

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
MAY SESSION, 1995

**FILED**

September 6, 1995

**Cecil Crowson, Jr.**  
Appellate Court Clerk

**ESTES ANDERSON,** )  
 )  
Appellant )  
 )  
vs. )  
 )  
**STATE OF TENNESSEE,** )  
 )  
Appellee )

No. 02C01-9501-CR-00015

SHELBY COUNTY

Hon. **W. Fred Axley**, Judge

(Post-Conviction)

**For the Appellant:**

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**For the Appellee:**

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**David G. Hayes**  
Judge

## **OPINION**

The appellant, Estes Anderson, appeals as of right from a judgment entered on July 20, 1994, by the Honorable W. Fred Axley, Judge of the Criminal Court of Shelby County, denying post-conviction relief. The appellant presents only one issue for our review: whether the trial court erred by finding that the appellant was not deprived of the effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and Article I, Section VIII of the Tennessee Constitution.

After a review of the record, we affirm the post-conviction court's dismissal of the petition.

### **I. Facts**

On May 14, 1992, after a trial by jury, the appellant was found guilty of aggravated rape. On June 17, 1992, the appellant was sentenced to twenty years in the state penitentiary. State v. Anderson, No. 02C01-9206-CR-00146 (Tenn. Crim. App. at Jackson, Sept. 15, 1993). The proof adduced at trial and summarized by this court on direct appeal developed the following facts. On October 12, 1990, the victim, who was six-years-old, was at home with her deaf mother, the appellant Anderson, and Arthur Bradford, who was asleep on the couch. The victim's mother left for thirty minutes to take a bath. The victim testified that, during this time, the appellant penetrated her with his penis. When the victim's mother returned, she saw the appellant pulling up and zipping his pants. She asked the victim to tell her what had happened, but the victim who was crying and scared was unable to do so, stating, "he told me not to tell." The victim eventually related to her mother what had happened.

The victim's mother was unable to report the incident until the Interpretive Service Center opened the following Monday. With her daughter present, the mother explained in sign language to the interpreter what had happened to her daughter. The victim was then taken to the Rape Crisis Center. A nurse practitioner examined the victim and observed two tears in the hymen and a "green-yellow discharge" believed to be related to venereal disease. A doctor's examination confirmed that the victim had contracted gonorrhea.

On direct appeal, this court concluded that there was sufficient evidence for the jury to have found the appellant guilty of aggravated rape. See Anderson, No. 02C01-9206-CR-00146. On November 3, 1993, appellant filed a *pro se* petition for post-conviction relief. He was appointed counsel on December 6, 1993. The petition was amended to allege ineffective assistance of trial counsel based upon counsel's failure to meet with appellant in preparation for trial; counsel's failure to obtain discovery; counsel's failure to investigate appellant's claims; counsel's failure to call potential witnesses; counsel's failure to explain the plea bargaining process; and counsel's failure to conduct a vigorous defense because she was afraid of the trial judge. An evidentiary hearing was conducted by the post-conviction court on April 7, 1994.

At the hearing, the appellant testified that he had never been arrested before the aggravated rape charge. He further testified that he had advised his attorney that he did not want to plead guilty because he was not guilty. He gave her the names of three witnesses, and the name of his girlfriend. He met with his attorney four or five times while he was in jail, but she did not discuss with him any information that she had received from the state, nor did she mention a medical report. She did not discuss jury selection with him, nor did she prepare him to testify. He was not informed prior to trial that the victim had been infected with gonorrhea. If he had known, the appellant stated that he would have

obtained a medical checkup which would have proven he did not have gonorrhea.

On cross-examination by the state, the appellant admitted that although he had never been involved in a jury trial, he had been arrested for shoplifting, DUI and child support. He also testified that had Arthur Braddock been called, he would have testified that appellant was not in the house on the day of the incident.

The appellant's trial attorney testified that she had six and one-half years experience as a defense attorney. She also testified that it was difficult for her to communicate with the appellant. The appellant made bond without advising her of this fact or of his whereabouts, he failed to respond to her letters, and failed to appear at his scheduled trial. This resulted in the forfeiture of his bond and the issuance of a *capias* for his arrest. She stated that while she respected the trial judge, she was not afraid of him. Counsel advised that she met with the appellant on at least six different occasions. She testified that the state never made an offer of less than fifteen years and that the appellant rejected that offer. Trial counsel further testified that she filed the standard discovery motions and discussed the information obtained through discovery procedures with the appellant. Counsel also stated that she informed the appellant that the victim had contracted gonorrhea allegedly as a result of the rape. Counsel admitted that she did not know how she could have ascertained if the appellant had ever had gonorrhea, but she added that the appellant testified at trial that he had never had gonorrhea and the state never contested this fact.

## **II. Ineffective Assistance**

The appellant raises only one issue in his brief: ". . . whether the evidence preponderates against the [post-conviction] [c]ourt's finding that [appellant] was not denied effective assistance of counsel." Initially, we are compelled to note that this issue may be treated as waived because it does not conform to Rule 27(a)(4), Tenn. R. App. P.. Harvey v. State, 749 S.W.2d 478, 479 (Tenn. Crim. App. 1987), perm. to appeal denied, (Tenn. 1988); accord Tortorich v. Erickson, 675 S.W.2d 190, 191 (Tenn. App.), perm. to appeal denied, (Tenn.1984) ; State v. Lewis, No. 2 (Tenn. Crim. App. at Jackson, Dec. 23, 1987), perm. to appeal denied, (Tenn. 1988) (Jones, J., concurring); see also Tenn. R. App. P. 27(a)(6-7). The "[Tennessee Rules of Appellate Procedure] do not contemplate that an appellant may submit one blanket issue as to the correctness of a judgment and thereby open the door to argument upon various issues which might affect the correctness of the judgment." Lewis, No. 2 [(quoting Leeson v. Chernau, 734 S.W.2d 634, 637 (Tenn. App.), cert. denied, (Tenn. 1987)]. It is essential that the appellant state with particularity the grounds upon which he seeks relief under the challenged ineffectiveness claim.

Although various ineffective assistance of counsel claims are presented in the appellant's brief, we are able to identify only one area of ineffectiveness which is supported by argument. Tenn. R. Crim. P. 10(b); Tenn. R. App. P. 27(a)(4). The appellant contends that counsel was ineffective for not properly investigating to determine whether the appellant had gonorrhea on the date of the rape. Appellant argues that medical records could have established that he did not have gonorrhea on this date. This information, he contends, would have supplied unbiased evidence of his innocence. In view of the fact that evidence on this issue was presented at the post-conviction hearing and that it is supported by argument, we elect to review this challenged ineffectiveness.

In determining whether the appellant received effective assistance of counsel, the reviewing court must look to whether the performance of trial

counsel was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To reverse a conviction on these grounds, the appellant must show by a preponderance of the evidence, Taylor v. State, 875 S.W.2d 684 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994), that counsel's representation was deficient and that there was prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). Counsel's representation is deficient if the errors were so serious as to deprive the appellant of representation guaranteed him by the Sixth Amendment. Cox v. State, 880 S.W.2d 713, 717 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). The deficient representation becomes prejudicial when the appellant is deprived of a fair trial with a reliable result. Id. Even if there are attorney errors, the appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" in order to succeed on an ineffectiveness claim. Strickland, 466 U.S. at 693, 103 S.Ct. at 2067.

On July 20, 1994, the post-conviction court entered its findings of facts and conclusions of law. The court found that the appellant's "credibility [was] minimal." In addition to this general conclusion, the court added that trial counsel and appellant met a number of times in preparation for trial, that counsel's efforts were reasonable in preparing a defense, and that counsel did obtain and did attempt to discuss discovery materials obtained with the appellant. Moreover, the post-conviction court found that counsel did interview all named witnesses (noting that unknown witnesses cannot be interviewed), that counsel was not afraid of the judge, that appellant testified in his own defense, and that counsel properly objected to matters before the trial court. Finally, the court noted that it was a tactical decision on the part of counsel not to pursue the issue of whether the appellant had gonorrhoea in the past.

The post-conviction court further found that the appellant had not established a factual basis on which relief could be granted. The court stated, "[t]here has been no evidence presented at the evidentiary hearing that could demonstrate that the outcome of the trial would have been different." The burden was on the appellant in the trial court to prove by a preponderance of the evidence factual allegations that would entitle him to relief by a preponderance of the evidence. Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988). On appeal, we are bound by the post-conviction court's findings of facts unless we conclude that the evidence in the record preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1990).

The record clearly supports the post-conviction court's findings. Although trial counsel did not pursue the venereal disease issue, no proof was presented by the state at trial on this issue except the fact that the victim had gonorrhea. At trial, the appellant testified that he did not have gonorrhea, and this was not refuted by the state. The post-conviction court noted,

. . . [trial counsel's] first knowledge of the victim's contracting gonorrhea came almost two years after the incident. There were . . . many opportunities for appellant to have his condition treated in the interim. There would have been no way to determine if [appellant] in fact had gonorrhea at the time of the incident other than to ask [appellant]. This was done on redirect. Proof of [appellant] being without gonorrhea would only prove that he did not have it at the time of trial.

Assuming for the sake of argument that trial counsel was deficient in failing to pursue the issue of whether the appellant had gonorrhea on the date of the incident, this fact would not per se support an ineffectiveness claim as it is also necessary to establish that prejudice resulted from the deficient performance. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. Moreover, we note that the medical records, which the appellant now contends were not produced

at his trial, were equally available for production at his post-conviction hearing. However, they were not so produced. The record before us is void of any proof which supports the appellant's factual allegations that he was not infected with gonorrhea on the date in question. This burden rests with the appellant. Thus, the appellant has failed to carry his burden in showing that his defense was prejudiced.

We agree with the post-conviction court in finding that the appellant has failed to establish facts on which relief can be granted. Moreover, we conclude that the appellant's claim is without merit. He has not carried his burden of establishing either deficient performance or prejudice. The judgment of the post-conviction court dismissing the petition is affirmed.

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**David G. Hayes, Judge**



CONCUR:

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**John H. Peay, Judge**

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**William M. Barker, Judge**