

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1996 SESSION

FILED
September 19, 1996
Cecil W. Crowson
Appellate Court Clerk

JONATHAN A. HYLER,)
)
Appellant,)
)
v.)
)
STATE OF TENNESSEE,)
)
Appellee.)

No. 01C01-9511-CR-00362
Davidson County
Hon. Thomas H. Shriver, Judge
(Post-Conviction)

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OPINION FILED: _____

AFFIRMED, BUT DELAYED APPEAL GRANTED

Joseph M. Tipton
Judge

OPINION

The petitioner, Jonathan A. Hyler, appeals as of right from the Davidson County Criminal Court's denying him post-conviction relief from his 1989 convictions for one count of aggravated rape and two counts of rape with an effective sentence of thirty years. See State v. Jonathan A. Hyler, No. 01C01-9010-CR-00267, Davidson Co. (Tenn. Crim. App. Sept. 5, 1991). The petitioner states that the issue he raises is whether the trial court erred in denying him post-conviction relief on the ground of ineffective assistance of counsel.¹ We glean from the argument portion of his brief that his particular contentions are as follows:

(1) trial counsel was ineffective for failure to address the fact that the victim's testimony indicated that a 911 tape would have been made, but was not produced;

(2) appellate counsel, retained before the motion for new trial was decided, was ineffective by failing to present the 911 tape issue;

(3) appellate counsel was ineffective by failing to file an application for permission to appeal to the Tennessee Supreme Court.

We conclude that the petitioner is not entitled to any relief with respect to his first two issues but that he is entitled to a delayed appeal.

At the evidentiary hearing in this case, the petitioner testified regarding various complaints he had against his trial counsel and appellate counsel. As for those relating to his issues on appeal, the petitioner stated that the victim claimed to have dialed 911 before the telephone was knocked out of her hand. He said that his attorneys never looked into the matter and that if they had, they would have found that such had never occurred. He testified that he believed that these circumstances were also evidence of the ineffectiveness of trial counsel that his appellate counsel failed to pursue, as well.

¹ The issue as phrased by the petitioner is so general that it fails to meet the purposes for which a statement of the issues is required. Ordinarily, the failure would constitute a waiver of any underlying issues. We commend to counsel State v. Williams, 914 S.W.2d 940, 947-949 (Tenn. Crim. App. 1995), app. denied, (Tenn. 1996), for future edification about the importance of proper briefing.

Also, the petitioner testified that after the court of criminal appeals affirmed his conviction, appellate counsel told him that an appeal to the Tennessee Supreme Court was being made. He said that counsel told him some nine or ten months later that the appeal was denied. The petitioner testified that it was only after he sought federal habeas corpus relief that he found that an appeal to the supreme court was never sought. The petitioner's fiancée and another friend testified regarding each of them overhearing appellate counsel talk to the petitioner about the status of an appeal to the Tennessee Supreme Court.

The petitioner's appellate counsel testified about representing the petitioner for the new trial motion and the appeal. He said he had numerous conversations with the petitioner and that he attempted to litigate at the new trial motion hearing the issue of the effectiveness of trial counsel. He did not recall reviewing with the petitioner any issue about the 911 tape and claimed to have raised all the issues that he thought needed to be raised on appeal. As for the failure to seek supreme court review, the appellate counsel admitted that he had no explanation for the failure and that he took full responsibility for it.

The trial court found that the effective assistance of trial counsel was not properly before the court because it had been previously determined in the direct appeal. Also, it noted that no actual prejudice was shown relative to the 911 tape issue. Finally, it found that the only matter of concern was appellate counsel's failure to seek review by the Tennessee Supreme court, although it did not see any prejudice flowing from such a failure.

We conclude that the record supports the trial court's findings. Under then existing law, the fact that the issue of the effectiveness of trial counsel was raised and decided in the direct appeal barred the trial court from reconsidering that issue because it was previously determined. See T.C.A. §§ 40-30-111 and -112(a). To the

extent that the issue of the effective assistance of appellate counsel remained viable, the record is devoid of any evidence that counsel's actions or failures prejudiced the petitioner in any way. Absent prejudice, counsel's conduct does not amount to the ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069 (1984).

On the other hand, unilateral termination of an appeal to the supreme court without notice to the client has been deemed ineffective assistance of counsel. See Moultrie v. State, 542 S.W.2d 835, 838 (Tenn. Crim. App. 1976). Also, Tennessee cases have allowed for delayed appeals without considering whether the issues to be raised have any merit. See Pinkston v. State, 668 S.W.2d 676 (Tenn. Crim. App. 1984); State v. Brown, 653 S.W.2d 765 (Tenn. Crim. App. 1983); State v. Hopson, 589 S.W.2d 952 (Tenn. Crim. App. 1979); Campbell v. State, 576 S.W.2d 591 (Tenn. Crim. App. 1978); Moultrie v. State, *supra*. In fact, in the context of the failure to preserve the right to seek supreme court review of this court's opinion, we believe that it would be particularly inappropriate for either a trial court or this court to assess the merits of or predict the outcome of a Rule 11, T.R.A.P., application for permission to appeal. Under these circumstances, we conclude that the petitioner was deprived of seeking second-tier review of his conviction through no fault of his own.

In consideration of the foregoing, we affirm the trial court's denying the petition for post-conviction relief in terms of vacating his convictions. However, the record demonstrates a factual basis to allow the petitioner to seek review by the supreme court on a delayed basis. We therefore vacate our judgment in case number 01C01-9010-CR-00267, dated September 5, 1991, and reinstate it as of the date of release of this opinion.

Joseph M. Tipton, Judge

CONCUR:

John H. Peay, Judge

David H. Welles, Judge