

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1996 SESSION

FILED
October 9, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

DAVID BROOKS,)
)
 APPELLANT,)
)
)
 v.)
)
)
)
 STATE OF TENNESSEE,)
)
)
 APPELLEE.)

No. 03-C-01-9507-CR-00204

Hamilton County

Russell C. Hinson, Judge
Sitting by Designation

(Post-Conviction)

FOR THE APPELLANT:

Edward T. Landis
Attorney at Law
744 McCallie Avenue, Suite 327
Chattanooga, TN 37403

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
500 Charlotte Avenue
Nashville, TN 37243-0497

Michael J. Fahey, II
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Gary D. Gerbitz
District Attorney General
600 Market Street, Suite 310
Chattanooga, TN 37402

David W. Denny
Asst. District Attorney General
600 Market Street, Suite 310
Chattanooga, TN 37402

OPINION FILED: _____

REVERSED AND REMANDED

Joe B. Jones, Presiding Judge

OPINION

The appellant, David Brooks, appeals as of right from a judgment of the trial court dismissing his suit for post-conviction relief following an evidentiary hearing. The trial court concluded the appellant had been afforded the effective assistance of counsel contemplated by the Sixth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution. In this Court, the appellant contends the evidence adduced at the evidentiary hearing preponderates against the conclusion reached by the trial court because the evidence established trial counsel were ineffective because they failed to (a) properly research important issues relevant to his defense, (b) introduce the victim's prior violent conduct to establish the victim was the aggressor in the confrontation, and (c) introduce two tape recordings of the appellant made shortly after his arrest to establish the degree of his intoxication at the time he committed the offense. It is the opinion of this Court that the judgment must be reversed, and this cause remanded to the trial court because the trial court did not make findings of fact as mandated by the Post-Conviction Procedure Act.

There are no written findings of fact contained in the record. Also, there is no written order adjudicating this matter on the merits. When ruling upon the merits of the grounds raised in the appellant's amended petition, the trial court alluded to the ultimate positions of the parties. The court then said:

I haven't expressed it in terms of findings of fact. I make a broad finding of fact that the defense of the petitioner met the requirements of the Constitution of the United States and State of Tennessee and standards of Baxter versus Rose and dismiss the petition.

This case was tried prior to the recent changes in the Post-Conviction Procedure Act. The relevant statute, Tenn. Code Ann. § 40-30-118 (b), mandated that the trial court make findings of fact in written form. The statute stated:

Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to

each such ground.

The use of the word "shall" clearly indicates the Tennessee General Assembly intended that the duty of the trial court to make findings of fact is mandatory. Sykes v. State, 477 S.W.2d 254, 260 (Tenn. Crim. App. 1971), cert. denied (Tenn. 1972); Blankenship v. State, 4 Tenn. Crim. App. 158, 163, 469 S.W.2d 530, 532, cert. denied (Tenn. 1971); Brown v. State, 1 Tenn. Crim. App. 462, 467, 445 S.W.2d 669, 671, cert. denied (Tenn. 1969). See State v. Gilley, 517 S.W.2d 7, 9 (Tenn. 1974); State v. Craven, 656 S.W.2d 872, 873 (Tenn. Crim. App. 1982); Garrett v. State, 530 S.W.2d 98, 100 (Tenn. Crim. App.), cert. denied (Tenn. 1975).

The purpose of this statute is to facilitate appellate review of the issues presented for review. State v. Swanson, 680 S.W.2d 487, 489 (Tenn. Crim. App.), per. app. denied (Tenn. 1984); George v. State, 533 S.W.2d 322, 326 (Tenn. Crim. App.), cert. denied (Tenn. 1975). When the trial court fails to make "a clear and detailed finding of fact," the appellate court is "at a complete loss to know the basis of the trial judge's decision and judgment; assignments of error [now issues] and appellate review are seriously frustrated if not completely thwarted by lack of a definitive finding of fact by the trial judge." Brown, 1 Tenn. Crim. App. at 467, 445 S.W.2d at 671.

When a trial court fails to perform its mandatory duty of making findings of fact, the remedy is reversal of the trial court's judgment, and a remand of the cause so that the trial court can make the relevant findings of fact. See Brown, 1 Tenn. Crim. App. at 467, 445 S.W.2d at 671. In this Court, the judgment of the trial court is reversed and remanded so the trial court may reconsider the grounds raised by the appellant, the admission of additional evidence, and, thereafter, prepare a proper findings of fact.

This Court parenthetically notes the tape recordings of the petitioner's voice would be admissible at a new trial. A chemical breath test revealed the appellant had an ethyl alcohol content of .22% shortly after the shooting. The tapes illustrate the appellant's state of intoxication. Tennessee Rules of Evidence 803(3) provides that evidence showing the state of mind of a party is admissible as an exception to the hearsay rule.

This evidence was relevant. It is an elementary principle of law that the intoxication of the accused may be sufficient to reduce a homicide from murder first degree to murder

second degree. The fact the audio tapes were made approximately four hours after his arrest goes to the weight of this evidence, not its admissibility. Therefore, the trial court should consider the admissibility and relevance of the audio tapes as evidence when determining whether the appellant is entitled to a new trial.

The first aggressor rule was first announced in the case of State v. Furlough, 797 S.W.2d 631 (Tenn. Crim. App. 1990), per. app. denied (Tenn. 1990). This opinion was filed on the 10th day of April, 1990. The Supreme Court denied the application for permission to appeal on July 23, 1990. This case was not tried until the latter part of January of 1991. On remand, the trial court should permit the petitioner to introduce evidence of the victim's prior violent acts which were unknown to the petitioner and fall within the purview of the first aggressor rule.

Finally, this Court questions the propriety of qualifying an attorney accused of rendering ineffective assistance of counsel and the assistant district attorney general who tried the case for the State of Tennessee as expert witnesses, and, thereafter, permitting them to testify regarding their opinions on whether counsel was ineffective. Both parties have a vested interest in the outcome of the proceeding. If defense counsel admitted he rendered ineffective assistance of counsel, he would have been reported to the Disciplinary Counsel for the Supreme Court. Such representation would constitute a violation of the Code of Professional Responsibility. However, defense counsel hedged his opinion by stating he essentially met the low threshold of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), but admitted he should have known how to introduce the audio tapes. The assistant district attorney general would be faced with retrying the petitioner if the relief was granted. In short, such evidence is entitled to very little weight in determining the proper resolution of this case.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

DAVID H. WELLES, JUDGE