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**IN THE
COURT OF APPEALS OF INDIANA**

D.E.,)
)
Appellant-Respondent,)
)
vs.) No. 49A02-0701-JV-00101
)
STATE OF INDIANA,)
)
Appellee-Petitioner.)

APPEAL FROM THE MARION SUPERIOR COURT, JUVENILE DIVISION
The Honorable Danielle Gregory, Magistrate
Cause No. 49D09-0505-JD-2321

September 11, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent D.E. appeals from the juvenile court's denial of his motion for relief from its judgment finding him to be delinquent for committing an act that would have been Battery,¹ a class A misdemeanor, had it been committed by an adult. D.E. contends that the juvenile court erroneously found that he did not receive the ineffective assistance of trial counsel where his trial attorney mistakenly included the incorrect cause number on his notice of appeal, thereby depriving him of his right to appeal the juvenile court's true finding of delinquency. Finding that D.E. was not prejudiced as a result of his attorney's error, we affirm the judgment of the juvenile court.

FACTS

On April 30, 2005, fifteen-year-old J.S. and some friends were playing basketball at Pleasant Run Park in Indianapolis. As they played, D.E. and several of his friends asked to join, and J.S. agreed. When J.S. turned around to pick up his basketball, D.E. and two of his friends began beating J.S. with their fists. After D.E. and his two friends stopped beating J.S., they ran away. J.S. ultimately went to the hospital and received treatment for a bloody nose, bruised eye, and concussion.

On May 23, 2005, the State filed a petition alleging D.E. to be a delinquent child for committing an act that would have been class A misdemeanor battery if committed by an adult. On August 19, 2005, following a hearing, the juvenile court found the allegation of delinquency true and also found that by committing the act, D.E. had violated probation or suspended commitments in two other juvenile cases. Following the

¹ Ind. Code § 35-42-2-1.

disposition hearing on September 28, 2005, the juvenile court committed D.E. to the Department of Correction for housing in a juvenile facility but it suspended the commitment and placed D.E. on probation.

On October 18, 2005, D.E.'s trial attorney filed a timely notice of appeal. Unfortunately, the cause number included in the notice of appeal pertained to a different, separate delinquency action involving D.E. On February 17, 2006, D.E. filed a motion for relief from judgment, alleging that his trial counsel had been ineffective for including the wrong cause number in the notice of appeal and that, as a result of the error, D.E. was forced to forego his appeal of the battery finding, against which he would have lodged a complaint regarding the sufficiency of the evidence. On December 18, 2006, following a hearing, the juvenile court denied D.E.'s motion. D.E. now appeals.

DISCUSSION AND DECISION

D.E. contends that the juvenile court erroneously denied his motion for relief from judgment. A motion for relief from judgment is within the equitable discretion of the court and our review is limited to whether the trial court abused its discretion. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. S.E. v. State, 744 N.E.2d 536, 538 (Ind. Ct. App. 2001).

Indiana Trial Rule 60(B) provides that a court may offer a party relief from judgment if the party establishes, among other things, "(1) mistake, surprise, or excusable neglect; . . . or (8) any reason justifying relief from the operation of the judgment" Although a Rule 60(B) motion for relief from judgment may not be used as a substitute

for a direct appeal or as a renewal of an expired attempt to appeal, a juvenile may raise an ineffective assistance of counsel claim in such a motion. S.E., 744 N.E.2d at 538-39.

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant 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. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

It was established in S.E. that the "failure to timely file a praecipe is an obvious mistake; it cannot be attributed to strategy or tactics. Furthermore, it is a serious mistake because a party that fails to timely file a praecipe forfeits the right to appeal." 744 N.E.2d at 539. And indeed, the State concedes that here, D.E.'s trial counsel's failure to place the proper cause number on the original notice of appeal constituted deficient performance. Appellee's Br. p. 5.

That conclusion does not end our inquiry herein, however, as we must determine whether the attorney's error resulted in prejudice to D.E. Had D.E. been able to appeal

the juvenile court's true finding of delinquency, he states that he would have challenged only the sufficiency of the evidence supporting the finding. When reviewing a claim that the evidence is insufficient to support a finding of delinquency, we look to the evidence most favorable to the judgment and any reasonable inferences that may be drawn therefrom. S.E., 744 N.E.2d at 539. We will neither reweigh the evidence nor judge the credibility of witnesses. Id. at 539-540. If there is substantial evidence of probative value that would permit a reasonable factfinder to find the respondent delinquent, we will affirm. Id. at 539.

To prove that D.E. committed an act that would have been class A misdemeanor battery had it been committed by an adult, the State was required to establish that D.E. knowingly or intentionally touched J.S. in a rude, insolent, or angry manner and that the battery caused bodily injury to J.S. I.C. § 35-42-2-1. "Bodily injury" means "any impairment of physical condition, including physical pain." Ind. Code § 35-41-1-4.

At the hearing, J.S. testified that after he agreed to allow D.E. and his friends to join a basketball game, D.E. and his friends began beating J.S. with their fists. D.E. was the first to hit J.S., and he and the other two boys struck J.S. several times, causing J.S. pain. J.S. ultimately received treatment at a hospital for a concussion, a bloody nose, and a bruised eye. Tr. p. 24-27. D.E. directs our attention to other evidence in the record, including testimony about his alleged alibi, and attacks the veracity of J.S.'s testimony, but these are merely requests that we reweigh the evidence and judge the credibility of witnesses—practices in which we do not engage when evaluating the sufficiency of the evidence supporting a true finding of delinquency. The State presented sufficient

evidence to support the juvenile court's finding that D.E. committed an act that would have been class A misdemeanor battery had it been committed by an adult. Consequently, D.E. has not established that he was prejudiced as a result of his trial counsel's failure to file a timely and proper notice of appeal, inasmuch as there is no reasonable probability that but for counsel's error, the result of the proceeding would have been different. As a result, we find that the juvenile court properly denied D.E.'s motion for relief from judgment.

The judgment of the juvenile court is affirmed.

BAILEY, J., and VAIDIK, J., concur.