

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
MARCH SESSION, 1995

FILED

March 22, 1996

Cecil W. Crowson
Appellate Court Clerk

WILLIAM CARLOS THOMAS)

Appellant)

vs.)

STATE OF TENNESSEE,)

Appellee)

No. 01C01-9412-CR-00413

WILSON COUNTY

Hon. **J. O. BOND**, Judge

(Post-Conviction)

For the Appellant:

ON APPEAL:

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For the Appellee:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

Opinion

The appellant, William Carlos Thomas, appeals from an order entered by the Criminal Court for Wilson County dismissing his petition for post-conviction relief. The appellant raises the following twelve issues for our review:

- (1) improper use of prior convictions to permit impeachment of the appellant;
- (2) systematic exclusion of African-Americans from the jury panel;
- (3) jury taint, based upon a juror's description to the jury of the appellant's past convictions;
- (4) jury taint, based upon a juror's statement to the jury that, after hearing proof, he believed that he was present at the scene of the crime;
- (5) sufficiency of the evidence;
- (6) improper admission of hearsay statements from an anonymous caller, implicating the appellant;
- (7) improper admission of hearsay statements concerning photographic line-up;
- (8) improper communication by prospective jurors to the jury panel concerning appellant's prior criminal history;
- (9) imposition of excessive sentences;
- (10) "whether the [d]efendant was deprived of his right to competent representation;"
- (11) "whether error of prejudicial dimensions was committed by the fact the attorney representing the [d]efendant never moved for a mistrial and total replacement of the jury panel after the jury had become tainted by the revelations of the jurors, Joe Hamilton and Richard Dotson;" and
- (12) "whether error of prejudicial dimensions was committed by the trial attorney failing to object to the admission of the D.N.A. test which was performed some year after the alleged incident."

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

I. Factual Background

_____ This case arises out of the brutal abduction, beating, rape, and subsequent shooting of Mrs. Bonnie Bundy. Mrs. Bundy lost the sight in one eye as a result of the incident. The appellant was indicted by the Wilson County Grand Jury for aggravated kidnapping, aggravated rape, assault with intent to commit first degree murder, and grand larceny. The appellant was convicted on all charges and received three consecutive life sentences for the first three offenses and a concurrent ten-year sentence for grand larceny of the victim's automobile.

On direct appeal, this court affirmed the convictions but modified the life sentences imposed for aggravated rape and aggravated kidnapping to reflect concurrent rather than consecutive sentencing. The appellant is now effectively serving two consecutive life sentences. In arriving at our decision on direct appeal, this court reached the following conclusions: First, the jury had before it sufficient evidence to convict the appellant of all four counts of the indictment. Second, the record does not support a finding that African-Americans were systematically excluded from the jury venire. Third, alleged statements to jurors concerning the appellant's prior criminal record and a dismissed juror's presence at the crime scene did not fatally taint the jury. Fourth, the trial court did not err in admitting hearsay statements from an anonymous informant, implicating the appellant. Fifth, the admission of hearsay statements identifying the appellant in a photo line-up was harmless beyond a reasonable doubt. Sixth, the appellant's failure to testify defeated his standing to challenge the trial court's ruling that evidence of three prior rape convictions could be used for impeachment purposes. Finally, regarding the issue of excessive sentences, two of the sentences were modified to reflect appropriate sentencing considerations.

The appellant filed a petition for post-conviction relief on July 27, 1992. The post-conviction court granted leave to amend the petition on March 7, 1994. The amended petition alleges numerous grounds for relief including ineffective assistance of counsel. The appellant contends that trial counsel performed incompetently in two ways: First, counsel failed to properly object to "jury taint." Second, counsel failed to object to the introduction of DNA evidence. On September 13, 1994, the post-conviction court conducted a hearing on the petition.

After receiving the testimony of the appellant and reviewing the post-conviction counsel's statement of the issues, the post-conviction court dismissed the appellant's petition. The court ruled that appellant's enumerated issues one through nine were the identical issues which the appellant had raised on direct appeal and, thus, have been previously determined. As to the remaining claims, alleging ineffectiveness of trial counsel, the court ruled that, although "worded a different way," issues ten, eleven, and twelve are simply a "rehashing" of the record. Finding all issues to be previously determined, the post-conviction court dismissed the appellant's petition. The appellant now seeks our review of the post-conviction court's ruling.

II. Review of Appellant's Issues One Through Nine

_____ Upon review, we agree with the post-conviction court's findings that the appellant's enumerated issues one through nine have been previously determined on direct appeal. State v. William Carlos Thomas, No. 01-C-9102-CR-00040 (Tenn. Crim. App. at Nashville, Aug. 2, 1991). Post-conviction courts lack jurisdiction to address claims that have been "previously determined." Tenn. Code Ann. § 40-30-111 (1990). "Previous determination" 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)(2)(1990); Harvey v. State, 749 S.W.2d 478, 479 (Tenn. Crim. App. 1987), perm. to appeal denied, (Tenn.1988). Thus, we conclude that the enumerated issues one through nine are without merit.

III. Waiver of Issues

Initially, we note that appellant's issues (10), (11), and (12), based on claims of ineffective counsel, are considered waived for failure to comply with Rule 27, Tenn. R. App. P. First, appellant fails to state issue (10)¹ in the form required by Rule 27(a)(4), Tenn. R. App. P. Appellant's issue (10) is too general in scope and leaves this court to speculate about the factual allegations supporting this issue. See Harvey, 749 S.W.2d at 479. Furthermore, the appellant has not identified the alleged objectionable conduct, he has not properly briefed the issue, and he has not made any reference to the record. Tenn. R. App. P. 27(a)(7); Tenn. R. App. P. 27(g). Issue (10) is thereby waived.

Appellant's issue (11)² is waived for failure to properly brief the issue in accordance with Rule 27(a)(7), Tenn. R. App. P. Also, appellant has failed to make references to the record as required by Rule 27(g), Tenn. R. App. P.

Finally, we add that appellant has waived issue (12).³ Appellant did not

¹"Was the [d]efendant deprived of his right to competent representation?"

²"Was error of prejudicial dimensions committed by the fact the attorney representing the [d]efendant never moved for a mistrial and total replacement of the jury panel after the jury had become tainted by the revelations of the jurors, Joe Hamilton and Richard Dotson?"

³"Was error of prejudicial dimensions committed by the trial attorney failing to object to the admission of the D.N.A. test which was performed some

raise issue (12) in either his original petition, his amended petition, or at his second post-conviction hearing.⁴ Appellant has also failed to make any reference to the record, Tenn. R. App. P. 27(g), notwithstanding the fact that his brief states ". . . the entire trial record is replete with proof of the ineffectiveness of the trial counsel."

IV. Ineffective Assistance of Counsel

Despite the waiver of these propositions, we choose to address issues (11) and (12) on their merits. In order to reverse a conviction based on ineffective assistance of counsel, the appellant has the burden of establishing (1) deficient representation and (2) prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984); Cooper v. State, 847 S.W.2d 521, 527 (Tenn. Crim. App. 1992). "Deficient representation" occurs when counsel renders services that fall below the range of competence demanded of criminal attorneys. Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991). "Prejudice," on the other hand, is a reasonable likelihood that the outcome would have been different but for the deficient representation. Cooper, 847 S.W.2d at 527. Because we consider it dispositive, we address only the prejudice prong of the test.

In issue (11), the appellant contends that trial counsel was ineffective in not moving for a mistrial upon learning that jurors Joe Hamilton and Richard Dotson had communicated extraneous information to other members of the jury,

year after the alleged incident?"

⁴We do recognize that this issue was mentioned by appellant at the first post-conviction hearing, see supra n.5, however, his failure to raise this issue at the second post-conviction hearing results in waiver of this issue.

thereby tainting the entire jury. However, the record does not support the appellant's contention that the jurors' communications of extraneous information were prejudicial.

On direct appeal, after fully examining the record, this court made the following observations concerning extraneous communications to other jurors by Joe Hamilton:

Voir dire examination was done on an individual basis outside the presence of other jurors. Prospective juror, Joe Hamilton, stated that he had read an earlier newspaper article indicating that the appellant had three prior convictions, served eleven (11) years and was on parole. He further stated that he had heard the article discussed by prospective jurors. He was excused and did not serve on the jury.

Appellant has made no showing that any of the final jury panel had knowledge of this information.

Thomas, No. 01-C-9102-CR-00040. With respect to communications by Richard Dotson, this court remarked:

After the state completed its proof, juror Richard Dotson, out of the presence of the other jurors, stated to the court that, after hearing the proof, he believed that he was present at [the crime scene] on the night of the crime. He further stated that he remembered seeing a car "bucking." He said that he had related the fact that he was at the store and saw the car "bucking" to other jurors. However, he acknowledged that he had stated nothing about the guilt or innocence of the appellant. Although the juror related that he remembered seeing a black person driving the [victim's] car, he did not relate this to any other jurors.

The trial judge stated that he felt the information related by juror Dotson to the other jurors was harmless and defense counsel stated, "Yes, sir." All agreed that juror Dotson would be excused and replaced by the alternate. Furthermore, all agreed that the jury would be told not to speculate as to the reason for juror Dotson's excusal. This was done ...

Id. The post-conviction court found and we agree that the facts before the

appellate court on direct appeal were, alone, insufficient to establish prejudice.⁵ The post-conviction court explicitly invited defense counsel to "bring [further proof] forward so that we can hear it." The appellant declined the court's invitation. Moreover, the post-conviction court had postponed the hearing from an earlier date in order to allow the appellant to supplement his petition and complete any necessary preparations. The appellant cannot now complain that he failed to fully avail himself of this opportunity. Thus, we conclude that the appellant has failed to carry his burden of demonstrating prejudice. In other words, because the record reveals no jury taint, a properly lodged objection by trial counsel could not have resulted in mistrial. Thus, counsel's failure to object could not have affected the trial's outcome.

In issue (12), the appellant contends that trial counsel was ineffective for failing to object to DNA evidence introduced at trial.⁶ We agree with appellant's statement that this evidence "in no way connected this defendant" to the crimes charged, other than demonstrating that appellant is within the twenty percent of

⁵We note the post-conviction court's incorrect assumption that this court, on direct appeal, would have considered and acted upon the existence of ineffective assistance of counsel, even though such an issue was not raised. Nevertheless, the post-conviction court did not foreclose consideration of the appellant's allegation of ineffective assistance of counsel and, indeed, encouraged the appellant to introduce additional evidence in support of his claim.

⁶Our review of the record fails to reveal the introduction of any DNA evidence at the appellant's trial. At the post-conviction hearing, appellant's counsel stated, "I think that it should be added to the fact that the specimen from the laboratory, I don't think that was gone into in proper form and should have really been gone into." Again, our review disclosed that only one area of forensic evidence was introduced at trial which involved a "specimen from the laboratory." This evidence, introduced by a serologist, established that the appellant was a Type O, non-secretor. A sperm sample, recovered from the seatcover of the victim's automobile, revealed that her assailant was also a non-secretor. The serologist testified that approximately twenty percent of the population are non-secretors.

the general population that could have perpetrated these crimes.⁷ We conclude that the appellant has failed to establish prejudice resulting from trial counsel's alleged failure to object to the admission of forensic evidence.

V. Conclusion

In summary, we conclude that the petition for post-conviction relief presents no meritorious issues. The appellant has failed to demonstrate any prejudice resulting from trial counsel's alleged deficient representation. All other issues alleged in the appellant's petition have been previously determined. For these reasons, we affirm the post-conviction court's dismissal of the appellant's petition.

David G. Hayes, Judge

⁷The following statement was made by appellant's counsel. "MR. BRODHEAD: ... I don't think it should have been admitted because it in no way connected this defendant to any of it, in any way, shape, or form. THE COURT: Was that not heard on appeal? MR. BRODHEAD: I think it was, Your Honor, but he doesn't feel like it was brought up on appeal correctly."

CONCUR:

Jerry Scott, Presiding Judge

Joseph M. Tipton, Judge
