

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 18, 2009

CHESTER WAYNE WALTERS v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for White County
No. CR599 David A. Patterson, Judge**

No. M2008-00385-CCA-R3-PC - Filed January 25, 2010

Petitioner, Chester Wayne Walters, appeals the dismissal of his petition for post-conviction relief in which he alleged that his trial counsel rendered ineffective assistance of counsel. Specifically, Petitioner contends that trial counsel's assistance was ineffective during the cross-examination of the victim. After a thorough review of the record, we conclude that Petitioner has failed to show that his trial counsel rendered ineffective assistance and 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 JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Billy K. Tollison, Sparta, Tennessee, for the appellant, Chester Wayne Walters.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Randall A York, District Attorney General; William Locke, Assistant District Attorney General; and Ben Fann, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Following a jury trial, Petitioner was convicted of two counts of rape of a child, a Class A felony, and two counts of aggravated sexual battery, a Class B felony. On appeal, this Court concluded that Petitioner's sentences for aggravated sexual battery violated double jeopardy principles and merged Petitioner's aggravated sexual battery convictions in counts

3 and 4 of the indictment with his rape of a child convictions in counts 1 and 2. Petitioner's sentences for rape of a child were each modified from twenty-five to twenty-three years. *State v. Chester Wayne Walters*, No. M2003-03019-CCA-R3-CD, 2004 WL 2726034 (Tenn. Crim. App., at Nashville, Nov. 30, 2004). The facts surrounding Petitioner's convictions were summarized by this Court in the direct appeal as follows:

This case relates to the defendant's having sexual intercourse with his girlfriend's twelve-year-old daughter. The victim testified that in 1997, she lived in a trailer with her mother, older brother, younger sister, and the defendant. She said that on February 10, 1997, she did not go to school because it was her twelfth birthday and that she was at home alone with the defendant. She said that she went into the bathroom about 4:00 p.m. to take a shower and that she got undressed. She said that the defendant came in the bathroom, got "ahold" of her, and that they ended up on the floor. She said that the defendant was touching her breasts and genital area and that he put his private in her private and began moving back and forth. She said that it felt like "it was ripping my intestines out," that the defendant ejaculated on her, and that she bled afterward. She said that the defendant told her it would feel better if she would be quiet and wait and that she "would want it more often." She said he also threatened to hurt his young son if she told anyone. She said she took a shower and did not tell her mother about the incident because her mother was in love with the defendant and because she was afraid her mother would hate her.

The victim testified that on Friday, September 12, 1997, her mother, brother, and sister went to the store and that she was at home alone with the defendant. She said that she was sitting on the living room couch and that the defendant walked over to her and began kissing her and taking off her clothes. She said that the defendant rubbed her private parts and had sexual intercourse with her, that he ejaculated, and that she bled. She said that right after the incident, her father's car pulled up to the trailer and her father blew the horn. She said the defendant went to the door in his underwear and told her father that everyone had gone to the store. She said that her father left and that she did not tell her mother about the incident when her mother got home. She said that she went to live with her father in order to get away from the defendant and that her father got custody of her and her brother. She said that in September 1999, the Department of Human Services (DHS) began investigating her relationship with Aaron Trobaugh, a jail inmate. She said that she and Mr. Trobaugh were friends and had been exchanging letters. She said Tonya Scott from the DHS questioned her about the letters and began

pressuring her. She said she became upset and told her stepmother and stepsister about having sex with the defendant. She said that she later told Ms. Scott about the abuse and that a doctor examined her. She said that she was telling the truth and that she had no reason to lie against the defendant.

On cross-examination, the victim testified that Mr. Trobaugh had known her mother for a long time, that he and her mother had grown up together, and that Ms. Scott questioned her about whether she had had sex with him. She said that she had never had sex with Mr. Trobaugh, that she loved him in a friendly way because he had done a lot for her family, and that they had exchanged friendship letters. She denied that they discussed marriage and sex in their letters but acknowledged that she told Ms. Scott she had kissed Mr. Trobaugh on the cheek. She said that she did not remember telling Ms. Scott she had kissed Mr. Trobaugh on the lips and that she had no reason to protect him.

Arthur Young, the victim's father, testified that after he divorced the victim's mother, the victim's mother had custody of the victim and her brother for about ten years. He said that he remarried, visited the children every weekend, and would pick them up on Friday afternoons. He said that in 1997, the victim and her brother were living in a trailer with their mother and the defendant and that on September 12, he went to the trailer to pick up the children for the weekend. He said that he blew the horn and that the defendant came to the door wearing only his underwear. He said that he asked the defendant where the victim's mother was and that the defendant told him everyone was at the store. He said that he went to the store and that his son told him the victim was at the trailer. He said that when the victim's mother came outside, he fussed at her for leaving the victim alone with the defendant. He said the victim's mother got upset and told him that the defendant would not hurt the victim. He said that he drove into town to speak with an attorney, that he filed for custody of his children immediately, and that a temporary custody hearing was held on September 15.

On cross-examination, Mr. Young testified that seeing the defendant in his underwear and learning that the victim was alone with the defendant concerned him very much. He said, though, that he did not go back to the trailer to get the victim because his ex-wife was upset and "would have stirred up all kinds of trouble." He said that after he got custody of his children, he did not ask the victim if anything was going on with the defendant and she did not tell him about the abuse. He acknowledged that in 1999, he confiscated

romantic letters that the victim and Aaron Trobaugh had exchanged. He said that as soon as he learned about their relationship, he put a stop to it. He said that in September 1999, the DHS began investigating the victim's relationship with Mr. Trobaugh and that someone from the DHS interviewed the victim at school without his permission. He said that at first, the victim did not tell anyone from the DHS about the defendant's sexual abuse. He said the victim later told his wife and Tonya Scott about it.

Dr. Allen Drake testified that he examined the victim on October 4, 1999, for possible sexual abuse. He said that the victim had a difficult time telling him about the abuse because she was embarrassed and that he obtained most of his information from the victim's stepmother. He said that according to the victim's stepmother, the victim had stated that the defendant forced the victim to have sex with him on several occasions when the victim was eleven or twelve years old. He said that he asked the victim if her stepmother's information was correct and that the victim said yes. He said that the victim's hymen had been broken but had completely healed and that he found no evidence of trauma, bleeding, or abrasions to the victim's external genitalia. He said that his examination of the victim was consistent with the stepmother's information and that the healed hymen indicated the abuse had occurred at least three weeks before he examined the victim. He acknowledged that something other than a penis could have penetrated the victim.

Id. 2004 WL 2726034, at *1-3.

II. Post-conviction Hearing

Tonya Scott, an employee with the Department of Children's Services, testified that she first interviewed the victim on September 30, 1999. Ms. Scott did not have a present recollection of discussing the interview with Petitioner's trial counsel. Ms. Scott said that the Department provided a transcript of the victim's interview to the State.

Petitioner's trial counsel testified that his trial strategy was focused on the impeachment of the victim's credibility. Trial counsel acknowledged that he did not interview Ms. Scott prior to trial. Trial counsel stated, however, that he had a transcript of Ms. Scott's interview with the victim and used the transcript to formulate the victim's cross-examination as to the times, dates, and details of the alleged incidents of sexual contact. Trial counsel acknowledged that there were inconsistencies between the victim's statements during her interview and her trial testimony, and that he did not address all of the inconsistencies during the victim's cross-examination. Trial counsel explained that a jury

can feel sympathy toward a minor victim of sexual abuse and one has to “develop a feel” for how to conduct the minor victim’s cross-examination. Trial counsel felt that the victim was confused at trial about certain aspects of the allegations. Trial counsel explained that questioning her about those inconsistencies which trial counsel felt were insignificant might have had a negative impact on the jury. Trial counsel also wished to avoid highlighting other inconsistencies, such as whether the victim saw semen before or after the sexual contact. Trial counsel was aware that the victim had told Ms. Scott that Defendant had engaged in sexual activity with her more than twice. Trial counsel questioned the victim at trial about her relationship with Mr. Trobaugh, and acknowledged that the victim denied at trial that her friendship with Mr. Trobaugh was sexual or that she had told Ms. Scott that Mr. Trobaugh kissed her on the lips.

On cross-examination, trial counsel said that he began practicing law in 1972 and had represented many criminal defendants, both in private practice and as a public defender. Trial counsel said that he was aware of the State’s proof prior to trial as well as the victim’s statements to Ms. Scott concerning other incidents of sexual contact with Defendant. Trial counsel filed a bill of particulars in order to narrow the circumstances of each allegation in the indictment. Trial counsel said that Defendant refused the State’s offer of settlement which would have included an effective sentence of eight years.

Trial counsel said that he thoroughly cross-examined the victim at trial about her relationship with Mr. Trobaugh and emphasized the length of time between the incidents and the victim’s disclosure of the sexual misconduct. Trial counsel said that he did not recollect that Patricia Young had any information that would be beneficial at trial because it was clear that Ms. Young was sympathetic to the victim.

Patricia Ann Young, the victim’s step-mother, testified that she had a close relationship with the victim. Ms. Young did not recollect being interviewed by either trial counsel or Mr. Lynch. Ms. Young stated that if she had testified at trial she would have said that she did not believe that the victim was a truthful person. Ms. Young said that the victim was dating some of her brother’s friends before the trial.

On cross-examination, Ms. Young said, however, that she had only heard about the victim’s relationships with young men from other people. Ms. Young acknowledged that if she had testified at trial, her testimony would be similar to her testimony at the sentencing hearing.

Marsha Ann Cummins, the victim’s step-sister, testified that the victim told her about Defendant’s conduct. Ms. Cummins said that the victim also confided in her that the victim had engaged in sexual relationships with two young men at some point before the victim told

Ms. Scott about Defendant's behavior. Ms. Cummins described the victim as "untruthful." Ms. Cummins said that she was not interviewed by the public defender's office before trial. On cross-examination, Ms. Cummins said that the victim told her that her first sexual experience was with Defendant.

Petitioner testified that he met with trial counsel on two occasions before trial. Petitioner said that at the first meeting, he gave trial counsel a list of approximately six potential defense witnesses including the victim's mother, Candy Kirby, and Mr. Trobaugh's girlfriend, Mary Nash Pitts. Petitioner said, however, that Ms. Kirby and Ms. Pitts could not be located for the post-conviction hearing. Petitioner stated that James Reeves' testimony would have been helpful at the time of trial, but Mr. Reeves no longer had any personal recollection pertaining to the offenses because of the passage of time. Petitioner stated that trial counsel never discussed trial strategy with him. Petitioner insisted that trial counsel should have called witnesses to testify on his behalf because Petitioner decided not to testify at trial,.

On cross-examination, Petitioner acknowledged that he did not know what Ms. Kirby or Ms. Pitts would have testified about if they had been called as witnesses at trial. Petitioner acknowledged that he told the trial court that it was his voluntary decision not to testify, but Petitioner stated that he made a "mistake." Petitioner agreed that it was "safe to say" that Mr. Reeves and Douglas Brown could not have provided any beneficial information if they had been called to testify at the post-conviction hearing.

In response to the post-conviction court's questions, trial counsel stated that he had several discussions with Petitioner concerning the trial process and strategy. Trial counsel said that he discussed with Petitioner the possibility of settling the charges, but Petitioner did not want to enter a plea of guilty. Trial counsel said that he did not know of anything he would have done differently except attempt to persuade Petitioner to enter a plea of guilty.

III. Standard of Review

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 (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.

IV. Ineffective Assistance of Counsel

Petitioner argues that his trial counsel’s assistance was ineffective because he failed to cross-examine the victim more thoroughly about her statements to Ms. Scott which were inconsistent with her trial testimony. Petitioner asserts that examples of the inconsistencies involve the following topics. During the interview, the victim told Ms. Scott that she did not know if Petitioner ejaculated because she “didn’t look.” The victim acknowledged, however, that she used the bathroom after the incident and noticed “white spots” when she wiped herself. At trial, the victim testified that Petitioner ejaculated on her. During her interview, the victim said that the first incident of sexual contact with Petitioner occurred on the living room couch after her mother and brother had gone to the store. At trial, the victim testified that the first occurrence happened in the bathroom on her twelfth birthday. The victim told Ms. Scott that the last occurrence of sexual contact with Petitioner occurred “during the summer;” at trial she identified September 12, 1997, as the date of the last occurrence. The victim told Ms. Scott that she had nightmares about the incidents, but at trial she denied that she had bad dreams.

The victim told Ms. Scott that Mr. Trobaugh kissed her on the lips, that their correspondence was more than just an exchange of friendly letters, and that she and Mr. Trobaugh discussed sex and finding a place for them to live together. At trial, the victim said that she loved Mr. Trobaugh as a friend and that the letters they exchanged were “friendship

letters.” The victim stated that Mr. Trobaugh kissed her on the cheek but did not recollect telling Ms. Scott that Mr. Trobaugh kissed her on the lips.

Petitioner contends that trial counsel’s failure to expose the victim’s inconsistent statements weakened his theory of defense that the victim accused Petitioner of the offenses because her relationship with Mr. Trobaugh had been exposed. Petitioner argues that placing the victim’s inconsistent statements before the jury would have created reasonable doubt as to the victim’s credibility.

Trial counsel acknowledged at the post-conviction hearing that his trial strategy rested for the most part on challenging the victim’s credibility because there were no witnesses to the sexual abuse. Trial counsel, however, pointed out that the cross-examination of a minor sexual abuse victim must be conducted carefully in order to avoid leaving a negative impression of the defendant with the jury. Many of the inconsistencies cited by Petitioner during the post-conviction hearing were either, in trial counsel’s view, not significant, or addressed issues that trial counsel did not want to unduly highlight, particularly the victim’s statements about the presence of semen which would only emphasize that Petitioner had in fact penetrated the victim.

This court has previously noted that “cross-examination is a strategic and tactical decision of trial counsel which is not to be measured by hindsight.” *State v. Kerley*, 820 S.W.2d 753, 756 (Tenn. Crim. App.1991). Moreover, “[a]llegations of ineffective assistance of counsel relating to matters of trial strategy or tactics do not provide a basis for post-conviction relief” so long as counsel’s “choices are informed ones based upon adequate preparation.” *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)); *Taylor v. State*, 814 S.W.2d 374, 378 (Tenn. Crim. App. 1991). “Further, we ‘acknowledge the unique difficulty of cross-examining a child at trial, especially concerning the sensitive issue of sexual abuse.’” *State v. Steven Gass*, No. M2003-01079-CCA-R3-PC, 2004 WL 1434475, at *2 (Tenn. Crim. App., at Nashville, June 25, 2004), *perm. to appeal denied* (Tenn. Jan. 13, 2005) (quoting *Jimmy Greene v. State*, No. E2000-00426-CCA-R3-PC, 2001 WL 237343, at *10 (Tenn. Crim. App. at Knoxville, Mar. 6, 2001), *perm. to appeal denied* (Tenn. July 2, 2001)).

Based on our review, we conclude that the evidence does not preponderate against the post-conviction court’s finding that Petitioner has failed to show that his trial counsel’s performance was deficient during the victim’s cross-examination. 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