

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FILED
October 8, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

CHARLIE W. DUNN and)
JOYCE WATKINS,)
)
Appellants,)
)
v.)
)
STATE OF TENNESSEE,)
)
Appellee.)

No. 01C01-9504-CR-00119
Davidson County
Hon. J. Randall Wyatt, Jr., Judge
(Post-Conviction)

For Appellant Dunn:

Thomas F. Bloom
500 Church Street
Nashville, TN 37219

For Appellant Watkins:

Carlton M. Lewis
208 Third Avenue North
Nashville, TN 37201

For the Appellee:

Charles W. Burson
Attorney General of Tennessee
and
Charlotte H. Rappuhn
Assistant Attorney General of Tennessee
450 James Robertson Parkway
Nashville, TN 37243-0493

Victor S. Johnson, III
District Attorney General
and
William Reed
Richard Fisher
Assistant District Attorneys General
Washington Square
222 2nd Avenue North
Nashville, TN 37201-1649

OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

OPINION

The petitioners, Charlie W. Dunn and Joyce Watkins, appeal as of right from the judgment of the Davidson County Criminal Court denying them post-conviction relief. They were convicted in 1988 of first degree murder and aggravated rape, receiving concurrent sentences of life and sixty years imprisonment. The judgments of conviction were affirmed on direct appeal. State v. Charlie W. Dunn and Joyce Watkins, No. 88-241-III, Davidson County (Tenn. Crim. App. Apr. 11, 1990), app. denied (Tenn. Oct. 1, 1990). They claim that they received the ineffective assistance of their respective counsel, raising the following issues:

(1) whether counsels' failure to react to surprise testimony by the medical examiner by presenting rebuttal witnesses or other readily available evidence constituted the ineffective assistance of counsel;

(2) whether counsels' failure to seek dismissal or amendment of the disjunctive premeditated/felony murder count of the indictment or to take other procedural steps to assure verdict unanimity constituted the ineffective assistance of counsel.

We affirm the trial court.

The petitioners were convicted of the aggravated rape and death of Ms. Watkins' four-year-old niece. This court's opinion on direct appeal reported the facts as follows:

The victim was the [four-year-old] niece of Ms. Watkins. The child had been staying with Rosie Williams, another aunt, at Fort Campbell, Kentucky. On Friday evening, June 26, 1987, Ms. Williams called her sister, Ms. Watkins, and asked her to come to her home on the military reservation at Fort Campbell and pick up the child. She and Mr. Dunn left Nashville at approximately 10:30 P.M. and drove to Ms. Williams' residence, arriving about an hour later. At approximately 1:00 A.M. they left and returned to Ms. Watkins' home in Davidson County, stopping at a market to get the child a Sprite.

The following morning Ms. Watkins took her niece to the emergency room of Nashville Memorial Hospital shortly after 9:00 A.M. The child was unconscious and was bleeding from the vaginal area. Later that day, she was transferred to

Vanderbilt University Medical Center for more specialized treatment. Although she was "brain dead," beginning about 3:45 or 4:45 P.M. that afternoon, she was maintained on life support equipment until the decision was made to remove the machines the next morning, at which time all vital signs ceased.

Dr. Mona Gretel Harlan, the Assistant Davidson County Medical Examiner, testified that the autopsy revealed that the child died as a result of bilateral subdural hematomas. She found the imprint of nine blows from human knuckles on the child's head. The force of the blows caused the veins and arteries on both sides of her brain to tear. In addition, there were multiple tears to the victim's hymen and also lacerations around her vagina extending back to the area around her anus. From her examination, she fixed the time that the injuries to the head and to the vagina occurred as some time after 1:35 A.M. on Saturday morning. . . .

The proof showed that from the time that she was picked up at Ms. Williams' home until she was taken to the emergency room at Memorial Hospital, the child was exclusively in the care, custody and control of Mr. Dunn and Ms. Watkins. Of course, Mr. Dunn was the only one of the appellants who had a penis. However, Dr. Harlan testified that the vaginal injuries could have been caused by any firm elongated object, and no traces of semen or sperm were found.

The appellants gave conflicting accounts as to what occurred. Furthermore, Ms. Watkins' stories conflicted as to the time they returned home, where she and the child slept, when she discovered the child was bleeding from the vagina, and when she called her sister (the child's grandmother) in Columbus, Georgia. According to her proof, she first called Columbus at about 2:00 or 2:30 A.M. Eastern Daylight Time, which would have been 1:00 or 1:30 A.M. in Nashville (Central Daylight Time), stating that the child was real sick and had a pink substance in her panties. This, of course, was an attempt to establish that the child was injured prior to coming into the custody of the appellants. Mr. Dunn gave conflicting statements as to where they slept and when he learned that the child had been injured.

In addition to the conflicting statements, the proof showed that Ms. Watkins washed the sheets from the bed in the master bedroom on Saturday morning, prior to taking the child to the hospital. Furthermore, the victim's sandals were found in the master bedroom, where, according to Ms. Watkins' statements, Mr. Dunn slept alone. Ms. Watkins said she and the child slept in another room. According to Mr. Dunn, he and Ms. Watkins slept together in the master bedroom and the victim slept alone in another room.

There were no witnesses in the home except the appellants and the victim. Neither appellant testified and the

victim's lips are sealed. Thus, this was a prosecution based entirely upon circumstantial evidence.

....

... No defense at all was interposed by Mr. Dunn. Ms. Watkins presented only two witnesses, the husband of the child's grandmother to prove the time that she first called Columbus, Georgia, and a social worker from Madisonville, Kentucky, who formerly worked in the Fort Campbell area, to testify about a previous complaint of physical abuse to the victim at the hands of Rosie Williams. That witness testified that her investigation revealed no physical abuse and that there were not even allegations of sexual abuse.

Dunn and Watkins, slip op. at 2-4, 8 (footnote omitted).

The evidence at issue in this case is the trial testimony of Dr. Harlan relating to the time that the head and vaginal injuries occurred. From the defense perspective, the goal of the testimony was to show that the injuries were or could have been inflicted while the victim was staying in Kentucky with Ms. Williams before the petitioners picked her up.

Dr. Harlan testified at the trial that the scalp injuries occurred within forty-eight hours from the time the victim was pronounced dead, based upon the absence of color change. She placed the vaginal injuries within the same time frame. However, Dr. Harlan also testified that while waiting to testify that day, she read the nurses' notes from the Vanderbilt University Medical Center, which indicated that the victim was brain dead on Saturday afternoon, some sixteen hours before death was officially pronounced. She said that this was significant because she had found no histiocytic response¹ to the subdural hemorrhage dotting, a response that she said would occur within twelve to fourteen hours of trauma to the head. Dating back from the time that death was pronounced, this would mean that the trauma would have occurred while the victim was in the hospital. On the other hand, dating back from the time that the victim

¹ This refers to the human body's reaction to hemorrhaging in which certain blood cells, known as histiocytes or macrophages, travel to the site and clean out dead tissue.

was considered to be brain dead, the time frame covered just the period of time that the petitioners had the victim with them in Nashville.

On cross-examination of Dr. Harlan, Mr. Dunn's attorney emphasized the absence of sperm or semen in the vaginal area and elicited the fact that a man or a woman could have caused the head trauma. Ms. Watkins' attorney questioned Dr. Harlan about the nurses' notes. Dr. Harlan said that she had received them when she talked with the attorney before trial but that she had not read them until minutes before testifying. The attorneys sought to emphasize that her opinion depended upon the accuracy of the nurses' observations and that, otherwise, the forty-eight-hour time frame was correct. Dr. Harlan's opinion remained that the injuries occurred within a twelve to fourteen-hour time frame. Neither petitioner's attorney called any medical expert to refute Dr. Harlan's testimony.

EVIDENTIARY HEARING

The evidentiary hearing focused primarily upon the issue of the time frame within which the injuries could have occurred. The petitioners' trial attorneys, two pathologists, the emergency room doctor, and a nurse practitioner experienced in child sexual abuse cases testified.

Niles Nimmo testified that he represented Ms. Watkins at trial, adding that he did not remember everything from the case that had occurred about six years before. He stated that he and David Vincent, who was Mr. Dunn's attorney, talked with Drs. Gretel and Charles Harlan before the trial regarding the cause of death and the time frame in which the injuries occurred. As a result of the meeting, Mr. Nimmo was satisfied that the medical evidence would support the defense theory that the injuries occurred before the petitioners took custody of the victim.

Mr. Nimmo testified that he was aware that Dr. Gretel Harlan was relying on the time of death being Sunday, when life support systems were removed, instead of Saturday afternoon, when the victim was deemed to be brain dead. He believed that this discrepancy would only help the defense by actually setting the time frame for the injuries further back during the period that the victim was in Kentucky.

Mr. Nimmo testified that before trial, he consulted with Dr. Jerry Francisco, who was the state medical examiner in Memphis. He provided to Dr. Francisco all the medical information he had, including the substance of the interview with the Harlans. Mr. Nimmo testified that Dr. Francisco essentially agreed with Dr. Harlan's opinions regarding the timing of the injuries. Mr. Nimmo said that as a result, he did not believe that Dr. Francisco was needed as a witness.

Mr. Nimmo said he was surprised at trial by Dr. Harlan's narrowed time frame of twelve to fourteen hours before Saturday afternoon based upon the Vanderbilt Medical Center nurses' records. He said he did not remember consulting any medical authority or expert after Dr. Harlan's testimony. Mr. Nimmo said he was certain that he and Mr. Vincent discussed the testimony, but he could not recall the nature of their conversation. Also, he could not recall whether strategy was involved in not pursuing it further. Mr. Nimmo added that although he did not know if the result of the trial would have been different, in retrospect, he probably should have consulted with Dr. Francisco or another expert after Dr. Harlan's testimony. When asked about his failure to question Dr. Harlan's qualifications, he replied that he had intended to use her testimony as an expert as well.²

² The trial record reflects that the defense accepted Dr. Harlan as a qualified expert and that she did not state her qualifications for the record. On cross-examination of Dr. Harlan, Mr. Nimmo elicited the fact that Dr. Harlan was not a board certified forensic pathologist.

David Vincent testified that he had been practicing law for thirty-eight years and had tried fifty to sixty murder cases. He said that he and Mr. Nimmo met with the Harlans together. He said he did not consult a separate expert, but he talked with Mr. Nimmo about the consultation with Dr. Francisco.

Mr. Vincent testified that the defense could not develop evidence to support their theory that the injuries were inflicted in Kentucky. He said that he questioned whether the jury would believe that the petitioners would have accepted the victim if she had already been injured to the extent she was when hospitalized. Mr. Vincent stated that Mr. Nimmo thoroughly investigated the case but was unsuccessful in finding defense evidence. He said that his client did not provide him with any leads to investigate. He also testified that theoretically, Dr. Harlan's testimony was very important, but that practically, it did not make any difference.

Dr. Kris Sperry testified in contradiction to Dr. Harlan's trial testimony. He testified that he was a forensic pathologist with the Fulton County, Georgia, Medical Examiner's Office since 1989. He said he finished his pathologist residency in 1985 and worked as a forensic pathologist in the office of the Medical Investigator for New Mexico until he went to Georgia. He stated that he had personally performed over three thousand autopsies and had been present for, reviewed or otherwise interacted with fourteen thousand to fifteen thousand others.

Dr. Sperry testified that he reviewed the autopsy report; photographs and tissue slides taken during the autopsy; the victim's hospital records; and the trial testimony of Dr. Harlan, the victim's aunt from Kentucky, and the woman who visited the Watkins' residence the morning that the victim was hospitalized. He said that these were sufficient for him to reach adequate opinions regarding the case.

Dr. Sperry testified that with respect to the head injury, specifically the subdural hemorrhage, histiocytes do not migrate to these areas. He said that the healing pattern of head injuries has been described for over fifty years and that it does not involve histiocytes. Thus, he stated that their absence indicates nothing regarding the age of the injury.

Dr. Sperry testified that the head injuries of the victim could have come from blunt trauma, severe shaking of the victim, or both. He said that the timing of the head injury "easily could be quite readily within 24 to 48 hours prior to the time of death." He indicated that this time frame was based upon the fact that no healing alterations were present. However, he also indicated that in some small children who are comatose, the healing process continues, while in other comatose children, the process stops. He added that the fact that the victim was on life support for about twenty-four hours complicated the matter. He agreed that the head injury could have occurred two to forty-eight hours before hospitalization.

Dr. Sperry testified that a person with head injuries like the victim's may have a lucid period and may not show signs of the injury until a day or two later. Thus, he said that the victim's fall down the stairs five days before being hospitalized could not have been the fatal injury, although it could have caused some of the bruising on the tissue surrounding the skull.

Dr. Sperry testified that the vaginal injuries occurred "somewhere in the neighborhood of about two to three days before pronouncement of death." Regarding penetration, he stated that the injuries were more consistent with a straddle injury, such as would occur if a child playing on monkey bars fell onto a bar, hitting the crotch region. He said that he would expect more localized injuries if they had been caused by penetration.

Dr. Warren Hill testified that he has practiced medicine since 1960, working in the emergency department of Memorial Hospital since 1972. He said that he has treated many lacerations and that dating the age of lacerations is part of his work because the course of treatment may be different depending upon the age of the wound. He added that he was confident in his ability to tell if wounds are less or more than six hours old.

Dr. Hill testified that he was the victim's initial treating physician at the hospital. He said that he would not change any of his trial testimony, in which he concluded that the vaginal injuries were fresh. He said that it was impossible for the vaginal injuries to have been two to three days old and that in his opinion, they were "probably less than three to four hours old." He said the fresh bleeding in the vaginal area was significant. In addition, he testified at the trial that old wounds have a blanching effect on their edges caused by constricting vessels limiting the blood supply but that blanching was not present in the victim's vaginal injuries. He stated that the vaginal injuries were from penetration. He acknowledged, though, that the primary concern during his care was the head injury, not the vaginal injuries.

Dr. Gretel Harlan testified at the evidentiary hearing that she had recently become a board certified forensic pathologist and had testified as an expert witness over two hundred times. She said that she had reviewed all of the relevant medical records in the case, her trial testimony, and Dr. Sperry's testimony. She testified that her conclusions as to the cause of death and to the time of injury remained as they were in her trial testimony. However, she stated that her use of the word "histiocyte" was incorrect, that she should have said "fibroblast." Also, she indicated that she should have discussed lucid periods and the lack of a fibrin layer in the subdural hemorrhage.

As for the vaginal injuries, Dr. Harlan testified that they came from penetration. She said that they were not from a straddle injury because penetration was required for the transverse tear she found that involved the lower internal part of the vagina. She stated that she dated these injuries as occurring within the same time frame as the head injuries.

Dr. Harlan testified that the head injuries were not consistent with a fall because the contusions outside of the skull in relation to the brain injuries were multiple and in varied areas, not centrally located. She believed that the victim received multiple blows to the head. She also said that the injuries were not consistent with severe shaking, unless the head was hitting something multiple times.

Dr. Harlan testified that the medical records reflect that the victim was comatose upon arrival at Memorial Hospital on Saturday morning and that she was placed on life support. She said the victim was determined to be brain dead Saturday afternoon but was kept on life support. She said the victim was pronounced dead on Sunday morning about 8:00 a.m.

Dr. Harlan testified that any healing process or other activity relative to the brain would have stopped when the victim became brain dead because the blood flow would have ceased. However, she said that with life support, the remainder of the body would have had blood flow, and the internal activities would have continued. Thus, she said that the injuries not involving the brain could still be dated. In this respect, Dr. Harlan testified that the freshness of the nonbrain injuries was a factor in her time frame determination.

Also, Dr. Harlan stated that the brain injuries were not consistent with the victim having a lucid period between the injury and the onset of symptoms. She said

that if such were the case, there should have been at least fibrin layering around the subdural hemorrhage, but there was not.

Upon cross-examination, Dr. Harlan was presented with a treatise that stated that a layer of fibrin is deposited about twenty-four hours after a subdural hemorrhage, that fibroblastic activity begins by thirty-six hours, and that a layer of fibroblasts two to five cells thick would be present after four or five days.

Upon the foregoing evidence, the trial court denied the petitioner's post-conviction petition. The trial court determined that the petitioners' respective attorneys did not render the ineffective assistance of counsel.

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 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 determined 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).

We also note that the approach to the issue of the ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown, we need not seek to determine the validity of the allegations about deficient performance. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

Under the post-conviction procedures in effect at the time the petitioners filed their petition for post-conviction relief, the burden was on the petitioners to prove their grounds for relief by a preponderance of the evidence. Tenn. Code Ann. § 40-30-210(f). On appeal, we are bound by the trial court's findings unless we conclude that the evidence preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). The petitioners have the burden of illustrating how the evidence preponderates against the judgment entered. Id.

I. ATTORNEYS' RESPONSE TO DR. HARLAN'S TRIAL TESTIMONY

The petitioners contend that their attorneys were ineffective by failing to respond adequately to the surprise trial testimony of Dr. Harlan, who testified that the victim's injuries occurred twelve to fourteen hours before she became brain dead. The petitioners argue that Dr. Harlan's testimony obliterated their sole defense that the victim's injuries were inflicted while the victim was in Kentucky and that the uncontradicted testimony was devastating at trial. The state contends that the attorneys were not deficient for failing to offer proof to rebut Dr. Harlan's testimony, and it further argues that the petitioners have not demonstrated prejudice.

The trial court concluded that the attorney's failure to seek proof to rebut Dr. Harlan's changed testimony did not constitute deficient performance. We seriously question this determination. Mr. Nimmo had previously consulted with Dr. Francisco, who had concurred with Dr. Harlan's original twenty-four to forty-eight hour time frame for the infliction of the injuries. Thus, the attorneys were aware of at least one medical expert with whom they could confer relative to the new testimony. Mr. Nimmo testified at the post-conviction evidentiary hearing that his decision not to seek or to offer evidence in rebuttal was not strategic. In this respect, in light of their knowledge of an expert who had expressed opinions contrary to Dr. Harlan's trial testimony, we doubt that the attorneys' failure to attempt to secure rebuttal evidence constitutes proper advocacy.

On the other hand, Mr. Vincent testified at the evidentiary hearing that evidence regarding the time frame of the injuries would only have been helpful if it completely excluded the petitioners, which Dr. Francisco's opinion would not have done. Furthermore, the petitioners have failed to show that Dr. Francisco, or any other medical expert with a similar opinion, was available to testify under the circumstances existing at the time of the trial or that Dr. Francisco would have testified consistently with his original time estimate.

Regardless, we do not believe that the petitioners have demonstrated prejudice. Even assuming that the substance of Dr. Sperry's testimony at the evidentiary hearing had been presented at trial, the petitioners have not shown a reasonable probability that the result of the trial is unreliable or that the proceedings were fundamentally unfair. Although Dr. Sperry testified that the head injuries could have occurred within twenty-four to forty-eight hours before the time of death, he also stated that they could have been inflicted as few as two hours before hospitalization, thus placing the victim in the petitioners' care. Dr. Sperry also testified that his time

estimate was based upon the absence of healing alterations, but he admitted that in some small children who are comatose, the healing process may stop altogether. He further testified that his estimate was complicated by the victim being placed on life support. In addition, the only evidence presented at trial with regard to a possible head injury in Kentucky was when the victim fell down the steps the Monday before the petitioners picked her up on Friday. However, Dr. Sperry testified that although this fall could have caused bruising, it would not have caused the brain injury that resulted in the victim's death because the fall occurred too far outside his time estimate.

With respect to the victim's vaginal injuries, Dr. Sperry testified that they occurred two to three days before the victim was pronounced dead and that the injuries were consistent with a straddle injury such as a fall from the monkey bars. However, the proof adduced at trial was that although the victim did fall off the jungle gym, this accident occurred weeks before her death. No evidence exists in the trial record of any straddle-type fall consistent with Dr. Sperry's estimated time frame.

Finally, the trial record contains ample evidence against the petitioners, the most glaring evidence being the numerous inconsistencies in their statements. Both petitioners gave several statements that were contradictory, both to their own earlier statements and to each other's statements. Ms. Watkins' version of what happened when they returned to Nashville varied nearly every time she was interviewed. At one point, she stated that she and the victim slept together in a chair before going to bed in a room separate from Mr. Dunn. At another time, she said they immediately went to bed when they arrived in Nashville. According to Mr. Dunn, Ms. Watkins slept with him in bed, and the victim slept in a separate bedroom. Later, Mr. Dunn made a statement in which he said that Ms. Watkins did not sleep with him but slept with the victim in a separate bedroom. Ms. Watkins stated that Mr. Dunn held the

victim in his lap during the ride to Nashville, but she later said that the victim sat between them in the car.

Ms. Watkins was adamant that they did not arrive in Nashville until 2:30 a.m. However, telephone records revealed that a call was placed from Ms. Watkins' home to Georgia at 1:06 a.m. Ms. Watkins said she did not notice the victim's vaginal bleeding until 8:00 or 9:00 a.m., but she also stated that she noticed the bleeding immediately when they arrived in Nashville. At one point, Ms. Watkins stated that she noticed the blood when they arrived in Nashville at 1:00 a.m. Mr. Dunn told Detective Bradford that he immediately noticed blood in the victim's panties when they arrived in Nashville. According to Ms. Watkins, the victim was asleep when they arrived in Nashville. According to Mr. Dunn, the victim was awake.

Other evidence at trial shows that the sheets on the bed in the master bedroom had been removed and washed Saturday morning before the victim was taken to the hospital. The evidence shows that the victim's sandals were found in the master bedroom, despite the fact that both Mr. Dunn and Ms. Watkins claimed that the victim stayed in a separate bedroom. Two witnesses testified that Ms. Watkins became upset when she learned that an autopsy would be performed. Ms. Watkins told both Ms. Williams and a Kentucky social worker that the victim was dying from a brain tumor.

The defense theory was that the injuries were inflicted upon the victim in Kentucky. However, the evidence shows that Ms. Williams, Ms. Fetterman and even Ms. Watkins stated that the victim appeared to be healthy when she left Kentucky. The next morning at the hospital, however, she had multiple bruises in the shape of knuckle marks on her head and had fresh blood in her vagina. Dr. Hill, who treated the victim when she first arrived at the hospital, testified that the victim's vaginal injury was fresh. His testimony both at trial and at the evidentiary hearing was that the vaginal injury was

only hours old and that no blanching existed to indicate that the wound was any older. Finally, despite an independent investigation by the Kentucky Department of Human Services, as well as investigations made pursuant to this case, no evidence of either physical or sexual abuse was ever found in Kentucky.

The circumstantial evidence of the petitioners' guilt is abundant, and Dr. Sperry's testimony is tenuous. The petitioners have not demonstrated a reasonable probability that as a result of their attorneys' performance, the trial was unreliable or the proceedings fundamentally unfair. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

II. DISJUNCTIVE INDICTMENT

Next, the petitioners contend that their attorneys were ineffective by failing to seek a dismissal or amendment to the disjunctive premeditated/felony murder count of the indictment or to take other steps to ensure verdict unanimity. The state contends that the trial court properly determined that the petitioners received the effective assistance of counsel. We agree.

The indictment in the present case charged the petitioners with first degree murder, alleging that the petitioners committed either premeditated murder or felony murder. In State v. Jefferson, 529 S.W.2d 674, 678 (Tenn. 1975), abandoned on other grounds, State v. Mitchell, 593 S.W.2d 280 (Tenn. 1980), our supreme court rejected Jefferson's claim that the indictment charging him with first degree murder by either premeditated or felony murder should have been quashed because it charged two offenses in a single count. The court held that the indictment charged him with one offense, first degree murder, and merely provided different means or intents with which the crime was committed. See State v. Keele, 644 S.W.2d 435, 439 (Tenn. Ct. Crim. App. 1982) (stating that the indictment alleging premeditated or felony murder charged the defendant with one offense, first degree murder); see also, Schad v. Arizona, 501

U.S. 624, 645, 111 S. Ct. 2491, 2504 (1991) (holding that the defendant was not deprived of due process upon conviction of first degree murder pursuant to an indictment alleging premeditated or felony murder). Thus, the disjunctive allegation of premeditated murder or felony murder to support the charge of first degree murder did not render the indictment in the present case invalid. The petitioners have not demonstrated prejudice.

We also hold that the petitioners have not demonstrated prejudice from their attorneys' failure to take additional steps to ensure verdict unanimity. First, the petitioners do not suggest what additional steps should have been taken. Our supreme court has stated that it is well-settled that "no constitutional or statutory provision prohibits a jury from rendering a general verdict of guilty of first degree murder where both premeditated and felony murder are charged and submitted to the jury." State v. Cribbs, 967 S.W.2d 773, 787 (Tenn. 1998); see also, Schad, 501 U.S. at 631, 111 S. Ct. at 2497. In light of the fact that the jury's general verdict did not deny the petitioners their right to jury unanimity, the petitioners have failed to demonstrate that they were prejudiced because their attorneys did not take any extra steps to ensure unanimity.

In consideration of the foregoing and the record as a whole, we affirm the trial court's denial of post-conviction relief.

Joseph M. Tipton, Judge

CONCUR:

Gary R. Wade, Presiding Judge

(Not participating)

Paul G. Summers