



Daniel Demaree v. State of Indiana

2020 | Cited 0 times | Indiana Court of Appeals | March 10, 2020

MEMORANDUM DECISION

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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I N T H E C O U R T O F A P P E A L S O F I N D I A N A

Daniel Demaree, Appellant-Petitioner,

v.

State of Indiana, Appellee-Respondent. March 10, 2020 Court of Appeals Case No. 19A-PC-861
Appeal from the Morgan Superior Court The Honorable Stephenie Lemay- Luken, Special Judge
Trial Court Cause No. 55D01-1704-PC-721

Bartreau, Senior Judge. Statement of the Case

[1] Daniel Demaree appeals the denial of his petition for post-conviction relief. We
affirm.

Issue

[2] Demaree raises numerous issues, only one of which is preserved for our review:
whether the post-conviction court erred in rejecting his claim of ineffective
assistance of trial counsel.



Daniel Demaree v. State of Indiana

2020 | Cited 0 times | Indiana Court of Appeals | March 10, 2020

Facts and Procedural History

[3] The circumstances underlying convictions are as follows:

Demaree and his wife, Tracy, had three children: Ba.D., a girl born on September 4, 1997, Br.D., a girl born on February 22, 2001, and a boy, L.D. Demaree began touching Ba.D. inappropriately when she was about nine or ten years old. He was a truck driver, and the first time he touched her, they were

The first time Demaree molested Ba.D. at home, she was in third grade. He pulled Ba.D. into his bedroom and made her take off her clothes and get on the floor, face down, with her legs spread open. Demaree's pants were unzipped, and Ba.D. felt something Ex. 12A p. 44 45. Afterwards, she felt something cold and wet on her Ba.D. was unable Id. at 49.

Demaree continued to touch Ba.D. on many occasions. Most of the time, he touched her Tr. p. 362, 365 66. On one occasion, he touched her vagina with his penis and moved his penis around. More than once, Demaree touched the inside of Ba.D.'s vagina with his tongue, causing her pain. These incidents occurred on the floor in Demaree's bedroom. Before the acts, Demaree put lotion on his penis; afterwards, he always put the rags he used to wipe himself and Ba.D. in the washing machine immediately. The last time Demaree molested Ba.D. was about a month before her eleventh birthday. As a result of the molestations, Ba.D. developed hemorrhoids and a rash.

Ba.D.'s younger sister, Br.D., was usually home when the molestations occurred. Ba.D. knew that Demaree also molested her sister, because Br.D. went to Ba.D. afterwards, crying, and told her what had happened. Demaree touched Br.D. Tr. p. 408 09. He

Id. at 410, 421. These incidents also occurred in Demaree's bedroom.

On occasions, Demaree told the girls that they would have to choose which one would go with him, or he would take both of them. He gave Ba.D. money to do things with him and told her not to tell; he gave Br.D. licorice as a bribe.

Demaree v. State, Cause No. 55A01-1005-CR-295, *1 (Ind. Ct. App. Feb. 10,

2011) (Demaree I). The State charged Demaree with numerous child molesting

related offenses. After a jury trial, the trial court entered judgments of

conviction determining that the jury had found Demaree guilty of five counts of

child molesting, all Class A felonies. The trial court imposed a total sentence of



Daniel Demaree v. State of Indiana

2020 | Cited 0 times | Indiana Court of Appeals | March 10, 2020

120 years. [4] Demaree appealed, challenging the admission of certain evidence and the appropriateness of his sentence pursuant to Appellate Rule 7(B). The Court affirmed . Id. at *4.

[5] On April 5, 2017, Demaree filed a petition for post-conviction relief. He later amended the petition with leave of court, and the State filed a response. The post-conviction court held an evidentiary hearing over several nonconsecutive days. On March 21, 2019, the trial court issued findings of fact, conclusions thereon, and an order denying

Discussion and Decision

1. Standard of Review

[6] Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Rose v. State*, 120 N.E.3d 262, 266 (Ind. Ct. App. 2019), trans. denied. A petitioner bears the burden of establishing an entitlement to relief during post-conviction proceedings. *Pierce v. State*, 135 N.E.3d 993, 1002 (Ind. Ct. App. 2019). The a

right to relief -

Henry v. State, 170 Ind. App. 463, 466, 353 N.E.2d 482, 484 (1976).

[7] -conviction relief faces a rigorous

DeWitt v. State, 755 N.E.2d 167, 169 (Ind. 2001). We will



Daniel Demaree v. State of Indiana

2020 | Cited 0 times | Indiana Court of Appeals | March 10, 2020

not disturb the post- denial of relief unless the evidence is without conflict and leads to but one conclusion, and the post-conviction court

reached the opposite conclusion. *West v. State*, 938 N.E.2d 305, 309 (Ind. Ct.

App. 2010), trans. denied. We accept the post-

unless they are clearly erroneous. *Id.* Further, we consider only the probative evidence and reasonable inferences therefrom that support the post-conviction court's determination, and we will not reweigh the evidence or judge witness credibility. *Id.*

[8] Demaree is proceeding pro se. Pro se litigants without legal training are held to

the same standard as trained counsel and are required to follow procedural

rules. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), trans. denied.

Consequently, pro se litigants must be prepared to accept the consequences for

failing to follow the rules. *Lowrance v. State*, 64 N.E.3d 935, 938 (Ind. Ct. App.

2016), trans. denied.

2. Waiver

[9] In the Statement of the Issues and Summary of the Argument sections of

his abrief, Demaree raises claims pertaining to his 120-year sentence,

ineffective assistance of trial counsel, ineffective assistance of appellate counsel,

and newly discovered 5-8, 19-21. By contrast, the

Argument substantively addresses only his claim

of ineffective assistance of trial counsel.



Daniel Demaree v. State of Indiana

2020 | Cited 0 times | Indiana Court of Appeals | March 10, 2020

[10] We will consider claim of ineffective assistance of trial counsel, but

Demaree has waived his other claims by failure to provide cogent argument supported by citation to authority. See Ind. Appellate Rule 46(A)(8)(a)

(allegations of error must be supported by authorities and the record); see also *Bigler v. State*, 732 N.E.2d 191, 196 (Ind. Ct.

App. 2000) (claim waived because it was presented in one sentence, without argument and citation to authority), trans. denied.

[11]

counsel, we note that prior to and during the evidentiary hearing, he did not ask the post-conviction court to take judicial notice of the trial record or the record on appeal from *Demaree I*.¹ In addition, during the post-conviction hearing he did not attempt to offer documents from the trial record or the record on appeal, or any other documentary evidence, as exhibits. Instead, Demaree, who participated in the hearing by telephone, purported to read from the transcripts while questioning witnesses.

[12] record on appeal from *Demaree I* to the current appeal, but denied his motion to take judicial notice.² We will not review the post-¹

The Chronological Case Summary indicates that Demaree filed a number of documents with the post-conviction court on November 7, 2017, well before the special judge took jurisdiction over this case. During the evidentiary hearing, he did not ask the post-conviction court to take judicial notice of those documents or otherwise seek to authenticate them as exhibits. Also, in Demaree's proposed findings of fact and conclusions of law, which he submitted after the evidentiary hearing had concluded, he asked the post-conviction court to take judicial notice of only one statement in the voir dire transcript.² In his appellate brief, Demaree renews his request for this Court to take judicial notice of the trial transcript and the record from *Demaree I*. We deny his request, using evidence that was not presented to the post-conviction court, so we have



Daniel Demaree v. State of Indiana

2020 | Cited 0 times | Indiana Court of Appeals | March 10, 2020

not considered the appellate record from Demaree I in this appeal.

3. Ineffective Assistance of Trial Counsel

[13] We analyze claims of ineffective assistance of trial counsel according to the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As the Indiana Supreme Court has explained:

First, we require the defendant or petitioner to show that, in light of all the circumstances, the identified acts or omissions of counsel were outside the wide range of professionally competent assistance. This showing is made by demonstrating that counsel's performance was unreasonable under prevailing professional norms. Second, we require the defendant or petitioner to show adverse prejudice as a result of the deficient performance. We will find prejudice when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unreliable.

Emerson v. State, 695 N.E.2d 912, 918 (Ind. 1998) (citations omitted). We do not need to determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiency. *Little v. State*, 819 N.E.2d 496, 501 (Ind. Ct. App. 2004), trans. denied.

[14] *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690, 104 S. Ct. at 2066. Whether a defendant received ineffective assistance of counsel is a fact-sensitive determination requiring review of the original trial record.

Mitchell v. State, 946 N.E.2d 640, 644 (Ind. Ct. App. 2011), trans. denied.

a. Jury Selection

[15] Demaree argues that his trial counsel should have sought to remove several potential jurors from the panel, claiming they demonstrated bias against him.



Daniel Demaree v. State of Indiana

2020 | Cited 0 times | Indiana Court of Appeals | March 10, 2020

Specifically, one of the potential jurors, a schoolteacher, allegedly stated she knew that Demaree brought a gun to school as a youth. Also, two other potential jurors were allegedly married to one another.

[16] Demaree did not submit the jury selection transcript to the post-conviction court during the evidentiary hearing or ask the court to take judicial notice of the transcript. As a result, we are unable to review his claim. See Mitchell, 946 N.E.2d at 645 assistance; Mitchell did not present trial record during post-conviction hearing). In any event, during the post-conviction hearing, 46.

Demaree has failed to demonstrate that the post-conviction court erred on this issue.

b. Conflict of Interest

[17] Demaree claims his trial counsel revealed during jury selection that he could not be impartial given the nature of the case, which established a conflict between counsel and his client. Once again, Demaree did not provide the jury selection transcript to the post-conviction court during the hearing. Further, he did not ask his trial attorney about this issue during the post-conviction hearing. In the absence of any evidence to support his claim, the post-conviction court did not err in rejecting it.

c. Jury Selection Transcript

[18] filed the Notice of Appeal for his direct appeal.

Demaree alleges that when counsel requested a transcript of the trial, he



Daniel Demaree v. State of Indiana

2020 | Cited 0 times | Indiana Court of Appeals | March 10, 2020

explicitly directed the court reporter to not prepare a transcript of the jury selection process. transcript of the trial hindered his appellate counsel and deprived him of his constitutional rights.

[19] Demaree did not submit the Notice of Appeal or the jury selection transcript to the post-conviction court during the hearing or ask the court to take judicial notice of those documents. testified he did not request a jury selection transcript because he out of voir dire. Id. at 35. Counsel made a strategic decision as to what claims were valid, and Demaree has failed to present evidence to establish that decision was deficient. He has failed to demonstrate the post-conviction court erred.

d. Exculpatory Evidence

[20] Demaree claims his trial counsel failed to obtain his mobile phone records and driver log from the prosecutor, and those items would have established that he was out of the state on the date that one of the molestations was alleged to have occurred. While it is undisputed that effective representation requires adequate pretrial investigation and preparation, it is well settled that we should resist judging an attorney s performance with the benefit of hindsight. McKnight v. State, 1 N.E.3d 193, 200 (Ind. Ct. App. 2013). As a result, counsel requires going beyond the trial record to show what investigation, if undertaken, would have produce Id. at 201.



Daniel Demaree v. State of Indiana

2020 | Cited 0 times | Indiana Court of Appeals | March 10, 2020

[21] Demaree did not offer the phone records or driver log as exhibits at the post-conviction hearing. Without them, the post-conviction court, and this Court, are unable to determine whether the outcome of the trial would have changed if counsel had timely obtained those documents for use at trial. Demaree has failed to establish reversible error.

e. Tran

[22] For his final substantive point of error, 3 Demaree claims his trial counsel should have objected to the admission into evidence of a He claims that during the interview, the child identified a date when Demaree molested her, but his phone records and driver log would have demonstrated that he was out of the state on that

3 As an additional claim of ineffective assistance of trial counsel, Demaree also argues, in passing, that trial counsel should have sought to prove cogent argument or citation to authority in support of this argument, and it is waived. Ind. Appellate Rule 46(A)(8)(a). date. As a result, Demaree claims the transcript would not have been admitted,

if counsel had objected to it, because it contained falsehoods. When a

petitioner alleges ineffective assistance of counsel for failure to raise an

objection, the petitioner must demonstrate that, had a proper objection been

had no choice but to sustain the objectio McAfee v. State, 459 N.E.2d 1186, 1188 (Ind. 1984).

[23] Once again, Demaree did not submit the phone records, driver log, or transcript to the post-conviction court, thereby failing to provide any evidence to support his claim. Further, even if Demaree had provided the missing documents to the post-conviction court, and even if we were to assume for the sake of argument



Daniel Demaree v. State of Indiana

2020 | Cited 0 times | Indiana Court of Appeals | March 10, 2020

that statements in the interview transcript were inconsistent with information in

any inconsistency would not

necessarily have resulted in the exclusion of the transcript from evidence.

[C]onflicts [in the evidence presented] serve as a basis for attacking the

credibility of the witnesses and the weight to be given their testimony, resolution of such conflicts is a question for the jury. *Taylor v. State*, 171 Ind.

App. 476, 477, 358 N.E.2d 167, 169 (1976). The trial court thus may have

allowed the interview transcript into evidence and allowed the jury to resolve

any inconsistencies. We cannot conclude that the trial court would have had

no choice but to make. Demaree has failed to establish reversible error. Conclusion

[24] For the reasons stated above, we affirm the judgment of the trial court.

[25] Affirmed.

Baker, J., and Brown, J., concur.

