

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1996 SESSION

FILED

February 20, 1997

Cecil W. Crowson
Appellate Court Clerk

CHARLES AUSTIN,)
)
Appellant,)
)
VS.)
)
STATE OF TENNESSEE,)
)
Appellee.)

No. 01C01-9603-CC-00093

DAVIDSON COUNTY

Hon. Walter C. Kurtz, Judge

(Post-Conviction -
Aggravated Rape)

For the Appellant:

KATHLEEN G. MORRIS
P.O. Box 128091
Nashville, TN 37212

For the Appellee:

CHARLES W. BURSON
Attorney General and Reporter

ELLEN H. POLLACK
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

VICTOR S. JOHNSON, III
District Attorney General

NICHOLAS D. BAILEY
Asst. District Attorney General
Washington Square, Suite 500
222 Second Avenue, N.
Nashville, TN 37201-1649

OPINION FILED: _____

AFFIRMED

JOE G. RILEY
JUDGE

OPINION

The petitioner, Charles Austin, appeals the order of the Criminal Court of Davidson County denying his petition for post-conviction relief. Petitioner filed his petition for post-conviction relief alleging ineffective assistance of counsel. The trial court found that petitioner did not prove ineffective assistance of counsel under the standard established by the United States Supreme Court in Strickland v. Washington and dismissed the petition. We affirm the judgment.

I

The petitioner was convicted of aggravated rape in July 1991, and received a sentence of eighteen (18) years. The evidence presented at trial revealed that on June 6, 1990, the petitioner was away from his residence most of the day while he was painting a house. When he returned home, he discovered that his daughter's nine-year old friend was sleeping on the couch. The petitioner digitally raped the nine-year old. After the child returned home the next day, her grandmother discovered that a pair of her underpants were bloody. When she asked the child about the blood, the child told her grandmother what had happened. The child was examined by a doctor, and petitioner was charged with aggravated rape.

The petitioner retained Mark Fishburn to represent him on this charge and a drug charge. Petitioner met with Mr. Fishburn soon after he was released from jail to discuss the rape charge and the other criminal charge. Mr. Fishburn tried to develop several defenses to the rape charge. He investigated whether the child might be lying in order to get attention because of a troubled family environment. He tried to review counseling records pertaining to the child's mental health history. The trial court viewed them in camera, gave counsel relevant records and placed the balance of the records under seal. Further, counsel attempted to find evidence that the child was promiscuous or that her father had been responsible for the rape. Additionally, he investigated the potential that the child's injuries were due to a fall on a trampoline that the child

previously sustained on the day of the rape.

Around two weeks prior to trial, Mr. Fishburn visited the Vanderbilt University Medical Library to research the possibility that the fall on the trampoline was the sole reason for the blood and other physical evidence corroborating the child's story. Mr. Fishburn made copies of articles in medical journals in order to contradict the testimony of the doctor who examined the child. Mr. Fishburn attempted, but was not able to speak with the doctor directly.

Mr. Fishburn was able to review the child's medical records. He also gave those records to a former crime lab supervisor to determine anything suspect that would aid petitioner in his defense. Additionally, he asked a friend who was a nurse to take a look at the files. Neither person found anything in the child's files which would be significant in petitioner's defense.

Mr. Fishburn received little cooperation from potential state's witnesses. The victim's family refused to talk with him. When he attempted to interview the case worker at the Department of Human Services, he was told to speak with the District Attorney's office.

After petitioner was convicted, he appealed his conviction. The conviction and sentence were affirmed. State v. Austin, C.C.A. No. 01C01-9204-CC-00120, Davidson County, (Tenn. Crim. App. filed December 31, 1992, at Nashville) . Petitioner then filed for post-conviction relief alleging ineffective assistance of counsel.

At the hearing, petitioner claimed that Mr. Fishburn (1) did not investigate the case properly and (2) improperly failed to hire an expert to rebut the state's medical evidence and provide the defense with an alternate theory of the child's injuries. Petitioner, however, did not produce an expert at the hearing who could testify about such medical findings. Petitioner then asked for a continuance in order to find such an expert. The trial court denied the the motion for a continuance and dismissed the petition for post-conviction relief.

II

The petitioner argues that his attorney did not conduct a proper

investigation of the rape charge and thus was prejudiced by his attorney's lack of competence. He alleges that his attorney did not make a thorough investigation of all possible defenses and witnesses. Petitioner argues that Mike Ensley should have been called to testify that petitioner was not drunk on the day of the rape. He further claims that had Mr. Fishburn interviewed all of the relevant witnesses, namely the victim, her family, and the doctor who examined the victim, he would have been more prepared for trial. Additionally, petitioner argues that Mr. Fishburn was ineffective by failing to retain an expert to contradict the state's medical evidence. Specifically, the petitioner claims that Mr. Fishburn did not properly develop the defense that the child's injuries were caused by the fall on the trampoline. Therefore, petitioner argues that if Mr. Fishburn had investigated and prepared properly, the evidence would produce reasonable doubt as to guilt.

III

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), provides a two-prong analysis when a petitioner claims ineffective assistance of counsel. The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Id. at 687, 104 S.Ct. at 2064. The test in Tennessee in determining whether counsel provided effective assistance at trial is whether his performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. Strickland v. Washington, *supra* at 689, 104 S.Ct. At 2065; State v. Williams, 929 S.W.2d 385, 389 (Tenn. Crim. App. 1996). The petitioner has not met his burden.

The petitioner complains that Mr. Fishburn did not present witnesses at trial who would have testified that petitioner was not drunk on the night of the rape. No evidence was offered at trial to prove otherwise. Mr. Fishburn testified

at the hearing that he did not believe that any of these witnesses could give any significant testimony. An attorney's strategic and tactical decisions are not subject to post-conviction review. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Similarly, petitioner has not presented evidence that the testimony of these witnesses would have affected the outcome of the trial.

Furthermore, petitioner alleges that Mr. Fishburn did not conduct a sufficient investigation. Contrary to petitioner's allegations, trial counsel conducted an adequate investigation. He interviewed several persons in preparation for trial endeavoring to develop an appropriate defense. Although he was not able to speak with the victim, her family or the doctor before testifying at trial, he endeavored to do so. Moreover, he conducted medical research on his own and secured the assistance of a nurse and a former crime lab supervisor to determine the significance of the child's medical records. Counsel's performance was not deficient and met the standard set forth in Baxter.

IV

Petitioner has also failed to show prejudice. Strickland 466 U.S. at 687, 104 S.Ct. at 2064; Cooper v. State, 849 S.W.2d 744, 746 -747 (Tenn. 1993). In order to prove prejudice, the petitioner must show a probability sufficient to undermine confidence in the outcome of the proceeding. Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). The petitioner has not shown that counsel could have done anything to change the trial's outcome. Petitioner has not shown that an expert would have testified that the child's injuries were inconsistent with sexual abuse. Additionally, there is no evidence that an expert would have testified that the child's injuries were more likely to have been caused by the accident on the trampoline.

Petitioner places great weight on the fact that Mr. Fishburn did not hire an expert who could testify regarding the medical evidence and the child's mental state as well. At the post-conviction hearing, however, petitioner did not produce any such expert. "When a petitioner contends that trial counsel failed to

discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing.” Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Without such evidence, the trial judge is left to speculate as to what further investigation would have revealed. Id. Therefore, we are unable to find that petitioner was prejudiced because of the lack of expert testimony.

V

In the alternative, petitioner contends that the trial judge should have granted the request for a continuance made at the conclusion of the evidence so that petitioner could find an expert to testify. Granting or denying a “[c]ontinuance is a matter which rests within the sound judicial discretion of the trial judge and his decision on the matter will not be disturbed absent a clear showing of prejudice to the appellant.” State v. Green, 613 S.W.2d 229, 233 (Tenn. Crim. App. 1980); see also State v. Mitchell, 753 S.W.2d 148 (Tenn. Crim. App. 1988). Petitioner has made no such showing here. Mere conclusory allegations or opinions, standing alone, are insufficient to support the granting of a continuance. State v. Bennett, 798 S.W.2d 783, 788 (Tenn. Crim. App. 1990). Whether such an expert could be found is speculative at best. We find that the trial judge did not abuse his discretion in denying the late hour request for a continuance.

VI

The petitioner has failed to meet the burden for establishing ineffective assistance of counsel as mandated by Strickland v. Washington. He has not shown that counsel’s actions fell below the range of competence demanded of attorneys in criminal cases. Additionally, he has not demonstrated prejudice. Furthermore, the trial judge did not abuse his discretion in denying a motion for a continuance in order that petitioner could find an expert to testify.

The judgment is AFFIRMED.

JOE G. RILEY, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE