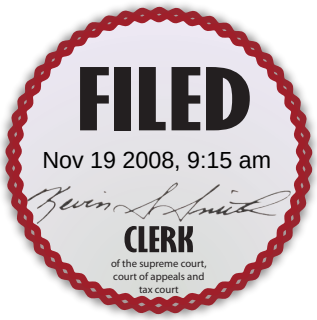

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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM ROGER ZEIDER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 09A02-0804-PC-374
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard A. Maughmer, Judge
Cause No. 09D02-0409-FA-8

November 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

William Roger Zeider appeals the denial of his petition for post-conviction relief ("PCR"). On appeal, Zeider raises a single issue, which we restate as whether the post-conviction court erred when it determined that Zeider received effective assistance of appellate counsel and denied his petition for PCR. Concluding Zeider has failed to demonstrate that he was prejudiced by any alleged deficient performance of appellate counsel, we affirm.

Facts and Procedural History

The facts pertinent to this decision as laid out by this court on direct appeal are:

> C.H. first met Zeider when C.H. was eight or nine years old. Around 1996, when C.H. was thirteen, Zeider asked C.H. if Zeider "could see [C.H.'s] privates." C.H. said no, but Zeider proceeded to remove C.H.'s pants and touch C.H.'s penis with his hands and mouth. On a subsequent occasion, C.H. awoke from a nap on Zeider's couch while Zeider was placing his lips on C.H.'s penis. And on a third occasion, Zeider entered into a locked bedroom where C.H. was sleeping, put his lips on C.H.'s penis, and touched C.H.'s buttocks.
>
> J.W. knew Zeider since the sixth grade, and in the summer of 2004, when J.W. was fifteen years old, J.W. visited Zeider "just about every day." J.W. introduced a friend, C.W., to Zeider. C.W. was fourteen years old at the time. C.W. visited Zeider three or four times. When C.W. visited, Zeider normally wore only underwear. During one of C.W.'s visits, Zeider touched C.W.'s penis with his hands and mouth. Zeider also touched C.W.'s buttocks. That act occurred while J.W. was in the same room.
>
> C.W. introduced S.M. to Zeider. S.M. was fourteen years old. As with C.W., Zeider wore only his underwear when S.M. visited. On a number of occasions, S.M., C.W., and Zeider watched pornographic films together in Zeider's living room. On another occasion, S.M. witnessed Zeider perform oral sex on C.W. Zeider instructed C.W. to "tap on his head" when C.W. was about to ejaculate. Zeider also touched S.M.'s penis with his hands and mouth.
>
> On another of S.M.'s visits, Zeider, S.M., C.W., J.W., and a twelve-year-old child, S.A., all masturbated while watching pornographic films together in Zeider's living room. On a separate occasion, S.M. brought his younger brother, T.M., to Zeider's house. T.M. was eleven years old.

> While Zeider, C.W., and S.M. watched pornographic films, T.M. played pool in another room. While in that other room, T.M. could hear on the television "women and stuff dancing and . . . them saying stuff and touching." However, when T.M. walked into the room with Zeider, C.W., and S.M., they turned off the television "right when" T.M. entered the room "[b]ecause he [was] too young."

Zeider v. State, No. 09A05-0601-CR-32, 2007 WL 166748, at *1 (Ind. Ct. App. Jan. 24, 2007) (citations and quotations omitted).

On September 20, 2004, the State charged Zeider with counts 1 and 2, child molesting, Class A felonies; counts 3 and 4, child molesting, Class C felonies; and counts 5-9, disseminating matter harmful to minors, Class D felonies. On January 19, 2005, the State amended the charging information to add counts 10-13, child molesting, Class A felonies. A jury convicted Zeider of counts 1-9 and 11 and acquitted him of count 10.[1] On December 12, 2005, the trial court sentenced Zeider to an aggregate sentence of sixty-eight and one-half years with the Department of Correction and a $10,000 fine.

On direct appeal of his conviction and sentence, Zeider argued that he received ineffective assistance of trial counsel, that the trial court abused its discretion in excluding evidence, that he was improperly convicted of multiple counts of disseminating matter harmful to minors, and that his sentence was improper. This court held that Zeider received effective assistance of trial counsel, but reversed Zeider's conviction on three counts of dissemination of matter harmful to minors and remanded to the trial court to adjust Zeider's sentence to sixty-seven years. See id., at *10.

On September 20, 2007, Zeider filed a petition for PCR alleging ineffective assistance of appellate counsel. The post-conviction court held a hearing on February 29,

[1]The State dismissed counts 12 and 13 prior to closing arguments.

2008, and issued its findings of fact and conclusions of law on April 2, 2008, denying Zeider's petition. Zeider now appeals.

Discussion and Decision

I. Standard of Review

To obtain relief, a petitioner in a post-conviction proceeding bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). Moreover, a petitioner who appeals a denial of a petition for PCR appeals from a negative judgment and therefore must establish "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002).

II. Ineffective Assistance of Appellate Counsel

Zeider argues that he received ineffective assistance of appellate counsel because 1) appellate counsel raised the issue of ineffective assistance of trial counsel on direct appeal rather than reserving it for PCR and 2) appellate counsel failed to argue ineffective assistance of trial counsel based upon trial counsel's failure to seek severance of the counts against Zeider. The Sixth Amendment entitles a criminal defendant to the effective assistance of counsel, not only at trial, but also during his first appeal as of right. Ben-Yisrayl, 738 N.E.2d 253, 260 (Ind. 2000) (citing Evitts v. Lucey, 469 U.S. 387, 396 (1985)). We analyze an ineffective assistance of appellate counsel claim similarly to an

ineffective assistance of trial counsel claim using the two-prong test set out in Strickland v. Washington, 466 U.S. 668 (1984). Ben-Yisrayl, 738 N.E.2d at 260. First, the petitioner must show that appellate counsel's performance was deficient or fell below an objective standard of reasonableness; second, the petitioner must show that the deficient performance actually prejudiced the defense. Strickland, 466 U.S. at 687-88. In other words, the petitioner must show that but for appellate counsel's deficient performance, there is a reasonable probability that the result of the appeal would have been different. Id. at 694. Failure to satisfy either prong will cause the claim to fail. Henley v. State, 881 N.E.2d 639, 645 (Ind. 2008).

A. Raising Ineffective Assistance of Trial Counsel on Direct Appeal Rather than on PCR

A claim of ineffective assistance of trial counsel, if not raised on direct appeal, may be presented in a post-conviction proceeding. Woods, 701 N.E.2d 1208, 1220 (Ind. 1998). However, if ineffective assistance of trial counsel is raised and decided on direct appeal, the issue will be foreclosed from collateral review. Id. Contrary to Zeider's assertion, our supreme court's decision in Woods does not require that ineffective assistance of trial counsel claims be brought in PCR proceedings. Rather, the Woods court held simply that an ineffective assistance of trial counsel claim, if not raised on direct appeal, may be raised on PCR, not that such a claim may only be raised or should always be raised on PCR. See id.

Deciding which issues to raise on appeal is one of the most important strategic decisions of appellate counsel. Stevens, 770 N.E.2d at 760. We show particular deference when reviewing a challenge to an appellate counsel's decision to include or

exclude issues "unless such a decision was unquestionably unreasonable." Id. (quoting Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997), cert. denied, 525 U.S. 1021 (1998)). Appellate counsel's performance will not be found deficient if the decision to present some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made. Id. Even if the choice was not reasonable, the petitioner must still demonstrate a reasonable probability that the outcome of the appeal would have been different. Id.

Zeider's appellate counsel chose to raise the issue of ineffective assistance of trial counsel on direct appeal rather than preserving the issue for PCR. Appellate counsel alleged deficient performance on the basis of trial counsel's stipulation to an element of counts 5-9, disseminating matter harmful to minors. Specifically, trial counsel made a strategic decision to stipulate that the pornographic films Zeider viewed with the children were harmful to minors. This court sufficiently analyzed trial counsel's strategic decision on the face of the record without the need for extrinsic evidence. For these types of claims that can be analyzed on the face of the record alone, "the interest of prompt resolution of the matter favors permitting it to be raised on direct appeal." Woods, 701 N.E.2d at 1211. In addition, Zeider has failed to demonstrate how the issue would have been resolved differently on PCR than on direct appeal. Therefore, Zeider has not established ineffective assistance of appellate counsel due to the decision to raise ineffective assistance of trial counsel on direct appeal rather than on PCR.

B. Failure to Adequately Argue Ineffective Assistance of Trial Counsel

Zeider next argues that appellate counsel should have raised the issue of trial counsel's failure to sever the counts into separate trials as a basis for ineffective assistance of trial counsel. Where a petitioner argues that appellate counsel failed to adequately argue the ineffective assistance of trial counsel, the petitioner faces a compound burden of demonstrating that appellate counsel's performance was deficient and but for the deficiency, trial counsel's performance would have been found deficient and prejudicial. Ben-Yisrayl, 738 N.E.2d at 261-62. If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. Henley, 881 N.E.2d at 645. In other words, if the evidence supports a finding that any alleged ineffective assistance of trial counsel did not prejudice Zeider at trial, then appellate counsel did not perform deficiently in failing to raise such allegations.

The post-conviction court found that trial counsel discussed the issue of severance with Zeider on several occasions. The post-conviction court also found that trial counsel's decision not to sever was based a strategic choice to use the State's weaker cases to attack the stronger ones and to point out inconsistencies across the testimony of all witnesses. This court will not second-guess the propriety of trial counsel's strategy. Lowery v. State, 640 N.E.2d 1031, 1041 (Ind. 1994). In order to succeed in his ineffective assistance of trial counsel claim, Zeider must show that trial counsel's strategy was "so deficient or unreasonable as to fall outside of the objective standard of reasonableness." Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). Trial counsel's

testimony on PCR supports the post-conviction court's findings that the decision not to sever was based on a sound strategic plan for the case. Further, trial counsel's performance resulted in the dismissal of two counts against Zeider prior to closing arguments and acquittal on a third count. Therefore, Zeider has failed to demonstrate how trial counsel's decision not to sever prejudiced him at trial. As a result, Zeider has not established ineffective assistance of appellate counsel for failure to adequately argue ineffective assistance of trial counsel.

Conclusion

Zeider's appellate counsel did not perform deficiently in raising the issue of ineffective assistance of trial counsel on direct appeal, and appellate counsel adequately argued the issue on direct appeal. Therefore, the post-conviction court did not err when it denied Zeider's petition for PCR.

Affirmed.

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