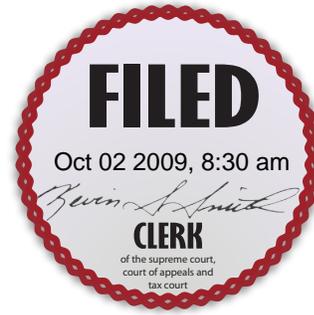


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RANDALL TISON,)
)
Appellant-Petitioner,)
)
vs.) No. 82A01-0904-PC-179
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Mary Margaret Lloyd, Judge
Cause No. 82D02-0110-CF-791

October 2, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Randall Tison appeals the post-conviction court's denial of his petition for post-conviction relief. We affirm.

Issue

Tison raises one issue, which we restate as whether he was denied the effective assistance of trial counsel.

Facts

In 2001, Tison was charged with child molesting as a Class A felony for placing his penis in the mouth of four-year-old Al.F. in 2001 and child molesting as a Class C felony for fondling five-year-old Au.F.'s vaginal area in 1996. The State later added charges of two counts of child molesting as Class B felonies and alleged that Tison placed his penis in Au.F.'s mouth on two occasions between 1995 and 1997 when she was between four and six years old. A jury found Tison guilty of child molesting as a Class A felony and two counts of child molesting as Class B felonies. The trial court sentenced Tison to an aggregate sentence of forty-five years in the Department of Correction.

Tison filed a belated appeal, arguing that: (1) the trial court erred by denying his motion to sever; (2) the trial court erred by denying his motions for mistrial following references to his pre-arrest silence and uncharged misconduct; (3) the trial court erred by allowing the State to cross-examine him regarding statements he made to a priest; (4) the trial court erred by excluding testimony from one of his defense witnesses; and (5) the trial court

erred when it found five-year-old A.I.F. competent to testify. Tison v. State, No. 82D02-0110-CF-791, slip op. at 2 (Ind. Ct. App. Dec. 3, 2003), trans. denied. We affirmed Tison’s convictions. Id. at 23.

Tison filed a petition for post-conviction relief, alleging that he was denied the effective assistance of trial counsel. In particular, Tison alleged that his trial counsel: (1) failed to properly investigate and prepare for trial, including the failure to call witnesses who could have provided exculpatory evidence; (2) failed to object to an aggravated sentence on Blakely grounds; (3) failed to object to the “admission of hearsay evidence that violated Mr. Tison’s right of confrontation;” (4) failed to properly prepare defense witnesses to testify; (5) failed to properly prepare Tison to testify; and (6) failed to interview exculpatory defense witnesses. App. at 45. After an evidentiary hearing, the post-conviction court issued findings of fact and conclusions of law rejecting Tison’s petition for post-conviction relief.

Analysis

Before discussing Tison’s allegations of error, we note the general standard under which we review a post-conviction court’s denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-

conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

The issue is whether Tison was denied the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel’s performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)), cert. denied. A counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Tison argues that his trial counsel was ineffective because: (1) his trial counsel failed to impeach five-year-old Al.F. with prior inconsistent statements; (2) his trial counsel failed to properly investigate the case by interviewing Tison's son; and (3) his trial counsel failed to properly prepare Tison for his testimony.

We first address Tison's claim that his trial counsel failed to impeach Al.F. with prior inconsistent statements. Tison did not raise this issue in his petition for post-conviction relief.¹ Indiana Post-Conviction Rule 1(8) provides that "[a]ll grounds for relief available to a petitioner under this rule must be raised in his original petition." Our supreme court has held that "[i]ssues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal." Allen v. State, 749 N.E.2d 1158, 1171 (Ind. 2001), cert. denied. Tison, therefore, may not raise the issue for the first time on post-conviction appeal.

Next, Tison contends that his trial counsel failed to properly investigate the case by interviewing Tison's son. On this issue, the post-conviction court found:

Miller [Tison's defense counsel] did not interview or depose the Petitioner's son, [J.T.], who was twelve (12) years old at the time. Petitioner's wife was the child's mother and had custody of the boy. The Petitioner and his wife were in the process of a divorce. The Mother was adamant that she wanted herself and her son to be left alone. Anytime Miller would approach the Mother to interview [J.T.], the result was "bad." Furthermore, Miller strategically decided not to formally depose [J.T.] or call

¹ Tison argues that he raised the issue by including it in his proposed findings of fact and conclusions of law. Indiana Post-Conviction Rule 1(8), however, requires that the issue be raised in the petition. Tison also argues that he raised the issue by alleging in his petition that his trial counsel failed to properly investigate and prepare for trial. Tison does not explain how his trial counsel's alleged failure to properly investigate and prepare for trial is the same issue as his trial counsel's failure to impeach Al.F. with prior inconsistent statements.

him as a trial witness, because he did not want potentially damaging testimony to be made a part of the record.

App. p. 121-22. Now eighteen years old, J.T. testified at the post-conviction hearing that he did not witness Tison commit a sex act with Al.F. The post-conviction court rejected Tison's ineffective assistance of counsel claim, concluding:

Although Counsel failed to interview [J.T.] or call [J.T.] as a witness and further [J.T.] testified at the P.C.R. hearing that he witnessed no molesting, Counsel on cross examination of victim, [Al.F.] got her to admit [J.T.] was located in the same room as her when the molest occurred, but was not looking in the direction of the victim when the molest happened. [J.T.] not witnessing a molest was evidence that Defense Counsel showed to the jury through cross, and still the jury convicted the Petitioner of Count I. The Court further finds no prejudice to Petitioner occurred in not calling [J.T.]. Even if Counsel's performance of not calling [J.T.] would have been deemed substandard, the jury knew the crux of what his testimony would have been and still convicted the Petitioner of this Count.

Id. at 124.

On appeal, Tison argues that J.T. could have testified at the trial that he never saw his father molest Al.F. even though she testified that J.T. was in the room at the time of the molestation. According to Tison, J.T.'s testimony "would have cast doubt on [Al.F.'s] testimony as it is unlikely [Al.F.] could have performed oral sex on Randall Tison without [J.T.] seeing something, since they were all allegedly in the same room when it occurred." Appellant's Br. p. 6. However, Al.F. testified at the trial that other people, including J.T., were in the room when Tison made her "suck his wiener" but that she was behind the other people and no one was looking at her or Tison. Trial Tr. p. 31. Given Al.F.'s testimony,

additional testimony from J.T. that he did not see his father molest A.L.F. would not have changed the outcome of the proceeding. Tison has failed to show that he was prejudiced by his trial counsel's failure to interview J.T.

Finally, Tison argues that his trial counsel failed to properly prepare him for his testimony. At the post-conviction hearing, Tison testified that his trial counsel failed to prepare him for his testimony and that he was forced to testify without preparation shortly after Amy Brandsasse's testimony. However, the post-conviction court found:

[A]t trial, Miller called three (3) defense witnesses. Amy Brandsasse finished testifying on September 24, 2002 at the end of the day. The Court adjourned and began the morning of September 25, 2002 with the Petitioner's testimony. Prior to his testifying, Miller spoke with the Petitioner about his testimony. Although Miller did not prefer to have his client testify, he noted that Petitioner had had no impeachable convictions. Specifically, Miller recalled instructing Petitioner to answer truthfully to the best of his ability, to explain the testimony of how the girl came up behind the car, address ways the Prosecution would attack him on cross examination and further explained that Miller would bring out "the weak stuff" on direct examination to defuse the impact of the disadvantageous information.

App. p. 122 (citation omitted). The post-conviction court then concluded:

The final allegation of ineffective assistance of counsel concerns the failure to prepare the Petitioner to testify.

- a) Petitioner testified at the P.C.R. hearing that he knew of this right not to testify but one to two minutes after Amy Brandsasse testified he was told he had to by his attorney.
- b) The Court finds the Petitioner testified at the beginning of September 25, 2002 while Amy Brandsasse was the last witness of September 24, 2002.

- c) The Court further finds Petitioner's Trial Counsel prepared him to testify as stated earlier in its Findings of Fact and thus no substandard assistance occurred.

Id. at 125-26.

The post-conviction court found Tison's defense counsel more credible, and on appeal, we cannot reassess the credibility of witnesses. Tison has failed to demonstrate that his trial counsel's performance was deficient. Moreover, Tison makes no argument that he was prejudiced by his trial counsel's alleged deficient performance. Tison fails to explain how, but for his trial counsel's failure to prepare him to testify, the outcome of the trial would have been different. Tison fails to even point out portions of his testimony, if any, that were problematic. See, e.g., Moffitt v. State, 817 N.E.2d 239, 253 (Ind. Ct. App. 2004) (rejecting the petitioner's argument that his trial counsel's failure to prepare the petitioner to testify constituted ineffective assistance of counsel), trans. denied.

Conclusion

We conclude that Tison's claim of ineffective assistance of trial counsel fails. The post-conviction court did not err by denying Tison's petition for post-conviction relief. We affirm.

Affirmed.

NAJAM, J., and KIRSCH, J., concur.