

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 26, 2007

GABRIEL ZAHARIA KIMBALL v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Bradley County
No. M-05-613 Carroll Ross, Judge**

No. E2006-01562-CCA-R3-PC - Filed September 24, 2007

Petitioner, Gabriel Zaharia Kimball, appeals the post-conviction court's denial of his petition for post-conviction relief in which he alleged ineffective assistance of counsel in connection with his entry of a plea of guilty to the offense of rape of a child. Petitioner argues on appeal that his trial counsel was ineffective because he failed to (1) advise Petitioner of his right to appeal the juvenile court's decision to transfer him to criminal court to be tried as an adult; (2) submit medical evidence at the transfer hearing; and (3) pursue an appeal of the juvenile court's denial of his motion to dismiss. After a thorough review, we affirm the judgment of the post-conviction court.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Charles Richard Hughes, Jr., District Public Defender, for the appellant, Gabriel Hughes.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer Bledsoe, Assistant Attorney General; Steve Bebb, District Attorney General; and John Williams, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Post-Conviction Hearing

Petitioner testified that he was charged in the Bradley County juvenile court on November 30, 2001, with delinquency regarding a charge of rape of a child. He was seventeen years old at the time. Petitioner acknowledged that he committed the offense against the victim, his five-year-old cousin. Petitioner's parents retained the assistance of attorney Jerry Hoffer to assist Petitioner in the initial hearing. The juvenile court ordered Petitioner to undergo a psychosexual evaluation which resulted in a recommendation that Petitioner enter a residential sex offender treatment program. Petitioner accordingly entered Hermitage Hall on December 24, 2001, pursuant to an agreed order.

Petitioner continued to participate in the program after he turned eighteen, but he voluntarily left the program in May 2003 because he said that the Hermitage Hall staff told him that his insurance would no longer pay his expenses at the facility.

Petitioner said that his father visited him at the facility once, and that they spoke on the telephone a few times. Petitioner said that he did not discuss the status of his case with his father, and he did not know that his juvenile case was still pending. Petitioner said that he did not learn until September 2003, that Mr. Hoffer had withdrawn from the case. Petitioner acknowledged that he was not aware that his father had informed the district attorney's office of his voluntary discharge from Hermitage Hall.

Petitioner said that the State filed a petition to transfer him to criminal court to be tried as an adult on October 18, 2003, when Petitioner was nineteen years old, and trial counsel was appointed to represent him at the transfer hearing. Petitioner said that his trial counsel met with him once before he was incarcerated on other unrelated charges in another county and three or four times after his incarceration on those charges. Petitioner discussed the upcoming transfer hearing with trial counsel during those meetings.

Petitioner testified that the transfer hearing was held on February 17, 2005. Petitioner said that he and his trial counsel did not discuss Petitioner's treatment at Hermitage Hall, and trial counsel did not request his medical records from the facility. Petitioner stated that no evidence was therefore presented at the transfer hearing as to how well he did in the program. Petitioner acknowledged that trial counsel filed a motion to dismiss on the basis that Petitioner had been prejudiced by the delay in prosecution, and that the motion was denied.

Petitioner said that the State initially offered to settle the charge if Petitioner agreed to enter a plea to a lesser charge in exchange for a recommended sentence of eight years. Petitioner believed that the offer was withdrawn because of the victim's age. Petitioner said that after his case was transferred to criminal court, he agreed to enter a plea of guilty to the charge of rape of a child in exchange for a recommended sentence of fifteen years. Petitioner believed that if he did not accept the State's offer of settlement, he would be sentenced to twenty-five years. Petitioner said that he did not know that he had the right to appeal the juvenile court's decision to transfer his case to criminal court.

On cross-examination, Petitioner acknowledged that he knew that he would be sentenced to fifteen years as a result of his entry of a plea of guilty. Petitioner conceded that he testified at the transfer hearing. He denied that he asked his trial counsel to set up a meeting with his father so that Petitioner could discuss the offered plea agreement with him. Petitioner insisted that his father "just decided to come down," and said that trial counsel was lying if he testified otherwise. Petitioner denied that trial counsel discussed his treatment at Hermitage Hall with the juvenile judge. Petitioner acknowledged that the juvenile court was aware of his later criminal charges. Petitioner said he entered a plea of guilty to theft of property over \$10,000 on December 16, 2003, and was

granted judicial diversion. Petitioner said he entered guilty pleas to two more theft charges in Williamson County on October 5, 2004, and was sentenced to three years' incarceration.

Petitioner denied that the delay between the filing of the charge in juvenile court and the transfer hearing was due in part to his other criminal charges. Petitioner said that the delay primarily resulted from the State's failure to communicate with Hermitage Hall. Petitioner insisted that he told people that he was leaving the facility, and that his therapist met with his family concerning his decision.

Petitioner's trial counsel testified that he was originally appointed to represent Petitioner by the juvenile court and represented Petitioner at both the transfer hearing and through the guilty plea submission hearing after Petitioner's case was transferred to criminal court. Trial counsel filed a motion to dismiss in juvenile court on the basis that the State's delay in prosecuting Petitioner was unreasonable. Trial counsel argued that Petitioner was prejudiced by the delay because by the time the transfer hearing was held, the matter was no longer capable of being resolved in juvenile court. Trial counsel said that he believed that the delay was prompted by a lack of communication between the State and Hermitage Hall.

Trial counsel said that he was aware that Petitioner had been ordered by the juvenile court to undergo treatment at Hermitage Hall, and he had a copy of Petitioner's psychosexual evaluation. Trial counsel stated that his conversations with Petitioner and others indicated that Petitioner's medical records from Hermitage Hall would not be favorable to Petitioner's case because they would show that Petitioner had not sufficiently progressed with his treatment at the facility. Trial counsel said that he did not request Petitioner's medical records because he did not want to introduce any adverse evidence. In addition, trial counsel said that Petitioner had left Hermitage Hall of his own accord and not because the facility released him for satisfactorily completing the program.

Trial counsel clarified that the State offered to settle the case prior to the transfer hearing by agreeing to recommend a sentence of eight years in exchange for Petitioner entering a plea of guilty to the lesser charge of aggravated sexual battery and waiving his right to a transfer hearing in juvenile court. Petitioner did not accept the offer, and the transfer hearing was conducted on the original charge of rape of a child. After the case was transferred to criminal court, the State again offered to settle the matter by recommending a sentence of fifteen years, with credit for the time spent at Hermitage Hall, in exchange for Petitioner's plea of guilty to rape of a child. Trial counsel said that he left the decision of whether to accept the offer up to Petitioner. Trial counsel stated that he believed Petitioner would be convicted if he proceeded to trial because Petitioner admitted to the investigating officer and his parents that he had committed the offense and because of the State's other evidence. Trial counsel believed that Petitioner would not be sentenced to the maximum sentence of twenty-five years for this offense, but he did not advise Petitioner that the minimum sentence of fifteen years was a certainty.

Trial counsel stated that he advised Petitioner that if he decided to enter a plea of not guilty and proceed to trial, he could appeal the juvenile court's decision to transfer him to criminal court,

but that if he entered a plea of guilty he would lose the right to appeal the issue. Trial counsel said he reviewed with Petitioner all of his rights which were waived as a result of entering his guilty plea, and he never had any concern over Petitioner's ability to understand the guilty plea submission process. Trial counsel said that Petitioner discussed the State's proffered offer of settlement with his father before he decided to accept the negotiated plea agreement.

II. Standard of Review

Petitioner argues that his trial counsel's assistance was ineffective because he (1) failed to advise Petitioner of his right to appeal the juvenile court's transfer ruling; (2) failed to submit medical evidence at the transfer hearing concerning his progress at Hermitage Hall; and (3) failed to pursue an appeal of the juvenile court's dismissal of his motion to dismiss.

A petitioner seeking post-conviction relief must establish his allegations by clear and convincing evidence. T.C.A. § 40-30-110(f). However, the trial court's application of the law to the facts is reviewed *de novo*, without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to *de novo* review. *Id.*; *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must establish that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he must show that counsel's ineffective performance actually adversely impacted his defense. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. *Id.* at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the *Strickland* test before he or she may prevail on a claim of ineffective assistance of counsel. See *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. *Id.* Failure to satisfy either prong will result in the denial of relief. *Id.* Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

III. Failure to Preserve Petitioner's Right to Appeal

The juvenile court has original jurisdiction over children who are alleged to be delinquent. T.C.A. § 37-1-134(a) (2003); *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006); *State v. Hale*, 833 S.W.2d 65, 66 (Tenn. 1992). Section 37-1-134(a)(1)-(4) provides the circumstances in which a juvenile court “shall” transfer a juvenile accused of conduct that constitutes a criminal offense to the criminal court to be tried as an adult. *Howell*, 185 S.W.3d at 329. As relevant here, the juvenile must be at least sixteen years old at the time of the offense and be provided with notice and a hearing. T.C.A. § 37-1-134(a)(1)-(3). During the hearing, the juvenile court must find “reasonable grounds to believe” that the juvenile committed the delinquent act as alleged, that the juvenile “is not committable to an institution for the mentally retarded or mentally ill,” and that the community’s interests require legal restraint or discipline of the juvenile. *Id.* at (a)(4)(A)-(C). If these grounds are found by the juvenile court, transfer from juvenile court to criminal court is subject to the juvenile court’s discretion. *Howell*, 185 S.W.3d at 329 (citing T.C.A. § 37-1-159(a)).

Appeals from juvenile court are governed by Tennessee Code Annotated section 37-1-159. There is no civil or interlocutory appeal from a juvenile court’s decision that a child should be dealt with as an adult in the criminal court. *State v. Griffin*, 914 S.W.2d 564, 566 (Tenn. Crim. App. 1995) (citing T.C.A. § 37-1-159(d)). If the juvenile judge who presides over the transfer hearing is a lawyer, the statute does not provide for an acceptance hearing in criminal court, and the criminal court has no authority to decline jurisdiction. *Id.* No evidence was presented at the post-conviction hearing that the juvenile judge in the case *sub judice* was not a lawyer. Indeed, trial counsel testified that he attempted to file a motion for an acceptance hearing which was apparently dismissed because Petitioner’s juvenile judge was, in fact, a lawyer. *See id.* (“If and only if a nonlawyer judge presides at the transfer hearing in juvenile court,” then the juvenile may move the criminal court to hold a hearing to determine whether it will accept jurisdiction over the juvenile.)

Thus, in order to seek appellate review of the juvenile court’s transfer ruling, “the juvenile in criminal court must *either* (1) enter a plea of not guilty and thus preserve the issue for review, if convicted, *or* (2) reserve the issue on a plea of guilty or nolo contendere pursuant to [Tennessee] Rule [of Criminal Procedure] 37(b)(2)(i) or (b)(2)(iv).” *Id.* (emphasis in original). “The second alternative assumes that the decision of whether the juvenile should be tried as an adult is a ‘certified question of law’ that may be appealed pursuant to Rule 37.” *Griffin*, 914 S.W.2d at 566.

This Court has previously observed that, assuming for purposes of the case that the transfer issue is dispositive of the criminal case, a trial counsel’s failure to preserve the issue of a juvenile court’s transfer ruling for appeal as a certified question of law is not automatically the ineffective assistance of counsel. *Eddie Lee Lowe v. State*, No. W1999-00881-CCA-R3-PC, 2000 WL 1285333 (Tenn. Crim. App., at Jackson, Aug. 30, 2000), *perm. to appeal denied* (Tenn., April 9, 2001). As the *Lowe* court stated:

[a] guilty plea based upon the reasonably competent advice of counsel may not be attacked because of the possibility that the eventual outcome of an issue may have

been favorable to the petitioner had he or she proceeded to trial. *McMann v. Richardson*, 397 U.S. 768, 769-70, 90 S. Ct. 1114, 1448 (1970). The decision to plead guilty before all the issues are resolved necessarily involves the making of difficult choices based upon uncertain judgments and predictions. *Id.* Furthermore, a defendant's decision to plead guilty may rest upon factors that go beyond the legal issues involved in the case such as the reduction of stress on the defendant and his or her family, the removal of uncertain consequences arising from a trial, and the reduction of actual exposure. *See, e.g., id.* at 768-69, 90 S. Ct. at 1447. Thus, in order to prove the prejudice prong of *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, the petitioner must establish that a reasonable probability exists that "but for counsel's errors," he would not have pled guilty but would have insisted on a trial. *Hill*, 474 U.S. at 59, 106 S. Ct. at 370.

Id., 2000 WL 1285333, at *7.

According to the transcript of the guilty plea submission hearing, the trial court thoroughly explained Petitioner's rights, including his right of appeal, which were waived by the entry of a plea of guilty. Petitioner stated that he understood the consequences of his plea, including his rights to appellate review, and that it was his desire to nonetheless enter a plea of guilty. Petitioner acknowledged that he committed the charged offense. Petitioner testified at the post-conviction hearing that he understood what he was doing when he entered his guilty plea, and that he did so because he did not want to risk being sentenced to the maximum sentence in the applicable sentencing range. Petitioner discussed the entry of a guilty plea with his father. These circumstances indicate that Petitioner wanted to plead guilty despite the loss of his right to appellate review of the juvenile court's transfer ruling. Moreover, Petitioner presented no evidence that the prosecutor would have accepted a certified question as part of the plea agreement, or that a certified question would have been appropriate as dispositive of the case.

After review, we conclude that Petitioner has failed to show that he was prejudiced by trial counsel's failure to certify a question regarding his transfer from juvenile court. Petitioner is not entitled to relief on this issue.

IV. Failure to Present Medical Evidence at the Transfer Hearing

Petitioner contends that his trial counsel was ineffective for failing to review his Hermitage Hall medical records prior to the transfer hearing and for failing to introduce his medical records as an exhibit at the hearing. Petitioner submits that as a result the juvenile court could not consider Petitioner's prior efforts at rehabilitation in its determination of whether Petitioner should be tried as an adult.

Initially we observe that neither the transcript of the transfer hearing nor Petitioner's medical records are included in the record. *See Tenn. R. App. P. 24* (noting that it is the appellant's duty to prepare an adequate record for appellate review). Thus, it is impossible to ascertain what evidence

was placed before the juvenile court or what information, whether favorable or unfavorable, was contained within the medical records other than what can be gleaned from the juvenile court's order dated March 7, 2005.

The juvenile court found:

- a. [Petitioner] was over the age of 16 at the time of the alleged conduct;
- b. Reasonable notice of the transfer hearing was given as required by law once the petition was filed, but there was an unreasonable delay (almost two years) in filing the petition;
- c. There are reasonable grounds to believe [Petitioner] committed the delinquent act as alleged;
- d. [Petitioner] is not committable to an institution for the developmentally disabled or mentally ill; and
- e. The interests of the community require that the child be put under legal restraint or discipline.

Among other matters, the court considered:

- a. [Petitioner] has neither a prior delinquency record nor past treatment efforts, both favoring [Petitioner];
- b. The offense was against a person, favoring the State;
- c. The offense was committed in a premeditated manner, favoring the State;
- d. Procedures, services and facilities, other than what was unsuccessfully attempted while [Petitioner] was a juvenile, are not available to the court;
- e. Nothing suggests there was any gang activity.

It is not clear from the record whether the juvenile court's observation about unsuccessfully attempted procedures, services or facilities referred to Petitioner's time with Hermitage Hall or was in reference to some other treatment program. Nonetheless, at the post-conviction hearing, trial counsel testified that after investigation, he made a strategic decision not to introduce Petitioner's Hermitage Hall medical records because he believed that such records would be detrimental to Petitioner's case. Instead, Petitioner testified on his own behalf at the transfer hearing, and trial counsel questioned Petitioner about his progress in the residential sex offender program. Based on the facts and circumstances existing at the time that trial counsel made his decision not to introduce

Petitioner's medical records, we conclude that trial counsel's performance fell within the range of competence demanded of attorneys in criminal cases. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

Moreover, Petitioner does not contend that but for trial counsel's failure to introduce his medical records as an exhibit at the transfer hearing, he would not have entered his guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985) (holding that in context of a guilty plea, to satisfy the second prong of *Strickland*, the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"). Based on the foregoing, Petitioner has failed to show that he was prejudiced by any deficiencies in his trial counsel's performance at the transfer hearing. Petitioner is not entitled to relief on this issue.

V. Failure to Appeal the Dismissal of his Motion to Dismiss

Petitioner testified at the post-conviction hearing that he was charged in juvenile court with the offense of rape of a child on November 30, 2001, but the State did not file a notice to transfer Petitioner's case to criminal court until October 8, 2003, when Petitioner was nineteen years old. Petitioner acknowledged that trial counsel filed a motion to dismiss in juvenile court on the basis that the delay in prosecution was unreasonable and prejudicial. The juvenile court dismissed Petitioner's motion after consideration, finding that the fact that Petitioner had been in custody either at Hermitage House or in another county on unrelated criminal charges was sufficient to show good cause for the delay.

Rule 17 of the Tennessee Rules of Juvenile Procedure provides that:

(a) TIME LIMITS GENERALLY. All cases in which a child is detained or in custody shall be scheduled for adjudication within thirty (30) days of the date the child is taken into custody. All other cases shall initially be scheduled for adjudication within thirty (30) days of the date of filing if such early scheduling appears to the court to be entirely reasonable and possible considering the circumstances of the case In any event, every case shall be scheduled to be heard within ninety (90) days.

(b) CONTINUANCES. Upon good cause being shown, or by agreement between the parties, any case may be continued from time to time as the court may direct.

Circumstances which may provide good cause for a longer period of time before adjudication include giving a juvenile time "to prove to the court that a less restrictive disposition may be desirable." *Id.*, Advisory Commission Comments. "Another valid reason for extensions of the limits would be to obtain psychological evaluations and testing which could not be obtained within the specified time limits." *Id.*

Petitioner argues that he was prejudiced by the delay in prosecution because at the time of the transfer hearing, Petitioner was an adult and could no longer be punished or receive rehabilitation as a juvenile offender. The post-conviction court found no prejudice noting that:

during much of the time [Petitioner] was undergoing treatment at a residential facility pursuant to orders of the juvenile court. And at other times, he was involved in other criminal proceedings in the criminal court of Williamson County. Petitioner had also rejected offers made to him to resolve the case on a plea to a lesser included offense, and the State, as it has a right to do, had withdrawn the offer and then eventually moved to transfer the case to criminal court.

Even assuming that the issue of delay is a “certified question of law” under Rule 37 of the Tennessee Rule of Criminal Procedure, Petitioner does not contend that but for his trial counsel’s failure to preserve this issue for appeal there is a reasonable probability that he would not have entered a plea of guilty. *Hill*, 474 U.S. at 59, 106 S. Ct. at 370. Nor does Petitioner contend that his guilty plea was not voluntarily and understandingly entered. Based on our review of the record, we conclude that Petitioner has failed to establish that he was prejudiced in this regard. Petitioner is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the post-conviction court.

THOMAS T. WOODALL, JUDGE