

## MEMORANDUM DECISION

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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### ATTORNEYS FOR APPELLANT

Amy E. Karozos  
Public Defender of Indiana

J. Jeffreys Merryman, Jr.  
Deputy Public Defender  
Indianapolis, Indiana

### ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Attorney General of Indiana

Jesse R. Drum  
Assistant Section Chief, Criminal  
Appeals  
Indianapolis, Indiana

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## IN THE COURT OF APPEALS OF INDIANA

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Carlos Prieto,  
*Appellant-Petitioner,*

v.

State of Indiana,  
*Appellee-Respondent.*

July 27, 2021

Court of Appeals Case No.  
21A-PC-344

Appeal from the Marshall Superior  
Court

The Honorable Robert O. Bowen,  
Judge

Trial Court Cause No.  
50D01-1903-PC-2

**Baker, Senior Judge.**

### Statement of the Case

[1] Appellant Carlos Prieto appeals from the post-conviction court's denial of his petition for post-conviction relief. We affirm.

## Issue

- [2] Prieto presents one issue for our review, which we restate as: whether the post-conviction court erred by denying him relief from his plea of guilty when he claimed that he maintained his innocence at his plea hearing.

## Facts and Procedural History

- [3] The facts underlying Prieto's conviction are as follows:

In December 2016, forty-five-year-old Prieto was living in Culver with his girlfriend and her five-year-old daughter, L.S. Prieto had known L.S. since she was a toddler, and he had been living with her and her mother since at least July 2016. On December 17, L.S.'s mother went out and left L.S. at home with Prieto. When L.S.'s mother returned, L.S. asked, "[I]s it okay if Carlos licks my vagina, again?" L.S. went on to say that Prieto had "licked her vagina today" and "licked her vagina another time[.]" L.S.'s mother confronted Prieto, who initially denied the allegations but later said, "I should've told you about this." He added that he "licked L.S.'s vagina . . . at L.S.'s request." Prieto was taken into custody the same night, and he admitted that he had "kissed [L.S.'s] vagina" three or four weeks earlier.

*Prieto v. State*, No. 18A-CR-1672, 2018 WL 6581622 (Ind. Ct. App. Dec. 14, 2018) (internal citations omitted).

- [4] The State charged Prieto with Count I, Level 1 child molesting; Count II, Level 4 child molesting; Count III, Level 1 child molesting, and Count IV, Level 4 child molesting. Prieto and the State entered into a plea agreement under

which Prieto pleaded guilty to Count I,<sup>1</sup> and the State dismissed the remaining counts, with sentencing left to the discretion of the trial court. Following a hearing, the court sentenced Prieto to thirty years. Prieto's sentence was affirmed on appeal. *See id.*

- [5] Prieto filed a pro se petition for post-conviction relief, which was later amended by appointed counsel. The court held an evidentiary hearing on Prieto's petition, after which it denied relief. This appeal ensued.

## Discussion and Decision

- [6] The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Daugherty v. State*, 52 N.E.3d 885, 889 (Ind. Ct. App. 2016), *trans. denied*. Therefore, when appealing from the denial of post-conviction relief, the petitioner is appealing from a negative judgment and faces the rigorous burden of showing that the evidence, as a whole, leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Harris v. State*, 762 N.E.2d 163, 166 (Ind. Ct. App. 2002), *trans. denied*.
- [7] Prieto contends the trial court should not have accepted his guilty plea because he maintained his innocence while simultaneously pleading guilty. A trial

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<sup>1</sup> Ind. Code §§ 35-42-4-3(a)(1) (2015), 35-31.5-2-221.5(1) (2014) (a person at least twenty-one years of age knowingly or intentionally performs an act involving a sex organ of one person and the mouth of another person with a child under fourteen years of age).

court may not accept a guilty plea that is accompanied by a denial of guilt. *Carter v. State*, 739 N.E.2d 126, 129 (Ind. 2000). However, this rule is explicitly contingent upon the protestation of innocence occurring at the same time the defendant attempts to enter the plea. *Id.* Moreover, the defendant's protestation of innocence must have been both consistent and unequivocal. *See id.* at 130; *see also Johnson v. State*, 960 N.E.2d 844, 849 (Ind. Ct. App. 2012) (defendant entitled to relief because he consistently maintained innocence at guilty plea hearing and clearly denied committing crime charged). On this topic, our Supreme Court has stated: "Admissions of guilt and assertions of innocence come in many shades of gray, and the trial judge is best situated to assess the reliability of each." *Carter*, 739 N.E.2d at 130.

[8] At his plea hearing, the court read the charge to Prieto, as follows: "Carlos Humberto Prieto, a person of at least 21 years of age, did perform other sexual conduct as defined in Indiana Code Section 35-31.5-2-221.5 with L.S. a child under the age of fourteen (14)." Tr. Plea Hrg. Vol. II, pp. 7-8. The following exchange then took place:

[Court] Do you understand that charge?

A [Prieto] Yes.

Q [Court] That's what's alleged you did. You understand that? And you would be admitting that you committed that offense. Do you understand that?

A Yes.

....

Q Okay. And knowing all of that is it still your intent to enter a plea of guilty?

A I believe it shouldn't be a Level 1.

Q Okay. That's what – that's what you would be pleading guilty to is a Level 1 Felony. If you're not pleading guilty to it, then we go to trial on all of the counts.

....

Q You want to proceed? And you understand you're giving up your right to a trial. You understand the offense of child molesting. You understand the risks of trial and you understand the potential penalties that could be assessed. Is that correct?

A Yes.

Q Okay. For the record then to Count I, the charge of Child Molesting as a Level 1 Felony, how do you plead, guilty or not guilty?

A Guilty.

....

Q Okay. As far as a basis in fact, are you stipulating to the probable cause affidavit?

[Defense Counsel] Yes, Your Honor, that's fine.

....

Q And, Mr. Prieto, you pled guilty to the offense of Child Molesting. I read the charges to you. Is what is contained in the charges – is that a correct statement?

A Not all of it.

Q A portion of it is?

A Yes.

Q Did you perform sexual conduct as defined in the Indiana Code with a child underneath the age of fourteen (14) years?

A It wasn't with that (inaudible).  
Q I didn't understand you. Say it again.  
A (No response).  
Q Yes?  
A Yes.  
Q Okay. And you're over the age of twenty one [sic] (21); correct?  
A Yes.  
Q Okay. I'm going to accept your plea of guilty to that offense.

*Id.* at 8, 8-9, 10, 11.

[9] At sentencing Prieto stated:

I just want to say that some of the – the stuff that I'm blamed for – I mean – I mean, they're not correct. I mean, there was just a – I was just trying to be a father, you know, and I take it on my own to treat – to treat L[.S.] (inaudible). You know, I didn't mean to touch her inappropriately that time. I mean, that's all I have to say.

Tr. Sent'g Hrg. Vol II, p. 16. During the court's examination of Prieto, the following exchange occurred:

Q Mr. Prieto, in that statement that you attached to the pre-sentence report, um, you're talking about the evidence that was procured by the State does not indicate it should be a Level 1 Felony.  
A Yes.  
Q Is that your dispute?  
A Yes. I mean –

Q So you're agreeing that what they said occurred occurred. It's just that there was no violence, I think, is what you're indicating?

A I mean, I was never mean to anybody (inaudible).  
....

Q But you admit you did what they said you did?

A Well, I mean, yes, but not what they say – not what they say.

Q So what did you do?

A I just give [sic] her a kiss. That's all.

Q That's it? Where did you give her a kiss?

A Yes.

Q Where?

A I mean, between her belly button and her private part.

Q And you're admitting though that what they – is in the charging information is correct?

A Ah –

Q I mean, you admitted it when you pled guilty.

A Well, I (inaudible) – I know the perception of the charges is very – very high.

Q And you're thinking that would not hurt her?

A I know that it was bad what I did. I understand that.

*Id.* at 19, 20.

[10] At his plea hearing, Prieto stated he understood the charge and then pleaded guilty to it. Later, when asked whether the charge was correct, he responded, “Not all of it.” Tr. Plea Hrg. Vol. II, p. 11. When the court attempted to

clarify Prieto's ambiguous comment, he responded first with an incomprehensible reply and then with no reply at all. While it appears from Prieto's statements about the level of his felony at both the plea and sentencing hearings that he wanted it known he had not used any violence in committing this offense, he never asserted his innocence. There is no evidence that Prieto made, let alone maintained, an assertion of innocence. Further, the trial court, which is in the best position to assess the reliability of an admission of guilt, had the opportunity to interact with and observe Prieto and thereafter accepted his plea. We conclude that Prieto's brief, vague, and sometimes incomprehensible responses do not amount to an unequivocal and consistent protestation of innocence. Consequently, this is not a case in which the trial court accepted Prieto's guilty plea while he simultaneously maintained his innocence.

## Conclusion

- [11] Prieto failed to establish that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.
- [12] Judgment of the post-conviction court is affirmed.

Najam, J., and Pyle, J., concur.