IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1998 SESSION

FILED

August 20, 1998

Cecil W. Crowson
Appellate Court Clerk

JABARI ISSA MANDELA, F/K/A JOHN HENRY WOODEN,	*	No. 01C01-9610-CR-00459
Appellant,	*	DAVIDSON COUNTY
VS.	*	Honorable Ann Lacy Johns, Judge
STATE OF TENNESSEE,	*	(Post-Conviction)
Appellee.	*	

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OPINION FILED:_____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The petitioner, Jabari Issa Mandela, appeals the trial court's denial of post-conviction relief. He presents the following issues for our review:

> (1) whether prosecutors withheld evidence in violation of Brady v. Maryland and whether imposition of the statute of limitations violates due process;
>
> (2) whether the trial court erred by not providing the petitioner with a full and fair hearing to present all claims regarding reasonable doubt jury instructions and ineffective assistance of counsel; and
>
> (3) whether the trial court abused its discretion by not allowing access to physical evidence for performance of new scientific testing.

We find no error and affirm the judgment of the trial court.

In 1982, the petitioner, then named John Henry Wooden, was convicted of second degree burglary, aggravated assault, aggravated sexual battery, and aggravated rape. Respectively, his sentences were six to fifteen years, three to nine years, thirty-five years and life; all sentences are being served consecutively. The convictions were upheld on direct appeal. State v. Wooden, 658 S.W.2d 553 (Tenn. Crim. App.), app. denied, (Tenn. 1983). In his first petition for post-conviction relief, the petitioner alleged ineffective assistance of counsel and lack of impartiality on the part of the trial judge. That petition was dismissed after an evidentiary hearing. This court affirmed. John Henry Wooden v. State, No. 85-290-III (Tenn. Crim. App., at Nashville, Oct. 3, 1986), app. denied, (Tenn. 1987). The second post-conviction petition, in which the petitioner alleged ineffective assistance of counsel and the use of perjured testimony by the state, was dismissed without an evidentiary hearing. This court affirmed, finding the issues either previously determined or waived. State v. John Henry Wooden, No. 86-74-III (Tenn. Crim. App., at Nashville, Nov. 19, 1986), app. denied, (Tenn. 1987).

The petitioner filed a third petition for post-conviction relief in May of 1993 contending that he was denied due process of law because the state withheld exculpatory evidence. The petitioner maintained that he first discovered the evidence in 1992 after making a request for police records under the Tennessee Public Records Law, Tenn. Code Ann. § 10-7-501, and the ruling in Freeman v. Jeffcoat, No. 01A01-9103-CV-00086 (Tenn. Ct. App., at Nashville, Aug. 30, 1991), app. denied, (Tenn. 1992). Until 1992, the petitioner had been unsuccessful in obtaining the records because police had denied him access to the files. The trial court ruled that the petitioner's claims were barred by the statute of limitations. The petition was dismissed without the appointment of counsel or an evidentiary hearing. On appeal, this court affirmed in part, finding most of the petitioner's claims had been waived or previously determined. Wooden v. State, 898 S.W.2d 752, 754 (Tenn. Crim. App. 1994). The case was, however, remanded to the trial court for appointment of counsel and an evidentiary hearing:

> Upon remand, the trial court should consider first whether the evidence [police reports discovered pursuant to the Tennessee Public Records Law] is in fact exculpatory. If so, it can then determine whether the evidence supports the application of the Burford due process exception to the statute of limitations. If each of these questions is resolved in the affirmative, the trial court may then consider appropriate relief.

Id., 898 S.W.2d at 755.

I

On remand, the trial court held an evidentiary hearing. Yvonne Sanders, a friend to the petitioner, testified that she made a Request to Inspect Public Records on June 24, 1992, and mailed police department records to the petitioner in September of 1992. The district attorney's office mailed its records sometime after January 5, 1993.

At the hearing, attorney Henry Martin testified that he had represented the petitioner at trial. He had taken over the case from attorney Richard McGee. He recalled that he and McGee had filed pretrial discovery motions. Martin recalled that identification was the key issue at trial.

Petitioner's post-conviction counsel showed Martin numerous exhibits to see if he could recall whether he had the documents prior to trial. Martin's responses varied. To clarify which documents Martin had before trial, petitioner's counsel introduced an affidavit and attachments prepared by Martin in November of 1984 for the hearing on the first petition for post-conviction. The affidavit and attachments had served to establish what discovery the state had provided the defense before trial. Martin acknowledged that his affidavit and attachments from 1984 would be more accurate than his memory.

The trial court heard this testimony and the arguments of counsel and, after carefully scrutinizing these documents, dismissed the petition, finding that the petitioner "totally failed to carry his burden of persuasion." The trial court concluded that the state did not withhold exculpatory information.

In the landmark case of Brady v. Maryland, the United States Supreme Court ruled that the prosecutor has a duty to furnish exculpatory evidence to the defendant. 373 U.S. 83, 87 (1963). Exculpatory evidence may pertain to the guilt or innocence of the accused and/or the punishment which may be imposed if the accused is convicted of the crime. State v. Marshall, 845 S.W.2d 228 (Tenn. Crim. App. 1992). The Supreme Court in Brady reasoned that a fair trial and a just result could not be obtained when, at the time of trial, the prosecution suppressed information favorable to the accused. Brady, 373 U.S. at 87-88.

Any "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. This duty to disclose extends to all favorable information irrespective of whether the evidence is admissible. Branch v. State, 469 S.W.2d 533 (Tenn. Crim. App. 1969). Information useful for impeaching a witness is considered favorable information that the prosecutor may not withhold. Giglio v. United States, 405 U.S. 150 (1972). And, while Brady does not require the state to investigate for the defendant, it does burden the prosecution with the responsibility of disclosing statements of witnesses favorable to the defense. State v. Reynolds, 671 S.W.2d 854, 856 (Tenn. Crim. App. 1984). The duty does not extend to information that the defense already possesses or is able to obtain or to information not in the possession or control of the prosecution. Banks v. State, 556 S.W.2d 88, 90 (Tenn. Crim. App. 1977).

Before this court may find a due process violation under Brady, the following elements must be established:

> 1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
>
> 2. [t]he State must have suppressed the information;
>
> 3. [t]he information must have been favorable to the accused; and
>
> 4. [t]he information must have been material.

State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995) (as amended on rehearing).

In Edgin, our supreme court adopted the following standard for materiality:

> [T]here is constitutional error "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ... "[T]he touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'"

Edgin, 902 S.W.2d at 390-91 (quoting Kyles v. Whitley, 115 S. Ct. 1555, 1566 (1995)).

To prevail on a petition for post-conviction relief, a petitioner must prove a constitutional violation by a preponderance of the evidence. State v. Spurlock, 874 S.W.2d 602, 610 (Tenn. Crim. App. 1993). This court is bound by the post-conviction court's findings unless the evidence preponderates otherwise. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). This court may not reweigh or reevaluate the evidence or substitute its inferences for those drawn by the post-conviction court. Moreover, questions concerning the credibility of witnesses and weight and value to be given their testimony are for resolution by the post-conviction court. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

Comparing the affidavit attachments with the records obtained in 1992 and 1993, we have determined that the state failed to disclose some thirty documents concerning their investigation of the petitioner. Of those thirty documents, only those pertaining to victims Terri Tipps, Denise Bolton and Rene Northcutt bear scrutiny. The remaining documents pertain to counts of the indictment that were severed and dismissed, resulted in not guilty verdicts, or were

mistried.

In each of the following instances, we conclude that the petitioner requested the information and that the state failed to supply an appropriate response. Defense counsel entered a proper discovery motion pre-trial and yet the petitioner did not obtain the documents until years after the trial. The question for this court is whether the documents contain any information that qualifies as both favorable, as defined in Brady, and material, as defined in Kyles v. Whitley.

(a)

The petitioner argues that Ms. Tipps gave false or inconsistent testimony at trial. Exhibit 7 is a crime scene search report listing potential evidence obtained from Ms. Tipps' apartment. The report indicates that the weather was cloudy and mild and notes the presence of artificial lighting. At trial, Ms. Tipps described the weather on the day of her attack as sunny. Although the information is inconsistent with trial testimony, we do not view this as material. The crime occurred during the day. While identification was a major issue at trial, the petitioner never asserted that the lack of available lighting was an obstacle.

Nor do we find material Exhibit 8, a document listing a number of assaults in Nashville, which has a column headed "Identification." Under the column coinciding with Ms. Tipps' address, someone wrote, "Yes?" The petitioner therefore claims that there was some question about his being adequately identified at some point during the investigation.

An inference may be that an unnamed investigator may have questioned whether Ms. Tipps could identify her attacker. In a pre-trial lineup and at

trial, she positively identified the petitioner as her assailant. The origin and meaning of the question mark is debatable. Certainly, Ms. Tipps was not the author. Otherwise, any interpretation would qualify as speculative.

Exhibit 9 is a police report describing the attack and documenting supplemental interviews with Ms. Tipps concerning her whereabouts and well-being. This information is not remotely exculpatory.

Exhibit 10, a TBI request for an exam prepared by Officer Dobson, contains a summary of the offense, "Victim returned to her apt. to find suspect in her apt. Suspect slapped, scratched, and vaginally raped victim." This summary statement was neither attributed to nor adopted by Ms. Tipps. The petitioner maintains that this statement of facts, which places the suspect inside the apartment when the victim arrived, is inconsistent with Ms. Tipps' trial testimony. At trial, she testified that she was in her apartment and the petitioner intruded upon her. Her pretrial statements to police similarly described the incident. While we agree that the summary statement by Officer Dobson is inconsistent with the trial testimony, the inconsistency is not material to any issue at trial.

Exhibit 36, a police report, indicates that Ms. Tipps agreed to view a lineup and Exhibit 40 is a copy of the lineup identification card. The petitioner does not clarify how these forms relate to his argument. Thus, he has failed to show either favorableness or materiality.

(b)

The petitioner contends that Ms. Bolton's trial testimony was inconsistent with her prior statements and that she actually identified another man

as her assailant.

Exhibit 13 is a police report which states the suspect used mace and placed a towel over Ms. Bolton's face. Exhibit 14, an incident report listing Ms. Bolton as the complainant, indicates that a sack rather than a towel was used; there is no mention of mace. These documents contained information that may have been useful for cross-examination of Ms. Bolton. Yet, Ms. Bolton described the attack consistently in her pre-trial statement to investigators, as noted in a police report, and in her testimony at trial. She positively identified the petitioner in a pre-trial lineup conducted in January of 1982 and again at trial. In light of her testimony as a whole, we do not find this discrepancy to be material.

Exhibit 15, dated August 31, 1981, is a photographic lineup identification form and a collection of photographs. Officer Vaughn, who filled out the form, wrote: "(while holding no. five) 'This looks like the man that came in on me. I think this is him but I can't be sure.'" The form indicates that Ms. Bolton failed to identify anyone at that time. From the record, we cannot determine whether the photograph of the petitioner was among those in the array. In consequence, he has not demonstrated how this particular evidence is either favorable or material.

Exhibit 16 is a police report written by an investigating officer made after a discussion with Ms. Bolton on July 8, 1981:

> [S]he stated that a m/b fitting the description of the suspect as far as she was able [to] determine visited a m/b that lives beneath her. She found out that his name is James L. Smith.

The petitioner maintains that Ms. Bolton was referring to James L. Smith as her assailant, not the neighbor who lived in an apartment beneath her. In our view, this

reference is ambiguous and could apply to either the neighbor or the suspect. The burden in a post-conviction case is on the petitioner to demonstrate his claim by a preponderance of the evidence. He has not done so on this issue.

(c)

The petitioner also argues that he was unable to establish an alibi regarding the attempted rape of Ms. Northcutt because the state withheld evidence. Exhibit 17 indicates that witnesses Joy Andrus and Patricia Rust viewed a lineup on January 20, 1982, in an effort to determine the identity of a suspicious man seen in the vicinity of Ms. Northcutt's apartment complex. Ms. Andrus identified the petitioner as the man she saw loitering in the area several days before Ms. Northcutt was attacked. Ms. Rust had seen a suspicious man leaving the building at about 12:30 the day of the attack. Although she did not get a good look at his face, she saw the suspect get in a new, light blue Cutlass. Ms. Rust was unable to identify the petitioner in the lineup.

At trial, Detective Vaughn, who had conducted the lineup, was asked who had viewed the lineups. Detective Vaughn mentioned several names but not Ms. Rust. The petitioner contends this information would have been useful in cross-examining Detective Vaughn at trial. Detective Vaughn, however, was not an important witness against the petitioner. Thus, the verdict retains its reliability despite this marginally favorable evidence.

The petitioner maintains that Ms. Rust's inability to identify the petitioner in a lineup is also significant because she "place[s] the assailant in the most southern part of the county ... when appellant was seen by more than three witnesses in the most northern part of the county ... less than thirty minutes after the

assault." Ms. Rust did not testify at trial. The petitioner presented proof of his alibi at trial. His girlfriend testified that she telephoned him at home shortly after 12:30 P.M. on the day Ms. Northcutt was attacked. This additional evidence would not have been all that favorable and is of dubious materiality in the context of the entire trial.

Finally, the petitioner contends that Exhibit 18A, a police report, is inconsistent with Ms. Northcutt's trial testimony and pre-trial statement. The police report shows the time of assault as 12:10 P.M. and describes the assailant as wearing a "blue sweat coat with hood." The report also indicates the assailant left Ms. Northcutt's apartment to get "val[i]um." At trial, Ms. Northcutt testified that the attack occurred shortly after 11:15 A.M.; she described her attacker as wearing a "blue sweatshirt with a hood" and recalled that he left her apartment to get "Quaaludes." These minor distinctions cast no doubt on the reliability of the verdict. In our view, the petitioner has failed to demonstrate this information is significantly material or favorable.

Because none of the information suppressed by the state qualified as exculpatory, whether application of the statute of limitations is violative of due process need not be addressed.

II

The petitioner's remaining claims are waived or previously determined and barred by the statute of limitations. The post-conviction statute in effect when the petition was filed defines waiver:

> (b)(1) A ground for relief is waived if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have

been presented.

> (2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

Tenn. Code Ann. § 40-30-112(b) (repealed 1995).

Our supreme court has held that "the rebuttable presumption of waiver is not overcome by an allegation that the petitioner did not personally, knowingly, and understandingly fail to raise a ground for relief." House v. State, 911 S.W.2d 705, 714 (Tenn. 1995). "Waiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." Id.

Any petitioner whose judgment became final before July 1, 1986, had only three years thereafter to file a petition for post-conviction relief. Tenn. Code Ann. § 40-30-102 (repealed 1995). Here the petitioner's judgment became final on October 11, 1983. He had until July 1, 1989 to file his post-conviction petition. Abston v. State, 749 S.W.2d 487, 488 (Tenn. Crim. App. 1988). The 1995 Act did not enlarge the time within which this petitioner could file as "the enabling provision ... is not intended to revive claims that were barred by the previous [three-year] statute of limitations." Carter v. State, 952 S.W.2d 417, 419 (Tenn. 1997).

Regardless, the petitioner would not prevail on the merits. He complains that the trial court denied him a full and fair hearing on issue of reasonable doubt jury instructions. The trial court refused to allow the petitioner to proceed pro se as he was represented by "imminently qualified counsel." There is no entitlement to proceed pro se. State v. Gillespie, 898 S.W.2d 738, 741 (Tenn. Crim. App. 1994).

At trial, the court provided the following reasonable doubt instruction:

> 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 investigation, to let the mind rest easily as to 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.

Our supreme court has consistently upheld this "moral certainty" instruction as consistent with the principles of Cage v. Louisiana, 498 U.S. 39 (1990). See, e.g., State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994); Carter v. State, 958 S.W.2d 620 (Tenn. 1997).

The petitioner also complains of a denial of due process because he was not permitted to present proof that his trial counsel was ineffective for failing to have the tape of his preliminary hearing transcribed. He maintains that trial counsel's omission hampered his efforts to impeach state witnesses at trial.

In our view, this claim has been previously determined. "A ground for relief is 'previously determined' if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a)(1)(repealed 1995). A full and fair hearing is provided when a petitioner has an opportunity to present the constitutional claim at a meaningful time and in a meaningful manner. House v. State, 911 S.W.2d 705, 711 (Tenn. 1995). Ineffective assistance of counsel is generally "a single ground for relief" under the post-conviction statute. Cone v. State, 927 S.W.2d 579, 581-82 (Tenn. Crim. App. 1995).

A petitioner may not relitigate previously determined grounds for relief by presenting additional factual allegations. Id. The petitioner asserted ineffective

assistance of counsel in his first petition for post-conviction relief. The trial court held an evidentiary hearing and ruled on the merits that the petitioner had received effective assistance of counsel at trial. This court affirmed. Wooden, No. 85-290-III, slip op. at 3. The petitioner subsequently claimed ineffective assistance of trial counsel in his second and third petitions. This court found the claims to be previously determined. Wooden, No. 86-74-III, slip op. at 2; Wooden, 898 S.W.2d at 754. This issue is without merit.

III

The petitioner argues that the trial court erroneously ignored his pro se motion for access to physical evidence for new scientific testing. The state contends that the petitioner has waived this issue by failing to make a record. The petitioner claims that because his appointed counsel refused to file a motion for access to physical evidence, he filed his own motion. He asserts that because the trial court refused to rule on the pro se motion, he was denied the right to be heard.

A person represented by counsel has no right to proceed pro se. State v. Burkhart, 541 S.W.2d 365 (Tenn. 1976). See also Ricky Harris v. State, No. 03C01-9611-CR-00410, slip op. at 32 (Tenn. Crim. App., at Knoxville, Apr. 23, 1998), perm. to appeal filed, (June 22, 1998) (applying the rule in Burkhart to the post-conviction setting). In consequence, the petitioner was not denied the right to be heard.

This issue is also waived, as the motion is not included in the record. Tenn. R. App. P. 24(b). When the record is incomplete and does not contain information relevant to a particular issue, this court may not make a ruling. State v. Cooper, 736 S.W.2d 125, 131 (Tenn. Crim. App. 1987).

The petitioner relies on the Post Conviction Procedure Act of 1995, Tenn. Code Ann. § 40-30-217 and the ruling in James Earl Ray v. State, C.C.A. No. 02C01-9703-CR-00107 (Tenn. Crim. App., at Jackson, Apr. 9, 1997), in asserting that trial courts are authorized to hear motions requesting access to physical evidence for scientific testing.

In our view, the petitioner misreads both the 1995 Act and the decision in Ray. The Act provides that a petitioner may file a motion to reopen a prior petition by showing "new scientific evidence establishing actual innocence ... and ... the petitioner is entitled to have the conviction set aside." Tenn. Code Ann. § 40-30-217(a)(2),(4). These provisions are not, however, avenues for discovery for the petitioner. Ray, slip op. at 3.

> One cannot proceed under Tenn. Code Ann. § 40-30-217(a)(2) to examine or test physical evidence in governmental control based on allegations that such an examination or test could establish actual innocence. ... This statute is designed for the extraordinary case when one has scientific evidence that establishes actual innocence. ....

Id. (emphasis in original). This issue is without merit.

Accordingly, the judgment of the trial court is affirmed.

_____
Gary R. Wade, Judge

CONCUR:

_____
William M. Barker, Special Judge

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Curwood Witt, Judge