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IN THE COURT OF APPEALS OF INDIANA

A.T.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 64A03-1010-CR-539
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause Nos. 64C01-0902-JD-154 and 64D02-0907-FD-7331

December 28, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

A petition was filed in Porter Circuit Court alleging that A.T. was a delinquent child for committing acts that would constitute criminal offenses if committed by an adult. A.T., who was nearly eighteen years old, was waived into adult court. He was subsequently convicted of three Class D felonies, and the Porter Superior Court ordered A.T. to serve an aggregate four and one-half year sentence in the Department of Correction. A.T. raises one issue on appeal: whether he received ineffective assistance of trial counsel during the waiver proceedings. Concluding that A.T.'s trial counsel was not ineffective, we affirm.

Facts and Procedural History

On February 6, 2009, a petition alleging that A.T. was a delinquent child was filed in Porter Circuit Court. Specifically, the petition alleged that seventeen-year-old A.T. committed several acts that would constitute three counts of Class D felony sexual battery, Class D felony criminal confinement, Class A misdemeanor public indecency, Class B misdemeanor criminal recklessness, and Class B misdemeanor disorderly conduct if committed by an adult. The charged acts were allegedly committed between November 1, 2008 and February 6, 2009.

The State filed a petition to waive A.T. from juvenile court, and a hearing was held on the petition on June 8, 2009, approximately three and one-half months before A.T.'s eighteenth birthday. After the hearing, on July 16, 2009, the trial court entered meticulous findings of fact and conclusions of law, which provide in pertinent part:

> 5) The Court finds consistent with the evidence, supported by corroborative testimony of B.W., A.V., A.A., and A.B., that there is probable cause to believe that [A.T.] did . . . touch several female passengers on their legs and

breasts on multiple occasions, attempt to reach up the skirt of one female passenger on at least one occasion and attempt to put his face in the groin of another female on at least one occasion while riding Portage High School bus number eighty-two. Specifically, the Court finds consistent with the evidence, supported by the testimony of B.W., that there is probable cause to believe that [A.T.] did . . . touch a female passenger on the inner thigh and breasts, sliding his hand on the victims [sic] body over her clothes while the victim tried to push him away. The Court finds consistent with the evidence that there is probable cause to believe that when this incident occurred, [A.T.] was uninvited into the victim's area on Portage High School bus number eighty-two. The Court finds consistent with the evidence supported by the testimony of A.B. and A.A. there is probable cause to believe that [A.T.] committed these acts without the consent of the victims involved, and the victims submitted to such advances out of fear of retaliation by the juvenile. The Court finds consistent with the evidence supported by the testimony of A.B. and W.A. that there is probable cause to believe that [A.T.] made statements to said victims regarding his desire to have sexual relations with them, and on at least one occasion one of the victims witnessed that the juvenile was aroused when he asserted his desire to have sexual relations with her.

6) The Court finds consistent with the evidence, supported by the testimony of A.B., there is probable cause to believe that [A.T.] did on at least one occasion during the period of November 1, 2008 and February 6, 2009, state to a female passenger "You're going to come to my house," while proceeding to restrain the female by using his legs to trap the victim's leg, preventing her from exiting Portage High School bus number eighty-two for a period of roughly five minutes. The Court finds consistent with the evidence that there is probable cause to believe that the victim's statements "let me go" and "I have to get off the bus" indicate that the victim was restrained without her consent.

7) The Court finds consistent with the evidence, supported by the testimony of A.A., there is probable cause to believe that [A.T.] did on at least one occasion . . . appear in a state of nudity by exposing his genitals while present at her residence. In addition, the Court finds consistent with the evidence indicating a pattern of sexually oriented behavior, that there is probable cause to believe that [A.T.] did appear in said state of nudity with the intent to arouse the sexual desires of himself or the alleged victim. The Court finds support for this pattern of behavior in the evidence, supported by the testimony of W.A., that [A.T.] did, on at least one other occasion during the period of November 1, 2008 and February 6, 2009, expose his genitals during a physical education class at Portage High School.

8) The Court finds consistent with the evidence, supported by the testimony of A.A., there is probable cause to believe on or about the 3rd of February,

2009, [A.T.] did recklessly, knowingly or intentionally perform an act which created substantial risk of bodily injury to all riders on Portage High School bus number eighty-two by spraying Axe body spray on a piece of paper and lighting it on fire with a lighter while the bus was in motion.
9) The Court finds consistent with the evidence, supported by the testimony of B.W., there is probable cause to believe that [A.T.] did on at least one occasion during the period of November 1, 2008 to February 6, 2009, recklessly, knowingly, or intentionally engage in fighting or tumultuous conduct with a female passenger and her brother while riding Portage High School bus eighty-two.
10) The Court finds consistent with the aforementioned facts as well as the corroborative testimony of W.A., Officer Troy Williams and Probation Officer Erik Shock, that [A.T.] is charged with acts that are part of a repetitive pattern of delinquent acts. Acts constituting repetitive acts need not have been referred to juvenile court, nor must there have been adjudications of delinquency in those acts. [Citation omitted]. Rather, the State need only establish by a preponderance of the evidence that the child has engaged in a pattern of delinquent acts. []
11) Specifically, the Court finds consistent with the evidence, supported by the testimony of W.A. there is probable cause to believe that [A.T.] did on at least one occasion during the period of November 1, 2008 and February 6, 2009, expose his genitals to several students during a physical education class at Portage High School. The Court also finds that there is probable cause to believe [A.T.] did on at least one occasion during the period of November 1, 2008 and February 6, 2009, touch the breast of a female student during a physical education class at Portage High School.
12) The Court finds consistent with the evidence [A.T.] was disciplined by school administrators on two occasions: once for touching the buttocks and breast of a female on February 26, 2008 and again for touching another female on the buttocks on April 17, 2008.
13) The Court finds consistent with the evidence, supported by the testimony of Probation Officer Erik Shock, that the Porter County Juvenile Probation Department received numerous referrals for misconduct by [A.T.] including theft, criminal conversion, run away, and indecent exposure. The Court finds consistent with the evidence, supported by the testimony of Probation Officer Erik Shock, [A.T.] has also received numerous infractions while serving time in the Porter County Juvenile Detention Center.
14) The Court finds consistent with the evidence [A.T.] is beyond rehabilitation under the juvenile justice system. Specifically, the Court finds consistent with the evidence, supported by the testimony of Probation Officer Erik Shock, the continued pattern and increasing severity of the acts

allegedly committed by [A.T.] indicate rehabilitation under the juvenile system has thus far been unsuccessful.

15) The Court finds that [A.T.'s] performance in high school is an indication he lacks the motivation to complete his rehabilitation under the juvenile system. He has earned minimal credits toward obtaining his high school diploma and was at the bottom of his class prior to his expulsion in 2009. These facts suggest a lack of commitment necessary to achieve success in a system with rules. His behavior is not conducive to successful rehabilitation under the juvenile justice system.

16) The Court finds on September 20, 2009, [A.T.] will reach the age of eighteen, making him ineligible for many of the programs necessary for effective rehabilitation under the juvenile justice system. Once eighteen, he will no longer be eligible for placement in a residential facility, acceptance into boy's school or placement in the Porter County Juvenile Detention Center. The lack of these programs significantly impedes the ability of the juvenile justice system to rehabilitate juveniles by removing consequences that are essential to the enforcement of ordered probation. Once eighteen, the responsibility to remain committed to rehabilitation would be left to the juvenile. Based on the seriousness of the acts charged, the evidence indicating the juvenile's resistance to rule based systems, and the limited programs available after his eighteenth birthday, the Court finds that the juvenile justice system can no longer serve the needs of [A.T.]

17) The Court finds consistent with the testimony of all of the witnesses, it is in the best interest of the safety and welfare of the community that [A.T.] stand trial as an adult. In determining the best forum for trying a juvenile, the judge must balance the juvenile's welfare with the best interests of society in light of particular circumstances presented by each case. *Massey v. State*, 371 N.E.2d 703, 705-06 (1978); Clemons v. State, 317 N.E.2d 859, 862-63 (1974) (holding that "Unlike a typical criminal action, juvenile waiver proceedings vests the judge with a wide amount of discretion in making his determination. In his decision making, the juvenile judge does not simply deal with a specific factual incident in the accused's life as does a criminal court judge, but rather the juvenile judge must consider the juvenile's past, his future, his mind, and his acts and then balance these factors against the safety, needs and demands of society.")[.]

18) The State of Indiana has an interest in the protection of children, especially in an education setting. Such an interest includes making sure that students are in the best possible environment to learn. Children who are consistently harassed coming to and from school are not likely to be in a position to focus on learning. Thus, the State's interest in protecting the well-being of children requires that the courts be able to exact judgments that not only promote the best possible rehabilitation for the offenders, but prevent and deter future acts of harm to students. In this particular case, the

State's interests would not be best served by allowing [A.T.] to remain in the juvenile justice system. The Court finds that once eighteen, the enforcement measures meant to keep juvenile offenders out of the community are no longer available, creating the potential for future offenses and further endangering the safety of the community. The welfare of the juvenile will not be served because the juvenile system will lack the necessary consequences to keep the juvenile on the proper course toward rehabilitation. The frequency and severity of the offenses herein demonstrate that [A.T.] will require significant rehabilitation which cannot reasonably be completed prior to his eighteenth birthday. After balancing the juvenile's welfare against the interests of society, it is the opinion of the Court that it is in the best interests of the safety and welfare of the community that [A.T.] stand trial as an adult.

19) Based on the overwhelming corroborative testimony provided at the Waiver Hearing, the Court finds that the witnesses as observed were extremely credible and support the evidence of the allegations contained in the Prosecutor's Petition for Waiver of Juvenile Jurisdiction.

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21) The Court finds the facts and circumstances of this matter were within the officer's knowledge, based upon reasonably trustworthy information, and sufficient to warrant a reasonable man's belief that a crime had been committed, there is probable cause to believe that [A.T.] committed the acts to which he is charged.

22) The Court finds pursuant to the evidence and testimony, the acts with which [A.T.] has been charged are part of a repetitive pattern of delinquent acts.

23) The Court finds based on the evidence and testimony, [A.T.] is beyond rehabilitation under the juvenile justice system.

24) The Court finds consistent with the evidence that it is in the best interest of the safety and welfare of the community that [A.T.] stand trial as an adult.

25) The Court finds in observing the witnesses in court and listening to their accounts of the despicable acts alleged in this matter, the victims involved suffered a tremendous amount of distress and fear due to their belief that they would be forced to endure continual acts of bullying and harassment without any foreseeable justice in sight. These emotions clearly impacted the ability of the victims to concentrate while in school, thus adversely affecting their education. The hostile environment in which the victims were placed will no doubt affect the way in which they view social interactions in the future.

Appellant's App. pp. 52-58. The Court then ordered that jurisdiction over the case be waived to Porter Superior Court.

After the charges were filed against A.T. in Porter Superior Court, a jury trial commenced on August 16, 2010. A.T. was found guilty of two counts of Class D felony sexual battery and Class D felony criminal confinement. The trial court ordered him to serve consecutive sentences of one and one-half years for each Class D felony conviction, for an aggregate sentence of four and one-half years. A.T. was also found guilty of Class A misdemeanor public indecency and Class B misdemeanor criminal recklessness. He was ordered to serve one year and six months respectively for those convictions, to be served concurrent to each other and to the sentences imposed for the Class D felony convictions. A.T. now appeals.

Discussion and Decision

A.T. argues he was subjected to ineffective assistance of trial counsel during the waiver proceedings. Initially, we observe that A.T. has raised this claim on direct appeal of his conviction, but a post-conviction proceeding is generally the preferred forum for adjudicating claims of ineffective assistance of counsel because the presentation of such claims often requires the development of new evidence not present in the trial record. See Woods v. State, 701 N.E.2d 1208, 1219 (Ind. 1998). If a defendant chooses to raise a claim of ineffective assistance of counsel on direct appeal, "the issue will be foreclosed from collateral review." Id. at 1220. This rule should "likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal." Id. When a claim of ineffective assistance of counsel is based solely on the trial record, as it

is on direct appeal, "every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight[,]" and "[i]t is no surprise that such claims almost always fail." Id. at 1216 (internal quotes and citation omitted).

A defendant must satisfy two components to prevail on an ineffective assistance claim. Smith v. State, 822 N.E.2d 193, 202–03 (Ind. Ct. App. 2005), trans. denied. He must demonstrate both deficient performance and prejudice resulting from it. Strickland v. Washington, 466 U.S. 668, 687 (1984). Deficient performance is representation that fell below an objective standard of reasonableness, wherein counsel has "committ[ed] errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." Brown v. State, 880 N.E.2d 1226, 1230 (Ind. Ct. App. 2008), trans. denied. We assess counsel's performance based on facts that are known at the time and not through hindsight. Shanabarger v. State, 846 N.E.2d 702, 709 (Ind. Ct. App. 2006), trans. denied. "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." Ritchie v. State, 875 N.E.2d 706, 714 (Ind. 2007). Prejudice occurs when a reasonable probability exists that "but for counsel's errors the result of the proceeding would have been different." Brown, 880 N.E.2d at 1230. We may dispose of claims upon failure of either component. Id.

Indiana Code section 31-30-3-2 provides that the juvenile court may waive jurisdiction upon finding that:

> (1) the child is charged with an act that is a felony:
>
> (A) that is heinous or aggravated, with greater weight given to acts against the person than to acts against property; or

(B) that is a part of a repetitive pattern of delinquent acts, even though less serious;
(2) the child was at least fourteen (14) years of age when the act charged was allegedly committed;
(3) there is probable cause to believe that the child committed the act;
(4) the child is beyond rehabilitation under the juvenile justice system; and
(5) it is in the best interests of the safety and welfare of the community that the child stand trial as an adult.

A.T. argues that his trial counsel was ineffective during the waiver proceedings because 1) counsel should have "establish[ed] a rehabilitation plan within the time frame prior to his 18[th] birthday taking into account needed behavioral modification and establish[ed] his lack of danger to the community;" 2) counsel should have had him evaluated to determine his rehabilitative needs and perform a risk assessment, developed a treatment plan, and presented a safety plan to the trial court; 3) counsel should have tried to "obtain his release so that treatment and progress could be made prior to the waiver hearing;" 4) counsel should not have agreed to delay the waiver hearing due to A.T.'s approaching eighteenth birthday; 5) counsel should have obtained expert psychological testimony to support his argument that A.T. was simply engaged in immature behavior; 6) counsel should have called character witnesses in A.T.'s defense[1]; and 7) counsel should have suggested an appropriate dispositional order as an alternative to waiver. Appellant's Br. at 15-16.

[1] A.T. argues that trial counsel should have called A.T., his parents, fellow students, teachers, and employers that might have positive things to say about A.T. A.T. also suggests that trial counsel should have elicited testimony from "detention officers to mitigate and explain the behavior write-ups." Appellant's Br. at 19. But there is no evidence in the record that would suggest that testimony from these individuals would have aided A.T. during the waiver proceedings.

A.T.'s arguments are merely suggestions of other strategies and tactics trial counsel might have employed during the waiver hearing. But, as we have repeatedly stated, "[e]vidence of isolated poor strategy, inexperience or bad tactics will not support a claim of ineffective assistance." See Flanders v. State, 955 N.E.2d 732, 739 (Ind. Ct. App. 2011).

Moreover, as A.T. notes in his brief, time was of the essence as A.T.'s eighteenth birthday was rapidly approaching. Had trial counsel obtained the evaluations and expert testimony that A.T. now suggests, it is likely that the waiver hearing would have been further delayed. There is also no evidence in the record that would establish what steps trial counsel did or did not take to evaluate A.T.'s rehabilitative needs.

A.T. generally suggests that trial counsel should have prepared an alternative dispositional plan, rather than the only proposed disposition of placement in the Boys School. It is reasonable to assume that A.T.'s trial counsel was attempting to prevent his placement in the Boys School. Trial counsel also attempted to elicit testimony that there were juvenile facilities and programs that might meet A.T.'s needs at least until his eighteenth birthday.

From our review of the record, it appears that A.T.'s trial counsel's strategy was to argue that the felony charges lacked probable cause, and that his client was simply immature and engaged in horseplay. As the State notes in its brief, trial counsel's strategy was to "undermine the court's confidence in the completeness of the evidence itself." Appellee's Br. at 10. To that end, trial counsel extensively and thoroughly cross-examined the State's witnesses.

Finally, there is simply no evidence in the record that would support the conclusion that had trial counsel done as A.T. suggests, that A.T. would not have been waived from juvenile court. Given the trial court's findings concerning A.T.'s offenses, A.T.'s age of nearly eighteen years, and the lack of juvenile rehabilitative programming available after his eighteenth birthday, it is reasonable to conclude that the outcome of the waiver proceeding would have been the same. For all of these reasons, we conclude that A.T.'s trial counsel was not ineffective during the waiver proceedings.

Affirmed.

BAILEY, J., and CRONE, J., concur.