

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1996 SESSION

FILED

November 8, 1996

**Cecil W. Crowson
Appellate Court Clerk**

JEFF ARWOOD,

*

C.C.A. # 01C01-9511-CC-00361

Appellant,

*

LINCOLN COUNTY

VS.

*

Honorable Charles Lee, Judge

STATE OF TENNESSEE,

*

(Post-Conviction)

Appellee.

*

For Appellant:

Curtis H. Gann
Assistant Public Defender
Seventeenth Judicial District
P.O. Box 1119
Fayetteville, TN 37334
(on appeal)

Robert H. Marlow
Assistant Public Defender
218 North Main Street
Shelbyville, TN 37160
(at trial)

For Appellee:

Charles W. Burson
Attorney General & Reporter

Sarah M. Branch
Counsel for the State
450 James Robertson Parkway
Nashville, TN 37243-0493

Weakley E. Barnard
Assistant District Attorney General
Seventeenth Judicial District
Lincoln County Courthouse
Fayetteville, TN 37334

OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The petitioner, Jeff Arwood, appeals the trial court's denial of his petition for post-conviction relief. The single issue presented for review is whether the petitioner received the effective assistance of counsel. We affirm the judgment of the trial court.

On May 25, 1989, the petitioner was convicted of aggravated sexual battery, for which he received a Range II sentence of 30 years; crime against nature (fellatio), for which he received a sentence of 15 years; and rape, for which he received a sentence of 15 years. The convictions were based primarily upon the testimony of two young females, who were seven years of age at the time of the offenses, and the testimony of various medical experts. This court affirmed the convictions on direct appeal. State v. Jeff Arwood, No. 01C01-9204-CC-00132 (Tenn. Crim. App., at Nashville, December 31, 1992), perm. to app. denied. The Range II, 15-year sentence for rape was upheld; the sentence for the crime against nature was modified to 12 years; that for aggravated sexual battery was modified to 25 years. Id., slip op. at 7. All sentences were ordered to be served concurrently. Application for permission to appeal to the supreme court was denied on May 10, 1993.

On October 1, 1993, the petitioner filed this application for post-conviction relief. The claim of ineffective assistance of counsel was supported by 62 asserted instances of deficient performance. The petitioner challenged his attorney's effectiveness not only at trial but also on appeal. At the conclusion of the evidentiary hearing, the trial court entered an opinion and order denying relief. The ruling provided, in summary, as follows:

1. That the petitioner was unable to prove that his trial counsel had failed to properly investigate or file pretrial motions;
2. That the petitioner was unable to demonstrate how trial counsel had been ineffective by failing to call certain witnesses or by failing to adequately examine those witnesses who did testify;
3. That the petitioner's complaints about trial counsel's strategy or trial tactics were unfounded; and
4. That the petitioner had failed to establish how any deficiency in the performance of his trial counsel might have affected the results of the trial.

In summary, the trial court found as follows:

The petitioner was ably represented at trial by an experienced, seasoned attorney who was well prepared. From this court's view of this six volume trial record, this court finds that trial counsel's advice and services rendered were well within the range of competency demanded of attorneys in criminal cases. No lawyer is likely to be free of error in a trial as contested as this was but no court has ever placed a standard of perfection on any lawyer. The record reflects that the defendant was given a fair trial.

In order for the petitioner to be granted relief on grounds of ineffective counsel, he must establish that the advice given or the services rendered were not within the range of competence demanded of attorneys in criminal cases and that, but for his counsel's deficient performance, the result of his trial would have been different. Strickland v. Washington, 466 U.S. 668, 693 (1984); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). The burden is on the petitioner to show that the evidence preponderated against the findings of the trial judge. Clenny v. State, 576 S.W.2d 12, 13 (Tenn. Crim. App. 1978), cert. denied, 441 U.S. 947 (1979). Otherwise, the findings of fact made by the trial court at the evidentiary hearing are conclusive on appeal. Graves v. State, 512 S.W.2d 603, 604 (1973). Moreover,

this court cannot second-guess trial counsel's tactical and strategic choices unless those choices are uninformed due to inadequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 278-79 (Tenn. Crim. App. 1980).

The testimony established that the petitioner's trial counsel had invested a considerable amount of time in preparation. An associate and an investigator were extensively involved in the case. Trial counsel described his commitment as having involved literally hundreds of hours. He had ten years of experience in the practice of law.

Trial counsel addressed the petitioner's complaints about his trial tactics. There was testimony that one of the alleged mistakes resulted from the petitioner's failure to be totally candid with his counsel. One character witness, called by the defense to testify to his good behavior around the two seven-year-old stepdaughters, acknowledged during cross-examination that the petitioner had exposed them to the use of marijuana. Trial counsel was unaware of that fact until the testimony; it does not appear that his lack of that knowledge was due to any lack of conscientiousness on his part. Moreover, it does not appear that trial counsel would have had a valid objection to the evidence had he made one. Two other claims of deficiency due to the failure to object were explained to the satisfaction of the trial court.

Further, medical evidence tended to corroborate the claims of the two minor victims. The petitioner has contended that his trial counsel was ineffective for having failed to object to the admission of this medical testimony. Petitioner has

been unable, however, to show how he might have been prejudiced because the evidence appears to have been admissible. In consequence, whether trial counsel raised this issue on appeal made no difference.

Finally, this court has reviewed each of the petitioner's claims. We have found neither deficiency in performance nor prejudice in result.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

Paul G. Summers, Judge

L. T. Lafferty, Special Judge