

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1996 SESSION

FILED
February 21, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

DAVID LEE RICHARDS,)
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 APPELLANT,)
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 v.)
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 STATE OF TENNESSEE,)
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 APPELLEE.)

No. 03-C-01-9508-CR-00219
Hamilton County
Stephen M. Bevil, Judge
(Post-Conviction Relief)

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OPINION FILED: _____

AFFIRMED

Joe B. Jones, Presiding Judge

OPINION

The appellant, David Lee Richards, appeals as of right from a judgment of the trial court denying his suit for post-conviction relief following an evidentiary hearing. The trial court found that the appellant received the effective assistance of counsel within the meaning of the United States and Tennessee constitutions. In this Court, the appellant contends that the trial court committed error of prejudicial dimensions in denying him relief on this ground. The judgment of the trial court is affirmed.

The appellant was tried and convicted of murder in the first degree and sentenced to life in the Department of Correction. His conviction and sentence were affirmed by this Court on March 23, 1993.

The record reflects that the appellant stabbed the victim several times with a knife and then stabbed himself. He subsequently gave a statement confessing his guilt. He made a courtroom confession of his guilt during the trial. Two of his nephews, who witnessed the murder, testified as witnesses for the state. Counsel for the appellant, faced with overwhelming evidence of guilt, attempted to establish that the appellant was intoxicated when he committed the offense. While this was not a defense, the jury could have reduced the charge of first degree murder to a conviction of second degree murder.

The attorney who represented the appellant had approximately seven conferences with him. She talked to the investigating police officer, talked to the physician who performed the autopsy, talked to the appellant's family, talked to the appellant's girlfriend, talked to the appellant's nephews, and an investigator obtained the remaining information that the attorney needed. The district attorney general's office permitted the attorney to review their file. She also did legal research on intoxication as a defense.

The appellant states in the argument portion of his brief that the following omissions prejudiced his defense:

1. Insufficient research of the charges and jury instructions relating to the distinction between premeditation and deliberation.

2. Failure to object to a jury instruction that premeditation could be formed in an instant.
3. Failed to move for a judgment of acquittal at the close of either the State's or the Defense's case; this failing to press the Honorable trial Judge into an acquittal of First Degree Murder due to the appellant's inability to form all essential elements of the offense in his state of intoxication by drugs.

The appellant does not cite any authority to support these particular grounds. However, it is apparent that the first two grounds are predicated upon the Supreme Court's decision in State v. Brown, 836 S.W.2d 530 (Tenn. 1992). The fallacy in these assertions is that Brown was decided in 1992. The appellant was tried in 1991. Objecting to an instruction containing the language challenged in Brown would have been an effort in futility. Any trial court in this state would have given an instruction containing the condemned words prior to the Supreme Court's decision in Brown.

The attorney raised this issue on direct appeal after Brown had been decided. This Court held that Brown was not to be applied retroactively. However, this Court noted that an instruction in violation of Brown was harmless as the evidence of the appellant's guilt was overwhelming. In short, the attorney who represented the appellant was not ineffective for her failure to object to the instruction.

Appellant's third ground, the failure to interpose a motion for judgment of acquittal at the conclusion of the state's case in chief and the defendant's case in chief, is likewise without merit. First, if counsel had made such a motion after the state's case in chief, the trial court would have denied the motion because there was sufficient evidence to sustain a conviction. Second, since the appellant testified in support of his defense, a motion made at the conclusion of the state's case in chief was waived. Again, if the counsel had made a motion for judgment of acquittal after all the proof, the trial court would have been required to take the strongest view of the evidence and all reasonable inferences from the evidence in favor of the state. In view of the overwhelming evidence of the appellant's guilt, the trial court would have denied the motion.

The evidence in this case does not preponderate against the findings of fact made by the trial court following the evidentiary hearing.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

DAVID H. WELLES, JUDGE