

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL 1997 SESSION

**FILED**

**September 2, 1997**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

|                     |   |                                   |
|---------------------|---|-----------------------------------|
| DARREL D. HAYES,    | * | C.C.A. # 01C01-9604-CR-00163      |
| Appellant,          | * | DAVIDSON COUNTY                   |
| VS.                 | * | Hon. J. Randall Wyatt, Jr., Judge |
| STATE OF TENNESSEE, | * | (Post-Conviction)                 |
| Appellee.           | * |                                   |

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OPINION FILED: \_\_\_\_\_

AFFIRMED

GARY R. WADE, JUDGE

## OPINION

The petitioner, Darrel D. Hayes, appeals from the trial court's denial of post-conviction relief from three counts of sexual battery and one count of aggravated rape. In this appeal of right, the petitioner presents the following issues for our consideration:

- (1) whether the petitioner was entitled to a delayed appeal for the failure of his counsel in his second post-conviction petition to file an appeal to this court; and
- (2) whether the petitioner was denied his right to the effective assistance of counsel by the failure of his counsel to have sought an examination for his drug abuse.

We affirm the judgment of the trial court.

On January 26, 1988, the petitioner was convicted of three counts of aggravated sexual battery, for which he received thirty-year sentences, and one count of aggravated rape, for which he received a sentence of forty-five years.<sup>1</sup> The sentences were ordered to be served concurrently. This court affirmed on direct appeal. State v. Darrell D. Hayes, No. 88-219-III (Tenn. Crim. App., at Nashville, June 29, 1989). There was no application for permission to appeal to the supreme court.

One year later, the petitioner filed his first application for post-conviction relief alleging that his trial counsel had unilaterally abandoned his appeal by failing to make application for permission to appeal to the supreme court under Rule 11, Tenn. R. App. P. At the conclusion of an evidentiary hearing, the trial

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<sup>1</sup>The record is not entirely clear on the number of convictions. This opinion follows the account appearing in State v. Darrell D. Hayes, No. 88-219-III (Tenn. Crim. App., at Nashville, June 29, 1989). Note the difference in spelling for the name "Darrel" in the various opinions.

court found favorably for the petitioner but, because it had no jurisdiction to set aside the 1989 opinion of this court, denied the petition pursuant to the procedure set out in Pinkston v. State, 668 S.W.2d 676 (Tenn. Crim. App. 1984). On appeal, this court then set aside and re-entered its 1989 opinion so as to permit a request for review by the supreme court. Darrel D. Hayes v. State, No. 01C01-9108-CR-00253 (Tenn. Crim. App., at Nashville, Mar. 5, 1992). The petitioner's application for permission to appeal to the supreme court was denied May 26, 1992.

A second post-conviction petition was filed July 14, 1992. At the conclusion of the evidentiary hearing, the trial court made extensive findings of fact and ultimately denied relief on April 6, 1993. There was no appeal. On June 28, 1995, the petitioner filed this application for post-conviction relief, alleging ineffective assistance of counsel at trial in general and, in particular, the failure of his post-conviction counsel to file an appeal of the 1993 order. In November of 1995, the trial court denied relief. Within thirty days thereafter, the petitioner filed notices of appeal for the judgments entered on both the second and third petitions. Later, on March 16, 1996, the petitioner filed a motion to re-open his second post-conviction petition; the trial court summarily denied relief and a request for permission to appeal to this court was denied on May 29, 1996. On February 24, 1997, another panel of this court entered an order denying petitioner's petition for writ of habeas corpus filed in 1996. Darrel D. Hayes v. State, No. 02C01-9610-CC-00335 (Tenn. Crim. App., at Jackson, Feb. 24, 1997), perm. to app. filed Apr. 16, 1997.

During the hearing on the second post-conviction petition, the petitioner testified that he was addicted to cocaine at the time of his trial. He claimed that he had been under the influence of drugs when he testified at his trial and had been so afflicted during several of the meetings he had with his counsel in

preparation for the trial. Acknowledging that he had not been helpful to his counsel during the course of the proceedings that led to his conviction, the petitioner insisted that his counsel should have required an evaluation for drug abuse. Upon further examination, however, the petitioner conceded that he was not on drugs during plea negotiations or on the first day of his trial and that others would not necessarily be able to detect the times he was under the influence.

The petitioner's trial counsel, who had been aware of prior drug usage, testified that he was unaware of any drug abuse on the part of his client during preparations for trial except for when a polygraph examiner expressed that suspicion. Trial counsel stated that he did not detect any abnormalities, even after the statement by the examiner; he believed that any drug use on the part of the petitioner was minor. Trial counsel did acknowledge that he would have sought tests for substance abuse had he known the extent of the petitioner's claims. The proof, however, also showed that no one in the petitioner's family mentioned possible drug abuse during the trial preparations. The petitioner's counsel in his first post-conviction petition then testified that he could not recall the petitioner ever having made complaints about being on drugs during the course of his trial.

The petitioner complains that he was denied an appeal from the trial court's denial of his second petition for post-conviction relief. He contends that his post-conviction counsel failed to communicate his decision not to file the notice of appeal. He asked this court to waive the thirty-day notice requirement under the rationale set out in State v. Scales, 767 S.W.2d 157 (Tenn. 1989). He relies on the ruling in Warren v. State, 833 S.W.2d 101 (Tenn. Crim. App. 1992), wherein this court allowed, "in the interest of justice," the appeal of a denial of post-conviction relief when, some six months after the denial of relief, the petitioner complained

about the lack of an appeal by his post-conviction counsel.<sup>2</sup> See Rule 4(a), Tenn. R. App. P. This court then considered the merits of his claim and ruled that the statute of limitations had expired at the time of his initial post-conviction claim. Warren, 833 S.W.2d at 102; see Tenn. Code Ann. § 40-30-102 (repealed 1995).

The ruling in Warren can, of course, be distinguished on the facts in this case. Here, over two years had passed between the 1993 order dismissing the second petition and the third petition, filed in 1995, asking for appellate review. After a review of the entire record in this cause, including the disposition by the trial court at the conclusion of the second post-conviction petition, this court would not ordinarily be inclined to grant an appeal "in the interest of justice." Rule 4(a), Tenn. R. App. P. First, a delay of over two years during a period in which the current statute of limitations in post-conviction cases is only one year, would appear to be contrary to legislative policy. Also, the petitioner has no constitutional entitlement to the effective assistance of counsel in a post-conviction proceeding. State v. House, 911 S.W.2d 705 (Tenn. 1995); Coleman v. Thompson, 501 U.S. 722 (1991). Thus,

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<sup>2</sup>Pinkston v. State, 668 S.W.2d 676, 677 (Tenn. Crim. App. 1984), has traditionally governed the procedure for obtaining a delayed appeal of a conviction (to be distinguished from a judgment denying relief in a post-conviction case). See Tenn. Code Ann. § 40-30-120 (repealed 1995). That holding required the trial court to hold an evidentiary hearing and make findings of fact. The defendant then had to appeal to this court for relief in the form of vacating and re-entering its original opinion. Pinkston, 668 S.W.2d at 667. In 1995 the Tennessee Supreme Court adopted Rule 28, Tenn. Sup. Ct. R., which established the Tennessee Rules of Post-Conviction Procedure. This new rule went into effect November 17, 1995, and provided, in part, as follows:

(D) If the court finds that petitioner was deprived of the right to request an appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure, the court shall make and certify such a finding and shall enter an order granting petitioner thirty (30) days to seek Rule 11 review.

Tenn. Sup. Ct. R. 28, § 9 (D). Rule 28 was amended on October 28, 1996, to provide as follows:

(D) Grant of a Delayed Appeal--Upon determination by the trial court or the Court of Criminal Appeals that petitioner was deprived of the right to request an appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure, the petitioner shall have sixty (60) days to seek Rule 11 review.

Tenn. Sup. Ct. R. 28, § 9 (D).

even if counsel had been negligent by failing to file a direct appeal of the 1993 ruling, the petitioner would not have been entitled to relief based upon the deficiency in the performance of his post-conviction counsel.

It should be noted that a delayed appeal is reserved for the direct appeal of the original conviction. A petitioner receiving a favorable judgment under the statute then may file his notice of appeal. State v. Cordell, 645 S.W.2d 763 (Tenn. Crim. App. 1982). The procedure is not available, however, for those seeking delayed review of a denial of post-conviction relief. See Tenn. Code Ann. § 40-30-213(a) (1996 Supp.) (providing for a delayed appeal from the "original conviction"). Rule 4(a), Tenn. R. App. P., does afford a possible remedy in criminal cases when more than thirty days pass from the entry of an adverse judgment; but that is so only when, in the discretion of this court, the circumstances warrant waiver "in the interests of justice." Scales, 767 S.W.2d at 157.

Even if our court had granted a delayed appeal on the second petition, we would have affirmed the trial court's dismissal. The petitioner insists that his trial counsel was ineffective for having failed to secure an examination for drug abuse. The petitioner insists that due to his abuse of illegal drugs, he was unable to assist his trial counsel in the preparation of the defense. Yet, the trial court accredited the testimony of the petitioner's trial counsel and ruled that there had been adequate communication regarding trial strategies. Moreover, it ruled that trial counsel, because of petitioner's attendance at regularly scheduled appointments and the failure on the part of any family member to suggest possible drug abuse, "neither knew nor had reason to know that petitioner was under the influence of narcotics at any time" during their meetings. Finally, the trial court found as fact that trial counsel had performed within professional guidelines.

In order to be granted relief on grounds of ineffective counsel, a petitioner must establish that the advice given or 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 results of his trial would have been different. Strickland v. Washington, 466 U.S. 668 (1994); Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). This two-part standard, as it applies to guilty pleas, is met when the petitioner establishes that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on trial. Hill v. Lockhart, 474 U.S. 52 (1985).

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 (Tenn. Crim. App. 1978). Otherwise, the findings of fact by the trial court are conclusive. Graves v. State, 512 S.W.2d 603 (Tenn. Crim. App. 1973). It cannot be said that incompetent representation has occurred merely because other lawyers, judging from hindsight, could have made a better choice of tactics. Hellard v. State, 629 S.W.2d 4 (Tenn. 1982).

Here, the petitioner acknowledged that others were unable to detect when he was under the influence of drugs. His family did not suggest to his trial counsel at anytime prior to trial that the petitioner's ability to assist might have been impaired. The only indication of drug usage prior to trial was an expression of suspicion on the part of a polygraph examiner employed by the defense. There was no testimony by the petitioner about how trial counsel could have been better prepared because he did not detect any problems in their communications. Thus, in

our view, the evidence does not preponderate against the findings by the trial court.<sup>3</sup>

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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David H. Welles, Judge

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Curwood Witt, Judge

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<sup>3</sup>Because the evidence clearly supports the conclusions by the trial court, this court will not address the issue of waiver. Tenn. Code Ann. § 40-30-206(g) (1996 Supp.); see State v. Smith, 814 S.W.2d 45, 47 (Tenn. 1991).