

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 24, 2006

CHRISTOPHER A. WHITE v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Blount County
No. C-15073 D. Kelly Thomas, Jr., Judge**

No. E2005-00841-CCA-R3-PC - Filed November 29, 2006

The petitioner seeks post-conviction relief from his Blount County Circuit Court conviction for aggravated assault and sentence of ten years as a Range II, multiple offender. The trial court dismissed the petition for post-conviction relief. In this appeal, the petitioner contends that he received the ineffective assistance of counsel because his trial counsel failed to call the victim's doctor to refute the serious bodily injury element of aggravated assault. We conclude that the trial court did not err in denying relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

P. Damon Wooten, Maryville, Tennessee, for the appellant, Christopher A. White.

Robert E. Cooper, Jr., Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Ellen Lee Berez, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case arose from the petitioner's domestic assault upon his wife, Jennifer White. According to testimony presented at the trial, the petitioner beat the victim throughout a period of thirty hours between the afternoon of December 26, 1998, and the early morning of December 28. During this time, the petitioner repeatedly threw the victim against walls and on the floor of their house, hit her face with his hands, hit her face against the bathroom sink and toilet, choked her, kicked her, and bit her. Police officers arrived at the house, and the petitioner and victim told the officers that the victim was assaulted by unknown assailants outside the house. The petitioner later repeated this story to officers and to Dr. Randy Kiriluk, the attending physician in a hospital emergency room. The victim had numerous bruises and abrasions on her face and body and suffered a fracture of the orbital bone surrounding her eye and a fracture of her nasal

bone. Dr. Kiriluk testified that the victim's eye injury could have presented a substantial risk of death if a bone fragment had penetrated her brain. The victim underwent surgery, performed by Dr. Mark Widloski, to repair the damage to her orbital bone. Her left eye was extremely swollen, and the victim testified that it remained swollen for about a month, during which time she was unable to see with it.

The petitioner was convicted of aggravated assault and sentenced to ten years. On direct appeal, this court affirmed the petitioner's conviction and sentence. State v. Christopher Alan White, No. E2002-00716-CCA-R3-CD, Blount County (Tenn. Crim. App. June 3, 2003).

At the post-conviction hearing, the petitioner testified that he accompanied the victim to the emergency room. He said he was certain that doctors did not prescribe pain medicine for her. He said the victim saw Dr. Widloski about a week following the assault and that the victim had not taken pain medicine that week. He said Dr. Widloski did not prescribe pain medicine for the victim until after the surgery. He said he told his trial counsel that Dr. Widloski said that the victim's injuries were not serious and that the surgery was an elective cosmetic surgery. He said he made these remarks to his counsel while the prosecutor was making statements at trial. The petitioner said counsel's response was that Dr. Widloski would not come to trial and testify to this.

The petitioner's trial counsel testified that he did not "specifically recall" having a conversation with the petitioner about Dr. Widloski during trial. He admitted that it was something the petitioner was likely to have told him, but that he would have been paying attention to the prosecutor's statements at the time. He said he talked with Dr. Widloski several times prior to the trial. He said they discussed the victim's injuries in "a general fashion." He said the primary content of their conversations involved the victim's account to Dr. Widloski that the petitioner did not assault her. He obtained an affidavit signed by Dr. Widloski stating that the victim told Dr. Widloski that unknown assailants caused her injuries.

Counsel testified that he made a "strategy decision" to focus the defense on arguing that the petitioner was not the victim's assailant, rather than on the extent of the injuries. He said he came to this decision in light of the photographs of the victim's injuries and the available medical records. He did, however, argue to the jury that the victim's injuries were not very serious, and he raised the issue on cross-examination. He said it was possible that a different result would have occurred if Dr. Widloski was called to testify as to the seriousness of the victim's injuries. Counsel said he was planning to call Dr. Widloski to testify and had subpoenaed him. About forty-eight hours before trial, however, he talked with Dr. Widloski, who said he did not believe the victim's initial story that the petitioner did not assault her. At this point, counsel decided that he would not call Dr. Widloski, out of fear that Dr. Widloski would say something damaging to the defense. Counsel said he discussed this with the petitioner and thought the petitioner agreed with his position. He said that although he hoped Dr. Widloski's opinion as to the truthfulness of the victim's statements would not be admissible, he was still worried because Dr. Widloski was very outspoken in his opinion that the petitioner was the assailant. He said he felt it was in the petitioner's best interest not to call Dr. Widloski.

Dr. Mark Widloski testified at the post-conviction hearing that he was an oral surgeon who treated the victim in January 1999. He described the victim's injuries as a "blow-out" fracture of the orbit (the eye socket), resulting in the bone being displaced in her sinus cavity, and a cracked bone on the left side of her nose. He said a "blow-out" fracture results when the eye receives impact and pushes on the bone. He said the victim's orbit injury was "serious to different degrees" in that it was not life-threatening but did carry a risk of possible facial disfigurement. He described the pain associated with the injury as similar to a broken nose. He did, however, say that the victim's injury was slightly more serious than a broken nose because it involved more than one bone; she suffered the orbit fracture in addition to a left side nasal fracture. He said he did not prescribe pain medication to the victim before surgery.

Dr. Widloski testified that he performed an operation on the victim the same day as his initial visit with her. He said that the victim could have elected not to have the surgery and that the worst result of not having the surgery would be a cosmetic defect around the victim's eye socket or nasal bone. He said the surgery was performed through the victim's mouth; he obtained access to the orbital bone through the victim's mouth and sinus cavity. He said no scars resulted from the surgery. He said the victim's nasal fracture was not treated because it was a non-displaced fracture. He said he prescribed pain medicine for the victim after the surgery.

Dr. Widloski testified that he saw the victim again on February 24, 1999. He said the victim visited him for a recheck because she complained of pain in her left facial region. He said the victim told him that her husband had hit her again. Dr. Widloski acknowledged signing an affidavit stating that the victim said her initial injuries came from an unknown assailant and not her husband, but he said he did not write the affidavit and could not specifically remember if he read it before he signed it. He testified that it was "quite easy" to crack the orbital bone, which is "eggshell thick."

The state read into the record various portions of the victim's testimony from trial. At trial, the victim described the physical pain she experienced from the petitioner's abuse: "I felt like every bone in my body was broken, that every muscle hurt. It was like searing pain all over. It was worse than when I had my son." She stated that her nose and neck bled and that she coughed up blood. At another time, the victim described the pain she experienced after the abuse had ceased:

My face was hurting. My head was hurting. My back and my ribs were hurting. I felt as if I could not breathe. I felt my ribs must be broken or bruised, they hurt so bad. My lungs were hurting. It hurt to take breaths. It hurt to cough. It hurt to talk. . . . It hurt to walk . . . from my legs being kicked."

The victim further testified at trial that her eye was swollen shut for about a month, during which time she could not see with it, and that at the time of the trial in November 1999, she had not fully healed. She said she continued to experience double vision occasionally and sometimes could not see out of her left eye. She said she also awoke in the mornings with the left side of her face swollen. She said she did not have these symptoms before the assault at issue.

The petitioner's appellate counsel testified at the post-conviction hearing that he also represented the petitioner in the motion for a new trial hearing. He said that six issues were raised in the motion, which was originally filed by trial counsel, and that he only orally argued the issues upon which he felt the petitioner was most likely to succeed. He said he contended at the hearing and on appeal that the convicting evidence was insufficient to prove the serious bodily injury element of aggravated assault. He said he thought there was a "reasonable chance" a court would reverse the conviction based on this issue because case law was ambiguous as to what constituted "serious bodily injury."

The trial court found that the petitioner failed to prove he was entitled to post-conviction relief and dismissed the petition. Regarding counsel's failure to call Dr. Widloski, the court found that "counsel was well aware of the proof that could be offered through Dr. Widloski and made a strategic decision to not call Dr. Widloski as a witness." It also found that the testimony of Dr. Widloski "would not have altered the outcome" of the trial.

The petitioner now appeals the trial court's judgment, arguing that trial counsel was ineffective in failing to call Dr. Widloski, whose testimony could have negated the serious bodily injury element of aggravated assault. The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance 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. Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See DeCoster, 487 F.2d at 1201.

The petitioner was indicted for "unlawfully and knowingly caus[ing] serious bodily injury" to the victim, in violation of Tennessee Code Annotated section 39-13-102. The petitioner contends in this post-conviction appeal that his trial counsel was ineffective in not calling Dr. Widloski at trial. He argues that Dr. Widloski had crucial testimony that could have negated the serious bodily injury element of aggravated assault, resulting in an acquittal or conviction on a lesser assault offense. The state responds that counsel made an informed tactical decision not to call Dr. Widloski and that, thus, he was not ineffective. We agree with the state.

Counsel testified that he spoke with Dr. Widloski several times before trial. In fact, counsel had subpoenaed Dr. Widloski to testify at trial. Counsel's ultimate decision not to call Dr. Widloski was based on a conversation about forty-eight hours before trial in which the doctor stated that he believed the petitioner had caused the victim's injuries. Because counsel had previously made the strategic decision to focus the defense on the victim's initial story that she was attacked by unknown assailants, he feared Dr. Widloski's testimony might damage the petitioner's case. He testified that he informed the petitioner of his decision and that he felt this decision was in the petitioner's best interest. Perhaps counsel would have had more success focusing on the extent of the victim's injuries rather than the identity of the assailant. However, it is not for this court to second-guess reasoned trial strategies, even if they are ultimately unsuccessful. The record shows that trial counsel's decision not to call Dr. Widloski was informed and based on adequate preparation; thus, we conclude that counsel's performance was not deficient.

Furthermore, we conclude that the petitioner was not prejudiced by counsel's decision not to call Dr. Widloski at trial. The petitioner argues that Dr. Widloski's testimony would have negated the serious bodily injury element of aggravated assault. "Serious bodily injury" is defined in our code as "bodily injury which involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a bodily function." T.C.A. § 39-11-106(a)(34). The petitioner argues that Dr. Widloski's testimony would have contradicted Dr. Kiriluk's testimony that the victim's injuries posed a risk of death and the victim's testimony that she suffered extreme pain. In addition, the petitioner argues, Dr. Kiriluk would have testified that surgery prevented the victim from suffering any disfigurement and that the victim's eyeball

was not damaged, which would have led to the conclusion that the victim's injuries did not substantially impair the function of her eye.

While Dr. Widloski's testimony would have been relevant to the issue of serious bodily injury, our confidence in the trial's outcome is not undermined by the absence of his testimony. Despite Dr. Widloski's testimony that the victim's injuries were not life threatening and that the pain associated with an orbit fracture is similar to a broken nose, there was sufficient evidence at trial from which a jury could easily find that the victim suffered serious bodily injury. The victim testified that her pain was severe and worse than the pain of child birth. It is true that this court previously held that the pain associated with a broken nose and bruising is not "extreme physical pain." State v. Sims, 909 S.W.2d 46, 49-50 (Tenn. Crim. App. 1995); State v. Andre Chamberlain, No. 01-C-01-9509-CR-00304, Davidson County, slip. op. at 7 (Tenn. Crim. App. Oct. 17, 1996). The victim in the present case, however, suffered more than the pain of her orbit fracture and facial injuries. Testimony at trial reflected that she suffered continual abuse for approximately thirty hours, during which time she was repeatedly thrown against a sink and toilet, kicked, and bitten. The abuse caused pain all over her body and even led to her coughing up and vomiting blood. In addition, the victim testified that she lost the use of her left eye for about a month and that, several months after the abuse, her vision was still impaired by occasional loss of vision in her left eye and bouts of double vision. Furthermore, even according to Dr. Widloski's testimony, the victim's orbit injury would have led to facial disfigurement if surgery had not been performed. Trial counsel cross-examined Dr. Kiriluk about the extent of the victim's injuries and challenged his testimony that the victim's injuries presented a risk of death. Dr. Kiriluk admitted that he found no neurological damage, that he did not prescribe pain medicine to the victim, that injuries like the victim's are usually treated with over-the-counter pain medicines and ice, and that he was not told that the victim suffered unconsciousness. Trial counsel compared the victim's injuries to the injuries a boxer sustains during a boxing match. Still, the jury found that the victim had suffered serious bodily injury and convicted the defendant of aggravated assault. We are not convinced that a reasonable probability exists that the introduction of Dr. Widloski's testimony would have altered the outcome of the trial.

We conclude that trial counsel was not deficient in failing to call Dr. Widloski and that the petitioner was not prejudiced by this failure. The petitioner did not receive the ineffective assistance of counsel. Based on the foregoing and the record as a whole, we affirm the judgment of the trial court dismissing the petition for post-conviction relief.

JOSEPH M. TIPTON, PRESIDING JUDGE