IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 24, 2007

LARRY ARNELL ADAMS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 83320 Richard R. Baumgartner, Judge

No. E2006-02409-CCA-R3-PC - Filed September 4, 2007

The petitioner, Larry Arnell Adams, was convicted of multiple offenses and received an effective sentence of thirty-seven years in the Tennessee Department of Correction. This court affirmed the petitioner's sentence on direct appeal. State v. Larry Arnell Adams, No. E2002-03046-CCA-R3-CD, 2004 WL 1467436 (Tenn. Crim. App. June 30, 2004). In November 2005, the petitioner filed a petition for post-conviction relief, alleging ineffective assistance of counsel based primarily on failure to call witnesses identified by the petitioner. Counsel was appointed, a hearing was held in Knox County Criminal Court, and the trial court denied relief. The petitioner appeals the trial court's ruling. After reviewing the record, we affirm the judgment of the trial court.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

J. Liddell Kirk, Knoxville, Tennessee, for the appellant, Larry Adams.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; Ta Kisha Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

A review of the technical record indicates that the petitioner was convicted by a Knox County jury of one count of especially aggravated kidnapping, one count of aggravated spousal rape, one count of assault, and two counts of rape. The victims of the petitioner's offenses were three women, including the petitioner's wife. In his brief filed in connection with the instant appeal, the "[p]etitioner's position at trial was that all of the alleged victims were with him voluntarily and consensually." The jury acquitted the petitioner on some of the charged offenses but convicted him for the offenses listed above. On appeal, this court held that while the trial

court "may have erred" in consolidating the offense involving one of the victims with the other offenses, such error was harmless. Larry Arnell Adams, 2004 WL 1467436, at *21. This court found no reversible error regarding any of the petitioner's issues and affirmed the petitioner's convictions. Id. at *24.

In December 2004, the petitioner filed a pro se petition for post-conviction relief, alleging that the petitioner received ineffective assistance of counsel at trial. The trial court appointed counsel and conducted a hearing on October 13, 2006. At that hearing, the petitioner alleged trial counsel failed to call persons identified by the petitioner as witnesses, failed to seek sequestration of the jury, failed to have the charges in his case severed, failed to object to certain statements made by the prosecutor during opening and closing arguments, and failed to seek recusal of the trial judge. However, on appeal, the petitioner focuses only on counsel's supposed failure to call witnesses. As such, only that portion of the evidence will be reviewed by this court.

At the post-conviction hearing, the entirety of the petitioner's proof consisted of the testimony of the petitioner and his trial counsel. The petitioner testified that he was represented by counsel at trial. He acknowledged discussing his case with counsel, including discussions of the state's evidence against him and of potential witnesses on the petitioner's behalf. The petitioner testified that he was aware that counsel had an investigator working on the case.

The petitioner testified that he gave counsel the names of several persons who he thought could have information that would be helpful to the case. One of these individuals was Mr. Short, who the petitioner claimed was the manager of a CVS Pharmacy on Magnolia Avenue in Knoxville. The petitioner claims that he was at the pharmacy on the date the state alleged he had kidnapped one of the victims, and that Short had seen the victim sitting alone in a car while the petitioner was in the store. The petitioner claimed that the car was parked in front of the store and that the victim was driving because he had been drinking. Therefore, the petitioner asserted that had Short testified, Short's testimony would have shown that the victim was not restrained by the petitioner during the time in question. On cross-examination, the petitioner admitted that although he claimed to have known Short for nearly three years, he did not know Short's first name. The petitioner also admitted that he was unaware whether counsel or his investigator ever talked to Short and was unsure as to how Short would have testified at trial. Short did not testify at the evidentiary hearing.

The petitioner also claimed that he told counsel about a man named Andrew or "Drew," who had been playing basketball at a park and had seen the victim in the car by herself on one of the days on which she later alleged she had been kidnapped. The petitioner testified that he did not know Drew's last name, but he told counsel that he lived near the park and had a "funny" jump shot. The petitioner claimed that Drew would have remembered the victim because only a few people were present at park that day. On cross-examination, however, the petitioner admitted that he did not know how Drew would have testified at trial. Drew did not testify at the evidentiary hearing.

The petitioner also stated that two men, Jeff and James Brody, saw the petitioner and the victim together on two days during which the victim was allegedly kidnapped. The petitioner

claimed that he and the victim went to the Brody residence on one of the days in question. He also claimed that he did not think that counsel spoke to either of the Brodys. The petitioner also claimed that he alerted counsel to the existence of a woman named Renee, who could have testified that the petitioner did not pull a gun on the victim, as was alleged. The petitioner testified that counsel was unable to locate Renee. The Brody brothers and Renee did not testify at the evidentiary hearing.

According to the petitioner, counsel told him that additional witnesses were unnecessary because the victim had already been caught in a number of lies. The petitioner admitted that he "partly agreed" with counsel's decision not to call additional witnesses related to the victim and did not "make a big deal" about counsel's decision. The petitioner admitted that counsel cross-examined the victim about her lies.

Counsel testified that he represented the petitioner at trial and on direct appeal, and that he handled all evidentiary motions in the petitioner's case. He noted that he met with the petitioner on numerous occasions to prepare for trial, which included discussions of the facts of the case, trial strategy, the issue of consolidation, and potential witnesses.

Counsel stated that his investigator met with many of the individuals identified by the petitioner. Counsel's investigator spoke with Short, the CVS manager, but Short "knew who Mr. Adams was but didn't know what we were talking about . . . in the store that day and anybody in a car or anything else." Counsel's investigator spoke with the Brodys and Renee, but those discussions led counsel to conclude that the testimony of these individuals would have been damaging to the petitioner's case. Therefore, counsel did not call these individuals as witnesses. Counsel also attempted to locate Drew, but was unable to do so. Furthermore, counsel testified that Drew's testimony was unnecessary because the victim admitted at trial that she had been in the petitioner's car watching the basketball game. While counsel did not call any of these five individuals suggested by the petitioner, counsel was able to find several other witnesses who testified on the petitioner's behalf at trial.

STANDARD OF REVIEW: POST-CONVICTION PROCEEDINGS

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) (2006). 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, the petitioner's claims are reviewed under a de novo standard with no presumption of correctness. Id. at 457.

INEFFECTIVE ASSISTANCE OF COUNSEL

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. The Strickland standard has been applied to the right of counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

The petitioner must satisfy both prongs of the Strickland test to prevail on a claim of ineffective assistance of counsel. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires the petitioner 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. The prejudice prong requires the 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. "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.

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 criterial 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 the counsel's perspective at the time." Strickland, 466 U.S. at 689. 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 claims he received ineffective assistance of counsel because counsel failed to call "potential[] witnesses available to trial counsel who *might have been able* to corroborate petitioner's assertion, in at least the case of one of the alleged victims, that she was with him voluntarily." (Emphasis added). However, the petitioner has failed to show by clear and convincing evidence that he was prejudiced by counsel's decision to not call these persons as witnesses. Apart from general statements that the testimony of the potential witnesses could have assisted him at trial, the petitioner presents no proof about the substance of these individuals' potential testimony. The potential witnesses did not testify at the post-conviction hearing, and at the hearing the petitioner stated that he could not testify with any certainty as to what the potential witnesses would have said had they testified. Furthermore, trial counsel stated that his investigator interviewed four of the potential witnesses, and based on these interviews, counsel concluded that these potential witnesses would not have provided testimony favorable to the petitioner. Counsel said he did not have enough information to locate the fifth potential witness, who the petitioner only identified by his first name. The trial court properly accredited the testimony of counsel and discounted the insufficient testimony of the petitioner. In light of this testimony, this court concludes that the petitioner has failed to present clear and convincing evidence to support his allegation of ineffective assistance counsel.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE