

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
FEBRUARY SESSION, 1995

FILED

November 15, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

DAN ANDERSON,)
)
Appellant)
)
vs.)
)
STATE OF TENNESSEE,)
)
Appellee)

No. 03C01-9409-CR-00332

SULLIVAN COUNTY

Hon. **Edgar P. Calhoun**, Judge

(Post-Conviction)
Aggravated Rape

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Dan Anderson, appeals from an order entered by the Criminal Court for Sullivan County dismissing his petition for post-conviction relief. The appellant presents two issues for our review. First, the appellant contends that his conviction for aggravated rape should be reversed because he received the ineffective assistance of counsel at trial. Second, the appellant argues that the post-conviction court erred in dismissing his challenges to the search of his residence, the sufficiency of the evidence in support of his conviction, and other evidentiary issues, which the post-conviction court found to be either "previously determined" or waived.

After reviewing the record, we affirm the post-conviction court's judgment.

I. Factual Background

On October 6, 1989, a Sullivan County jury convicted the appellant of aggravated rape. The appellant was sentenced to the maximum sentence of twenty-five years in the penitentiary as a Range I offender. This court affirmed the conviction on direct appeal. In that case, we held that (1) the state presented sufficient evidence at trial to obtain a conviction; (2) the trial court properly denied the appellant's motion to suppress evidence on Fourth Amendment grounds; (3) the trial court properly denied the appellant's motion to prohibit the state from proving prior felony convictions at trial; and (4) the trial court did not err in sentencing. See State v. Anderson, No. 929 (Tenn. Crim. App. at Knoxville, April 1, 1991).

The appellant filed a petition for post-conviction relief on February 28,

1994. In his petition, the appellant alleged ineffective assistance of counsel, insufficiency of the evidence, the illegal search of his residence, and the wrongful introduction of his prior record. The appellant contends that counsel failed to provide competent representation in two ways: first, trial counsel failed to object to the introduction of a statement that the appellant gave to the police after his arrest; and second, counsel failed to "require the State to elect at the close of its proof in chief as to the particular incident for which conviction was being sought."¹ On June 6, 1994, the post-conviction court conducted an evidentiary hearing to address the issues raised in the petition.

At the hearing, the appellant testified that, in a statement to the police following his arrest, he admitted to having "consensual" sex with the victim. On cross-examination, the appellant conceded that he voluntarily gave the statement to the police in an attempt to exonerate himself and that "consent" was his best defense at trial. However, the appellant also testified that he informed trial counsel that he was under the influence at the time he made the statement. He asked that trial counsel object to the admission of the statement at trial.

The appellant's trial counsel testified that he did not object to the admission of the appellant's statement because he had no basis for such an objection. The appellant had advised him that, at the time the statement was given, the appellant understood his rights and voluntarily waived them. Trial counsel also stated that he did not object to the admission of the statement, because the statement allowed the jury to hear the appellant's version of events without subjecting the appellant to cross-examination. Trial counsel and the

¹A copy of the indictment was not included in the record. Nevertheless, the record before us does reflect that the indictment obtained by the State was a single count indictment which charged the appellant with one offense of aggravated rape.

appellant both agreed that cross-examination would have revealed the appellant's extensive history of prior felony convictions.²

After considering the evidence, the post-conviction court dismissed the appellant's petition. The court found that the appellant's trial counsel performed competently. Specifically, the court found that trial counsel's failure to object to the admission of the appellant's statement was a tactical decision. Moreover, with respect to the issue of election of offenses, the court observed that any motion requesting an election of offenses would have been meritless, because "only one offense occurred but in three different manners, orally, vaginally and anally."³ The court added that "if the issue was meritorious, the proof presented is equally strong as to each manner and conviction could have resulted from either penetration alone." Finally, the court refused to consider the remaining issues as they had previously been determined on direct appeal or waived. The appellant now seeks our review of the post-conviction court's judgment.

II. Ineffective Assistance

In order to reverse a conviction based on the ineffective assistance of counsel, the appellant must establish (1) deficient representation and (2) 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 appellant of representation guaranteed to 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 appellant is deprived of a fair trial with a reliable result. Id.

²The appellant had ninety-four (94) previous convictions for forgery.

³The proof at trial established that, during the early morning hours of February 26, 1989, the defendant had vaginal and anal intercourse with the victim and then forced her to perform fellatio on him.

In post-conviction proceedings, the petitioner has the burden of proving the grounds raised in the petition by a preponderance of the evidence. State v. Clark, 800 S.W.2d 500, 506 (Tenn. Crim. App. 1990). Moreover, the trial court's 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). On appeal, those findings are conclusive unless the evidence preponderates against them. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990); Swanson v. State, 680 S.W.2d 487, 490 (Tenn. Crim. App. 1984). In other words, this court must affirm the judgment unless it is shown that the evidence contained in the record preponderates against the findings of the trial court. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

The appellant first contends that trial counsel's failure to require the state to "elect" the particular incident for which conviction was being sought constitutes deficient representation. We disagree. The appellant argues correctly that when the evidence suggests that a defendant has committed multiple sexual offenses against a victim, the state is required to elect the particular offense that it is relying upon to constitute the offense charged. Burlison v. State, 501 S.W.2d 801, 804 (Tenn. 1973).

In cases where there are more instances of criminal behavior proven than there are counts to accommodate them, the state must match specific conduct to a specific count. Thus, the possibility of two convictions for the same conduct is eliminated. Election requires the jury to be unanimous in the conduct upon which a particular conviction is based.

State v. Hallock, 875 S.W.2d 285, 292-293 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994) [citing Burlison v. State, 501 S.W.2d 801 (Tenn. 1973)].

In the case *sub judice* the appellant was charged in a single count

indictment with one offense of aggravated rape. The record before us supports the commission of but one offense. Indeed, at the post-conviction hearing, during opening remarks by appellant's counsel, the trial judge stated, "It's all essentially one transaction ... It's not a situation where he could have been convicted of three separate offenses of aggravated rape at that point. It was all essentially one occurrence." At the conclusion of the hearing, the judge again observed that the three instances of penetration in this case were "all part of the same general transaction." Thus, a non-unanimous jury verdict based upon unindicted conduct was not possible.

The trial court's finding is supported by previous decisions of this court. In State v. Bost, No. 01-C019112-CR-00373 (Tenn. Crim. App. at Nashville, September 3, 1992), the defendant was convicted of aggravated rape and aggravated sexual battery. This court dismissed the conviction for aggravated sexual battery, concluding that the sexual battery occurred "concomitantly" with conduct that resulted in a conviction for aggravated rape. In Lillard v. State, 528 S.W.2d 207 (Tenn. Crim. App. 1975), we upheld the defendant's two separate rape convictions, "committed upon the same victim upon the same night." Id. at 209. However, the defendant and the victim in Lillard "drove away from [the scene of the first intercourse], 'around the road and in a field,'" before the second intercourse occurred. Id. at 210. This court concluded that, following the first intercourse, the defendant formed a second intent to rape the victim. Id. at 211. Moreover, "[t]he evidence of the second rape [was] entirely additional to that of the first." Id. Finally, we distinguished Lillard from the case where multiple penetrations occur during a single episode of intercourse, and "the single basic intent to have intercourse and the same force and/or coercion is common to the penetrations, even if they be momentarily interrupted." Id.

The appellant in this case did not deny that he sexually penetrated the

victim. Thus, the only question for the jury was whether penetration was consensual, as asserted by the appellant, or obtained by force or coercion. There is nothing in the record in this case which remotely suggests that the appellant's use of force or coercion was not common to all the penetrations. Moreover, the record supports a conclusion that the penetrations occurred during a single episode of intercourse, and were motivated by a single basic intent. Thus, the risk of a non-unanimous jury verdict did not exist, and we cannot conclude that trial counsel's failure to request an election of offenses was deficient representation.

Similarly, we cannot conclude that trial counsel's failure to object to the admission of the appellant's prior statement rendered his representation ineffective. The post-conviction court's finding that trial counsel failed to object for tactical reasons after consultation with the appellant must be taken as fact unless the record preponderates against that finding. Janow v. State, 470 S.W.2d 19, 21 (Tenn. Crim. App. 1971). Nothing in the record contradicts this finding. Therefore, we conclude that trial counsel's performance was not deficient. See, e.g., Vermilye, 754 S.W.2d at 85 (tactical decisions cannot give rise to a claim of deficient representation if made with knowledge of all relevant law and facts).

After a review of the record, we conclude that the findings of the post-conviction court are supported by the record. Therefore, we are bound to uphold the post-conviction court's decision. Furthermore, the record demonstrates that the appellant has failed to meet his burden of proving the grounds he has alleged in his petition. Appellant has failed to show that his counsel was deficient or that counsel's performance prejudiced the outcome of his trial. Accordingly, we conclude that the appellant's claim of ineffective assistance of counsel is without merit.

III. Issues Not Addressed by Post-Conviction Court

The appellant next alleges that the post-conviction court erred in failing to address other claims raised in his petition. The appellant argues that the court should have considered the following issues: (1) whether the victim was an "accomplice" to the crime requiring corroboration of her testimony; (2) whether the trial court erred in sentencing by using the knife wound as an aggravating factor; (3) whether the state presented sufficient evidence at trial to obtain a conviction; (4) whether police seized evidence from the appellant's residence in violation of the Fourth Amendment; and (5) whether the trial court improperly admitted evidence of the appellant's extensive criminal history. We find that these last five issues have been previously determined on direct appeal or waived and, therefore, cannot be raised in a post-conviction petition.

Post-conviction courts lack jurisdiction to address claims that have either been "waived" or "previously determined." Tenn. Code Ann. § 40-30-111 (1990). A rebuttable presumption of waiver arises when the petitioner fails to raise a particular issue in a prior proceeding before a court of competent jurisdiction. Tenn. Code Ann. § 40-30-112(a) (1990). A previous determination, on the other hand, occurs when a court of competent jurisdiction has ruled on the merits of an issue "after a full and fair hearing." Tenn. Code Ann. § 40-30-112(b) (1990).

In the instant case, the post-conviction court properly declined to address issues not pertaining to the ineffective assistance of counsel. All but one of the issues were "previously determined" on direct appeal. See Anderson, No. 929 (Tenn. Crim. App. at Knoxville, Apr. 1, 1991). The appellant failed to raise the remaining issue, accomplice corroboration, at that time. This failure gives rise to a presumptive waiver under the post-conviction statute. Tenn. Code Ann. § 40-30-112 (b)(2) (1990). The appellant has offered no evidence to rebut that

presumption. Moreover, the issue does not relate to any constitutional provision. Thus, relief under the post-conviction statutes is not available. See Tenn. Code Ann. § 40-30-105 (1990). Accordingly, we conclude that all five of these issues fall outside the scope of post-conviction review.

For the foregoing reasons, we affirm the post-conviction court's dismissal of the appellant's petition.

DAVID G. HAYES, Judge

CONCUR:

PAUL G. SUMMERS, Judge

WILLIAM M. BARKER, Judge