



## **Case Summary**

Douglas L. Hayden, who was employed as a correctional officer at an Indiana juvenile correctional facility, was convicted of committing five acts of sexual misconduct with two of the juveniles in the facility. His convictions and sentence were affirmed on direct appeal. Hayden filed a petition for post-conviction relief, alleging that his trial counsel was ineffective in failing to discover that the mother of one of the juveniles had filed a civil lawsuit on her son's behalf against the Indiana Department of Correction and in failing to impeach the juvenile with that information. The post-conviction court denied Hayden's petition.

On appeal, Hayden argues that there is a reasonable probability that the result of his trial would have been different if his counsel had discovered the lawsuit and used it for impeachment. We disagree and affirm the ruling of the post-conviction court.

## **Facts and Procedural History**

In Hayden's direct appeal, another panel of this Court recited the relevant facts as follows:

Hayden was employed as a Locations Count Officer (LCO) at the Logansport Juvenile Diagnostic Facility (the Logansport Facility) from January 1993 to February 2001. J.V., who was born on August 19, 1984, was an inmate at the Logansport Facility in April and May of 2000. Sometime between April 5 and April 24, 2000, while J.V. was in his unit, Hayden asked him if he wanted to clean the shower room. J.V. agreed, and asked Hayden if another boy could help him. Hayden said no. After cleaning the shower room, J.V. went into a bathroom stall and began cleaning a toilet near the shower room. As J.V. was cleaning the toilet, Hayden entered the stall and ordered J.V. to stand next to the wall in "search position." (Transcript p. 240). Search position means "[y]ou put your hands on the wall ... and spread your feet apart." (Tr. p. 240). J.V. got in the search position and Hayden came up

behind him and asked if he could “jack off” in front of J.V. (Tr. p. 241). Hayden exposed his penis and rubbed it against J.V.’s backside. Hayden then turned J.V. around to face him and put J.V.’s hand on his erect penis. Hayden made J.V. rub his penis. Hayden then pulled down J.V.’s pants and inserted his finger inside J.V.’s anus. J.V. yelled in pain, and Hayden quickly pulled up J.V.’s pants and told him to continue cleaning the toilets.

Thereafter, on either May 4 or May 5, 2000, Hayden went inside J.V.’s room and told him to assume the search position. While searching J.V., Hayden grabbed J.V.’s penis twice.

Sometime between June 5 and June 8, 2000, Hayden signed out A.M., who was born on October 28, 1985, for cleaning duty. After Hayden and A.M. finished cleaning, Hayden took A.M. inside the cleaning supply closet and performed oral sex on A.M. A few days after this incident, while Hayden and A.M. were cleaning the kitchen, Hayden pulled down A.M.’s pants and performed oral sex on him. Thereafter, during an interview with A.M., Hayden asked A.M. if he wanted to touch his penis. A.M. then touched Hayden’s erect penis.

A few days after the sexual encounters with Hayden, A.M. was transferred to the Plainfield Juvenile Correctional Facility. While at the Plainfield Facility, A.M. wrote a letter to Hayden stating that he was “looking forward to doing what we will when I get out. [ ] I had fun. Want more fun.” (State’s Exhibit no. 22). Based on this letter, Logansport Facility officials conducted an investigation and relieved Hayden of his duties.

On March 30, 2001, the State filed an information charging Hayden with Count I, sexual misconduct with a minor as a Class B felony, I.C. § 35-42-4-9; Count II, sexual misconduct with a minor as a Class B felony, I.C. § 35-42-4-9; Count III, sexual misconduct with a minor as a Class C felony, I.C. § 35-42-4-9; Count IV, sexual misconduct with a minor as a Class D felony, I.C. § 35-42-4-9; Count V, sexual misconduct with a minor as a Class D felony, I.C. § 35-42-4-9; Count VI, sexual misconduct with a minor as a Class B felony, I.C. § 35-42-4-9; and Count VII, sexual misconduct with a minor as a Class C Felony, I.C. § 35-42-4-9.

On June 17, 2003, a jury trial was held. At the close of the evidence, the jury found Hayden guilty of Counts I, II, III, VI, and VII.<sup>[1]</sup>

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<sup>1</sup> The trial court granted Hayden’s motion for directed verdict on Counts IV and V, which were based on allegations relating to a third inmate who failed to appear at trial.

*Hayden v. State*, 830 N.E.2d 923, 926-27 (Ind. Ct. App. 2005) (footnote omitted), *trans. denied*.

On direct appeal, Hayden contended that the trial court erred in allowing the superintendent of the Logansport Juvenile Facility to remain at the State's counsel table after Hayden moved for a separation of witnesses order. He also challenged his thirty-eight-year aggregate sentence, with ten years suspended to probation. Finally, he claimed that the State had improperly withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); namely, that on August 29, 2001, J.V.'s mother filed a civil complaint on J.V.'s behalf against the Indiana Department of Correction, alleging that Hayden touched J.V. in a rude, insolent, and sexual manner. The Indiana Attorney General's office represented the Department of Correction and received Hayden's permission to attend several depositions taken in the criminal matter.

On July 7, 2005, this Court affirmed Hayden's conviction and sentence. In addressing his *Brady* claim, the Court observed:

Hayden could have easily discovered that the presence of the Indiana Attorney General's office at the depositions was in a representative capacity concerning J.V.'s civil lawsuit. Because the existence of J.V.'s civil lawsuit could have been discovered by reasonable diligence, we find that the State did not suppress this information in violation of *Brady v. Maryland*.

*Hayden*, 830 N.E.2d at 932. Hayden filed a petition for transfer to the Indiana Supreme Court, which that court denied on September 14, 2005.

On November 14, 2005, Hayden filed a pro se petition for post-conviction relief. With assistance of counsel, the petition was amended on March 25, 2010, to assert a single

claim: that trial counsel was ineffective in failing to discover the civil lawsuit and impeach J.V. with evidence that he had a financial stake in the outcome of the criminal trial. After conducting an evidentiary hearing, the post-conviction court issued an order denying Hayden's petition. Hayden filed a motion to correct error, which the post-conviction court also denied. This appeal ensued.

### **Discussion and Decision**

The petitioner in a post-conviction proceeding bears the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To the extent his appeal turns on factual issues, he must convince us 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), *cert. denied* (2003). However, while the post-conviction court's findings of fact are accepted unless they are clearly erroneous, no deference is accorded to conclusions of law. *Fisher*, 810 N.E.2d at 679.

Hayden claims that his trial counsel's failure to discover J.V.'s civil lawsuit against the Department of Correction and pursue the matter on cross-examination amounted to ineffective assistance of counsel. To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, a

defendant must show that counsel's performance was deficient." *Id.* at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." *Id.*

"Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial," that is, a trial where the result is reliable. *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 one that is sufficient to undermine confidence in the outcome. *Id.*

"The two prongs of the *Strickland* test are separate and independent inquiries. Thus, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice that course should be followed." *McCann v. State*, 854 N.E.2d 905, 909 (Ind. Ct. App. 2006) (citation omitted). Assuming, without deciding, that Hayden's trial counsel performed deficiently, we conclude that Hayden has failed to establish that he was prejudiced by counsel's deficient performance.

The Indiana Supreme Court has said that "[i]f a witness in a criminal trial has a financial motive for testifying in a certain fashion, then the jury should hear about those matters because they are relevant to the question of the witness' credibility." *McCarthy v. State*, 749 N.E.2d 528, 532 (Ind. 2001). In *McCarthy*, the issue was whether the trial court

committed reversible error in “limiting [the defendant’s] right to cross-examine a witness on the question of bias.” *Id.* at 531. The court held that the issue was subject to a harmless error analysis on direct appeal: “The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.” *Id.* at 534 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

Whether the trial court’s error is harmless depends on several factors including:

[T]he importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.

*Id.* at 535 (quoting *Van Arsdall*, 475 U.S. at 684).

In this post-conviction proceeding, the issue is not whether Hayden was denied his right to cross-examine J.V. about the civil suit, but whether there is a reasonable probability that the result of his trial would have been different but for his counsel’s failure to discover the lawsuit and use it for impeachment. And Hayden bears the burden of establishing that reasonable probability by a preponderance of the evidence. In attempting to meet this burden, Hayden advances several arguments, none of which we find persuasive.<sup>2</sup>

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<sup>2</sup> The post-conviction court concluded that evidence regarding the lawsuit “would have been admissible to impeach J.V.’s testimony against [Hayden]” but further concluded that Hayden had “not made a showing that cross-examination of J.V. about the civil lawsuit would have resulted in testimony favorable to [Hayden].” Appellant’s App. at 142. For purposes of this opinion, we assume that Hayden made such a showing.

He first contends that the credibility of his accusers was

suspect to begin with because they were all inmates at a correctional facility. In fact, one of them failed to show up to testify. Furthermore, the environment at the Logansport Juvenile Intake Diagnostic Facility ... made it doubtful that such crimes could go undetected: during normal hours, approximately 84 inmates and more than 50 employees would be moving around the Facility, which was monitored both inside and out by 57 cameras.

Appellant's Br. at 12-13. The jurors were well aware that Hayden's accusers were juvenile offenders and that one of them failed to appear at trial; the trial court granted Hayden's motion for directed verdict on the counts relating to that juvenile.<sup>3</sup> As for whether it was "doubtful" that the crimes could have gone undetected, the jurors heard testimony from Troy Smith, who was "in charge of [the facility's] custody operation," that "[a]nybody that's been there for any period of time knows where all the blind spots in the facility are." Trial Tr. at 64, 95. Moreover, the jurors visited the facility during trial and thus were able to view the various crime scenes firsthand. *See id.* at 418 (trial court instructing jury prior to visit).<sup>4</sup>

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<sup>3</sup> In his reply brief, Hayden says,

the jury received preliminary instructions on two sexual battery charges regarding a third alleged victim (J.W.), heard details about J.W.'s accusations during the State's opening argument, and heard testimony on how J.W.'s accusations surfaced. But J.W. failed to show up to testify, resulting in the trial court's granting Hayden's motion for judgment on the evidence for those two charges. Under these circumstances, it is difficult to tell whether Hayden's jury truly believed the accusing witnesses were credible or merely thought where there was smoke, there must be fire.

Appellant's Reply Br. at 2. Hayden's argument is pure speculation and disregards the trial court's instructions to the jury about the State's burden of proof. *See* Trial Tr. at 457-58 ("The State has the burden of proving the defendant guilty beyond a reasonable doubt.... If based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, you should find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you should give him the benefit of the doubt and find him not guilty."). "We presume that the jury follows the trial court's instructions." *Harris v. State*, 824 N.E.2d 432, 440 (Ind. Ct. App. 2005).

<sup>4</sup> Notably, Hayden does not assert that any of the crime scenes were in fact monitored by cameras.



Next, Hayden attacks A.M.'s credibility, noting that he "was a sex offender himself who had admitted having sexual contact with other male inmates" and that he "admitted misleading investigators about many things." Appellant's Br. at 13. These inconsistencies and credibility concerns were either preemptively raised by the prosecutor on direct examination or thoroughly explored by Hayden's counsel on cross-examination, and thus the jurors were fully apprised of them.<sup>5</sup>

Hayden observes that he "could not have been convicted of two of his charges without J.V.'s testimony" and contends that "[i]f the jury had known about J.V.'s financial interest in the case's outcome, there is a reasonable probability it wouldn't have believed him, if only for the reason that he was an incarcerated offender whose credibility was already disputable." *Id.* at 13-14. This bald assertion is insufficient to satisfy Hayden's burden to establish prejudice by a preponderance of the evidence.

Finally, Hayden claims that

impeaching J.V. may also have impacted the charges supported by A.M.'s testimony. On his own, A.M.'s credibility was controversial because he admitted lying to investigators about his accusations. But combined with J.V.'s unimpeached testimony, A.M.'s story became more believable. If J.V. had been impeached by his civil lawsuit, there is a reasonable probability that the jury wouldn't have believed A.M. or J.V.

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<sup>5</sup> Hayden says that he "denied having any kind of sexual contact with his accusers" and "also presented evidence about why the alleged [sic] victims had targeted him: rumors were being circulated at the Facility that Hayden was gay." Appellant's Br. at 13. Hayden never established that the victims actually knew about the rumors and never cogently explained why they would have "targeted" him because of them. *See* Trial Tr. at 436 (defense closing argument) ("[Correctional Officer] Deitrich, the evidence is in there that he told nine students that Mr. Hayden is gay. If you want to believe that those nine students didn't pass it along to the other students, that it never got circulated, that it never got passed around, that's not reasonable. Of course, it got passed around. And who knows the troubled minds that [J.V.] and [A.M.] have. But anything that they did for whatever reason, I submit, is not logical or reasonable. Who knows what they had in mind."). Moreover, J.V. indicated that he was segregated from A.M. and the other juvenile "sex offenders" and therefore "never hung around them." *Id.* at 257. In short, Hayden's conspiracy theory is pure conjecture.

*Id.* at 14. Hayden's assertion that J.V.'s testimony made A.M.'s testimony "more believable" is utter speculation, as is his claim that there is a reasonable probability that the jury would have acquitted him on the charges relating to A.M. if it had learned about J.V.'s civil lawsuit.

Furthermore, Hayden's characterization of J.V.'s testimony as "unimpeached" is inaccurate and misleading. The jury learned that J.V. had been incarcerated for committing disorderly conduct, and defense counsel questioned correctional officers Troy Smith and William Oaks about the workings of an officer's equipment belt, apparently in an effort to establish how cumbersome it would have been for Hayden to expose himself to J.V. in the shower room. During closing argument, defense counsel disparaged J.V.'s testimony as follows:

[J.V.] talks about this occurring in a bathroom stall. Well, you were all out there taking a view of whether there's a door on those stalls or not. And then we get to whether this is reasonable to believe. Is that reasonable? Door or no door, it doesn't make any sense. The possibility of discovery is too great. How dumb would a man have to be to do that? When the facility is open, no problem coming and going into the bathroom, that's why it's there.... But if you're going to do something like this, why do it in a facility where there's as many as eighty-four kids present plus staff, plus cameras. I think he said fifty-four cameras. And you pick that spot instead of your own home where you can lock the door, you know who's there, nobody's going to interrupt you, but that never happened.... If you compare the testimony of [A.M.] and [J.V.] with [Hayden's] testimony -- I want you -- I invite you to do that and see what or who is, who is the credible person here? Not [A.M.]. [J.V.] is talking about yelping. Why didn't he say "I shouted," "I screamed," "I moaned." Yelping. I submit that's a slip of the tongue. That's not how people talk. Someone sticks his finger in your anus, are you going to yelp, are you going to scream, are you going to make some other kind of noise. Where does the yelping come from?

Trial Tr. at 434-36. J.V.'s testimony may have been unequivocal, but it certainly was not "unimpeached."

To be sure, as is frequently the case with allegations of sexual misconduct, there was no eyewitness to the charged crimes and no evidence of physical injury. Thus, the jurors' assessment of the credibility of Hayden and his accusers was critical to the determination of Hayden's guilt or innocence. As stated earlier, the prosecutor preemptively disclosed some potentially damaging information regarding A.M. and J.V. on direct examination, and Hayden's counsel further attacked their credibility on cross-examination. Hayden testified at trial, and thus the jury was able to assess his credibility as a witness. Among other things, the jury heard testimony that Hayden was disciplined for "[h]aving an offender out during a formal count" on June 5, 2000 – the same date on which he had assigned A.M. to a work detail and on or about the same date that he was alleged to have committed sexual misconduct with A.M. Trial Tr. at 118. Also, Hayden acknowledged that he once had "a group of troubled kids at [his] house that [he had been] raising," often "with no legal authority to have them there." *Id.* at 387, 386.

The civil lawsuit was filed by J.V.'s mother on his behalf five months after the State filed criminal charges against Hayden, and we find nothing unusual about a parent filing such a lawsuit in such a circumstance. On this record, we simply cannot conclude that Hayden has established by a preponderance of the evidence that there is a reasonable probability that the result of his trial would have been different if the jury had been aware of J.V.'s financial interest in the outcome. Therefore, we affirm the post-conviction court.

Affirmed.

BAILEY, J., dissents with separate opinion.

MATHIAS, J. concurs.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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DOUGLAS L. HAYDEN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 09A02-1105-PC-481
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

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**BAILEY, Judge, dissenting**

I respectfully dissent because, in my view, Hayden has established his claim of ineffectiveness of trial counsel. In the absence of physical evidence, witness credibility is absolutely crucial. Nonetheless, counsel failed to discover the existence of a victim-witness civil lawsuit and pursue the matter on cross-examination. Counsel also stood idly by as accusations by a third juvenile, J.W., were introduced through hearsay from multiple witnesses.

“If a witness in a criminal trial has a financial motive for testifying in a certain fashion, then the jury should hear about those matters because they are relevant to the question of the witness’ credibility.” McCarthy v. State, 749 N.E.2d 528, 533 (Ind. 2001). As this Court observed in Hayden’s direct appeal, the exercise of “reasonable diligence” would have yielded knowledge concerning the pending civil suit. Hayden v. State, 830 N.E.2d 923, 932 (Ind. Ct. App. 2005), trans. denied. The potential for discovery was “easy” in that deputies from the Indiana Attorney General’s office were present at multiple depositions at which Charles Scruggs (“Scruggs”) represented Hayden. Id. As counsel failed to discover and introduce impeachment evidence, his performance is deficient. Of course, to establish the prejudice prong of his ineffectiveness claim, it was incumbent upon Hayden to show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland v. Washington, 466 U.S. 668, 694 (1984).

At the post-conviction hearing, the Honorable Teresa Harper (“Harper”), who previously practiced law as a criminal defense attorney, offered uncontroverted testimony regarding Hayden’s trial and his legal representation by Scruggs, now deceased. Scruggs, who had longstanding injuries from a bomb explosion in the Howard County Courthouse, had more recently been involved in a very serious motorcycle accident. He had broken his neck and surgery had been performed to insert titanium rods into the vertebrae to maintain posture. The multiple injuries were “debilitating” such that, as Hayden’s trial neared, Scruggs asked Harper to assist him. (P.C.R. Tr. 15.)

Harper entered an appearance on the first day of trial, and Scruggs assigned Harper the task of reviewing depositions to prepare to cross examine witnesses. While reviewing the depositions, Harper noticed that representatives from the Attorney General's office had been present. She came to believe, based on information from Scruggs, that the appearance was because of a wrongful termination lawsuit.

As the trial progressed, Scruggs was "in agony" and "unsteady on his feet." (P.C.R. Tr. 31.) His condition forced him to cede to greater participation by Harper than had been planned.<sup>6</sup> According to Harper, as the evidence unfolded, it became apparent that it was essentially a contest of credibility between juvenile offenders and a career military and corrections officer. Hayden testified and denied all allegations of sexual misconduct. The theory of the defense was that the Department of Correction wanted to be rid of Hayden as an employee because of rumors about his sexual orientation.

A.M. testified that, while he was housed in a juvenile detention facility, he had participated in sex acts with Hayden and later wrote to Hayden obliquely referring to their "fun." (Tr. 173, St. Ex. 22.) During cross-examination, A.M. admitted that he had falsely claimed that Hayden had stroked his inner thigh. A.M. also freely admitted that, in his early statements to investigators, he had minimized his own role in sex acts for fear that his participation in a juvenile sex offender program would be jeopardized. Thus, the jury was apprised that A.M. was a sex offender and had given conflicting accounts of activity between

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<sup>6</sup> Judge Harper gave an example, "I saw him forgo an opportunity to develop a relationship with the jury without giving me a meaningful opportunity to prepare for voir dire." (P.C.R. Tr. 40.)

himself and Hayden. Arguably, A.M.'s trial testimony was subjected to vigorous and thorough challenge by the defense. However, the jury heard no serious challenge to the credibility of J.V. This is so because Harper first learned – and to the best of Harper's knowledge Scruggs first learned – about the pending civil suit only after trial.

Furthermore, the allegations of a third juvenile detainee, J.W., were introduced through the hearsay testimony of a corrections officer and an Indiana State Police investigator. Scruggs acquiesced in this testimony with the apparent expectation that J.W. would subsequently testify.<sup>7</sup> When J.W. failed to appear to testify, counsel did not move for a mistrial or an admonishment to the jury. As such, the second-hand account of J.W.'s allegation of "wrong touching" went unchallenged. (Tr. 211.)

As is frequently the case with allegations of sexual misconduct, there was no eyewitness and no evidence of physical injury. The jury was asked to make its determination of guilt or innocence based upon the diametrically opposed testimony of alleged victims and perpetrator. J.V.'s civil lawsuit was not mentioned. In addition to the omission of relevant impeachment evidence, counsel's failure to seek any corrective measure when J.W. failed to testify further convinces me that Hayden did not receive the effective assistance of trial counsel. Although Hayden was not convicted of the charges pertaining to J.W., I cannot

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<sup>7</sup> As juvenile corrections officer Brandon Collins began to repeat a statement made by J.W., Scruggs interposed, "Hearsay, Your Honor, but I'm not going to object." (Tr. 208.) The Prosecutor argued: "Judge, it's not meant for the truth of the matter. He'll be here to testify himself." and Scruggs reiterated: "I'm not objecting." (Tr. 208.) When Indiana State Police investigator Tony Frawley testified that J.W. "was making allegations of sexual connotations against Mr. Hayden and inappropriate contact," no objection was lodged. (Tr. 312.)



simply ignore the bolstering effect of an additional unchallenged account of sexual misconduct.

I believe there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and accordingly would vote to reverse the denial of post-conviction relief.