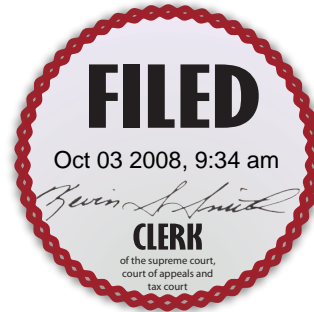


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LISA M. FISH,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 91A02-0802-PC-87

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-0510-FB-161

October 3, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Lisa Fish (“Fish”) was convicted in White Superior Court of Class B felony sexual misconduct with a minor. She appeals the denial of her petition for post-conviction relief and argues that her trial counsel was ineffective. Concluding that Fish was not prejudiced by trial counsel’s deficient performance, we affirm.

Facts and Procedural History

On December 20, 2006, Fish was convicted in White Superior Court of Class B felony sexual misconduct with a minor. Fish did not deny having sexual intercourse with the victim, N.S. Her defense at trial was that N.S. was sixteen years old on the date of the offense. A jury found Fish guilty as charged. She was sentenced to ten years with nine years suspended to probation.

Fish filed a notice of appeal, but that appeal was dismissed without prejudice. On July 18, 2007, she filed a petition for post-conviction relief alleging ineffective assistance of counsel. A hearing was held on Fish’s petition on October 18, 2007.

The post-conviction court issued its findings of fact and conclusions of law on January 2, 2008. The court made the following findings with regard to counsel’s representation:

9. The defendant’s petition is based upon a claim of ineffective assistance of trial counsel in that:

- a. Trial counsel failed to impeach the alleged victim with his prior inconsistent statement to the police;
- b. Trial counsel failed to lay the proper foundation for the admission of the exculpatory evidence of the Petitioner’s special education school records;
- c. Trial counsel failed to object to the prosecutor’s improper final argument that the prosecutor has a duty to society to protect children and that the petitioner should be convicted because she

was a danger to children rather than because she was guilty of the offense; and

- d. Trial counsel failed to adequately investigate the case prior to trial by failing to obtain exculpatory evidence establishing the alleged victim's dates of employment at McDonalds and the date of the victim's bicycle theft that could have established that the date of the offense occurred when the alleged victim was 16 years old.

10. Trial counsel cross examined the victim and attempted to impeach him with his prior statements.

11. Trial counsel failed to obtain properly authenticated school records of the defendant and the copies that were tendered for admission were not admitted. However, the defendant testified at trial and her nature, character, ability and education level were presented through her testimony.

12. The prosecutor improperly stated during final argument to the jury that he had a duty to society to protect children and that the defendant should be convicted because she was a danger to children. Defendant's trial counsel did not object to this statement.

13. As the Court recalls the evidence concerning the victim's McDonalds employment, no records were produced by the local McDonalds indicating that the defendant was employed there. It was not in dispute, however, whether or not the victim worked at McDonalds. He did. Unfortunately, employment records that would have indicated when the victim was employed there, apparently do not exist.

17. This court is not convinced that the allegations of trial counsel's poor strategy, bad tactics, mistakes, or carelessness are present or that they rise to the level of incompetence that would render the jury's decision unjust or unreliable.

18. This court believes that the defendant's evidence failed to prove that trial counsel's action or inaction prejudiced the defendant to such an extent that the results would have been different, but for trial counsel's action or inaction.

19. This court believes that the defendant's evidence failed to prove that trial counsel was ineffective.

Appellant's App. pp. 36-37. The court denied Fish's petition for post-conviction relief.

Fish appeals. Additional facts will be provided as necessary.

Standard of Review

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. McCary v. State,

761 N.E.2d 389, 391 (Ind. 2002). Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Davidson v. State, 763 N.E.2d 441, 443 (Ind. 2002). 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) (2006); 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. 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.

The post-conviction court entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6) (2006). “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.’” Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (quoting State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997)). Although we accept findings of fact unless they are clearly erroneous, we give conclusions of law no deference. Fisher, 810 N.E.2d at 679.

Discussion and Decision

Fish claims that her trial counsel was ineffective for failing to adequately investigate facts concerning N.S.’s age on the date of the offense, for failing to obtain Fish’s school records which would have established that she has an extremely low IQ,

and for failing to impeach N.S.'s credibility with prior inconsistent statements made during the police investigation.

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, a claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."

Appellate review of the post-conviction court's decision is narrow. We give great deference to the post-conviction court and reverse that court's decision only when "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the postconviction court."

Although the two parts of the Strickland test are separate inquiries, a claim may be disposed of on either prong. Strickland declared that the "object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (internal citations omitted).

Moreover, we presume that counsel provided adequate assistance, and we give deference to counsel's choice of strategy and tactics. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Id.

First, Fish argues that her trial counsel was ineffective for failing to obtain certified school records to introduce into evidence during the hearing on her motion to suppress her statement to the police. Fish attempted to suppress her statement by arguing that her waiver of her rights and her statement were not made knowingly or voluntarily because of her limited mental ability. However, a defendant's claimed mental condition

does not render a confession involuntary, absent coercive police conduct. Stevens v. State, 770 N.E.2d 739, 750 (Ind. 2002); Pettiford v. State, 619 N.E.2d 925, 928 (Ind. 1993)(“Although a person’s mental condition is relevant to the issue of susceptibility to police coercion, where the person voluntarily makes a confession without police coercion the confession may be considered in spite of the mental condition.”).

Fish has not alleged that any police misconduct occurred. Moreover, during the motion to suppress hearing, Fish testified that she was a special education student from kindergarten through 12th grade, she described her reading ability to the court, and that she has a “slow learning disability” for which she receives social security disability payments. Trial Tr. pp. 156-57. Although Fish’s school records would have certainly aided the trial court in its assessment of her mental abilities in considering whether her statement was voluntary,¹ we cannot conclude that Fish was prejudiced by trial counsel’s failure to offer certified copies of her school records into evidence.

Next, Fish argues that her trial counsel was ineffective for failing to impeach N.S. with his prior inconsistent statements. In this case, the jury was asked to resolve one ultimate issue: was N.S. fifteen or sixteen on the date Fish engaged in sexual intercourse with him? N.S. testified that he was fifteen on the date he had sexual intercourse with Fish. Tr. p. 43. During cross-examination of N.S., Fish’s counsel attempted to impeach N.S. with his inability to recall specific dates, but failed to use his prior inconsistent statements about when the sexual intercourse occurred. Specifically, after N.S.’s

¹ Although her school records were not admitted, evidence of Fish’s disabilities was also presented to the jury in an attempt to convince the jury that her statement to Officer Shafer was not voluntary.

sixteenth birthday he began employment at McDonalds² and committed a bicycle theft. He stated on at least one occasion that the offense occurred after those two events. Also, N.S.'s statement to Officer Shafer about the details of the offense differed from his testimony at trial. Trial counsel rendered deficient performance when he failed to impeach N.S. with his inconsistent statements.

However, Fish cannot establish prejudice as a result of this error because the weight of the evidence supports the jury's conclusion that N.S. was fifteen on the date of the offense.³ Officer Patrick Shafer testified that N.S. stated that he was fifteen years old when he had sex with Fish. Tr. p. 191. Officer Shafer testified that every witness he spoke with about the investigation told him that N.S. was fifteen when the sexual intercourse occurred, and Fish also admitted that N.S. was fifteen. Tr. p. 224. Friends of both Fish and N.S. testified that N.S. was fifteen when he had sex with Fish. See Trial Tr. p. 73 (Norma Trammel testified that Fish knew N.S. was fifteen years old, but discussed having sex with him); p. 89 (Becky Trammel testified that Fish told her she wanted to have sex with N.S. and Fish knew he was fifteen); pp. 95, 97 (K.G. testified that Fish had sex with N.S. before N.S. dropped out of school, and N.S. dropped out of school on his sixteenth birthday); pp. 110, 125 (Kim Krivanek testified that Fish knew N.S.'s birthdate and Fish stated that she had sex with N.S. before his sixteenth birthday).

² Fish cannot establish prejudice for counsel's failure to obtain N.S.'s employment records from McDonalds. It was undisputed that N.S. began his employment with McDonalds after his sixteenth birthday.

³ For this same reason, Fish cannot establish prejudice with her claim that counsel was ineffective for failing to subpoena N.S.'s mother. During the investigation, N.S.'s mother stated that N.S. was working at McDonalds when "all this happened" and also that it happened "after the trouble with the bicycles." Appellant's App. pp. 426-27. Moreover, Fish waived this claim by failing to raise it in her petition for post-conviction relief. See Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006), trans. denied.

For all of these reasons, we conclude that Fish cannot establish prejudice from trial counsel's deficient performance. The trial court therefore properly denied her petition for post-conviction relief.

Affirmed.

BAKER, C.J., and BROWN, J., concur.