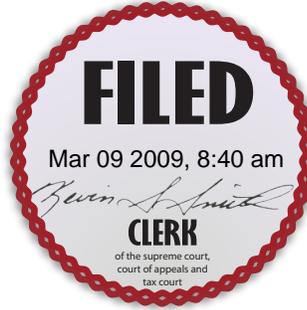


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES ALTES,)

Appellant-Defendant,)

vs.)

No. 49A02-0808-PC-726

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
The Honorable Stanley E. Kroh, Master Commissioner
Cause No. 49G03-0211-PC-277488 and 49G03-0210-PC-268813

March 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

James Altes appeals the denial of his amended petition for post-conviction relief, in which he challenged his convictions for five counts of child molesting, two as class A felonies and three as class C felonies. Altes claims his trial counsel was ineffective for failing to move for severance of the charges, which involved four different victims.

We affirm.

The facts underlying Altes' offenses were set out by this court in his direct appeal as follows:

Altes, born on October 15, 1960, lived with his four children on Hoyt Avenue in Marion County, Indiana. At his residence, Altes maintained a swimming pool, basketball court, and large screen television for his children to enjoy. Several children from the neighborhood and his children's friends often visited Altes' home and frequently spent the night. During these sleep-overs, the children would sleep on blankets in the living room, while Altes would sleep on the couch even though he had his own separate bedroom. In addition to visiting his home, Altes would take the children on trips to the park or to the airport to watch the airplanes.

J.H., born on May 1, 1988, lived with her father on Hoyt Avenue. She frequently visited Altes' home and spent the night there. When she was nine years old, Altes began treating J.H. as his girlfriend by kissing her on the lips, touching her, telling her that he loved her, and that he wanted to marry her. Altes bought J.H. several gifts, including a necklace depicting two kissing angels inscribed with "[t]o [J.H.], on her 11th birthday, Love Jay." Eventually, J.H.'s feelings toward Altes changed from considering him cool to thinking that she loved him.

One day, when J.H. was around nine years old, she was again spending the day at Altes' residence. As she was taking a shower, Altes entered the bathroom without invitation, undressed, and joined J.H. in the shower. When he got into the shower, Altes started rubbing his hands all over J.H.'s body, including her breasts and vagina.

Sometime in 1999, when J.H. was eleven years old, J.H. was visiting Altes' home and watching television with Altes' daughter in his bedroom. When Altes' daughter left the bedroom, Altes entered the room and locked the door behind him. He first undressed J.H. and then undressed himself. After he rubbed his hands all over J.H.'s body and kissed her on the lips, Altes inserted his penis inside her vagina. Altes threatened J.H. and told her that he would

come after her if she told anyone.

In August of 1999, J.H.'s mom, who is divorced from J.H.'s dad, was living in Lebanon, Indiana. At that time, J.H.'s parents had an argument about Altes driving J.H. to visit her mother without her father's permission. After they talked to Altes, J.H.'s parents informed him that he no longer could see their daughter. The next day, J.H.'s mother received several phone calls from Altes, inquiring why he no longer could spend time with J.H. Several weekends later, J.H.'s mother noticed two posters in the windows of Altes' home, stating "I love you, [J.H.]" and "I miss you, [J.H]."

In 1999, H.B., born on March 6, 1988, moved with her mother to a home on Hoyt Avenue. That summer, when H.B. was eleven years old, she stayed overnight at Altes' home. H.B. was lying on the couch while other children were sleeping on the floor of the living room. During the night, Altes, sitting next to her on the couch, asked if he could give her a foot massage, to which she consented. Altes started rubbing her feet with his hand, and then continued to rub her legs for a couple of minutes. Thereafter, Altes moved his hand underneath H.B.'s underwear and started rubbing her bare bottom.

M.D., born on April 5, 1991, lived with her aunt and uncle on Hoyt Avenue. One evening during the summer of 2001, M.D. spent the night at Altes' home. M.D. and Altes' daughter were lying on cushions on the living room floor watching television, while Altes was lying on the couch. At some point, Altes moved onto the floor and laid down behind M.D., who was lying on her side, and put his arm around her. Altes started rubbing her upper body with his hand, first on top of her clothes but, later, he moved his hand underneath her clothes. Altes stopped when M.D. got up to use the bathroom.

A.B., born on December 7, 1989, was seven years old when she visited Altes' residence. During one visit she stayed overnight, sleeping on the living room floor with other children while Altes slept on the couch. During the night, Altes moved from the couch next to A.B. Altes slipped his hand underneath her clothes and put his finger inside her vagina. As A.B. moved away from him and towards a loveseat, Altes told her to come back, which she refused to do.

Altes v. State, 822 N.E.2d 1116, 1119-20 (Ind. Ct. App. 2005), *trans. denied*.

On October 23, 2002, the State filed an information in Marion County Superior Court Criminal Division Five (Court Five) charging Altes with two counts of child molesting, one as a class A and one as a class C felony. J.H. was the alleged victim in both counts. Thereafter, on November 7, 2002, the State amended the information to include three

additional counts of child molesting, one as a class A felony and two as class C felonies. These new counts involved M.D., H.B., and one of Altes's daughters. On the same date as the amendment, the State filed a separate information in Marion County Criminal Division Three (Court Three), alleging one count of class A felony child molesting involving A.B.

On December 10, 2002, the State sought to have the Court Five case transferred and consolidated into the Court Three case. In its motion, which was granted, the State noted, "Altes does not object to the consolidation of this matter." *Appendix* at 229. On February 3, 2003, the State filed an amended information that combined the six charges from both causes. Several months thereafter, on July 8, Altes filed a motion seeking to have the cases against him consolidated and remanded to the original court of filing, Court Five. Following a hearing, this motion was denied.

A jury trial of the consolidated causes commenced in Court Three on July 28, 2003. The jury found Altes not guilty of the charge involving his daughter and was hung with respect to the remaining five charges of child molesting. Soon after the first trial, Altes's private counsel withdrew and the court appointed a public defender for Altes. The State subsequently filed an amended information that included only the five remaining counts. The victims alleged in these counts were J.H. (Counts I and II), M.D. (Count III), H.B. (Count IV), and A.B. (Count V). Altes's second jury trial commenced on January 26, 2004. He was convicted of all five counts as charged.

After an unsuccessful direct appeal, Altes filed a pro se petition for post-conviction relief, which was amended by counsel on December 28, 2007. At the hearing on the matter,

Altes presented no witnesses and entered only the certified trial record of proceedings. On June 26, 2008, the post-conviction court entered a detailed order denying Altes's petition for post-conviction relief. Altes now appeals, claiming his trial counsel was ineffective for failing to move for severance of the charges.

A post-conviction petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). Further, on appeal, a petitioner faces a "rigorous standard of review" from the denial of post-conviction relief. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001). The petitioner must convince us that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Dewitt v. State*, 755 N.E.2d 167.

A claim of ineffective assistance of trial counsel requires a showing that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant so much that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). See also *Taylor v. State*, 840 N.E.2d 324 (Ind. 2006) (the failure to satisfy either component will cause an ineffective assistance of counsel claim to fail). When an appellant brings an ineffective assistance of counsel claim based upon trial counsel's failure to file a motion, the appellant must demonstrate that the trial court would have granted said motion. *Wales v. State*, 768 N.E.2d 513 (Ind. Ct. App. 2002), *trans. denied*.

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.

Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002) (citations omitted). Thus, we will not second-guess the propriety of trial counsel's tactics and will reverse only where the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. *See Davidson v. State*, 763 N.E.2d 441. This is so even when counsel's choices may be subject to criticism or the choices ultimately prove detrimental to the defendant. *Id.* "Further, the decision of whether to file a particular motion is a matter of trial strategy, and, absent an express showing to the contrary, the failure to file a motion does not indicate ineffective assistance of counsel." *Glotzbach v. State*, 783 N.E.2d 1221, 1224 (Ind. Ct. App. 2003).

We agree with the post-conviction court that it was clearly trial counsel's strategy to have the counts tried together. Altes's counsel during the first trial, Thomas Shirley, did not oppose the State's motion to consolidate the causes for trial and, in fact, filed a subsequent motion indicating his desire to have all charges consolidated. This strategy proved fairly successful, as Altes's first trial resulted in an acquittal on one class A felony count and a hung jury on the other five counts. Given this result, the public defender's (Thomas Leslie) decision not to change this strategy decision for Altes's second trial was sound and reasonable.

Further, a review of the transcript reveals that the theory of defense argued by Leslie was that the charges were the result of an overzealous police investigation and media blitz in 2002 and that the alleged victims who came forward years later were not credible. In this regard, Leslie established that J.H. did not make the allegations against Altes until two months after J.H. had been banned from his home as the result of an unrelated falling out between her parents and Altes. While J.H.'s allegations were made to police in November 2000, the investigation was not fully pursued until October 2002. At that time, investigators began contacting girls from the neighborhood and found other alleged victims.¹ In closing argument, Leslie argued that there were several common threads among the various allegations, including: 1) there were no other witnesses to each alleged crime, despite the fact many other children were present at the home; 2) the victims were all friends, yet never told each other upon being molested; 3) the victims kept going to Altes's home despite the alleged abuse; and 4) all of the allegations arose well after the alleged molestations and after the fallout with J.H.'s family, resulting in J.H. feeling rejected by Altes. In sum, Leslie argued to the jury that this "piling on" of charges was the result of an overzealous effort by police that caused the girls to get caught up in the police questioning and all the attention they were receiving. *Trial Transcript* at 521.

Though the strategy ultimately proved unsuccessful in Altes's second trial, we agree with the trial court's assessment of defense counsel's performance -- Leslie zealously

¹ Although H.B. testified she had told J.H. in 2000 about the molestation, H.B., M.D., and A.B. did not come forward to any adults or police officers until the investigation was reopened at the end of 2002.

advocated for his client. The strategic decision to have all charges tried together was not so deficient or unreasonable as to fall outside of the objective standard of reasonableness. *See Davidson v. State*, 763 N.E.2d 441. Therefore, we find that Altes received effective assistance of counsel at trial.²

Judgment affirmed.

NAJAM, J., and MAY, J., concur

² Having refused to second-guess the propriety of trial counsel's strategy, we need not reach the issue of whether a motion for severance pursuant to Ind. Code Ann. § 35-34-1-11(a) (West, PREMISE through 2008 2nd Regular Sess.) would have been granted if it had been sought by trial counsel.