IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1999 SESSION

FILED

May 6, 1999

Cecil W. Crowson
Appellate Court Clerk

STEVEN CRAIG GRIFFIN,	)	
	)	
Appellant,	)	C.C.A. No. 01C01-9801-CC-00004
	)	
vs.	)	Davidson County
	)	
STATE OF TENNESSEE,	)	Hon. Ann Lacy Johns, Judge
	)	
Appellee.	)	(Post-Conviction)
	)	

FOR THE APPELLANT:

WILLIAM C. ROBERTS (at hearing)
Attorney at Law
222 Second Ave. N., Ste. 360M
Nashville, TN 37201

DWIGHT E. SCOTT (on appeal)
Attorney at Law
4024 Colorado Ave.
Nashville, TN 37209

FOR THE APPELLEE:

JOHN KNOX WALKUP
Attorney General & Reporter

KIM R. HELPER
Assistant Attorney General
425 Fifth Ave. N., 2d Floor
Nashville, TN 37243-0493

VICTOR S. JOHNSON, III
District Attorney General

KYMBERLY HAAS
JOHN SEABORG
Asst. District Attorneys General
222 Second Ave. N., Ste. 500
Nashville, TN 37201

OPINION FILED:_____

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The petitioner, Steven Craig Griffin, appeals from the Davidson County Criminal Court's dismissal of his petition for post-conviction relief. Griffin is presently serving an effective 85-year sentence for his convictions of kidnapping and six counts of aggravated rape. State v. Steven Craig Griffin, No. 01C01-9404-CR-00144, slip op. at 2 (Tenn. Crim. App., Nashville, June 28, 1995). In this appeal, Griffin attacks the lower court's determination that he received the effective assistance of counsel at trial.[1] Having reviewed the record, the briefs of the parties, and the applicable law, we affirm the lower court's dismissal.

At the post-conviction hearing, the court heard the testimony of the petitioner as well as the sharply contrasting testimony of his lead trial attorney. In passing on the issues, the court made factual findings which accredited the state's evidence over that presented by the petitioner. Based upon these findings, the court found that Griffin had failed to carry his burden of proving his claims and dismissed the petition.

The Sixth Amendment of the United States Constitution and Article I, § 9 of the Tennessee Constitution both require that a defendant in a criminal case receive effective assistance of counsel. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). When a defendant claims ineffective assistance of counsel, the standard applied by the courts of Tennessee is "whether the advice given or the service rendered by the attorney is within the range of competence demanded by attorneys in criminal cases." Summerlin v. State, 607 S.W.2d 495, 496 (Tenn. Crim. App.

---

[1]Griffin is represented by counsel in this appeal. Nevertheless, he lodged a pro se brief. His attorney filed a brief, as well. The briefs of the petitioner and his attorney do not raise the same issues. In this court, a litigant has no right to proceed simultaneously through counsel and pro se. See, e.g., State v. Burkhart, 541 S.W.2d 365, 371 (Tenn. 1976). Only those issues presented in counsel's brief are properly before the court.

1980).

In Strickland v. Washington, the United States Supreme Court defined the Sixth Amendment right to effective assistance of counsel. 466 U.S. 668, 104 S. Ct. 2052 (1984). First, the appellant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and must demonstrate that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Constitution. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Second, the petitioner must show that counsel's performance prejudiced him and that errors were so serious as to deprive the defendant of a fair trial, calling into question the reliability of the outcome. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

The petitioner's burden of proof in all post-conviction cases filed after May 10, 1995 is by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f) (1997). The court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and must evaluate counsel's performance from counsel's perspective at the time of the alleged error and in light of the totality of the evidence. Strickland, 466 U.S. at 690, 695, 104 S. Ct. at 2066, 2069. The petitioner must demonstrate that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Strickland, 466 U.S. at 695, 104 S. Ct. at 2069. A trial court's findings of fact following a post-conviction hearing have the weight of a jury verdict. Bratton v. State, 477 S.W.2d 754, 756 (Tenn. Crim. App. 1971). On appeal, those findings are conclusive unless the evidence preponderates against the judgment. Butler v. State, 789 S.W.2d 898, 900 (Tenn. 1990).

I

In his first ineffective assistance of counsel claim, Griffin alleges that his trial counsel failed to pursue the issue of whether there was Jencks material[2] available for Officers Eugene Ivey and Joe Hunter. Apparently, both of these witnesses were off duty when they observed the victim shortly after the crimes. A defense investigator spoke to one of the two prior to trial, and a recorded statement was made. At trial, the state did not produce any Jencks material; however, it is not clear whether such material existed.

At the post-conviction hearing, Griffin presented no evidence that the witnesses in question prepared any sort of report for the incident. Obviously, therefore, Griffin offered no proof that the contents of any such report or statement could have been used to obtain a more favorable result at trial.

The evidence of record does not preponderate against the trial court's finding that Griffin failed to carry his burden of proof.

II

Griffin's second allegation of ineffective assistance relates to the absence of DNA testing in his original prosecution. The petitioner makes two attacks. First, he claims that trial counsel should have aggressively pursued cross-examination of the state's expert regarding other "inconclusive" tests and the fact that DNA testing would have included or excluded Griffin as the source of semen. Second, Griffin claims that trial counsel was deficient for not obtaining DNA testing.

With respect to the lack of cross-examination of the expert on the

---

[2] See Tenn. R. Crim. P. 26.2 (requiring party who called a witness other than the defendant to produce any pretrial statements of the witness to the party against whom the witness was called prior to commencement of cross-examination).

absence of DNA testing, the trial court correctly found that DNA evidence was irrelevant to the consensual sex defense offered by the defendant. Such a defense acknowledges that sexual relations occurred; DNA testing would only prove or disprove that sexual relations occurred. Thus, pursuit of the proposed line of cross-examination would do nothing to further Griffin's consent defense.

Trial counsel testified that because the petitioner demanded trial within 180 days under the Interstate Compact on Detainers Act, see Tenn. Code Ann. § 40-31-101, art. III(a) (1997), there was not sufficient time for DNA testing. As the trial court correctly found, the defendant opted against DNA testing in favor of a speedy trial, so his counsel was not deficient in not obtaining DNA testing.

III

In his third complaint of ineffective assistance, the petitioner attacks his trial counsel's failure to object to the grant of a mistrial after two jurors read a newspaper article which revealed Griffin's two previous sex crime convictions from another state. Apparently, the newspaper containing this article was in the jury room. Griffin contends his trial counsel should have inquired how the newspaper got there. Further, Griffin claims he asked trial counsel to raise a double jeopardy issue following the mistrial, but counsel did not do so.

At the post-conviction hearing, Griffin offered no evidence that the mistrial was granted for less than "manifest necessity." See, e.g., State v. Taylor, 912 S.W.2d 183, 185 (Tenn. Crim. App. 1995) (double jeopardy is not offended upon subsequent trial where first trial ended in mistrial granted due to manifest necessity). Trial counsel testified that she found no proof or legal authority which would have raised a double jeopardy bar to the defendant's retrial. Trial counsel also testified that she did not object to the trial court's grant of a mistrial because "[i]t

was not in [Griffin's] best interest to have anybody on his jury who knew" of the previous sex crime convictions.

As the trial court correctly found, the defendant failed to carry his burden of proof on this issue. Furthermore, it is apparent that counsel made informed strategic decisions that we are not free to second-guess on collateral review. See Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993) (citation omitted).

IV

Griffin's final allegation of ineffective assistance is that counsel did not vigorously pursue factual inquiry about the prosecutor having been stuck in an elevator with two of the jurors during trial.

At the hearing, Griffin testified that the incident was memorialized on the record at trial. He alleged that the trial court instructed the prosecutor to state on the record that she had not spoken with the jurors and that the prosecutor responded as instructed by the trial court.[3] Griffin testified that there should have been further inquiry of the jurors. He testified that, alternatively, the court should have issued a curative instruction. Notwithstanding these contentions, Griffin offered no proof that the jurors and the prosecutor spoke to each other while on the elevator. Further, he presented no curative instruction that should have been read to the jury.

[3]In his brief, Griffin alleges the trial court said, "Do you want to state for the record that you did not communicate with any of the jurors on the stuck elevator?" He then alleges that the prosecutor responded, "I did not open my mouth, Your Honor. I entered the elevator first, and only belatedly realized that I was on there with some jurors." The trial record is not before this court. It was neither offered as an exhibit at trial nor consolidated with the appellate record of this case. Nevertheless, the trial court's inquiry and the prosecutor's response, as alleged in the petitioner's brief, indicate nothing untoward.

Trial counsel testified that she had no independent recollection of the incident; however, based upon her knowledge of the prosecutor's reputation, she would have accredited an on-the-record statement by the prosecutor that she had no communication with jury members. As such, trial counsel would not have insisted upon further inquiry of the jurors.

The post-conviction court observed that the physical plant of the courthouse was such that it is difficult for jurors and attorneys to avoid using the elevators together.

Again, the trial court correctly found that the petitioner failed to sustain his burden of proving ineffectiveness because trial counsel acted reasonably in not pursuing the matter further based upon her knowledge of the prosecutor. The evidence does not preponderate to the contrary upon our appellate review.

Finding no error in the proceedings below, we affirm the judgment of the trial court.

_____
JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

_____
DAVID G. HAYES, JUDGE

_____
JOHN EVERETT WILLIAMS, JUDGE