

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 26, 2007

TIMOTHY WADE DAVIS v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Knox County
No. 85070 Richard R. Baumgartner, Judge**

No. E2007-00036-CCA-R3-PC - Filed November 5, 2007

A Knox County Criminal Court jury convicted the petitioner, Timothy Wade Davis, of four counts of rape of a child and one count of especially aggravated sexual exploitation of a minor, and the trial court sentenced him to an effective seventy-six years in confinement. This court affirmed the petitioner's convictions and sentences. See State v. Timothy Wade Davis, No. E2003-02162-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 941 (Knoxville, Oct. 25, 2004), aff'd, State v. Davis, 185 S.W.3d 338 (Tenn. 2006). Subsequently, the petitioner filed a petition for post-conviction relief, and the post-conviction court denied the petition after an evidentiary hearing. On appeal, the petitioner contends that he received the ineffective assistance of counsel because his trial attorneys failed to object to the State's use of four photographs to establish four incidents of child rape when there was no accurate way to determine when the photographs were taken. Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

James L. Flanary, Knoxville, Tennessee, for the appellant, Timothy Wade Davis.

Robert E. Cooper, Jr., Attorney General and Reporter; J. Ross Dyer, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Jason Haynes, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The evidence at trial revealed, in pertinent part, that the petitioner had been a friend of the young victim's parents for a long time, regularly visited their home on weekends, and vacationed

with the family. Davis, 185 S.W.3d at 340. Between May 1997 and June 1999, the victim's parents allowed the petitioner to take the six- or seven-year-old victim to the park to play. Id. However, toward the end of May 1999, the victim's mother learned that the petitioner had been taking the victim to his home. Id. In the summer of 1999, the victim told her mother that the petitioner had been sexually abusing her in his home. Id. The victim's mother contacted the police, and the victim met with a counselor. Id. at 340-41. She told the counselor about the petitioner's having taken photographs of the abuse and where he kept photographs in his house. Id. at 341. Based on this information, the police obtained a search warrant, searched the petitioner's home, and found a large number of Polaroid photographs showing the petitioner sexually abusing the victim. Id. The petitioner admitted to police that he had abused the victim. Id. at 342. At trial, the State relied on four of the photographs to support four counts of child rape. See Davis, No. E2003-02162-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 941, at *9.

After this court and our supreme court affirmed the petitioner's convictions, the petitioner filed a timely petition for post-conviction relief, arguing that he received the ineffective assistance of trial counsel. The post-conviction court appointed counsel, and counsel filed an amended petition, arguing that the petitioner received the ineffective assistance of counsel because his trial attorneys failed to object to the jury's being allowed to convict the petitioner of four counts of child rape based upon the four photographs rather than requiring the jury to determine the specific date for each offense.

At the evidentiary hearing, the petitioner testified that two attorneys represented him at trial. He acknowledged that some Polaroid photographs were introduced into evidence at trial and that the photographs did not have anything on them to show the date or time they were taken. When asked whether trial counsel objected to the introduction of the photographs into evidence, the petitioner said, "Not that I know of" and then, "No." On cross-examination, he stated that he did not recall whether his attorneys filed a motion to suppress the photographs.

One of the petitioner's trial attorneys testified that he practiced criminal defense law exclusively and that he and co-counsel were appointed to represent the petitioner. Counsel tried to keep the photographs out of evidence as the fruit of an illegal search and "for other reasons too." However, the trial court ruled that the search warrant for the petitioner's home had been valid and that the State could introduce the photographs into evidence. The State's position at trial was that based on the victim's different clothing and hair in four of the photographs, the photographs must have been taken on different days. Counsel stated that the victim looked completely different in the four photographs and that the petitioner looked different "on a couple of occasions." Counsel believed he argued to the trial court that the State should not be allowed to rely on the four photographs. Nevertheless, the trial court ruled that the photographs were "absolutely, clearly different" and allowed the State to introduce them into evidence to show that the four counts of child rape occurred on different days.

On cross-examination, counsel testified that the victim was only able to say at trial that the abuse occurred over a period of time, and she did not know one day from another. Counsel stated that the defense objected to all of the photographs "because how do you know that it wasn't the same day, whether it was the same minute[?]" However, the trial court inspected

every photograph and found four that were so distinct that it allowed the State to introduce them into evidence. Counsel acknowledged that the photographs were not time-stamped.

The post-conviction court, which also presided at the petitioner's trial, stated that it remembered this issue being raised at trial. The court noted that at trial, it had ruled that the four photographs "were clearly distinct period[s] of time[], and that was based on the fact that the child's appearance would be different in the various photographs." The post-conviction court stated that it had allowed the State to rely on four photographs that "clearly show[ed] that there were four distinct separate incidences" and that the petitioner's attorneys had raised this issue zealously. The post-conviction court denied the petition for post-conviction relief.

II. Analysis

The petitioner maintains that he received the ineffective assistance of counsel because his trial attorneys failed to object to the State's reliance on the four undated photographs to establish that he committed four counts of child rape. The State contends that, contrary to the petitioner's claim, trial counsel attempted to suppress the photographs and argued to the trial court that they were not distinguishable enough to prove four distinct crimes. We conclude that the petitioner is not entitled to post-conviction relief.

To be successful in a claim for post-conviction relief, the petitioner must prove all factual allegations contained in the post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court's conclusions of law purely de novo. Id.

"To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel's performance was within the range of competence required of attorneys in criminal cases. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

Initially, we note that the petitioner has failed to include any transcripts from his trial with the record on appeal. However, this court may take judicial notice of the direct appeal record. See State ex rel. Wilkerson v. Bomar, 376 S.W.2d 451, 453 (Tenn. 1964). Despite the petitioner's error, we choose to take judicial notice of the direct appeal record for purposes of the current appeal.

We have reviewed the direct appeal record and can find no indication that the defense objected to the State's reliance on the four photographs. The record reflects that the State originally indicted the petitioner on six counts of child rape, one count of especially aggravated sexual exploitation of a minor, and one count of possession of child pornography. The indictments alleged that the offenses occurred between May 1997 and July 1999. Prior to trial, the defense filed two motions to suppress evidence found in the petitioner's home based upon the search warrant for the home having been invalid and the petitioner's having been unlawfully arrested. Our review of the pretrial hearings on the motions reveals that the defense never objected during the hearings to the State's reliance on any photographs to establish the different child rapes.

After the victim testified at trial, the State announced that "the girl's testimony made it a little more difficult [to prove all six counts of child rape]" and that the State "may wind up not going with all the charges that we originally had." The prosecutor announced that he was going to review the photographs and make an election of offenses. After the State rested its case, it announced that the trial court should dismiss two counts of child rape. As to the remaining four counts, the State said that it would rely on photograph exhibit numbers three, four, twelve, and thirty-eight "because of the hairdo or the clothing or the color of the film it's clear from -- at least from our opinion those are different incidences or occasions." Again, the defense never raised an objection. Therefore, the trial transcript directly contradicts trial counsel's testimony at the post-conviction evidentiary hearing that he objected to the State's reliance on the photographs as depicting four distinct crimes.

In any event, we have reviewed the four photographs at issue. Exhibit three is a black-and-white Polaroid of the victim performing fellatio on an unidentified male. The victim's hair is down, and she is wearing a short-sleeved shirt with the sleeves rolled down. Exhibit four is a color Polaroid photograph of the victim performing fellatio on an unidentified male. She is topless, and her hair is in ponytails. Exhibit twelve is a color Polaroid showing a completely naked, unidentified female child with a penis slightly penetrating her vagina. Finally, exhibit thirty-eight is a color photograph of the victim performing fellatio on an unidentified male. In the photograph, her hair is down, and she is wearing a blue Mickey Mouse t-shirt with the sleeves rolled up.

The State was not required to prove the specific dates of the offenses. See State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993). The State properly elected which counts of child rape it wanted to pursue and selected one photograph to prove each count. We conclude that the four photographs at issue show four distinct incidents of rape of a child. Therefore, the petitioner has failed to show that he was prejudiced by trial counsel's failure to object to the photographs. The post-conviction court properly denied the petition for post-conviction relief.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

NORMA McGEE OGLE, JUDGE