

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

APRIL SESSION, 1996

FILED
August 2, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

DONALD RAY HARRIS,)
)
Appellant,)
)
VS.)
)
STATE OF TENNESSEE,)
)
Appellee.)

C.C.A. NO. 02C01-9508-CC-00208

MADISON COUNTY

HON. JOHN FRANKLIN MURCHISON
PRESIDING JUDGE

(Post-Conviction)

FOR THE APPELLANT:

JAN R. PATTERSON
225 West Baltimore Suite B
Jackson, TN 38301

GEORGE MORTON GOOGE
District Public Defender for
the 26th Judicial District
227 West Baltimore
Jackson, TN 38301

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

MICHELLE L. LEHMANN
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243

JERRY WOODALL
District Attorney General

DONALD ALLEN
Assistant District Attorney
P. O. Box 2825
Jackson, TN 38302

OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Donald Ray Harris appeals the trial court's denial of his petition for post-conviction relief. On September 12, 1990, a Madison County Circuit Court jury convicted Appellant of one count of aggravated sexual battery. As a Range I standard offender, he received a sentence of ten years in the Tennessee Department of Correction. On December 31, 1991, this Court affirmed the judgment of the trial court. On June 3, 1994, Appellant filed a petition for post-conviction relief in the Madison County Circuit Court, alleging that he received ineffective assistance of counsel in violation of his Sixth Amendment rights. Following an evidentiary hearing, the trial court denied his petition. In this appeal as of right, Appellant presents the following issue: whether his trial counsel provided effective assistance.

After a review of the record, we affirm the judgment of the trial court.

In a petition for post-conviction relief, the petitioner must establish his or her allegations by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court are conclusive on appeal unless the evidence preponderates against those findings. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). In reviewing a denial of collateral relief, this Court is bound by the following well-established rules of appellate review:

(1) this court cannot reweigh or reevaluate the evidence or substitute its inferences for those drawn by the trial judge, (2) questions concerning the credibility of witnesses, weight and value to be given their testimony, and factual issues raised by evidence are resolved by the trial judge, and (3) on appeal, the petitioner has

the burden of demonstrating why the evidence contained in the record preponderates against the judgment entered by the trial judge.

Taylor v. State, 875 S.W.2d 684, 686 (Tenn. Crim. App. 1993) (citing Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990)).

When a petition for post-conviction relief alleges ineffective assistance of counsel, the petitioner has the burden of establishing (1) deficient representation and (2) prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686 (1984); Barr v. State, 910 S.W.2d 462, 464 (Tenn. Crim. App. 1995). Deficiency occurs when counsel provides assistance that falls below the range of competence demanded of criminal attorneys. Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim App. 1991). Prejudice is the reasonable likelihood that, but for deficient representation, the outcome of the proceedings would have been different. Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994).

Appellant alleges that his trial counsel was ineffective in preparing his defense and in advising him not to testify at trial. Only Appellant and his trial counsel testified at the post-conviction hearing. Following the hearing, the trial court denied Appellant's petition, finding that he had not suffered any abridgement of his constitutional rights. The trial court ruled that the services and advice provided by the trial counsel did not fall below the range of competence demanded by attorneys and that nothing that he did or failed to do would have likely changed the outcome of the trial. Furthermore, the trial court observed that the trial counsel "did an excellent job" and that "his performance was above that . . . of the average attorney."

On appeal, Appellant maintains that an adequate investigation would have revealed that his wife had framed him by “brainwashing” her son into making accusations of molestation against him. The trial counsel testified that, until approximately two weeks before the trial, Appellant claimed that he would reconcile with his wife and that her son would recant his accusations. When it became evident that a reconciliation was not forthcoming, the trial counsel developed the defense theory that, under Tennessee case law, the child victim was actually an accomplice because he freely involved himself in a sexual act with Appellant, and, as an accomplice, his accusations required corroboration. The trial counsel believed that, due to the unusual nature of the case, the State would fail to corroborate the offense. Indeed, as a result of this defense, one count of aggravated rape was dismissed.

Appellant claims that he had “hundreds” of additional witnesses who would testify on his behalf but that his trial counsel failed to interview them. The trial counsel testified that Appellant never provided him with any names. The trial counsel further testified that the only witnesses specifically discussed were Appellant’s former wife, his parents, and his brother. The former wife was prepared to testify that she had experienced no problems with Appellant during their marriage; however, due to pressure from her current husband, she requested that she not be made to testify. Appellant agreed, and his former wife did not testify. The trial counsel advised against the appearance of any of Appellant’s family members, concluding that their testifying would allow the State to pursue other incidents of intra-family molestation. In light of these “family problems,” we cannot conclude counsel’s performance was deficient.

Appellant submits that he had witnesses waiting in the hall on the day of trial but that his trial counsel failed to call any of them. The trial counsel stated that he had no knowledge of any possible witnesses in the hall on the day of trial. Even assuming that witnesses were waiting in the hall, there is no evidence that the testimony of these witnesses would have been favorable to Appellant had it been a part of his defense. As the trial court noted, Appellant makes broad and general allegations, failing to offer proof of specific witnesses who would have testified, what they would have said, and how he was prejudiced as a result of their absence. No prejudice is demonstrated where a post-conviction petitioner fails to show that potential defense witnesses, who were not called by trial counsel, would have testified favorably. See Taylor v. State, 875 S.W.2d 684, 687 (Tenn. Crim. App. 1994).

Appellant argues that he wanted to testify but conceded this decision to his trial counsel. The trial counsel responded that he advised against Appellant testifying because of a tape-recorded statement that he made to the Department of Human Services prior to trial. In this statement, Appellant discusses allowing his children under the bed covers while he and his wife were nude, showering with his wife and children, and comparing genital sizes with his children. A reviewing court must defer to an attorney's trial strategy or tactical choices so long as they are informed and based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982); Vermilye v. State, 754 S.W.2d 82, 85 (Tenn. Crim. App. 1987). Here, the trial counsel made a sound tactical decision based upon his belief that the State would use the statement during cross examination and that the jury would not accept Appellant's "parenting concepts." Under the circumstances, this tactic was advisable.

Appellant has failed to present evidence that preponderates against the finding of the trial court. The record clearly reveals that Appellant's trial attorney rendered effective assistance of counsel.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

PAUL G. SUMMERS, JUDGE