IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY SESSION, 1998

FILED

March 30, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

LARRY DALE TAYLOR,	)	**C.C.A. NO. 02C01-9708-CR-00328**
	)	
Appellant,	)	
	)	**DECATUR COUNTY**
V.	)	
	)	
	)	**HON. JULIAN P. GUINN, JUDGE**
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	**(POST-CONVICTION)**

FOR THE APPELLANT:

J. MICHAEL IVEY
107 Tennessee Avenue South
P.O. Box 127
Parsons, TN 38363

FOR THE APPELLEE:

JOHN KNOX WALKUP
Attorney General & Reporter

PETER M. COUGHLAN
Assistant Attorney General
2nd Floor, Cordell Hull Building
425 Fifth Avenue North
Nashville, TN 37243

G. ROBERT RADFORD
District Attorney General

JERRY W. WALLACE
Assistant District Attorney General
P.O. Box 637
Parsons, TN 38363

OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Petitioner, Larry Dale Taylor, appeals as of right the trial court's dismissal of his petition for post-conviction relief. We affirm the judgment of the trial court.

On July 5, 1994, following a jury trial, Petitioner was convicted of rape of a child. The trial court sentenced him to fifteen (15) years as a Range I Standard Offender. Petitioner subsequently filed a petition for post-conviction relief in the Decatur County Circuit Court which is the subject of this appeal. Petitioner argues four issues in this appeal: (1) that the indictment was fatally insufficient in that it did not adequately set forth the culpable mental state for rape of a child; (2) that the jury was unconstitutionally selected; (3) that the jury which convicted him was not impartial; and (4) that he received ineffective assistance of counsel at trial.

I. Indictment

Petitioner argues that his indictment for rape of a child was fatally defective because if failed to allege a *mens rea*. In support of his argument, Petitioner relies upon the decision of this Court in State v. Roger Dale Hill, C.C.A. No. 01C01-9508-CC-00267, Wayne County (Tenn. Crim. App., Nashville, June 20, 1996). However, our supreme court reversed this Court's decision in Hill. See State v. Hill, 954 S.W.2d 725 (Tenn. 1997). The Tennessee Supreme Court held in Hill as follows:

> [F]or offenses which neither expressly require nor plainly dispense with the requirement for a culpable mental state, an indictment which fails

> to allege such mental state will be sufficient to support prosecution and conviction for that offense so long as
>
> (1) the language of the indictment is sufficient to meet the constitutional requirements of notice to the accused of the charge against which the accused must defend, adequate basis for entry of a proper judgment, and protection from double jeopardy;
>
> (2) the form of the indictment meets the requirements of Tenn. Code Ann. § 40-13-202; and
>
> (3) the mental state can be logically inferred from the conduct alleged.

Id. at 726-27.

Tennessee Code Annotated section § 39-13-522(a) defines rape of a child as the "unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." This statute does not expressly require nor plainly dispense with the requirement for a culpable mental state. However, the required mental state may be inferred from the nature of the criminal conduct alleged in the indictment in the Petitioner's case. The indictment in the instant case alleged that:

> [Petitioner] on or about the 7th day of OCTOBER 1993, before the finding of this indictment, in the County and State aforesaid, did commit rape of a child by having unlawful sexual penetration of one, [victim], a child less than thirteen (13) years of age, thereby committing the offense of RAPE OF A CHILD, in violation of T.C.A. 39-13-522(a), against the peace and dignity of the State of Tennessee.

Obviously, the act for which Petitioner is indicted, unlawful sexual penetration of a victim under the age of thirteen (13), is "committable only if the principal actor's *mens rea* is intentional, knowing, or reckless." Hill, 954 S.W.2d at 729. Also, the language of the indictment sufficiently apprised Petitioner of the offense charged, and the indictment was stated in ordinary and concise language so that a person of common understanding would know what was intended. Tenn. Code Ann. § 40-13-

202. Furthermore, the language in the indictment adequately protects Petitioner against subsequent reprosecution for this same offense. Hill, 954 S.W.2d at 727, 729. Therefore, the indictment in this case meets constitutional and statutory requirements of notice and form and is, therefore, valid. This issue is without merit.

II. Jury Selection

Petitioner argues next that the jury which convicted him was unconstitutionally selected or impaneled. Petitioner, an African -American, claims that no African-American jurors were in the jury pool. However, Petitioner admitted at the post-conviction hearing that he was not aware of any indication that anyone was excluded from the jury panel or the jury list because of race. Petitioner's trial counsel also testified that he was not aware of anything that would support Petitioner's claim. In fact, there was hardly any proof on the subject. Petitioner did subsequently supplement the record with a 1990 Census which indicated that about four percent (4%) of the Decatur County population was African-American.

No person has a constitutional right to be tried by a jury of his own race, either in whole or in part. Harvey v. State, 749 S.W.2d 478, 481 (Tenn. Crim. App. 1987), perm. to appeal denied, id. (Tenn. 1988). The mere fact that there were African-Americans in the community but none were on the jury is not proof of the violation of any right. Id. In the absence of any evidence that this jury was not selected from a source fairly representative of the community, we cannot hold that Petitioner established a prima facie violation, and therefore, we find no constitutional abridgment. See Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690

(1975); State v. Nelson, 603 S.W.2d 158 (Tenn. Crim. App. 1980). This issue is without merit.

III. Impartial Jury

Petitioner claims that he did not get a fair trial because two of the jurors were allegedly acquainted with the victim's family. Specifically, he argues that juror Bob Cooper and another unnamed juror worked at Decatur County Hospital with the victim's grandmother. He also alleges that the victim was taken to this hospital after the rape.

At the post-conviction hearing, Petitioner testified that Mr. Cooper knew him. However, his trial counsel testified that at no time during his voir dire discussions with Petitioner did Petitioner tell him that this juror might be biased. Trial counsel testified that during voir dire he did not remember "any juror saying they were biased towards one side or the other . . . or any relationship where they knew the victim or the victim's family or the defendant or anybody for the State that would influence, you know, their deliberations." Petitioner even acknowledged that he never heard any of the jurors imply that they could not render an impartial verdict. None of the allegedly biased jurors were called as witnesses at the post-conviction hearing, so Petitioner's claims are the only evidence of juror bias. Following the post-conviction hearing, the court found that Petitioner's trial counsel had conducted an extensive voir dire examination and had used seven peremptory challenges. It also found no evidence to suggest that any of the jurors were biased. Petitioner has failed to meet his burden of proving his allegations by a preponderance of the evidence, and therefore, this issue is without merit.

IV. Assistance of Counsel

In determining whether counsel provided effective assistance at trial, the court must decide whether counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (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, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 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 the 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) (citation omitted).

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 they were made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper, 849 S.W.2d at 746.

In determining whether this Petitioner has satisfied these requirements, this Court must give the findings of the trial court the weight of a jury verdict, and the

judgment of the trial court will not be reversed unless the evidence contained in the record preponderates against the findings of fact made by the trial court. State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

Petitioner makes four claims of ineffective assistance of counsel: (1) counsel failed to conduct proper voir dire of Bob Cooper and the unnamed woman who worked at the same hospital as the victim's grandmother; (2) counsel failed to ask for a mistrial when no African-Americans were on the jury; (3) counsel failed to request or obtain a second medical examination of the victim; and (4) counsel failed to call certain witnesses.

Petitioner's first two claims are meritless. As previously discussed, there was no indication that any of the jurors were biased against Petitioner based on their place of employment. Also, Petitioner has failed to establish a prima facie case that a method of systematic exclusion was used to keep African -Americans off the jury. Therefore, his trial counsel could not be ineffective for failing to request a mistrial.

Petitioner next claims that his trial counsel should have requested a second medical evaluation of the victim. His trial counsel testified that Petitioner never told him that he wanted a second medical opinion. More importantly, trial counsel also stated that the medical opinion he did get was favorable to the defense, and that he did not want to contradict those findings with a second evaluation. Specifically, he said that the first evaluation "was just as favorable to us or more -- more than the State really, because he can't say the child had been penetrated." Petitioner's trial counsel used a legitimate trial strategy in relying upon the single evaluation. Therefore, his decision to not obtain a second medical evaluation cannot be a basis

for post-conviction relief. See State v. Martin, 627 S.W.2d 139 (Tenn. Crim. App. 1981), perm. to appeal denied, id. (Tenn. 1982).

Lastly, Petitioner claims that his trial counsel did not call certain character witnesses to testify on his behalf. However, none of these witnesses were presented at the post-conivction hearing to state what they would have testified to had they been called at trial. There is no evidence that these witnesses' purported testimony would have in any way helped Petitioner's case. Furthermore, Petitioner's trial counsel testified that he consulted with Petitioner at trial as to every witness they considered calling and that the final decision as to whether or not to put them on the stand was the Petitioner's. The judge at the post-conviction hearing credited counsel's testimony over that of the Petitioner's, and we find nothing in the record to preponderate against that finding. In conclusion, the evidence contained in the record does not preponderate against the trial court's finding that Petitioner received the effective assistance of counsel, and therefore, all of Petitioner's claims are without merit.

Finding no merit to any of Petitioner's claims, we accordingly affirm the judgment of the trial court.

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THOMAS T. WOODALL, Judge

CONCUR:

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JOSEPH B. JONES, Presiding Judge

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JOHN H. PEAY, Judge