IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER SESSION, 1996

LOUIS FRANCIS GIANNINI,	)	**C.C.A. NO. 02C01-9603-CR-00091**
	)	
Appellant,	)	
	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. JOHN P. COLTON**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

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

FOR THE APPELLANT:

ROBERT M. FRIEDMAN
LAWRENCE W. WHITE
Suite 3400
100 North Main Building
Memphis, TN 38103

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

DEBORAH A. TULLIS
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

JOHN W. PIEROTTI
District Attorney General

DAVID SHAPIRO
Assistant District Attorney General
Criminal Justice Complex, Third Floor
201 Poplar
Memphis, TN 38103

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Louis Giannini, appeals as of right the trial court's denial of his petition for post-conviction relief and writ of error coram nobis. He presents the following issues for review: (1) That the trial court erred by denying him a new trial from a writ of error coram nobis because of newly discovered evidence; (2) that the Defendant's due process rights were violated because he was force medicated when he appeared at trial; and (3) that defense counsel rendered ineffective assistance.

The Defendant was convicted by a jury verdict of two counts of first-degree murder, one count of assault with the intent to commit first-degree murder, accompanied by bodily injury, and one count of assault with intent to commit first-degree murder. The jury sentenced him to life imprisonment for each of the first-degree murder convictions, to be served consecutively. The trial court sentenced the Defendant as a Range II offender to fifty (50) years for the assault with bodily injury and thirty-five (35) years for the assault without bodily injury. These sentences are to be served concurrently with the two life sentences. A panel of this Court affirmed the Defendant's convictions and sentences. State v. Louis Francis Giannini, No. 36, Shelby County (Tenn. Crim. App., Jackson, Nov. 12, 1991), perm. to appeal denied, id. (Tenn. 1991).

The Defendant filed a petition for post-conviction relief on July 15, 1992, and subsequently filed an amended petition on October 27, 1992, including a

motion for new trial based on newly discovered evidence. The State objected to the motion for new trial, asserting that it was filed beyond the thirty (30) day period for such a motion pursuant to Rule 33(b) of the Tennessee Rules of Criminal Procedure. The State also asserted that the Defendant's motion was presented improperly as a writ of error coram nobis and should not have been considered. Defense counsel responded that the gravamen of the newly discovered evidence claim supported a writ of error coram nobis and attached an affidavit of a witness' recantation. The trial court denied the State's motion to dismiss the petition and conducted evidentiary hearings on both the post-conviction relief claims and the coram nobis claim. The trial court denied the Defendant's petition and writ of error coram nobis on September 8, 1995. The Defendant now brings this appeal pursuant to Rule 3(b) of the Tennessee Rules of Appellate Procedure.

Although the facts were fully developed in the Defendant's opinion on appeal from his conviction, we will briefly summarize them for clarity in this appeal. The Defendant married Terri Giannini in 1982 and they have one child from that marriage. In late 1987, Mrs. Giannini filed for a divorce. The couple separated and Mrs. Giannini started dating one of her co-workers, Derek Cheshier. She also frequently visited the home of Bill Bailey, another co-worker whom she transported to work, and his girlfriend, Donna Etheridge. After the breakup, the Defendant became depressed, a condition which worsened during the 1987 holiday season. He erroneously believed that Mrs. Giannini was dating Mr. Bailey and went to the Bailey/Etheridge residence on New Year's Eve to see his wife. Bailey said she was not at the apartment, but the Defendant noticed her in the hallway, wearing a towel. The Defendant attempted to grab the towel

from Mrs. Giannini, who struggled until Mr. Bailey intervened. Mrs. Giannini was allegedly choked and knocked to the floor.

The Defendant left the apartment and returned later with a rifle. He entered the home and shot and killed Bailey and Etheridge. He found Mrs. Giannini and Cheshier in a bedroom and shot through the door, injuring Cheshier. Upon entering the bedroom, he pointed the rifle at Mrs. Giannini, but did not fire. He left the apartment and later surrendered to the police. Mrs. Giannini divorced the Defendant and married Derek Cheshier.

I. Writ of Error Coram Nobis

The Defendant argues as his first issue that the trial court erred by denying his writ of error coram nobis for a new trial because of newly discovered evidence. At his trial, the Defendant's ex-wife, Terri Cheshier, testified as to the facial expression and demeanor of the Defendant at the time of the killings. After trial, she recanted part of her testimony, the relevant portions and changes appearing in an affidavit submitted with the amended petition for post-conviction relief filed on July 15, 1993.

A writ of error coram nobis is available to a defendant in a criminal prosecution. Tenn. Code Ann. § 40-26-105. However, the remedy is limited to "errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding." Tenn. Code Ann. § 40-26-105. This includes post-conviction proceedings. See

Rowe v. State, 498 S.W.2d 322, 325 (Tenn. 1973). A writ of error coram nobis also lies "for subsequently or newly discovered evidence relating to matters which were litigated at the trial" when the trial court "determines that such evidence may have resulted in a different judgment, had it been presented at the trial." Tenn. Code Ann. § 40-26-105; Cole v. State, 589 S.W.2d 941 (Tenn. Crim. App.1979). The purpose of this remedy "is to bring to the attention of the [trial] court some fact unknown to the court, which if known would have resulted in a different judgment." State ex rel. Carlson v. State, 219 Tenn. 80, 85-86, 407 S.W.2d 165, 167 (1966).

A petition for the writ of error coram nobis in a criminal case, which seeks relief on the ground of subsequently or newly discovered evidence, should recite: (a) the grounds and the nature of the newly discovered evidence, Crawford v. Williams, 31 Tenn. 341, 342 (1851), (b) why the admissibility of the newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial, Tenn. Code Ann. § 40-26-105, (c) that the petitioner "was without fault in failing to present" the newly discovered evidence at the appropriate time, see State ex rel. Carlson, 219 Tenn. at 87, 407 S.W.2d at 168, Johnson v. Russell, 218 Tenn. at 448, 404 S.W.2d, 471, 473, and (d) the relief sought by the petitioner. Tenn. R. Crim. P. 47. Affidavits should be filed in support of the petition or at some point in time prior to the hearing. See Ross v. State, 130 Tenn. 387, 390-394, 170 S.W. 1026, 1027-28 (1914); State v. Todd, 631 S.W.2d 464, 466-467 (Tenn. Crim. App.1981), perm. to appeal denied, id. (Tenn.1982).

The decision to grant or deny a petition for the writ of error coram nobis on the ground of subsequently or newly discovered evidence rests within the sound discretion of the trial court. Tenn. Code Ann. § 40-26-105; Teague v. State, 772 S.W.2d 915 921 (Tenn. Crim. App 1988), perm. to appeal denied, id. (Tenn. 1989), cert. denied, 493 U.S. 874, 110 S.Ct. 210, 107 L.Ed.2d 163 (1989); Jones v. State, 519 S.W.2d 398, 400 (Tenn. Crim. App.1974). Before the petitioner is entitled to relief, it must be established, and the trial court must find, that a defendant "was without fault in failing to present certain evidence at the proper time" and that the subsequently or newly discovered evidence relating to matters litigated at trial "may have resulted in a different judgment had it been presented at the trial." Tenn. Code Ann. § 40-26-105.

As a general rule, subsequently or newly discovered evidence which is simply cumulative to other evidence in the record, see Scruggs v. State, 218 Tenn. 477, 479-80, 404 S.W.2d 485, 486 (1966), or serves no other purpose than to contradict or impeach the evidence adduced during the course of the trial, see Hawkins v. State, 220 Tenn. 383, 392, 417 S.W.2d 774, 778 (1967), will not justify the granting of a petition for the writ of error coram nobis when the evidence, if introduced, would not have resulted in a different judgment.

In exercising its discretion, the trial court must determine the credibility of the witnesses who testify in support of the accused's error coram nobis application. If the trial court does not believe that the witnesses presented by the accused are credible, the court should deny the application. Conversely, if the witnesses are credible, and the evidence presented would result in a different judgment, the trial court should grant the relief sought.

In the case sub judice, the trial court conducted a full evidentiary hearing on the Defendant's claim of newly discovered evidence. Terri (Giannini) Cheshier stated in her affidavit and at the hearing that, although she had testified at trial that the Defendant tried to choke her, she would change the statement to reflect that he merely knocked her down. She also changed her testimony describing the Defendant's expression and demeanor at the time of the murders from his being angry to his being distant, totally blank and real confused. The Defendant argues that Mrs. Cheshier's recanted testimony constitutes newly discovered evidence that, if offered, might have changed the outcome of the trial.

The trial court set out extensive findings of fact and conclusions of law to support its denial of the Defendant's writ. The court determined that the Defendant was not at fault in failing to present the recanted testimony within the proper time. However, the court found that the evidence was not material, but that it was merely cumulative of the testimony of other witnesses and unlikely to change the outcome of the trial.

The Defendant asserts that because Mrs. Cheshier was the only eyewitness to the killings, her changed testimony is probative of the issue of his insanity at the time the crime was committed. He claims that the State improperly elicited Mrs. Cheshier's testimony by the use of leading questions. One of the jurors from the original trial testified at the hearing that if Mrs. Cheshier's testimony had been presented at the trial as she asserted in her affidavit, that juror would have been influenced favorably towards the Defendant in determining his guilt or innocence in relation to his insanity defense. However, the juror

stated that Mrs. Cheshier's testimony alone would not have changed his mind about the verdict in the case.

The trial court also noted that the Defendant's assertion that the changed testimony would alter the results of the original trial raised a sufficiency of the evidence issue. The court examined in detail the evidence considered at the trial and determined that the Defendant called six character witnesses who testified that he was exhibiting symptoms of mental distress at the time of the murders. He also offered three expert witnesses who testified regarding his legal insanity. The State offered six witnesses other than Mrs. Cheshier who testified that the Defendant was sane.

In light of this evidence, the trial court found that the changed testimony was not likely to change the outcome of the trial. Absent this effect, the newly discovered evidence is merely cumulative testimony that serves only to impeach the credibility of the State's witness, Mrs. Cheshier. In reviewing the record, we conclude that the trial court was in the best position to review the evidence and to determine the credibility of the witnesses. We conclude that the trial court did not abuse its discretion in finding that the newly discovered evidence was neither material nor would it have changed the outcome of the trial. The writ of error coram nobis was properly denied.

This issue has no merit.

II. Post-Conviction Petition

A.

In his petition for post-conviction relief, the Defendant contends that his due process rights were violated when he was forced to take psychotropic medication for his mental condition while he appeared at trial. He cites Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), for the proposition that he had a right to show his true mental state to the jurors during his trial. The State argues that this issue is waived because it was not raised during his direct appeal, citing Tennessee Code Annotated section 40-30-112(b)(1). However, the post-conviction procedure statutes provide grounds for relief "when the conviction is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the Constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right." Tenn. Code Ann. § 40-30-105. The Defendant bases his claim on a due process issue posed in Riggins, which was decided after his direct appeal process was concluded and necessarily unavailable when issues were raised in his appeal.

We must first determine whether Riggins has established a new right and, if so, whether such right should be applied retroactively. Generally, a new rule of law is that which "breaks new ground or imposes a new obligation on the States or the Federal Government . . . [or] if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 489 U.S. 288, 301, 109 S.Ct. 1060, 1070, 103 L.Ed. 334, 349 (1989); Meadows v. State, 849 S.W.2d 748, 751 (1993)(emphasis in original). A new rule of federal constitutional law is retroactively applied to all cases, state or federal, pending on direct review or not yet final, regardless of whether the new rule constitutes a "clear break" with the past. Griffith v. Kentucky, 479 U.S. 314,

107 S.Ct. 708, 93 L.Ed.2d 649 (1987). However, a new rule will not be given retroactive application to cases on collateral review unless (1) the rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (2) the rule requires the observance of procedures implicit in the concept of ordered liberty. Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

The United State Supreme Court has recognized that persons have a liberty interest under the Due Process Clause of the Fourteenth Amendment to avoid the involuntary administration of antipsychotic medications. See Washington v. Harper, 494 U.S. 210, 221 , 110 S.Ct. 1028, 1036, 108 L.Ed.2d 178 (1990). However, the State may involuntarily administer such drugs when there is a finding of (1) an overriding justification; and (2) a determination of medical appropriateness. Riggins, 504 U.S. at 135, 112 S.Ct. at 1815.

In Riggins, the petitioner claimed that the involuntary administration of Mellaril, an antipsychotic drug, prevented him from receiving a fair trial because it affected his attitude, appearance, and demeanor while attending his trial. 504 U.S. at 131-32, 112 S.Ct. at 1813. The Court found that "once Riggins moved to terminate administration of antipsychotic medication," it became necessary for the State to demonstrate its justification and the medical need for the drugs. 504 U.S. at 135, 112 S.Ct. at 1815. Thus, the involuntary administration of the Mellaril began after Riggins instituted a proceeding to terminate the drug's use and the trial court ordered it to continue. 504 U.S. at 130-31, 112 S.Ct at 1812-13. The Court also found that the State offered no justification for its decision, but suggested that a possible justification might be that the State "could not

obtain an adjudication of Riggin's guilt or innocence by using less intrusive means." 504 U.S. at 135-36, 112 S.Ct. at 1815. The Court specifically noted that it did not decide whether a defendant had a right to discontinue medication if it would render him or her incompetent to stand trial. Id.

We conclude that under Riggins, the State's need to justify the involuntary administration of medication to an accused appears to impose a procedure needed for "ordered liberty" and that it "implicat[es] the fundamental fairness of the trial." Teague, 489 U.S. at 311-312, 109 S.Ct. at 1076. We, therefore, will address this issue on its merits.

We now turn to the facts of the case at bar. After his arrest, the Defendant was held in jail in the "K-pod" for suicidal inmates. The jail psychiatrist, Dr. Kington, found that the Defendant was depressed with psychotic features and was at risk for suicide. He prescribed Navane, an antipsychotic drug, Norpramine, for depression, and Cogentin, a drug used to counteract side effects of the Navane. These medications have a number of side effects, including sedation and emotional detachment. Dr. Kington maintained the Defendant on high doses of these medications from January, 1988, through his trial in November, 1988, and he continued this regimen until 1990. The Defendant's need for drug therapy was used as part of his insanity defense at trial.

The Defendant contends that he complained of feeling "wiped-out" and "zombie-like" before and at trial. He stated that he asked the jail medics and his counsel to be taken off the medication. He reports that jail staff watched him swallow his medication, but that he never tried to avoid taking the drugs. At no

time did the Defendant request his counsel to institute any action to prevent the administration of the medication. Defense counsel described the Defendant's symptoms as having improved while he was on the prescribed drugs. The Defendant was able to move from the restrictive "K-pod" in the jail to another unit because he was no longer suicidal. The Defendant's expert witness, Dr. Crupie, testified at the post-conviction hearing that the Defendant was on a high dosage of Norpramine and Navane. He also stated that administering medication to prevent suicide would take priority over avoiding side effects that might impair a defendant's ability to participate in his defense. The Defendant's counsel testified that he discussed the case with the Defendant, who answered questions appropriately. He also specifically recalled discussing jury selection with the Defendant. Defense counsel, when asked about any changes he observed in the Defendant, stated that he became less emotional, but noted that he cried less and became easier to communicate with.

The case sub judice is distinguishable from Riggins on its facts. The trial court found that the Defendant did not invoke his rights because he did not request to discontinue treatment and that there was no court order forcing involuntary administration of his medications. The trial court also found that a State employee demonstrated that the medication regimen was medically appropriate, essential for the Defendant's safety and a reasonable alternative to more restictive incarceration. We agree that the necessary predicate to invoking due process rights and requiring an evaluation using the two-pronged test in Riggins is that there must be an involuntary administration of medication. In Riggins, that occurred only after a formal proceeding was conducted in which the court ordered the petitioner to continue taking the medications. 504 U.S. at 1815,

112 S.Ct. at 135. But see Rickman v. Dutton, 864 F. Supp. 686, 713-14 (M.D. Tenn. 1994) (administering sedative to defendant, initiated by the State, one day before and during his trial without any medical necessity shown held violative of due process). Here, the Defendant instituted no such action to terminate drug treatment. In fact, his need for the medications was an important facet of his insanity defense at the original trial. Therefore, we cannot conclude that he was given those medications involuntarily.

Assuming arguendo that an involuntary administration of the medications has occurred, the State has shown an overriding justification to prescribe the drugs for the Defendant's safety to prevent him from committing suicide and to stabilize his mental illness. Also, although the Defendant was on high doses of medications, no evidence has been presented that the course of treatment was not medically appropriate.

In a post-conviction relief proceeding, the burden is generally on the petitioner to prove by a preponderance of the evidence the allegations in the petition. State v. Kerley, 820 S.W.2d 753, 755 (Tenn. Crim. App.1991). In reviewing post-conviction proceedings, "the factual findings of the trial court are conclusive unless the evidence preponderates against such findings." Cooper v. State, 849 S.W.2d 744, 746 (Tenn.1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn.1990). The evidence does not preponderate against the trial court's findings which led him to conclude that the Defendant's due process rights were not violated. Accordingly, we affirm the ruling of the trial court on this issue.

B.

Finally, the Defendant asserts that he was afforded ineffective assistance of counsel for the following reasons: (1) That counsel failed to request a continuance when the Defendant was on sedating medications, (2) that counsel failed to adequately prepare an expert witness, (3) that counsel failed to object to the State's witness' testimony regarding the Defendant's demeanor at the time of the killings, and (4) that counsel failed to object to the State's reference to an unreported court decision during closing arguments.

In determining whether counsel provided effective assistance at trial, the court must decide whether counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To succeed on a claim that his counsel was ineffective at trial, a petitioner bears the burden of showing that his counsel made errors so serious that he was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the petitioner resulting in a failure to produce a reliable result. Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984); Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). To satisfy the second prong the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When reviewing trial counsel's actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. Hellard

v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time they were made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper 849 S.W.2d at 746.

The Defendant first contends that he was provided ineffective assistance when defense counsel did not demand a continuance because of the effects of the psychotropic medications on the Defendant's appearance. He asserts that defense counsel knew he was on these medications and that his ability to participate in his defense was impaired.

The Defendant testified at the post-conviction hearing that he was unable to communicate with defense counsel. His defense counsel testified that he noted an improvement in the Defendant's ability to control himself emotionally and this improved his ability to communicate. Defense counsel also stated that he recalls discussing the case with the Defendant, who gave appropriate answers to his questions. He also specifically remembers discussing jury selection with the Defendant.

The Defendant also claims that the effect of the medications on his demeanor, making him unemotional, prejudiced him because the jury saw him as unfeeling or uncaring. Although he may have appeared unemotional to the jury, defense counsel used the fact that the Defendant was on medication to support his insanity defense. One juror testified that he thought that the Defendant's unemotional state was "unusual" and that he "seemed to show no interest." However, there is no evidence that this had an effect prejudicial to the Defendant. It is equally as plausible that his unemotional state bolstered his

appearance as being a person who was insane at the time of the murders. We will not second-guess defense counsel's choice of trial tactics. There is no evidence that defense counsel fell below the expected standard of performance. This issue has no merit.

Next, the Defendant contends that defense counsel failed to adequately prepare before trial and to properly examine an expert witness called by the defense. He claims that the meeting with and examination of Dr. Crupie was conducted without the depth necessary for adequate representation. There is evidence that defense counsel met with Dr. Crupie before the trial to discuss his testimony and that the testimony was consistent with that pretrial meeting. In addition, defense counsel presented two other expert witnesses to testify at trial regarding the Defendant's mental condition. There is no evidence that the depth and substance of the other experts' testimony was inadequate. The evidence does not show that defense counsel's actions were below the range of competence expected under the circumstances. This issue has no merit.

Finally, the Defendant contends that defense counsel made errors of prejudicial dimension when he failed to object to Mrs. Giannini Cheshier's testimony regarding the Defendant's demeanor at the time of the killings, and when defense counsel failed to object to the State's citation during closing arguments to an unpublished decision of this Court.

Regarding the failure to object to Mrs. Cheshier's testimony at trial, the Defendant contends that defense counsel improperly allowed her to testify about the mental state of the Defendant. As previously discussed, Mrs. Cheshier later

recanted that testimony. Although her testimony at trial about the Defendant's mental state was objectionable, we do not agree that the Defendant suffered any prejudice as a result of the testimony in question. We addressed this issue regarding the writ of error coram nobis and agree with the trial court that the substance of the testimony was not material nor would the changed testimony alter the outcome of the trial. Defense counsel presented several other lay witnesses and expert witnesses who described the Defendant's mental state at the time of the murders. Therefore, even assuming that trial counsel was deficient in failing to object, we find no prejudice.

The Defendant also claims that defense counsel was ineffective because he failed to object to the State's use of obsolete law from an unpublished case while presenting the rebuttal argument at closing. On appeal, a panel of this Court determined that the issue was waived because counsel did not timely object. State v. Louis Francis Giannini, No. 36, Shelby County, slip op. at 15 (Tenn. Crim. App., Jackson, Nov. 12, 1991), perm. to appeal denied, id. (Tenn. 1991). Rather, counsel chose to raise the objection after the State had concluded the argument. Although this Court noted that defense counsel's failure to object was error, we must evaluate counsel's actions to determine whether effective assistance has been rendered. Defense counsel's strategic decision not to object during the State's rebuttal argument was a legitimate trial tactic, the use of which does not necessarily indicate that counsel's representation was deficient. See Cone v. State, 747 S.W.2d 353, 356 (Tenn. Crim. App.1987), perm. to appeal denied, id. (Tenn. 1988).

We do not feel that counsel's failure to object was indicative of deficient representation, nor do we find prejudice. Although the cited case contained an inapplicable standard of law to determine an insanity defense, the passage quoted by the State referred only generally to determinations of sanity and the use of expert opinions. There is no evidence that the jury received any information about an obsolete rule of law. The trial court found that no prejudice was shown, and we agree. This issue has no merit.

We affirm the judgment of the trial court.

_____
DAVID H. WELLES, JUDGE

CONCUR:

_____
JOE B. JONES, PRESIDING JUDGE

_____
JERRY L. SMITH, JUDGE