

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1996 SESSION

FILED
March 27, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

STEPHEN R. STAMPS,)
)
 Appellant,)
)
 v.)
)
 STATE OF TENNESSEE,)
)
 Appellee.)

No. 02C01-9606-CR-00199
Henry County
Honorable C. Creed McGinley, Judge
(Post-Conviction)

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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

OPINION

The petitioner, Stephen Ray Stamps, appeals as of right from the Henry County Circuit Court's denial of post-conviction relief. He was convicted in 1992 of rape and sentenced as a Range I, standard offender to twelve years in the Tennessee Department of Correction. The conviction was affirmed on direct appeal. State v. Stephen Ray Stamps, No. 02C01-9301-CC-00002, Henry County (Tenn. Crim. App. Mar. 2, 1994), app. denied (Tenn. July 18, 1994). The petitioner asserts that he received ineffective assistance of trial counsel because of counsel's (1) failure to object to testimony of the victim's out-of-court statements and (2) failure to object to the state presenting this testimony before the victim had testified. We disagree.

Given the detailed account of the history of the petitioner's case in this court's first opinion, we will provide only the basic circumstances of the convicting trial relevant to our present decision. The petitioner's wife testified that she left the victim, her fourteen-year-old daughter by a prior marriage, alone with the petitioner. The next day she found a box of condoms stored in the victim's bedroom. Knowing that the petitioner had not used a condom with her in over a year, she confronted the petitioner who explained that the condoms belonged to his brother. She noticed that the condom box had a date of manufacture that was two months after petitioner's brother had last lived in the residence. Mrs. Stamps testified that after again confronting the petitioner, he explained that he used the condoms when masturbating. Because she was not satisfied with his answer, she said that she asked the petitioner if he had been "messing with" her daughter.

Mrs. Stamps testified that immediately after this conversation with the petitioner, she went to the victim's school. She testified that she left the school with the victim and asked the victim if the petitioner had touched her. She testified that the victim told her that the petitioner had touched her and had been having sex with her.

Paris Police Officer Tom Lankford testified that he was in the office when Mrs. Stamps and the victim came to the police department to file a complaint. Officer Lankford stated that the victim said that the petitioner had been having sex with her and the last time was the evening that she was home alone with the petitioner. He also testified that the victim told him that this had been going on for almost two years. Officer Lankford testified that because the victim lived outside the city limits, he contacted the county. He said that he also obtained consent to search the house. After conducting the search, he assisted the county detective in interviewing the victim. The interview was recorded on videotape.

Henry County Sheriff's Department Investigator Steven Page testified that he conducted the videotaped interview. The videotape was played for the jury.

The victim testified that on the night of the rape she had to stay home with the petitioner and not go to the store with her mother because she was being punished for not doing her chores. She said that she was doing her homework when the petitioner asked her if she was ready. The victim testified that the petitioner then had sex with her.

Dr. Robert Adams testified that he examined the victim three days after the rape. He said that she told him that the petitioner had been having sex with her weekly for the past one and a half years.

With this evidence, the petitioner was convicted of rape. On appeal, the petitioner claimed, among other things, that it was error for the trial court to allow the introduction of the videotaped interview. The state argued that the evidence was admissible as a fresh complaint. This court determined that the videotape did not qualify as a fresh complaint under the application of any standard and that it was error

for it to be introduced. However, this court concluded that in the context of the entire record, the introduction of the videotape was harmless error. This determination was based upon the state having proved practically all of the content of the videotaped interview through testimony of the state's four witnesses which was admitted without objection.

The petitioner filed a pro se petition for post-conviction relief. After counsel was appointed, an amended petition was filed, alleging that the petitioner received the ineffective assistance of trial counsel because his trial attorneys (1) failed to obtain a continuance when the indictment was amended on the day of trial, (2) failed to object to the amendment of the indictment, (3) failed to impeach witnesses properly, (4) failed to call two witnesses to testify, and (5) failed to object to evidence that could have been excluded.

At the post-conviction evidentiary hearing, Jeffery Fagan testified that he was co-counsel for the petitioner at his trial and employed by the Public Defender's Office. He testified that he and co-counsel, Guy Wilkinson, used the trial strategy that the petitioner did not commit the rape and that the allegations were fabricated by the child and her mother.

Mr. Fagan testified that in support of this theory, they attempted to show the inconsistency of statements made by the victim. He said that he did not make hearsay objections to the trial testimony of the child's mother and the investigating police officer because he wanted the jury to hear the testimony. He said that he believed that the testimony, taken as a whole, showed that the allegations were fabricated.

Mr. Fagan testified that he did object to the introduction of the videotape recording of the victim's interview, and that he expected the tape to be allowed as

evidence because of the other testimony that he had allowed in by not objecting. He explained that it was his trial strategy to allow all this into evidence in order that he could argue that it was inconsistent with the victim's testimony. He said that he had feared that if he had objected and the statements were not admitted into evidence, the state's only evidence would have been the testimony of the victim and her mother. Mr. Fagan admitted that he could still have used his trial strategy if the evidence had been merely corroborative and not substantive evidence.

On cross-examination, Mr. Fagan testified that he took all relevant actions during trial that were consistent with his trial strategy. He further explained that he did not object as hearsay to the doctor's testimony of the victim's statements because the statements explained the medical evidence. He also testified that he consulted with the petitioner about the trial strategy and the evidence against him.

Guy Wilkinson testified that he was co-counsel with Mr. Fagan and that they met with the petitioner several times to discuss the case and witnesses. Mr. Wilkinson testified that his closing argument may not have been very detailed or pointed to specific instances of inconsistent testimony, but he believed that his argument made the point and did not belabor it. He said the jury was on notice from the beginning that the defense strategy was that the petitioner did not commit the rape and that the allegations were fabricated.

The trial court found that there were no grounds for relief proven. It noted that many of the petitioner's claims had been reviewed on direct appeal and were not open for further review. As for the petitioner's claims regarding his attorneys, the court dismissed them because it found that the attorneys developed a reasonable trial strategy and zealously represented the petitioner throughout the proceedings.

The petitioner now asserts that he received the ineffective assistance of trial counsel because of trial counsel's (1) failure to object to testimony of the victim's out-of-court statements and (2) failure to object when the state presented this testimony before the victim had testified. Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is upon the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). The Strickland standard has been applied, as well, to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (counsel's conduct will not be measured by "20-20 hindsight"). Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See Hellard, 629 S.W.2d at 9; DeCoster, 487 F.2d at 1201. We note, as well, that the claim of ineffective assistance of counsel can be defeated by

the failure to make the required showing of either deficient performance or sufficient prejudice. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

In his first claim, the petitioner alleges that he received the ineffective assistance of counsel when his attorneys failed to object to testimony of the victim's out-of-court statements and failed to ask for curative instructions each time a witness testified concerning the victim's out-of-court statements. The petitioner argues that if counsel had objected, the victim's out-of-court statements could only come in as fresh complaint, and that it would have been reversible error to admit the statements as fresh complaint. The petitioner further asserts that if his attorneys had objected to the out-of-court statements, the error found on appeal for the admission of the videotaped interview would not have been harmless. The petitioner further argues that the failure to ask for curative instructions increased the out-of-court statements' prejudicial effect.

In his second claim, the petitioner alleges that he received the ineffective assistance of counsel because his attorneys failed to object to the admission of testimony of the victim's out-of-court statements before the victim had testified. The petitioner characterizes this testimony as fresh complaint and argues that it could not have corroborated the victim's testimony because the victim had not yet testified. The state responds to both of the petitioner's claims by stating that the petitioner has not shown that but for the alleged errors committed by counsel, he would have been acquitted or his appeal granted.

The burden was on the petitioner in the trial court to prove his allegations that would entitle him to relief by a preponderance of the evidence.¹ Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988). On appeal, we are bound by the trial court's findings unless we conclude that the evidence preponderates against those

¹ For post-conviction petitions filed on or after May 10, 1995, petitioners have the burden of proving factual allegations by clear and convincing evidence. T.C.A. § 40-30-210(f).

findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). In this respect, the petitioner has the burden of illustrating how the evidence preponderates against the judgment entered. Id.

In the petitioner's claims that he received ineffective assistance of counsel, he points to two courses of conduct engaged in by his attorneys as proof of his claims. However, the trial court found that their conduct was governed by a legitimate trial strategy. The attorneys testified that their strategy was to assert that their client did not rape his stepdaughter and to show, through the inconsistent statements of the victim, that the victim and her mother fabricated the allegations.

Both of petitioner's claims turn on the failure of counsel to object to testimony of the victim's out-of-court statements. The petitioner points to the doctrine of fresh complaint for determining the actions he asserts that his attorneys should have taken.

At the time of the trial, the fresh complaint doctrine in Tennessee followed the rule stated in Phillips v. State, 28 Tenn. (1 Hum.) 246 (1848). The doctrine developed in Phillips remained good law until it was expressly overruled, in part, in State v. Kendricks, 891 S.W.2d 597 (Tenn. 1994). The doctrine stated in Kendricks applied only to adult victims. Id. at 600. The fresh complaint doctrine was held to be not applicable to child victims in State v. Livingston, 907 S.W.2d 392 (Tenn. 1995). Both Kendricks and Livingston were decided by the Tennessee Supreme Court after the trial in this case, although the cases had passed through the appellate courts before this case had been tried.

In Phillips, the fresh complaint doctrine allowed both the fact and the details of the complaint to be admitted before the victim's credibility had been attacked, with the only limitation on admissibility being that the complaint must have been made

within a reasonable time. Kendricks, 891 S.W.2d at 602-603. If the complaint was not made soon after the incident, it was held admissible only if there was a reasonable explanation for the delay. State v. Lewis, 803 S.W.2d 260, 264 (Tenn. Crim. App. 1990). Lewis identified several factors that could indicate that the delay in making the complaint was reasonable, including the victim's age and mental capacity and threats made to the victim. Id.

The details of fresh complaint are considered corroborative and "support the 'accuracy' of the victim's trial testimony." Kendricks, 891 S.W.2d at 603. However, the jury must be instructed of the limited purpose of fresh complaint. Lewis, 803 S.W.2d at 263-64. In Lewis, this court commended the trial court for contemporaneously instructing the jury that the fresh complaint testimony was limited to corroboration of the victim's testimony. Id. at 264.

On the petitioner's direct appeal, this court determined that the videotaped interview did not qualify as a fresh complaint. It implied, though, that the mother's testimony may have qualified under the fresh complaint doctrine. No implication of the doctrine's applicability was made with respect to the testimony of the police officers or the doctor.

The testimony of the two police officers and the examining doctor arguably would not have been admissible as fresh complaint. The victim's statements offered by these witnesses were statements made after the victim's mother had confronted the victim. These statements were not spontaneous because they were elicited by questioning from persons that the victim could easily see as authority figures.

However, the record supports the trial court's finding that it was a legitimate strategy for the petitioner's attorneys to allow the testimony of these witnesses in an attempt to show the inconsistencies of the victim's statements. For

arguable points of law, counsel's strategy will be given deference provided that the decisions are informed ones based upon adequate preparation. See Hellard, 629 S.W.2d at 9; DeCoster, 487 F.2d at 1201. In this case, the attorneys could have reasonably determined that although the testimony may not have been admissible, any action they took to keep out the testimony would have been contrary to trial counsel's strategy of demonstrating inconsistencies in the victim's statements to others.

The petitioner complains that trial counsel should have requested a limiting instruction that the testimony was admissible only as corroborative evidence and not as substantive evidence. However, we note that the trial court gave a limiting instruction to the jury after counsel objected to the introduction of the videotaped interview and again just before jury deliberations. Thus, any failure by counsel to request such an instruction was inconsequential to the petitioner's case.

In this case, the petitioner has failed to carry the burden of proving by a preponderance of the evidence that trial counsel's performance, even though unsuccessful, was not the result of reasonable professional judgment. Strickland, 466 U.S. at 699, 104 S. Ct. at 2071. The petitioner has not offered evidence that preponderates against the trial court's findings of fact and the conclusion that the petitioner's trial counsel developed a reasonable trial strategy and zealously represented the petitioner throughout the proceedings.

In consideration of the foregoing and the record as a whole, we conclude that the evidence does not preponderate against the trial court's findings that resulted in the denial of relief. The judgment of the trial court is affirmed.

Joseph M. Tipton, Judge

CONCUR:

Joseph B. Jones, Presiding Judge

Jerry L. Smith, Judge