

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY SESSION, 1996

WAYNE E. MITCHELL, ) C.C.A. NO. 01C01-9507-CR-00227  
                                  ) )  
                  Appellee, ) )  
                                  ) )  
                                  ) )  
VS. ) )  
                                  ) )  
STATE OF TENNESSEE, ) HON. SETH NORMAN  
                                  ) JUDGE  
                                  ) )  
                  Appellant. ) (Post-Conviction)

**FILED**  
May 9, 1996  
Cecil W. Crowson  
Appellate Court Clerk

ON APPEAL FROM THE JUDGMENT OF THE  
CRIMINAL COURT OF DAVIDSON COUNTY

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OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Petitioner appeals pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. After conducting an evidentiary hearing, the trial court denied the Petitioner's request for post-conviction relief from his convictions of aggravated burglary and aggravated rape. We affirm the judgment of the trial court.

The Petitioner argues two issues in support of his argument that the trial court erred in denying his request for post-conviction relief. He first asserts that he was afforded the ineffective assistance of counsel at trial. His second argument is that the trial court should have found that the State violated Rule 16 of the Tennessee Rules of Criminal Procedure and Brady v. Maryland, 373 U.S. 83 (1963), because the State failed to provide a Federal Bureau of Investigation (FBI) report to the defense.

The Petitioner was convicted by a jury of aggravated burglary and aggravated rape. He unsuccessfully appealed his conviction to this court. State v. Wayne E. Mitchell, No. 01-C-01-9209-CR-00295, Davidson County (Tenn. Crim. App., Nashville, filed Mar. 11, 1993), cert. denied, (Tenn. 1993). The Tennessee Supreme Court denied the Petitioner's request for an appeal from this court.

I.

The Petitioner's first issue is whether he was afforded the ineffective assistance of counsel. He contends that his attorney did not interview witnesses, did not meet with the Petitioner sufficiently prior to trial, and failed to request that a DNA examination be performed.

The Petitioner testified at his post-conviction hearing that he gave his lawyer a list of witnesses. He stated at the hearing that these witnesses would have testified that he lived in the apartment complex where the incident occurred. The Petitioner could not name these witnesses when asked at the hearing, but stated that he wanted the apartment manager and a neighbor to testify. He also admitted at the hearing that his mother and sister testified at trial that the Petitioner lived at the apartment complex. Trial counsel testified at the post-conviction hearing that he and his investigator spoke with everyone that they could find that were on the Petitioner's list.

The Petitioner also testified at the hearing concerning his meetings with his trial counsel prior to trial. The Petitioner was incarcerated at the penitentiary prior to trial. He testified that he did not meet with his trial counsel until two days before trial. He stated that he met with trial counsel three times at the most before trial. Petitioner stated that he did receive letters from counsel in reply to his letters while he was incarcerated before trial. On cross-examination Petitioner testified that there were "quite a few letters" exchanged. Trial counsel testified that he spoke with the Petitioner twice in person shortly before trial. Counsel also stated that he spoke with the Petitioner on the phone a few times

and that they exchanged several letters. Trial counsel also testified that because the defense being used was that of an alibi, it was more imperative to speak with the Petitioner's alibi witnesses, his mother and sister.

The Petitioner also challenges the effectiveness of his representation at trial because his counsel did not request a DNA test. Before the trial, the Tennessee Bureau of Investigation (TBI) performed a secretion test on samples gathered after the incident. The result of this test was inconclusive as to whether the Petitioner was the perpetrator. Trial counsel testified at the hearing that because the TBI test results were inconclusive, he did not wish to risk creating evidence that would implicate the Petitioner. Therefore, he did not request a DNA test.

The test to determine whether or not counsel provided effective assistance at trial is whether or not his performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Under Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984), there is a two-prong test which places the burden on the appellant to show that (1) the representation was deficient, requiring a showing that counsel made errors so serious that he was not functioning as "counsel" as guaranteed a defendant by the Sixth Amendment, and (2) the deficient representation prejudiced the defense to the point of depriving the defendant of a fair trial with a reliable result. 466 U.S. at 687. To succeed on his claim, the appellant must show that there is a "reasonable probability," which is a probability sufficient to undermine confidence in the outcome that, but for the counsel's

unprofessional errors, the results of the proceeding would have been different. Id. at 694. The burden rests on the appellant to prove his allegations by a preponderance of the evidence. Long v. State, 510 S.W.2d 83, 86 (Tenn. Crim. App. 1974). We also do not use the benefit of hindsight to second-guess trial strategy by counsel and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

When this test is applied to the issues brought by the Petitioner concerning the effectiveness of his counsel at trial, we find that his trial counsel was not ineffective. He spoke with all the witnesses that he could locate. It is obvious that the desired testimony of the witnesses cited by the Petitioner was presented in the trial by other witnesses. There is no evidence that trial counsel communicated with the Petitioner an insufficient amount of time. For these two issues the Petitioner did not show that counsel was so deficient that he failed to perform as counsel as required by the Constitution, therefore, he failed to meet the first prong of the test. As for the issue concerning the DNA test, we consider this decision to fall under the category of trial tactics. Counsel's decision not to pursue a DNA test was based on a realistic apprehension of creating detrimental evidence that did not exist. As stated above we do not second guess the trial tactics of counsel. Petitioner's trial counsel was not ineffective in his representation of the Petitioner.

This issue is without merit.

II.

The Petitioner's second argument in support of his appeal is that the trial court should have found that the State violated Rule 16 of the Tennessee Rules of Criminal Procedure and Brady v. Maryland, 373 U.S. 83 (1963). Before the Petitioner's trial, the State did not give the Petitioner a copy of DNA test results from a test performed by the FBI. The test results were inconclusive because one of the samples tested was either degraded or contained insufficient DNA.

Post-conviction relief can only be granted when a petitioner's "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Therefore, Rule 16 violations cannot be used as a basis for granting post-conviction relief. However, error pursuant to Brady may be a valid basis for relief.

In Brady, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. The Court later stated in United States v. Agurs, 427 U.S. 97 (1976), that if the evidence that was not supplied to the defense would not deprive the defendant of a fair trial, then there is no constitutional violation. Id. at 108. The Court then held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985).

We cannot conclude that outcome of the Petitioner's trial would have been different if the FBI report had been disclosed. The inconclusive results of the DNA test did not exclude or implicate the Petitioner. This court held on direct appeal that there was sufficient evidence to uphold the Petitioner's conviction. State v. Wayne E. Mitchell, No. 01-C-01-9209-CR-00295, Davidson County (Tenn. Crim. App., Nashville, filed Mar. 11, 1993). We cannot conclude that the nondisclosure of an inconclusive DNA test undermines confidence in the outcome of the trial.

This issue is without merit.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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JOSEPH M. TIPTON, JUDGE