

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1998 SESSION

FILED

May 27, 1998

Cecil W. Crowson
Appellate Court Clerk

ROLAND H. MATLOCK,)
)
Appellant,)
)
VS.)
)
STATE OF TENNESSEE,)
)
Appellee.)

NO. 01C01-9703-CR-00091

DAVIDSON COUNTY

HON. THOMAS H. SHRIVER,
JUDGE

(Post-Conviction)

FOR THE APPELLANT:

TERRY J. CANADY
211 Printers Alley Building
Suite 400
Nashville, TN 37201-1414

FOR THE APPELLEE:

JOHN KNOX WALKUP
Attorney General and Reporter

LISA A. NAYLOR
Assistant Attorney General
Cordell Hull Building, 2nd Floor
425 Fifth Avenue North
Nashville, TN 37243-0493

VICTOR S. JOHNSON, III
District Attorney General

KYMBERLY HAAS
Assistant District Attorney General
Washington Square, Suite 500
222 Second Avenue North
Nashville, TN 37201-1649

OPINION FILED: _____

AFFIRMED IN PART; DELAYED APPEAL GRANTED

**JERRY L. SMITH,
JUDGE**

OPINION

The petitioner, Roland H. Matlock, appeals the order of the Criminal Court of Davidson County denying his petition for post-conviction relief after an evidentiary hearing. He is presently serving an effective sentence of thirty-five (35) years as a result of guilty pleas to aggravated burglary, aggravated kidnapping and four (4) counts of rape. On appeal petitioner claims he received ineffective assistance of counsel because: (1) counsel persuaded him to plead guilty to aggravated kidnapping contrary to the principles of State v. Anthony; and (2) counsel failed to advise him of his right to seek second tier appellate review of his convictions and sentences to the Tennessee Supreme Court. Because we find that petitioner was denied his right to seek second tier appellate review, we grant him the right to seek a delayed appeal to the Tennessee Supreme Court. In all other respects, the judgment of the trial court is affirmed.

BACKGROUND

A.

In 1990, petitioner was charged in a thirteen-count indictment with three (3) counts of aggravated burglary, two (2) counts of aggravated kidnapping, six (6) counts of rape, one (1) count of sexual battery and one (1) count of theft of property over \$500. The circumstances surrounding the indictment were that, in the early morning hours of February 23, 1990, petitioner broke in the back door of the apartment occupied by A. R. and A. M.,¹ female students at a local university.² A. R., who was studying at the time, attempted to escape from petitioner out the front door. Petitioner was able to catch her, however, and they struggled. A. R. received abrasions and bruises on her face and neck as a result of the struggle. Petitioner

¹ The policy of this Court is not to reveal the names of rape victims.

² Petitioner broke into the victims' apartment two previous times the same night, thereby resulting in three (3) counts of aggravated burglary. On one of these occasions, petitioner took a television and a VCR.

forced A. R. upstairs in her apartment, where A. M. was sleeping. Petitioner demanded that both victims remove their clothing and forced them to perform fellatio on him, alternating between the victims on several occasions.

Petitioner then demanded that the victims give him their money and other valuables. He took \$15 and a bank card belonging to A. R. After he left the victims' apartment, petitioner withdrew money from an automatic teller machine using A.R.'s ATM card.

B.

Petitioner pled guilty to one (1) count of aggravated burglary, one (1) count of aggravated kidnapping (of A. R.) and four (4) counts of rape. The trial court sentenced him to six (6) years for aggravated burglary, eight (8) years for aggravated kidnapping and twelve (12) years for each count of rape. All sentences were ordered to run consecutively, except that two (2) counts of rape were to run concurrently with the other two (2) counts, resulting in an effective sentence of thirty-eight (38) years.

On direct appeal, this Court reduced petitioner's sentence for aggravated burglary to three (3) years and affirmed the remaining sentences. State v. Roland H. Matlock, C.C.A. No. 01C01-9107-CR-00212, Davidson County (Tenn. Crim. App. filed March 5, 1992, at Nashville).

C.

In 1993, petitioner filed this petition for post-conviction relief alleging ineffective assistance of counsel.³ At the evidentiary hearing, petitioner testified that his attorney, Mark Fishburn, was appointed to represent him approximately twenty-seven (27) days prior to the trial date. He claimed that Fishburn only met with him twice, failed to investigate the circumstances surrounding his case and failed to prepare a defense for trial. Petitioner testified that Fishburn misinformed him that he would receive an effective sentence of nineteen (19) years, and he was

³ Petitioner also claimed that he did not knowingly and voluntarily plead guilty because the trial court failed to advise him of his rights pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). It appears that petitioner abandoned this allegation, as there was no mention of this issue during the evidentiary hearing nor on this appeal.

“swindled” into pleading guilty.

Petitioner claimed that Fishburn did not explain the case of State v. Anthony, 817 S.W.2d 299 (Tenn. 1991), and its effect on his aggravated kidnapping charges. He stated that if he had known about Anthony prior to his pleading guilty, he would not have pled guilty to aggravated kidnapping.⁴ He also stated that Fishburn took no steps to preserve his right to seek appellate review of his sentences to the Tennessee Supreme Court.

On cross-examination, petitioner conceded that the state's evidence against him was overwhelming. Petitioner acknowledged giving a statement to the police admitting to the offenses.⁵ The state had a photograph taken at the ATM shortly after the offenses when petitioner used the stolen bank card, and one of the victims identified petitioner from a line-up. Furthermore, petitioner's fingerprints were found on a telephone in the apartment. While insisting that his attorney failed to prepare a defense, petitioner was not aware of any particular defense that Fishburn should have pursued.⁶

Defense attorney Mark Fishburn also testified at the hearing. He testified that he was appointed to represent petitioner and received full discovery from the state as part of an “open file” policy, including the statements of both victims. He was aware of the overwhelming evidence against petitioner, including petitioner's own statement implicating himself. He was concerned that there was no viable defense in this case in light of petitioner's claims that the victims consented to having sexual relations with him. He recalled speaking to the petitioner at length concerning State v. Anthony and its effect on petitioner's aggravated kidnapping charges if he were convicted after a trial. At that time, Anthony was pending appeal in the Tennessee Supreme Court. He testified that the state would offer a plea

⁴ At that time, Anthony was pending appeal in the Tennessee Supreme Court. However, Anthony was not released until approximately nine (9) months after petitioner entered his guilty pleas.

⁵ In one statement, petitioner implied that the sexual attacks upon the victims were consensual. At the post-conviction hearing, petitioner admitted that the victims did not consent, but maintained that the victims “bargained” with him in order to get him to leave.

⁶ Petitioner testified that “there is a defense if he's a defense attorney. Otherwise, there is no reason to have a defense attorney in the case.”

agreement only if petitioner agreed to plead guilty to the aggravated kidnapping of A. R.

At the conclusion of the proof, the state conceded that no application for permission to appeal was filed with the Tennessee Supreme Court on petitioner's behalf with regard to his direct appeal.

D.

In denying post-conviction relief, the trial court considered the overwhelming evidence against petitioner. The trial court also noted that Fishburn negotiated a favorable plea agreement by having seven (7) counts of the indictment dismissed. The court found that State v. Anthony did not apply to the aggravated kidnapping count as it was not incidental to the rapes or the burglary. The trial court concluded that petitioner did not prove that Fishburn's representation was deficient, nor did he establish prejudice from any of the alleged instances of deficient performance.

The trial court further found that an attorney is not required to file a frivolous appeal, and any appeal to the Tennessee Supreme Court would have been frivolous. Therefore, the court concluded that Fishburn was not ineffective for failing to file an application for permission to appeal to the Tennessee Supreme Court. As a result, the trial court denied relief.

POST-CONVICTION STANDARD OF REVIEW

The trial judge's findings of fact on post-conviction hearings are conclusive on appeal unless the evidence preponderates otherwise. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990); Adkins v. State, 911 S.W.2d 334, 341 (Tenn. Crim. App. 1995). The trial court's findings of fact are afforded the weight of a jury verdict, and this Court is bound by the trial court's findings unless the evidence in the record preponderates against those findings. Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997); Alley v. State, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997); Dixon v. State, 934 S.W.2d 69, 72 (Tenn. Crim. App. 1996).

INEFFECTIVE ASSISTANCE OF COUNSEL

This Court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2064; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

The test in Tennessee in determining whether counsel provided effective assistance is whether his performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. Strickland v. Washington, 466 U.S. at 689, 104 S.Ct. at 2065; Alley v. State, 958 S.W.2d 138, 149 (Tenn. Crim. App. 1997); State v. Williams, 929 S.W.2d 385, 389 (Tenn. Crim. App. 1996).

In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court applied the two-part Strickland standard to ineffective assistance of counsel claims arising out of a guilty plea. The Court in Hill modified the prejudice requirement by requiring a defendant to show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. 474 U.S. at 59, 106 S.Ct. at 370.

STATE V. ANTHONY

In his first issue, petitioner claims that trial counsel was ineffective for allowing him to plead guilty to aggravated kidnapping. He asserts that the aggravated kidnapping was "essentially incidental" to the burglary and the rapes, and his conviction for aggravated kidnapping violates due process under the

principles of State v. Anthony, *supra*. He maintains that had he known about the implications of Anthony prior to his pleading guilty, he would not have pled guilty to aggravated kidnapping.

In State v. Anthony, the Supreme Court held that when kidnapping is “essentially incidental” to another offense, due process prohibits a conviction for kidnapping. Id. at 306-307. The test to be applied is whether, under the facts of each case, “the confinement, movement or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction.” Id. at 306.

At the time petitioner entered his guilty plea, Fishburn was aware of the overwhelming nature of the state’s evidence against petitioner. Petitioner faced the possibility of thirteen (13) convictions, including two (2) convictions for aggravated kidnapping. Petitioner also faced the possibility that he would be required to serve consecutive sentences on these convictions. Although Fishburn believed that one (1) of the aggravated kidnapping charges would have to be merged with the rape charges, he determined that the other charge, the charge to which petitioner pled, could constitutionally stand. Furthermore, the plea agreement was contingent upon petitioner pleading guilty to aggravated kidnapping.

At the post-conviction hearing, the trial court found that the aggravated kidnapping conviction was not essentially incidental to the aggravated burglary or the rape convictions under Anthony. Considering this along with the foregoing circumstances surrounding petitioner’s guilty plea, the trial court concluded that counsel was not deficient for allowing petitioner to plead guilty to aggravated kidnapping. Petitioner has not shown that the evidence preponderates against this finding. This issue is without merit.

FAILURE TO FILE APPLICATION FOR PERMISSION TO APPEAL

Petitioner also argues that he received ineffective assistance of counsel in that his attorney failed to file an application for permission to appeal to the Tennessee Supreme Court. Therefore, he was not able to seek second tier appellate review by the Tennessee Supreme Court in his direct appeal.

The state conceded at the evidentiary hearing that counsel failed to file a Tenn. R. App. P. 11 application for permission to appeal to the Tennessee Supreme Court, but maintains that there is no duty on the part of counsel to file a frivolous Rule 11 application. While it is true that counsel is under no obligation to file a frivolous Rule 11 application, in such circumstances counsel must notify the defendant pursuant to Rule 14 of the Tennessee Supreme Court that counsel is withdrawing from the case and the defendant himself must file a Rule 11 application within 60 days of this court's opinion should defendant desire to do so. There is no evidence in the record before this Court that counsel filed a motion to withdraw pursuant to Rule 14 of the Tennessee Supreme Court after this Court's opinion was filed on direct appeal. When a defendant is denied second tier appellate review on a direct appeal through no fault of his own, he is entitled to a delayed appeal. Pinkston v. State, 668 S.W.2d 676, 677 (Tenn. Crim. App. 1984). We, therefore, grant petitioner the right to seek a delayed appeal to the Tennessee Supreme Court.

CONCLUSION

Because we find that petitioner was denied second tier appellate review in his direct appeal, we grant him the right to seek a delayed appeal to the Tennessee Supreme Court. Accordingly, we vacate our judgment of March 5, 1992, and reinstate it as of the date of the release of this opinion. In all other respects, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

THOMAS T. WOODALL, JUDGE