

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
DECEMBER SESSION, 1996

FILED

January 28, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JAMES RINES,)
)
Appellee)
)
vs.)
)
STATE OF TENNESSEE,)
)
Appellant)

No. 03C01-9606-CC-00210

COCKE COUNTY

Hon. BEN W. HOOPER, II, Judge

(Post-Conviction)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, James Rines, appeals the Cocke County Criminal Court's denial of his petition for post-conviction relief. In this appeal, the appellant contends that his conviction for first degree murder is constitutionally deficient because (1) the trial court's jury instructions on "reasonable doubt" and "premeditation and deliberation" were erroneous and (2) he was denied the effective assistance of counsel.

After a review of the record, we affirm the judgment of the trial court.

I. Background

On September 20, 1990, a Cocke County jury returned a verdict finding the appellant guilty of the first degree murder of his wife and sentenced him to life imprisonment. This court affirmed the appellant's conviction on January 13, 1993, and permission to appeal was denied by the supreme court on May 10, 1993. See State v. Rines, No. 03C01-9204-CR-00115 (Tenn. Crim. App. at Knoxville, Jan. 13, 1993), perm. to appeal denied, (Tenn. May 10, 1993). On March 9, 1995, the appellant filed a petition for post-conviction relief. The trial court held a hearing on the petition on December 18, 1995.

At the hearing, the appellant testified that, during his 1990 trial, he was represented by the assistant public defender, Susanna Thomas. He maintained that, throughout her representation, Ms. Thomas only discussed the case with him two times prior to trial. Specifically, he testified that she only visited him "one time for about fifteen minutes," while he was being held in jail. After being released on bond, the appellant discussed his case with Ms. Thomas "one time

right before the trial for approximately one hour or forty-five minutes to an hour." Additionally, the appellant alleges as deficient performance trial counsel's failure to assert the defense of intoxication and failure to file appropriate motions to suppress statements he made to law enforcement and medical personnel. The appellant also testified that trial counsel failed to prepare special jury requests regarding premeditation, deliberation, and reasonable doubt.

Trial counsel's testimony at the post-conviction hearing differed significantly from that of the appellant's. Ms. Thomas' testimony indicated that she maintained constant contact with the appellant for the six weeks prior to trial, including visits with the appellant in preparation for trial.¹ The investigator for the public defender's office also assisted trial counsel in her pretrial investigation. Together they interviewed all potential witnesses, except one witness they could not locate. Ms. Thomas testified that no attempt was made to suppress the appellant's initial statements to law enforcement because she considered such a motion frivolous and without merit.

Ms. Thomas related that the appellant asserted that the shooting of his wife was the result of a struggle over the weapon. Specifically, she stated that, at trial, the appellant testified that "[his wife] took the gun from his pocket and assaulted him." Additionally, the proof established that the appellant was shot in the leg. However, the evidence also revealed that, following the shooting of his wife, the appellant dialed 911 for assistance. The appellant advised the first officer who arrived at the scene that he was shot in the leg and that his wife was injured. These statements were made through a window while the appellant remained inside the residence. In response to the officer's further inquiry about the wife's whereabouts, the appellant stated "She's lying here beside me on the

¹She made five pages of notes, including a diagram of the scene, from her initial interview with the appellant. After the preliminary hearing, she met with the appellant again and filled out his background information and a medical release. At their third meeting, the two discussed possible witnesses against the appellant.

bed. I've shot her damn brains out and I think she's dead." Shortly thereafter, the appellant gratuitously provided a second statement that he "got tired of her [fooling] around on him, so I blew her damn brains out." Moreover, trial counsel was confronted with the appellant's threats to kill his wife made the day prior to her murder.

Additionally, Ms. Thomas testified that the blood alcohol analysis performed hours after the shooting placed the appellant's blood alcohol level at .27 percent. She further testified that, through the process of extrapolation, she learned that the appellant's blood alcohol level at the time of the shooting would have been in the .34 range. However, she stated that, although the jury was informed of the .27 blood alcohol level, this fact was not offered as a specific defense. She testified that the agreed upon defense was self-defense, and that intoxication and self-defense are incompatible defenses. Trial counsel also confirmed that all of the jury charges were the standard pattern instructions at the time of the trial.

The trial court accredited the testimony of trial counsel and dismissed the petition stating that:

. . . defense counsel properly investigated the case . . . that the defendant's case was tried on the theories of self-defense and accident. . . The Court finds that the defenses of accidental killings and self-defense could have been in conflict with an intoxication defense and further finds that defense counsel was not ineffective in failing to pursue the theory of diminished capacity as result of intoxication. . . that the jury charge given on pre-meditation and deliberation was the charge that was prescribed by the Supreme Court of Tennessee at the time the trial was held. . . the reasonable doubt instruction was given pursuant to the jury pattern instruction in effect at the time the case was tried.

An order denying the petition was entered on January 9, 1996. The appellant filed a notice of appeal on March 6, 1996.

II. Analysis

Before we commence our review, we acknowledge the State's contention that the appellant's appeal is not properly before this court due to failure to timely file his appeal. See Tenn. R. App. P. 4(a). The entry of judgment in the present case was filed on January 11, 1996. The appellant did not file his notice of appeal until March 6, 1996. This exceeds the thirty day time limit within which one may file a notice of appeal. Tenn. R. App. P. 4(a). Moreover, the appellant captions his issues as "Whether Rines was deprived of due process because of unconstitutional jury instructions" and "Whether Rines was deprived of effective assistance of counsel. . . ." These issues are waived because they do not conform to Rule 27(a)(4), Tenn. R. App. P. Harvey v. State, 749 S.W.2d 478, 479 (Tenn. Crim. App. 1987); accord Tortorich v. Erickson, 675 S.W.2d 190, 191 (Tenn. App. 1984); see also Tenn. R. App. P. 27 (a)(6-7). "T.R.A.P. does not contemplate that an appellant may submit one blanket issue as to the correctness of a judgment and thereby open the door to argument upon various issues which might affect the correctness of the judgment." State v. Lewis, No. 2 (Tenn. Crim. App. at Jackson, Dec. 23, 1987) (Jones, J. concurring). Nonetheless, in the interest of justice, we elect to address these issues as articulated in the appellant's brief.

A. Reasonable Doubt Instruction

The appellant contends that the reasonable doubt instruction provided by the trial court is constitutionally invalid due to the use of the term "moral certainty." The appellant has failed to include a record of the questioned

instruction.² Nonetheless, this claim is without merit. In Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 1245-48 (1994), the United States Supreme Court ruled that the phrase "moral certainty" may have lost its historical meaning and that modern juries, unaware of the historical meaning, might interpret the term to mean something less than the high level of determination constitutionally required in criminal cases. See Covington v. State, No. 01C01-9606-CC-00250 (Tenn. Crim. App. at Nashville, Sept. 30, 1996). Nonetheless, although marking its disapproval, the Court did not hold that it was constitutionally invalid. Id. Additionally, the Tennessee Supreme Court has held that "[t]he use of the phrase 'moral certainty by itself is insufficient to invalidate an instruction on the meaning of reasonable doubt.'" State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994), cert. denied, --- U.S. ---, 115 S.Ct. 909 (1995). This issue is without merit.

B. Instructions on Premeditation and Deliberation

Next, the appellant argues that the instructions given regarding premeditation and deliberation contain the "same fatal flaws as those condemned . . . in [State] v. Brown, 836 S.W.2d 530 (Tenn. 1992)." The appellant contends that Brown should be given retroactive application. This court has previously determined that Brown created no new constitutional right and is not to be applied retroactively. See Lofton v. State, 898 S.W.2d 246, 249-50 (Tenn. Crim. App. 1994), perm. to appeal denied, (Tenn. 1995) (citing Slate v. State, No. 03C01-9201-CR-00014 (Tenn. Crim. App. at Knoxville, Apr.

²In their briefs, both parties agree that the trial court provided the following instruction on reasonable doubt:

A reasonable doubt is an honest doubt which remains after an investigation of all the evidence which will not permit your mind to rest easily as to the certainty of guilt. A reasonable doubt does not include a captious, possible or an imaginary doubt. Absolute certainty of guilt is not required to convict, but moral certainty is required.

(Emphasis added).

27, 1994)). Moreover, this court has stated that "the mere fact that [the] instruction has been abandoned . . . does not necessarily mean that its previous use equated with a due process violation" cognizable in a post-conviction proceeding. Id. (quoting Slate, No. 03C01-9201-CR-00014; see also Bell v. State, No. 01C01-9304-CR-00130 (Tenn. Crim. App. at Nashville, Aug. 4, 1994)). Thus, Brown is inapplicable to the present case. This issue is meritless.

C. Ineffective Assistance

In his final issue, the appellant complains that he received the ineffective assistance of counsel. Again, he contends that his trial counsel failed to file a motion to suppress statements, failed to properly prepare for trial, and failed to develop the defenses of intoxication and accident. Initially, we note that the appellant's argument pertaining to trial counsel's failure to file a motion to suppress has been previously determined by this court on direct appeal. See Rines, No. 03C01-9204-CR-00115. Post-conviction relief is not a forum in which to relitigate claims of error raised and determined previously. State v. McClintock, 732 S.W.2d 268, 272 (Tenn. 1987). Thus, our review is limited to the appellant's contentions regarding counsel's failure to adequately prepare for trial and counsel's failure to develop additional defenses at trial.

In determining whether the petitioner received the effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution and Art. I, Sect. IX of the Tennessee Constitution, we must inquire as to whether the performance of trial counsel was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To reverse a conviction on these grounds, the petitioner must show by a preponderance of the evidence, Taylor v. State, 875

S.W.2d 684 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994), that counsel's representation was deficient and that there was prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). Counsel's representation is deficient if the errors were so serious as to deprive the petitioner of representation guaranteed him by the Sixth Amendment. Cox v. State, 880 S.W.2d 713, 717 (Tenn. Crim. App. 1994). The deficient representation becomes prejudicial when the petitioner is deprived of a fair trial with a reliable result. Id.

First, the appellant alleges that counsel failed to adequately prepare for trial. To support this claim, he states that counsel failed to sufficiently meet with him prior to trial, that counsel failed to visit the crime scene, that counsel failed to further the appellant's blood alcohol content at the time of the murder, and that counsel failed to interview potential witnesses. In direct contravention to these assertions, trial counsel testified that she, along with her investigator, spent a substantial amount of time preparing the appellant's case. See supra note 2. Additionally, she asserted that she did investigate the appellant's blood alcohol content and that she or her investigator did interview all of the witnesses supplied by the appellant.

Next, the appellant contends that counsel failed to develop the defenses of intoxication and accident at trial. Trial counsel testified that the agreed defense strategy was that of self-defense. She agreed that, although intoxication might negate the appellant's ability to form the necessary intent, the appellant's previous threats to kill his wife on the day before the murder seriously weakened this argument. She further asserted that the defenses of intoxication and self-defense are incompatible defenses. The decision as to defense strategy is a tactical one, which a court may not second guess as long as the

decisions are informed and based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1992). The record sufficiently establishes that the decision to use self-defense as the proposed defense strategy was well-informed. We will not interfere with this decision.

In the present case, the post-conviction court entered findings of facts and conclusions of law.³ These findings of fact have the weight of a jury verdict. Vermilye v. State, 754 S.W.2d 82, 84 (Tenn. Crim. App. 1987); Bratton v. State, 477 S.W.2d 754, 756 (Tenn. Crim. App. 1971). These findings are conclusive unless we find that the evidence preponderates against it. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990); State v. Swanson, 680 S.W.2d 487, 490 (Tenn. Crim. App. 1984). Additionally, the petitioner has the burden of proving the grounds raised in the petition. There is no evidence in the record that disputes the court's finding. Therefore, we must affirm the judgment. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

III. Conclusion

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 which denied post-conviction relief. The appellant has failed to meet his burden of proof. Moreover, the appellant's challenges to the provided jury instructions are without merit. We affirm the judgment of the trial court.

³See *supra* Section I of Opinion for a summary of the findings of facts by the post-conviction court.

DAVID G. HAYES, Judge

CONCUR:

DAVID H. WELLES, Judge

THOMAS T. WOODALL, Judge