

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER SESSION, 1995

FILED
February 21, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

ERNEST LOYD RAY,)

Appellant,)

VS.)

STATE OF TENNESSEE,)

Appellee.)

C.C.A. NO. 02C01-9505-CC-00152

DYER COUNTY

HON. JOE G. RILEY
JUDGE

(Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF DYER COUNTY

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OPINION FILED _____

**ORIGINAL APPELLATE JUDGMENT
VACATED AND REINSTATED**

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant filed a petition for post-conviction relief alleging ineffective assistance of counsel. After conducting an evidentiary hearing, the trial court found that the Defendant had failed to establish that he was entitled to relief due to the ineffective assistance of his trial counsel, but the trial court also found that the Defendant was denied the opportunity for review by the Tennessee Supreme Court through no fault of his own. We agree with the trial court and grant the Defendant post-conviction relief to allow him to seek review by the Supreme Court on a delayed basis.

The Defendant was convicted of the rape of his fifteen-year-old step-daughter. At trial, the victim testified against the Defendant and set forth facts sufficient to sustain a conviction. In addition, the Defendant had confessed to the crime in a tape-recorded statement which was introduced as evidence against him. On direct appeal, the only issue raised was whether the trial court erred in overruling the Defendant's motion to suppress his confession. This court affirmed the ruling of the trial court and upheld the Defendant's conviction.¹ No application for permission to appeal was filed with the Tennessee Supreme Court. The Defendant then sought post-conviction relief, arguing that his constitutional right to counsel was violated by ineffective assistance of counsel.

The trial court rejected the Defendant's post-conviction petition, finding that: (1) Trial counsel's failure to cross-examine the victim regarding relatively insignificant inconsistencies between her trial testimony and her prior statements was a reasonable and justified tactical decision which resulted in no prejudice; (2) that trial counsel's decision not to object to certain allegedly leading questions was the result of a tactical

¹State v. Ernest Loyd Ray, No. 02C01-9108-CC-00166, Dyer County (Tenn. Crim. App., Jackson, filed Aug. 26, 1992).

decision and that the Defendant was not prejudiced in this regard; (3) that the Defendant failed to establish that trial counsel failed to properly investigate the case, failed to put on character witnesses or failed to adequately consult with the Defendant or that any prejudice resulted to the Defendant from any such actions; (4) that trial counsel preserved for appeal the sentencing issues by incorporating same into the motion for a new trial but that appellate counsel's decision not to pursue the issues was a tactical decision and that the Defendant was not prejudiced in any way by the failure to raise the sentencing issues on appeal; and (5) that the Defendant never had an opportunity to seek review of his case by the Tennessee Supreme Court.

To secure post-conviction relief in Tennessee, the defendant must prove an abridgment of a Federal or State constitutional right. Tenn. Code Ann. § 40-30-105 (repealed 1995).² To prevail on an ineffective assistance of counsel claim, the defendant must show that the adversarial process failed to produce a reliable result. Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993) (citing Strickland v. Washington, 466 U.S. 668 (1984)); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

Proving failure of the adversarial process because of ineffective assistance of counsel requires the defendant to satisfy, by a preponderance of the evidence, both prongs of a two-pronged test. See Butler, 789 S.W.2d at 899. First, the defendant must prove that counsel's performance failed to meet the threshold of competence demanded of attorneys in criminal cases. Butler, 789 S.W.2d at 899. Second, the defendant must prove actual prejudice resulting from the deficient performance. Cooper, 849 S.W.2d at 747 (citing Strickland, 466 U.S. at 687).

²Current law is codified at Tenn. Code Ann. § 40-30-203.

Scrutiny of counsel's performance should be highly deferential. Strickland, 466 U.S. at 689. The court should judge counsel at the time of the alleged error in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper, 849 S.W.2d at 746. To satisfy this prong, the defendant must show that counsel's performance does not meet the Sixth Amendment standard of objective reasonableness. Strickland, 466 U.S. at 687; Cooper, 849 S.W.2d at 747. Objective reasonableness demands that counsel's performance fall within the wide range of professional competency. Strickland, 466 U.S. at 688, 690; see Cooper, 849 S.W.2d at 746. Informed tactical decisions made by trial counsel, such as a decision not to call the defendant to testify, are not to be second guessed. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

The defendant must prove prejudice that results in an unfair or unreliable proceeding. Lockhart v. Fretwell, 113 S.Ct. 838, 843-44 (1993); Strickland, 466 U.S. at 687. To satisfy this prong, the defendant must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding defendant'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).

The resolution of the factual issues raised by the Defendant was determined by the trial court after a hearing in which the Defendant's wife, who was the mother of the victim, the Defendant, and the Defendant's trial counsel testified. The trial judge weighed the testimony of these witnesses, examined the record of his conviction, and found that the Defendant had failed to carry the burden of proof to support his claims, which the Defendant must do to prevail. State v. Kerley, 820 S.W.2d 753 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1991). This court is bound by the findings of the trial judge on the factual determinations unless the evidence preponderates against the findings. Rhoden v. State, 816 S.W.2d 56 (Tenn. Crim. App.), perm. to

appeal denied, id. (Tenn. 1991). We conclude that the evidence supports the findings of the trial judge.

In Pinkston v. State, 668 S.W.2d 676 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1984), this Court said that "unilateral termination of a direct appeal following first-tier review entitles a prospective appellant to relief in the form of a delayed appeal." Id. at 677. The appropriate procedure for obtaining post-conviction relief of this sort is for the trial court to hold a hearing and make relevant findings of fact concerning the petitioner's allegations of deprivation of second-tier review. Id. Once the trial court finds a factual basis for relief but denies relief for lack of jurisdiction, the petitioner is able to appeal that judgment to the Court of Criminal Appeals which is the only Court that can vacate and reinstate its own judgments. Id.

In the case sub judice, the trial court found that the Defendant's attorney did not advise him of his right to appeal from the Court of Criminal Appeals to the Tennessee Supreme Court. Thus, the trial court found a factual basis for relief but dismissed the petition for lack of jurisdiction to vacate and reinstate the Court of Criminal Appeals' judgment. Accordingly, the proof is unrefuted in the record that the Defendant was denied the opportunity of review by the Tennessee Supreme Court through no fault of his own. The State does not oppose the relief sought by the Defendant. We, therefore, vacate our judgment in State v. Ernest Loyd Ray, No. 02C01-9108-CC-00166, Dyer County (Tenn. Crim. App., Jackson, filed Aug. 26, 1992), and reinstate it as of the date of the filing of this opinion.

As this Court said in Pinkston, our grant of relief under these circumstances in no way suggests a true reversal of the trial court's judgment but is "simply an application of appropriate authority and jurisdiction." Id. at 678. We appreciate Judge Riley's clear and definitive handling of the issue.

The record demonstrates a factual basis, as in Pinkston, for post-conviction relief to allow Ernest Loyd Ray to apply for permission to appeal to the Supreme Court on a delayed basis. We, therefore, vacate our judgment of August 26, 1992 and reinstate it as of the date of this opinion. Counsel for the Defendant, Vanedda Prince, shall pursue the delayed appeal unless allowed to withdraw pursuant to Rule 14 of the Rules of the Supreme Court.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

JOHN H. PEAY, JUDGE