

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1999 SESSION

FILED

February 3, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

NATHANIEL FLEMING,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

NO. M1998-00757-CCA-PC
C.C.A. # 01C01-9804-CC-00148

HICKMAN COUNTY

Honorable Donald P. Harris, Judge

(Post-Conviction Relief--Life)

ORDER

The petitioner, Nathaniel Fleming, appeals from the trial court's dismissal of his petition for post-conviction relief. In May 1989, the Hickman County grand jury indicted the petitioner for first degree murder. This indictment led to a first trial which ended in a hung jury. At his second trial in October 1991, he was found guilty of the indicted charge and sentenced to life in prison. On direct appeal, the petitioner's conviction was affirmed. The petitioner then filed a petition for post-conviction relief. This petition was denied by the trial court, and the petitioner appealed. However, on this appeal, petitioner's counsel submitted a brief "pursuant to Anders" which argued the relevant legal points but concluded that each was ultimately frivolous. However, unlike proper Anders procedure, counsel for petitioner failed to file an accompanying motion to withdraw. Petitioner thereafter moved for dismissal of counsel and reappointment of different counsel. Considering this development, this Court, reserving judgment, allowed the petitioner time to submit a supplemental brief in addition to counsel's Anders brief. We have carefully reviewed the briefs, the pleadings and the record, and decide to continue to treat counsel's submitted brief as an Anders brief, to consider the additional issues raised by the petitioner in his pro se filing, and DISMISS the appeal.

PROCEDURAL POSTURE

The posture of this appeal is confusing but nevertheless crucial. This action began when the petitioner filed a petition for post-conviction relief on October 18, 1993. For this petition, the public defender was appointed as counsel on November 19, 1993. Subsequently, on February 22, 1994, this counsel filed a motion to be relieved as counsel for petitioner alleging a conflict of interest. On March 8, 1994, the trial court denied this motion finding that no conflict existed and ordered counsel to continue representation.

Months later, on January 12, 1995, the petitioner filed a motion to have this same counsel removed. Before any determination of this motion, on May 18, 1995, the petitioner withdrew it and was granted a continuance.

Finally, on March 26, 1996, counsel filed an amended petition for post-conviction relief. In consideration of this petition, the trial court conducted an evidentiary hearing. Before any decision was entered, the petitioner filed a motion for dismissal and reappointment of counsel on November 20, 1997, citing an “inordinate delay in the adjudication of his petition for post conviction relief.” Apparently, no action was taken on this motion. Later, on March 12, 1998, the trial court by written order denied the petition. In response, counsel filed a notice of appeal and submitted an Anders brief with this Court.

Unsettled by his counsel’s Anders brief, petitioner filed a motion to dismiss counsel and to appoint new counsel on August 20, 1998. Having considered these motions and having read counsel’s Anders brief, this Court gave the petitioner 30 days to submit a pro se brief raising any additional points. After submission, the order provided, this Court would consider this pro se brief, review all the pleadings and the record and determine whether new counsel should be appointed or whether the appeal should be dismissed. It is here with petitioner’s pro se brief,¹ counsel’s Anders brief, and the state’s brief, that we now stand.

ANALYSIS

¹ Petitioner’s pro se filing alleges Sixth Amendment violations regarding ineffectiveness of post-conviction counsel.

The bulk of our analysis attempts to situate this case within the proper context and procedural track. That is, we are presented with a posture that differs from the proto-typical Anders proceeding, but nevertheless conclude that Anders provides the appropriate context and resolution. Accordingly, we also conclude that the appeal is entirely frivolous on the record before the Court, we dismiss the appeal.

The Sixth Amendment provides that “the accused shall enjoy the right to have the assistance of counsel for his defense” and thereby protects one of the more fundamental and important rights that criminal defendants enjoy. However, at the same time, defense lawyers are under ethical obligations to not deliberately mislead the court or consume the time and energies of the court by advancing frivolous argument. The result, in some cases, is a dilemma between a counsel’s duty to his client and the counsel’s duty of ethical representation. This dilemma was addressed by the United States Supreme Court in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), which announced a rule and procedure for such a situation on direct appeal,

“if court-appointed counsel wishes to withdraw on the ground that his or her client’s appeal is wholly frivolous, he or she must include with the withdrawal motion a brief referring to anything in the record that might arguably support the appeal. The appellate court then reviews the entire record to determine whether an appeal would indeed be frivolous. If the court determined that an appeal on the merits would be frivolous, the court may permit counsel to withdraw.”

Accordingly, this Anders procedure seeks a fair balance between the defendant’s right to counsel and an attorney’s ethical obligations.

In Tennessee, as a petitioner enjoys a limited statutory right to representation to the first post-conviction petition and appeal, see Tenn. Code Ann. § 40-30-206; see also Waite v. State, 948 S.W.2d 283 (Tenn. Crim. App. 1997); Blair v. State, 969 S.W.2d 423 (Tenn. Crim. App. 1997), the procedure outlined above is applicable to petitioner’s appeal. However, our analysis is complicated by an anomaly: while counsel filed a brief citing Anders and arguing appropriate issues, he did not file an accompanying motion to withdraw.

In a true Anders situation,

(1) Appellate counsel must file a motion requesting permission to withdraw with this Court. This motion shall follow the requirements of Tenn. R. App. P. 22. We would expect proof of service, appropriate affidavits, and a memorandum of law to accompany this motion.

(2) Accompanying the motion set out above, but filed as a separate document, should be a brief referring to anything in the record which might arguably support the appeal. Proper legal argument and legal authority is required even if the weight of that authority is against the defendant. A one-sentence statement of the issue for review does not begin to fulfill this requirement. The brief shall be in compliance with Tenn. R. App. P. 27. Reference to the reason appellate counsel requests to withdraw shall only be contained in the motion, not the brief.

The court would then determine whether or not the case is entirely frivolous. If it is entirely frivolous, we remove counsel and dismiss the appeal. If it is not, then the court removes counsel, appoints new counsel, orders a brief to be filed, orders the state to respond, and proceeds to resolve the case.

In this case, counsel filed an Anders brief but did not file a motion requesting removal. Nevertheless, this Court treated the case in its September 21, 1998 order, and continues to treat it, as an Anders proceeding for good reason. Despite the absence of a motion to withdraw, petitioner, himself, filed a motion to remove counsel. This motion to remove accompanied with counsel's Anders brief created, in essence, a de facto Anders proceeding: that is, simultaneously a brief and a motion to excuse counsel were before the court.

Reviewing the briefs, the pleadings and the record, this Court now determines that all the issues asserted in both counsel's brief and petitioner's supplemental brief are necessarily frivolous.

First, there are three issues raised by counsel for the petitioner, and each is against the weight of Tennessee authority:

- (1) Trial counsel was ineffective in failing to obtain written transcripts of certain trial testimony;²
- (2) the trial court improperly instructed the jury on "reasonable doubt;"³ and

2 The trial court found that audio tapes of this testimony were available to counsel and that the petitioner has not demonstrated the requisite level of prejudice. We agree with these findings and find no merit in this issue.

3 The trial court found that similar reasonable doubt instructions have been upheld by the Tennessee Supreme Court. See e.g., State v. Nichols, 877 S.W.2d 722 (Tenn. 1994); Pettyjohn v. State, 885 S.W.2d 364 (Tenn. Crim. App. 1994). We agree with the trial court.

(3) the trial court improperly charged the jury on “premeditation and deliberation.”⁴

Second, petitioner’s issues relate to ineffective assistance of counsel on post-conviction. There is no statutory or constitutional right to effective counsel on post-conviction in Tennessee. See House v. State, 911 S.W.2d 705, 712 (Tenn. 1995). Therefore, we find no merit in the petitioner’s claims and conclude that all issues are frivolous.

CONCLUSION

Accordingly, we DISMISS the appeal.

JOHN EVERETT WILLIAMS, Judge

CONCUR:

DAVID G. HAYES, Judge

JAMES CURWOOD WITT, JR., Judge

⁴ This claim relies upon State v. Brown, 836 S.W.2d 530 (Tenn. 1992); however, as the trial court concluded, the Brown holding is not retroactive and does not apply to this case. We agree with this conclusion.