

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE SESSION, 1997

FILED
September 2, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

RODNEY CORLEY,

Appellant.

) C.C.A. NO. 01C01-9608-CR-00336

)

)

) DAVIDSON COUNTY

)

)

) HON. SETH NORMAN, JUDGE

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)

) (POST-CONVICTION)

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Petitioner appeals as of right, pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure, from the Davidson County Criminal Court's denial of his Petition for Post-conviction Relief. The Petitioner argues that the trial court erred for two reasons: (1) The Petitioner received ineffective assistance of counsel at trial by trial counsel's failure to present testimony of a material witness; and (2) the Petitioner was denied his right to due process of law because the "reasonable doubt" jury instruction given in his case allowed the jury to find guilt based on a lesser degree of proof than is required by the Constitution. We affirm the judgment of the trial court.

I.

The Petitioner's first issue is that trial counsel was ineffective because he failed to present the testimony of a material witness at trial. 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 witness in question was with the Petitioner and his co-defendant when the crime occurred. Trial counsel stated that he intended to call the witness to testify that the Petitioner was not the shooter in the incident. However, during trial the Petitioner told trial counsel for the first time that he had brutally assaulted the victim. At this time, because of the possibility of testimony concerning the brutal assault by the Petitioner, trial counsel decided it was more beneficial to do without the witness' testimony.

We first point out that this witness did not testify at the hearing for the Post-conviction Petition. For this reason, what this witness may or may not have testified to is pure supposition. Supposition cannot be used to support the Petitioner's claim that he was prejudiced by the absence of this witness.

Trial counsel's decision not to call the witness was clearly trial strategy. The Petitioner has not shown that his trial counsel made errors so serious that he was not functioning as counsel as guaranteed under the Sixth Amendment. Therefore, he has not met the first prong of the Strickland test.

This issue is without merit.

II.

Petitioner claims in his second issue that the trial court erred in dismissing the petition when the Petitioner was denied his right to due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the Tennessee Constitution, because the "reasonable doubt" jury instruction given in his case allowed the jury to find guilt based on a lesser degree of proof than is required by the Constitution.

The "reasonable doubt" instruction given at trial is as follows:

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a capricious, possible, or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required as to every proposition of proof requisite to constitute the offense.

This same instruction has been approved by this court on two previous occasions. Pettyjohn v. State, 885 S.W.2d 364, 365 (Tenn. Crim. App. 1994); State v. Hallock, 875 S.W.2d 285, 294 (Tenn. Crim. App. 1993). In Pettyjohn, this court applied the same analysis that was announced in Victor v. Nebraska,

511 U.S. 1 (1994). The standard to judge the appropriateness of the “moral certainty” language in a jury instruction is that the instruction must be examined as a whole to decide the effect on the jury. This court has held that the language of the above instruction does not lead to a lesser degree of proof than that required by the Constitution. We agree with the previous decisions of this court.

Therefore this issue is without merit.

The judgment of the trial court is affirmed.

THOMAS T. WOODALL, JUDGE

CONCUR:

JOSEPH B. JONES, Presiding Judge

WILLIAM M. BARKER, Judge