

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY SESSION, 1998

FILED
February 23, 1998
Cecil W. Crowson
Appellate Court Clerk

CHARLES MICHAEL)
GENTRY,)

Appellant,)

VS.)

STATE OF TENNESSEE,)

Appellee.)

C.C.A. NO. 01C04974-CR-10

DAVIDSON COUNTY

HON. SETH NORMAN
JUDGE

(Post-Conviction)

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

FOR THE APPELLANT:

BOB LYNCH, JR.
Suite 316, Washington Square
222 Second Avenue North
Nashville TN 37201

FOR THE APPELLEE:

JOHN KNOX WALKUP
Attorney General and Reporter

ELLEN H. POLLACK
Assistant Attorney General
425 Fifth Avenue North
Nashville, TN 37243-0493

VICTOR S. JOHNSON
District Attorney General

STEVE DOZIER
Assistant District Attorney General
Washington Square, Suite 500
222 Second Avenue North
Nashville, TN 37201-1649

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner, Charles Michael Gentry, appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure from the trial court's denial of his petition for post-conviction relief. On May 9, 1996, the Petitioner filed a motion to reopen his first petition for post-conviction relief, claiming that the "reasonable doubt" jury instruction charged at his trial was unconstitutional. In his motion to reopen, he asserted that his claim was based on the violation of a constitutional right not recognized as existing at the time of his trial. See Tenn. Code Ann. § 40-30-217(a)(1). The trial court granted the motion to reopen and considered the Petitioner's claim on its merits. On October 29, 1996, the trial court issued an order denying the petition. We affirm the judgment of the trial court.

In April of 1977, the Petitioner was convicted by a Davidson County jury of first degree murder and was sentenced to life imprisonment. A panel of this Court affirmed his conviction on November 2, 1978, and the Tennessee Supreme Court denied permission to appeal on March 5, 1979. Charles Michael Gentry v. State, C.C.A. No. B-8655, Davidson County (Tenn. Crim. App., Nashville, Nov. 2, 1978), perm. to appeal denied (Tenn. 1979).

On June 30, 1989, the Petitioner filed a petition for post-conviction relief. Unfortunately this petition is not included in the record before us. According to the Petitioner, however, the 1989 petition originally contained arguments that his trial counsel rendered ineffective assistance, that the trial court erred in admitting

his statement, and that the State committed prosecutorial misconduct. It appears that the 1989 petition was amended in February of 1990 to include two additional issues, the first contending that the trial court erred in charging the jury on lesser included offenses of first degree murder and the second contending that police officers engaged in misconduct in obtaining his statement. The trial court conducted evidentiary hearings on the petition in February and October of 1990. On October 22, 1990, the trial court denied the petition. This Court affirmed the denial of the petition on December 3, 1991, and the Tennessee Supreme Court denied permission to appeal on March 16, 1992. Charles Michael Gentry v. State, C.C.A. No. 01C01-9104-CR-00099, Davidson County (Tenn. Crim. App., Nashville, Dec. 3, 1991), perm. to appeal denied (Tenn. 1992).

On May 9, 1996, the Petitioner filed a motion to reopen his first petition for post-conviction relief. In his motion to reopen, he contends that the jury instruction on “reasonable doubt” given at his trial in 1977 was unconstitutional. According to the motion to reopen, the jury in his case was instructed as follows:

By reasonable doubt is not meant that which of possibility may arise, but is that doubt engendered by an investigation of the whole proof, and an inability, after such an investigation to let the mind rest easily upon the certainty of guilt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense and as to every grade of crime charged or included in the indictment.¹

He contends that equating “moral certainty” with “beyond a reasonable doubt” did not correctly convey the concept of “reasonable doubt” to the jury and impermissibly lowered the State’s burden of proof as to his guilt.

¹ We note that the actual jury instruction is not included in the record. The quoted instruction comes from the motion to reopen the petition for post-conviction relief and the Petitioner’s brief to this Court.

The Petitioner cites several cases in support of his argument that the “reasonable doubt” jury instruction was unconstitutional. Among those cases are Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1991), Austin v. Bell, 938 F.Supp. 1308 (M.D. Tenn. 1996), aff’d in part, rev’d in part, 126 F.3d 843 (6th Cir. 1997), and Rickman v. Dutton, 864 F.Supp. 686 (M.D. Tenn. 1994). He argues that this line of cases established a new constitutional principle that jury instructions such as the one given at his trial violate due process guarantees and the right to a jury trial. As a result, he asserts that his claim fits within a statutory provision allowing for reopening his original post-conviction petition. See Tenn. Code Ann. § 40-30-217(a)(1).

It is true that the United States Supreme Court has been critical of the continued use of the “moral certainty” language in reasonable doubt jury instructions. See Victor, 114 S.Ct. at 1248. Yet neither the United States Supreme Court nor any Tennessee state court has held that a reference to “moral certainty” within a reasonable doubt jury instruction is per se unconstitutional. Rather, courts must look to the entire charge to determine if the “moral certainty” language was placed in a context in which the jury would understand that the phrase meant certainty with respect to human affairs. See State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994), cert. denied, 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); Pettyjohn v. State, 885 S.W.2d 364, 365-66 (Tenn. Crim. App. 1994). We therefore do not believe that the Cage and Victor line of cases established a new constitutional rule for purposes of Tennessee Code Annotated section 40-30-217(a)(1). See Charles Walton Wright v. State, C.C.A. No. 01C01-9506-CR-00211, Davidson County (Tenn.

Crim. App., Nashville, Mar. 20, 1997), slip op. at 10, perm. to appeal granted (Tenn. 1997). Accordingly, the Petitioner's challenge to the reasonable doubt jury instruction does not constitute a proper ground under Tennessee Code Annotated section 40-30-217(a)(1) for reopening his first petition for post-conviction relief.

Moreover, even if the Petitioner's challenge to the reasonable doubt jury instruction were considered on its merits, we do not believe he would be entitled to post-conviction relief. In Victor, the United States Supreme Court ruled that the phrase "moral certainty" may have lost its historical meaning and that modern juries, unaware of the historical meaning, might understand "moral certainty" to mean something less than the high level of determination constitutionally required in criminal cases. Victor, 114 S.Ct. at 1246-48. While expressing criticism of the continued use of the "moral certainty" phrase, the Court did not hold that it was necessarily constitutionally invalid. Id. Instead, as we stated above, the Court looked to the full jury charge to determine if the phrase was placed in such a context that a jury would understand that it meant certainty with respect to human affairs. Id. The Court has expressed particular concern over the use of the terms "grave uncertainty" and "actual substantial doubt" in conjunction with "moral certainty." See Cage, 498 U.S. at 41, 111 S.Ct. at 329-30 (holding that the use of the three phrases together could be interpreted by a reasonable juror to allow a finding of guilt based on a degree of proof below that required by due process).

In the case sub judice, it does not appear that the additional terms found objectionable in Cage were included in the jury charge. Furthermore, considering the entire jury charge, we are satisfied that the reasonable doubt jury instruction

conveyed the proper level of evidentiary certainty to comport with the due process guarantees of the United States and Tennessee constitutions. Tennessee courts have repeatedly upheld reasonable doubt jury instructions similar to the one given in the present case. See Nichols, 877 S.W.2d at 734; Pettyjohn, 885 S.W.2d at 366; State v. Hallock, 875 S.W.2d 285, 294 (Tenn. Crim. App. 1993); Terry Shannon Kimery v. State, C.C.A. No. 03C01-9512-CC-00412, Greene County (Tenn. Crim. App., Knoxville, Jan. 28, 1997), perm. to appeal denied (Tenn. 1997). Thus, the full jury charge given in the Petitioner's case did not violate his due process rights under either the United States or Tennessee Constitutions even though it contained the "moral certainty" phrase.

We do note that, as the Petitioner points out, a jury instruction similar to the one given in the present case was found to be unconstitutional in Rickman v. Dutton, 864 F.Supp. 686, 709-10 (M.D. Tenn. 1994) and again in Austin v. Bell, 938 F.Supp. 1308, 1318-19 (M.D. Tenn. 1996), aff'd in part, rev'd in part, 126 F.3d 843 (6th Cir. 1997). The Petitioner's reliance on these cases, however, is not well-founded. This Court is not bound by the federal district court's decision with regard to the constitutionality of the reasonable doubt jury instruction. Instead, we are required to follow only the applicable constitutional rulings of the United States Supreme Court. See State v. McKay, 680 S.W.2d 447, 450 (Tenn. 1984), cert. denied, 470 U.S. 1034, 105 S.Ct. 1412, 84 L.Ed.2d 795 (1985); State v. Bowers, 673 S.W.2d 887, 889 (Tenn. Crim. App. 1984). Furthermore, we point out that the district court's holding with regard to the constitutionality of the "reasonable doubt" jury instruction was reversed on appeal. Austin v. Bell, 126 F.3d 843, 847 (6th Cir. 1997) (holding that the jury instruction at issue was more

similar to the constitutionally acceptable language in Victor than the unacceptable language in Cage).

For the reasons set forth in the discussion above, we conclude that the trial court did not err in dismissing the petition for post-conviction relief. We therefore affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

THOMAS T. WOODALL, JUDGE