

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH 1997 SESSION

FILED
September 30, 1997
Cecil W. Crowson
Appellate Court Clerk

JOE GLASGOW, JR.,)
)
Appellant,)
)
v.)
)
STATE OF TENNESSEE,)
)
Appellee.)

No. 01C01-9603-CC-00092
Davidson County
Honorable Walter C. Kurtz, Judge
(Post-Conviction)

For the Appellant:

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OPINION FILED: _____

REVERSED AND REMANDED IN PART, DELAYED APPEAL GRANTED WITH
JUDGMENT IN CASE NO. 01-C-01-9102-CC-00082 VACATED AND REINSTATED

Joseph M. Tipton
Judge

OPINION

The petitioner, Joe Glasgow, Jr., appeals as of right from the Davidson County Circuit Court's denial of his petition for post-conviction relief. He contends that he is entitled to post-conviction relief because he received ineffective assistance of counsel during the hearing on his motion for new trial and on direct appeal and because the trial court violated his due process rights when it failed to hold a full and fair hearing before it ruled that he did not have "standing" to challenge a search. Because we conclude that the trial court unduly limited the petitioner's proof at the post-conviction hearing, we remand the case for another hearing. We also grant the petitioner a delayed appeal.

The petitioner was convicted of possession of more than five grams of a schedule two controlled substance for resale. As a Range II, especially aggravated offender, he received a fifty-year sentence. This court affirmed his conviction. State v. Joe Glasgow, Jr., No. 01-C-01-9102-CC-00082, Davidson County (Tenn. Crim. App. Oct. 10, 1991).

At the hearing on the petitioner's motion for a new trial and in his direct appeal to this court, the petitioner argued that he received the ineffective assistance of trial counsel because his trial counsel failed to file a motion to suppress the drugs that were introduced against him. After hearing proof on the matter, the trial court concluded that trial counsel was not ineffective for failing to file a motion to suppress, finding that the petitioner did not have a reasonable expectation of privacy in the area where the drugs were found. This court likewise concluded that the petitioner had failed to show that a motion to suppress would have been meritorious. State v. Joe Glasgow, Jr., slip op. at 10.

At the post-conviction hearing in this case, the petitioner argued that his post-trial counsel was ineffective at the motion for new trial and on appeal in the presentation of the ineffective assistance of counsel claim. He also argued that his appellate counsel was ineffective for failing to appeal his case to the Tennessee Supreme Court.

With respect to the presentation of his claim of ineffective assistance of trial counsel, the petitioner argued that counsel at the hearing on the motion for new trial and counsel on appeal were ineffective because they failed to argue that the trial court was in error for raising the “standing” issue. The petitioner also sought to prove that he had a legitimate expectation of privacy in the area where the drugs were found and that his counsel at the hearing on the motion for a new trial was deficient for failing to present his testimony as proof of “standing” to contest the search. The post-conviction court ruled that the search issue had been previously determined and prohibited the petitioner from presenting any proof on his expectation of privacy in the place where the drugs were found.

Regarding his appellate counsel's failure to appeal his case to the Tennessee Supreme Court, the petitioner testified that he understood that his appellate counsel would pursue his appeal to the end. He said that he did not expect his attorney to stop appealing his case when he was denied relief in this court. He recalled that he did not have any discussion with his attorney after this court decided his direct appeal. He said that he learned of this court's decision after his mother mailed him a copy of the opinion and a letter that his attorney had sent to her. He said that he learned from his mother that he would have to pay an additional \$2,500.00 for the lawyer to pursue an appeal to the supreme court. He admitted that the letter he received with the opinion said “something about a notice of appeal in thirty days.” However, he explained that he only received the letter and opinion ten days before the expiration of this time period.

He recalled that he mailed a notice of appeal within the ten days but was told that it was untimely because it did not have a certain postmark on it.

The petitioner's appellate counsel testified that he had limited contact with the petitioner. He explained that the petitioner's family hired him and that most of his contact was with them. He said that he sent the petitioner's family a letter explaining the time limitations of filing an application for permission to appeal to the Tennessee Supreme Court. At the conclusion of the proof, both the state and trial court agreed that the petitioner should receive a delayed appeal because his appellate counsel did not adequately communicate with him regarding his right to seek supreme court review. Accordingly, in its written order denying post-conviction relief, the trial court recommended that this court grant the petitioner a delayed appeal.

I

The petitioner contends that he received ineffective assistance of counsel at the motion for new trial and on appeal because his attorneys failed to argue that the trial court was in error for raising the "standing" issue. He asserts that under State v. White, 635 S.W.2d 396 (Tenn. Crim. App. 1982), the trial court was precluded from deciding the petitioner's ineffective assistance of counsel claim based on his lack of the requisite expectation of privacy to challenge the search because the state never raised the issue. He also argues that the trial court's consideration of the petitioner's lack of a legitimate expectation of privacy under these circumstances amounted to a violation of his due process rights. We disagree.

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, 113 S. Ct. 838, 842-44 (1993). Our supreme court has also applied this standard 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), and to the right to appellate counsel under the Fourteenth Amendment. Campbell v. State, 904 S.W.2d 594, 596 (Tenn. 1995); see Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985).

The petitioner relies on White to argue that his counsel was deficient at the hearing on the motion for a new trial and on appeal for failing to contest the trial court's reliance on his lack of "standing" to contest the search. In White, this court rejected the state's argument that the defendant lacked the requisite expectation of privacy to challenge the search of the car he was driving because the issue was not raised or litigated in the trial court. Because it was not addressed, the record on appeal did not contain "the nature and circumstances of the defendant's possession of the vehicle on the night of his arrest." White, 635 S.W.2d at 399. Under such circumstances, this court held that the state was estopped from contesting White's expectation of privacy in the car on appeal when it failed to raise the issue in the trial court.

Unlike White, the issue of the petitioner's expectation of privacy in this case was raised in the trial court. After the close of proof at the motion for new trial hearing, the trial court questioned the petitioner's counsel about the petitioner's "standing" to challenge the search. The state also argued that the petitioner did not have "standing" to challenge the search. The petitioner's attorney responded by arguing that the petitioner could not be charged with possessing the drugs for resale if he lacked a sufficient possessory interest in the drugs to challenge the search.

The petitioner argues that under White, the trial court was precluded from considering whether the petitioner had a sufficient expectation of privacy to challenge the search because the state did not raise the issue. We disagree. As previously noted, the state did challenge the petitioner's "standing" to contest the search at the hearing on the motion for a new trial. Moreover, the issue of the petitioner's expectation of privacy in the area searched is part of the substantive Fourth Amendment question he raised relative to whether his rights were violated by an unreasonable search or seizure. See Rakas v. Illinois, 439 U.S. 128, 132, 133, 99 S. Ct. 421, 424-25 (1978); United States v. Salvucci, 448 U.S. 83, 87, 100 S. Ct. 2547, 2550-51, n.4 (1980). To determine whether a motion to suppress the drugs would have been meritorious, the trial court had to determine as a part of the Fourth Amendment analysis whether the search unreasonably infringed upon the petitioner's legitimate expectation of privacy.

As the party seeking to prove that the drugs should have been suppressed, the petitioner had the initial burden of proving that he had a legitimate expectation of privacy in the place that was searched by a preponderance of the evidence. State v. Burton, 751 S.W.2d 440, 445-46 (Tenn. Crim. App. 1988). Thus, the trial court was justified in considering whether the petitioner met this burden. Because the petitioner's argument to the contrary is without merit, we hold that his post-trial counsel were not deficient for failing to raise it.

We likewise hold that the trial court's consideration of the petitioner's failure to establish a legitimate expectation of privacy did not amount to a violation of the petitioner's due process rights. The petitioner had ample opportunity to present proof on the issue at the hearing on his motion for a new trial.

II

Next, the petitioner argues that his counsel at the hearing on the motion for a new trial was ineffective for failing to make an offer of proof showing that a motion to suppress would have been meritorious. Unfortunately, we cannot determine whether this issue has any merit on the record before us. During the post-conviction hearing, the trial court repeatedly ruled that the petitioner could not present evidence with respect to the search issue because it had been previously determined.

Although we agree with the trial court that any issue regarding the merits of the search issue or the effectiveness of the petitioner's counsel at trial has been previously determined, the petitioner was entitled to present proof on his claim that his successor counsel at the motion for a new trial was ineffective in his handling of the search and trial counsel effectiveness issues. In this vein, the post-conviction court erred by refusing to allow the petitioner an opportunity to show that evidence existed that would have established that he had a legitimate expectation of privacy in the area where the seized drugs were found and that his attorney was deficient for failing to present it at the hearing on the motion for a new trial. Accordingly, this case must be remanded for the petitioner to have an opportunity to present proof on the issue.

III

Finally, we address the trial court's conclusion that the petitioner is entitled to a delayed appeal. The trial court found that appellate counsel's failure to communicate with the petitioner deprived the petitioner of his right to pursue an appeal to the Tennessee Supreme Court. On appeal, we are bound by this factual finding unless we conclude that the evidence preponderates against it. See Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). On the record before us, we cannot conclude that the evidence so preponderates.

Unilateral termination of an appeal to the supreme court without notice to the client has been deemed ineffective assistance of counsel. See Moultrie v. State, 542 S.W.2d 835, 838 (Tenn. Crim. App. 1976). Also, Tennessee cases have allowed for delayed appeals without considering whether the issues to be raised have any merit. See Pinkston v. State, 668 S.W.2d 676 (Tenn. Crim. App. 1984); State v. Brown, 653 S.W.2d 765 (Tenn. Crim. App. 1983); State v. Hopson, 589 S.W.2d 952 (Tenn. Crim. App. 1979); Campbell v. State, 576 S.W.2d 591 (Tenn. Crim. App. 1978).

In this case, the petitioner testified that his appellate counsel failed to notify him of this court's decision and his right to seek Tennessee Supreme Court review. Although the petitioner admitted that he learned about this court's opinion and his right to seek supreme court review of the decision ten days before the time for filing an application expired, the trial court found that appellate counsel's lack of communication with the petitioner deprived him of his opportunity to seek further appellate review. The state agreed with the post-conviction court that the petitioner was entitled to a delayed appeal. Under these circumstances, we conclude that the petitioner was deprived of seeking second-tier review of his conviction through no fault of his own.

In consideration of the foregoing, we vacate our judgment in State v. Joe Glasgow, Jr., No. 01-C-01-9102-CC-00082, Davidson County (Tenn. Crim. App. Oct. 10, 1991), and reinstate it as of the date of the filing of this opinion. Also, because the post-conviction court improperly limited the evidence it allowed the petitioner to present at the post-conviction hearing, we remand this case for another evidentiary hearing.

Joseph M. Tipton, Judge

CONCUR:

Joe G. Riley, Judge

Thomas T. Woodall, Judge