

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER SESSION, 1999

FILED
December 27, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

MICHAEL GLEN BRICE,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. NO. 03C01-9807-CR-00267

SULLIVAN COUNTY

**HON. JAMES E. BECKNER
JUDGE (By Interchange)**

(Post-Conviction Aggravated Robbery)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

The petitioner, Michael Glen Brice, appeals the Sullivan County Criminal Court's order denying his petition for post-conviction relief. In 1993, the petitioner was convicted of one (1) count of aggravated robbery, one (1) count of burglary and five (5) counts of aggravated assault. He received an effective sentence of twenty (20) years as a Range II offender. He filed the present petition in 1996, claiming that he received ineffective assistance of counsel at trial. After an evidentiary hearing, the trial court denied post-conviction relief. On appeal, the petitioner contends that he received ineffective assistance of counsel at trial due to (1) counsel's failure to file a motion to suppress a photographic lineup, and (2) counsel's failure to effectively cross-examine the state's eyewitnesses. After a thorough review of the record before this Court, we affirm the trial court's judgment.

I.

A. Trial

The petitioner was convicted in 1993 of one (1) count of aggravated robbery, one (1) count of burglary and five (5) counts of aggravated assault. His convictions were affirmed by this Court on direct appeal. State v. Michael Glen Brice, C.C.A. No. 03C01-9311-CR-00385, Sullivan County (Tenn. Crim. App. filed October 23, 1995, at Knoxville), *perm. to app. denied* (Tenn. April 1, 1996). To place the petitioner's issues in the proper perspective, we will recite the relevant facts as stated by this Court on direct appeal.

The evidence adduced at trial revealed that two black men entered a Hardee's in Bristol on the evening of Sunday, September 8, 1991 around 9:30 p.m. Both of the men's faces were partially covered by masks. Six people-- four employees and two customers-- were present at the Hardee's during the commission of the offense. . . . Prior to trial, each witness was shown a photographic array containing six photographs including the defendant's photograph and that of Gerald Thomas, the co-defendant who entered a guilty plea to the robbery and testified for the defense. The defendant was pictured in photograph number two and Mr. Thomas was in photograph number four.

Rhonda Denise Smith, one of the customers, identified photograph number four from the array, but said if she had to choose another one, it would be photograph number two. At trial she pointed to the defendant as one of the robbers, but wrongly asserted very emphatically that he was the one in photograph number four that she had previously recognized. The other customer, Melissa Michelle Radar, identified the man in photograph number four as the one most like the robber who held a gun to her head. She pointed to the man in photograph number two as the other one at whom she had merely glanced from fifteen feet away. At trial, she testified that the defendant was one of the two robbers. Two of the employees, Walter Glenn Doan, Jr. and Diona Nicole Glover, were unable to identify the defendant at trial. However, both had picked his photograph from the photo array about two months after the robbery. Mr. Doan had additionally picked photo number five as a possibility. Another employee, Dottie Ann Snodgrass, claimed that she only got a glance and was not sure if the robber had on a mask or not but, she was sure that the defendant was one of the two robbers. She had also identified the photographs numbered two and four from the array before the trial. The final employee, Cheryl Blevins, identified only photo number two from the array and was absolutely sure that the defendant was one of the men who robbed the Hardee's.

On the other hand, the defendant presented evidence which suggested he was not involved in the robbery of the Hardee's. The principal witness was Gerald Thomas who had already confessed to the crime. He claimed to have been high on cocaine on the night of the robbery. Although he did not remember committing the crime, he pleaded guilty because he had been identified by several of the witnesses. He was certain, though, that the defendant was not involved. They were apparently old friends and Mr. Thomas' testimony was that he had not seen the defendant since mid-1984. The defendant also took the stand denying his involvement in the robbery. On direct examination, he responded frankly to questions regarding his prior convictions for selling cocaine. He contradicted Mr. Thomas' testimony by saying he ran into Mr. Thomas once in August of 1991 and talked to him for about ten minutes. The defendant was unable to provide an alibi for the night of the robbery as, he testified, "it was just an ordinary day" for him.

State v. Michael Glen Brice, C.C.A. No. 03C01-9311-CR-00385, slip op. at 2-3.

B. Post-Conviction Hearing

At the post-conviction hearing, the petitioner testified that he and his attorney met briefly a few times prior to trial. He stated that trial counsel did not discuss trial strategy with him. Although counsel provided him with a copy of the eyewitnesses' statements prior to trial, the petitioner and trial counsel did not discuss the contents of the witnesses' statements. The petitioner maintained that trial counsel did nothing during trial to attack the eyewitnesses' respective identifications of him as one of the perpetrators.

The petitioner called attorney Ann Short to testify at the post-conviction hearing as an expert with regard to the standard of competency for criminal defense attorneys. She testified that trial counsel had a “solid legal basis” for challenging the photographic lineup under Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Therefore, she concluded that trial counsel’s performance prior to trial was deficient for failing to file a motion to suppress the photographic lineup and resulting identifications. Further, Short testified that counsel’s cross-examination of the eyewitnesses was inadequate; thus, she opined that trial counsel’s performance did not meet the standard of competency required of criminal defense attorneys.

The petitioner’s trial counsel, Frank Miller, was deceased at the time of the post-conviction hearing. The trial transcript indicates that counsel did not file a motion to suppress the pretrial photographic lineup and ensuing identifications.

In a written order, the trial court determined that, even though trial counsel “probably should have” moved to suppress the photographic lineup identifications, the photographic array was not impermissibly suggestive. Therefore, the trial court concluded that the petitioner had not established prejudice as a result of trial counsel’s alleged deficiencies. Because the petitioner did not establish a reasonable probability that the result of the proceedings would have been different, the trial court denied the petition for post-conviction relief. From the trial court’s order denying relief, the petitioner now brings this appeal.

II.

The petitioner alleges that he received ineffective assistance of counsel at trial. He claims that the pretrial photographic lineup was improperly suggestive and the witnesses’ identifications were not reliable. He argues that the photographic lineup and the ensuing identifications should have been suppressed at trial; therefore, he claims that trial counsel was ineffective for failing to file a motion to suppress the photographic lineup and the

witness identifications. He further asserts that trial counsel's cross-examination of the eyewitnesses was inadequate in that he did not fully point out the inconsistencies in their testimony. He insists that, because identity was the central issue at trial, the result at trial would have been different, but for counsel's deficient performance.

A. Standard of Review

In post-conviction proceedings, the petitioner has the burden of proving his claims by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f). Moreover, the trial court's findings of fact are conclusive on appeal unless the evidence preponderates against the judgment. Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996); Campbell v. State, 904 S.W.2d 594, 595-96 (Tenn. 1995); Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993).

B. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution provides, in part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Similarly, Article I, § 9 of the Tennessee Constitution guarantees an accused "the right to be heard by himself and his counsel . . ." Additionally, Tenn. Code Ann. § 40-14-102 provides, "[e]very person accused of any crime or misdemeanor whatsoever is entitled to counsel in all matters necessary for such person's defense, as well to facts as to law."

The United States Supreme Court articulated a two-prong test for courts to employ in evaluating claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court began its analysis by noting that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S.Ct. at 2064. When challenging the effective assistance of counsel in a post-conviction proceeding, the petitioner bears the burden of establishing (1) the attorney's representation was deficient; and (2) the deficient performance resulted in prejudice so as to deprive the

defendant of a fair trial. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Powers v. State, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). This Court is not required to consider the two prongs of Strickland in any particular order. Harris v. State, 947 S.W.2d 156, 163 (Tenn. Crim. App. 1996). “Moreover, if the Appellant fails to establish one prong, a reviewing court need not consider the other.” Id.

The test in Tennessee in determining whether counsel provided effective assistance at trial is 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); see also Harris v. State, 947 S.W.2d at 163. In order to demonstrate that counsel was deficient, the petitioner must show that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688, 104 S.Ct. at 2064; Harris v. State, 947 S.W.2d at 163.

Under the prejudice prong of Strickland, the petitioner must establish that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

In reviewing counsel’s conduct, a “fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. The mere failure of a particular tactic or strategy does not *per se* establish unreasonable representation. Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996). However, this Court will defer to counsel’s tactical and strategic choices only where those choices are informed ones predicated upon adequate preparation. Id.; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

C. Photographic Lineup

The petitioner claims that the out-of-court photographic lineup was unnecessarily suggestive, and as a result, the photographic array and the resulting eyewitness

identifications would have been inadmissible at trial. Thus, he argues that trial counsel was ineffective for failing to file a motion to suppress the photographic array and identifications.

Out-of-court eyewitness identifications as well as in-court identifications may be challenged on constitutional grounds. A defendant's right to due process is violated if, under the totality of the circumstances, "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968); Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967); see also State v. Strickland, 885 S.W.2d 85, 88 (Tenn. Crim. App. 1993). "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972). Examples of impermissibly suggestive identification procedures include:

that all in the lineup but the suspect were known to the identifying witness, that the other participants in a lineup were grossly dissimilar in appearance to the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect.

United States v. Wade, 388 U.S. 218, 233, 87 S.Ct. 1926, 1935-36, 18 L.Ed.2d 1149 (1967) (footnotes omitted).

Although an identification procedure may be unnecessarily suggestive, the identification arising out of it may be admissible at trial if the identification is nonetheless reliable. Neil v. Biggers, 409 U.S. at 199-201, 93 S.Ct. at 382-83. The factors to be considered in determining the reliability of the identification include:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199, 93 S.Ct at 382; see State v. Edwards, 868 S.W.2d 682, 695 (Tenn. Crim. App. 1993).

The trial court found that the photographic array and eyewitness identifications would not have been suppressed at trial because the photographic array was not impermissibly suggestive. We agree. The photographic array depicted six (6) black males with similar facial characteristics, hair color and hair length. In addition, there is no evidence that the police officers conducting the photographic lineup suggested that the petitioner was a suspect.

The petitioner argues that the lineup was suggestive because a height chart is visible in four (4) of the photos.¹ This fact is significant in that two of the individuals depicted in the photographic array are six (6) feet tall, whereas the petitioner is merely five (5) feet, five (5) inches in height. Generally, a photographic array depicting individuals with disproportionate heights would give rise to a conclusion that such identification procedure was impermissibly suggestive. See State v. Billy Murrell Meeks, C.C.A. No. 01C01-9308-CC-00248, 1994 Tenn. Crim. App. LEXIS 654, at *5, Franklin County (Tenn. Crim. App. filed October 6, 1994, at Nashville). However, two witnesses testified at trial that one of the perpetrators walked over to their table while they were dining at Hardee's. Both witnesses described this man as somewhat short in height. Yet, both witnesses identified this man as the man shown in photo number four (4), which indicates that the individual pictured is six (6) feet tall. Clearly, the height chart did not render the photographic array unduly suggestive to the petitioner's detriment.

The photographic array was not unnecessarily suggestive and, therefore, did not violate the petitioner's right to due process. The photo lineup and ensuing eyewitness identifications were properly admitted into evidence at trial.² Thus, trial counsel was not ineffective for failing to move to suppress the photographic array and identifications.

¹ Although the height chart is visible in four (4) of the photographs, the actual numbers indicating the respective heights of the individuals are apparent in only two (2) of those photographs.

² Because we conclude that the photographic array was not improperly suggestive, it is unnecessary to determine if the eyewitness identifications were nonetheless reliable under Neil v. Biggers.

This issue is without merit.

D. Cross Examination of State Witnesses

In his second allegation of ineffective assistance of counsel, the petitioner contends that trial counsel was ineffective for failing to properly cross-examine the state's eyewitnesses. He argues that counsel's cross-examination of the witnesses was inadequate because counsel failed to point out inconsistencies in the witnesses' testimony. We disagree.

A reading of the trial transcript indicates that trial counsel effectively cross-examined the state's witnesses at trial. Counsel attempted to discredit the witnesses by pointing out various discrepancies in their testimony. Additionally, counsel attempted to cast doubt upon the reliability of the witnesses' out-of-court and in-court identifications. After reviewing the record before this Court, we conclude that counsel's performance in this regard was not constitutionally deficient.

Moreover, the petitioner has not demonstrated that, but for counsel's alleged error, the result of the proceeding would have been different. Although the petitioner testified that he was not present during the robbery, every eyewitness, either prior to trial or during trial, identified the petitioner as one of the perpetrators of the Hardee's robbery. It is doubtful that further cross-examination would have changed the result at trial. Thus, the petitioner has not established that he was prejudiced as a result of trial counsel's failure to conduct a more thorough cross-examination of these witnesses.

This issue has no merit.

III.

After reviewing the record before this Court, we conclude that trial counsel provided competent representation at the petitioner's trial. Thus, the trial court properly denied the petition for post-conviction relief. Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

GARY R. WADE, PRESIDING JUDGE

JAMES CURWOOD WITT, JR., JUDGE