

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST SESSION, 1996

FILED
November 8, 1996
Cecil W. Crowson
Appellate Court Clerk

RONALD E. THOMAS,)
)
 Appellant,)
)
)
)
 VS.)
)
 STATE OF TENNESSEE,)
)
 Appellee.)

C.C.A. NO. 01001991 CR 00382

WILSON COUNTY

HON. J. O. BOND
JUDGE

(Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF WILSON COUNTY

FOR THE APPELLANT:

J. ROBERT HAMILTON
225 East Market Street
Lebanon, TN 37087

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

EUGENE J. HONEA
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

TOM. P. THOMPSON, JR.
District Attorney General

ROBERT HIBBETT
Assistant District Attorney General
111 Cherry Street
Lebanon, TN 37087

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure from the trial court's denial of his petition for post-conviction relief. The Petitioner pleaded guilty to five counts of aggravated child abuse on December 6, 1991. In accordance with the plea agreement, he was sentenced to eight (8) years on each count as a Range I Standard Offender, with the sentences to run consecutively.¹ In this appeal, the Petitioner contends that he was denied effective assistance of counsel at the guilty plea hearing.² We affirm the judgment of the trial court.

Initially we note that the Petitioner failed to file his notice of appeal within the time period allowed by Rule 4 of the Tennessee Rules of Appellate Procedure. The trial court dismissed the post-conviction petition by an order entered August 10, 1995. The Petitioner filed his notice of appeal on September 19, 1995. The elapsed period exceeds the thirty (30) day limit mandated in Rule 4. See T.R.A.P. 4(a). It appears from the record, however, that the State has suffered no prejudice. In the interest of justice, we will therefore address the merits of the Petitioner's issue on appeal. See T.R.A.P. 4(a); State v. Mullins, 767 S.W.2d 668, 669 (Tenn. Crim. App. 1988).

¹The sentences were to be served concurrently with an effective sentence of 48 years the Petitioner had received in Davidson County.

² In his pro se petition, the Petitioner also raised the issues of prosecutorial misconduct and a conspiracy by law enforcement officials to deprive him of his right against self-incrimination. These issues were not addressed at the hearing on the post-conviction petition, nor were they raised in his brief upon appeal to this Court. Accordingly, because of the lack of proof in the record with regard to these allegations, we will not address these two issues in this opinion.

We begin our discussion with a brief summary of the pertinent facts surrounding the offenses of which the Petitioner was convicted. The Petitioner was involved in a romantic relationship with Victoria Fisher. Although the Petitioner and Fisher were not married, they had a son who was approximately fourteen (14) months old at the time of the commission of the offenses. Fisher also had custody of two sons by a previous marriage, ages four (4) years old and two (2) years old. After moving from Ohio to Tennessee, the family lived at several motels and campgrounds in the Nashville area. In July of 1990, as the family moved around in the Nashville area, the Petitioner committed multiple acts of abuse against the two oldest children. Upon the discovery of injuries to the children, the Petitioner made a statement to law enforcement officials in which he admitted the acts of abuse. He was subsequently indicted in Wilson County for five counts of aggravated child abuse. His attorney then worked with the District Attorney General's office to obtain a satisfactory guilty plea, which included an agreement regarding the appropriate sentence.

The Petitioner now claims that he was afforded ineffective assistance of counsel at his guilty plea hearing. He argues that his attorney was ineffective for advising him to plead guilty in Wilson County to offenses of which he had already been convicted in Davidson County and for advising him to accept consecutive sentences for each count in the indictment.

In determining whether or not counsel provided effective assistance at trial, the court must decide whether or not counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). To succeed on a claim that his counsel was

ineffective at trial, a petitioner bears the burden of showing that his counsel made errors so serious that he was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the petitioner resulting in a failure to produce a reliable result. Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984); Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). To satisfy this second prong the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When reviewing trial counsel's actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time it was made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper 849 S.W.2d at 746.

This two part standard of measuring ineffective assistance of counsel was also applied to claims arising out of the plea process. Hill v. Lockhart, 474 U.S. 52 (1985). The prejudice requirement was modified so that the petitioner "must show that there is a reasonable probability that, but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

The Petitioner and his attorney were the only witnesses at the post-conviction hearing. On direct examination, the Petitioner testified that he had

advised his attorney of his double jeopardy concerns arising from his Davidson County child abuse convictions. He also claimed that his attorney had pressured him into accepting consecutive sentences as part of the plea agreement simply because his effective sentence of forty (40) years in Wilson County ran concurrent to his effective sentence of forty-eight (48) years in Davidson County.

The Petitioner's attorney at the guilty plea hearing, Gary Vandever, testified that the Petitioner had not advised him about any double jeopardy concerns. Vandever testified further that he was, in fact, aware of the Petitioner's Davidson County sentence for similar offenses. Vandever met with the Petitioner several times and fully discussed the proof, the applicable punishment range, and the possibility of a guilty plea. He negotiated with the District Attorney General's office and arrived at a plea agreement in which the Petitioner would plead guilty to all five counts of the indictment, receive the minimum sentence in his range on each count, and serve all counts consecutive to each other but concurrent to the Davidson County sentence. He testified that this agreement was the best deal which the State offered. Vandever stated that the Petitioner had willingly accepted the plea agreement and "thought it was a good deal."

At the conclusion of the post-conviction hearing, the trial court found Vandever's testimony to be persuasive. In fact, the trial judge stated that "Vandever did everything he was supposed to do as a lawyer." The trial court commented that some of the motels and campgrounds at which the Petitioner's family had stayed appeared to be in Davidson County while others were in Wilson County. The Petitioner's chief complaint was that he had been convicted in Davidson County for offenses committed in Wilson County. Even at the post-

conviction hearing, however, the Petitioner admitted that he had committed the offenses alleged in the Wilson County indictment. As a result, the trial court concluded that the Petitioner's double jeopardy concerns regarding his Wilson County convictions were unfounded. The trial judge also stated that the Petitioner's sentence was not excessive and that the plea agreement had been properly accepted by the State, the Petitioner, and the trial court. Accordingly, the trial court dismissed the post-conviction petition.

After reviewing the entire record, we find that the trial court did not err in dismissing the petition. There is no evidence in the record to support the contention that the representation provided by Vandever was constitutionally deficient. With regard to the Petitioner's double jeopardy concerns, it appears that the Petitioner committed some acts of abuse in Davidson County and others in Wilson County. Furthermore, Vandever testified that the Petitioner viewed the plea agreement as a "good deal," and the trial court found that testimony to be credible. From the record before us, we cannot conclude that Vandever's arrival at a plea agreement with a forty (40) year effective sentence running concurrent to a lengthier Davidson County sentence constituted inadequate representation. Thus, the Petitioner has not satisfied the first prong of our two-part standard for determining ineffective assistance of counsel. His issue lacks merit.

For the reasons set forth in the discussion above, we find that the Petitioner failed to demonstrate that he received ineffective assistance of counsel at his guilty plea hearing. We therefore affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOSEPH M. TIPTON, JUDGE