

The post-conviction court properly denied Lloyd's petition for post-conviction relief.

Affirmed.

MATHIAS, J., and CRONE, J., concur.