

IN THE CRIMINAL COURT
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

DIVISION III

Filed
Heidi Kuhn, Clerk
BY W 9-15-22
D.C.

Jason White,
Petitioner,

VS.

State of Tennessee,
Respondent.

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Case Number: 17-01568

Order Denying Petition for Post-Conviction Relief

This cause came to be heard upon the Petition for Post-Conviction Relief, Amended Petitions, the State's Response and upon the evidentiary hearing conducted in this cause. Counsel was appointed, but Petitioner continually and expressly conveyed his desire to represent himself. Counsel (appointed) remained available for assistance in filing documents and as a resource for Petitioner.

The hearing was delayed by Petitioner's motions to recuse the court, the last of which was disposed of by the denial of the TRAP Rule 10 application. Jason L. White vs. State of Tennessee, W 2022-00841-CCA-R10-PC (July 20, 2022)

Further, complicating matters is the fact that Petitioner (apparently for security reasons) is being housed in New Mexico, rather than in a Tennessee Department of Correction facility.

The hearing was conducted over parts of two days; July 5 and July 8, 2022.

I. HEARING

Petitioner, having continually been advised to his statutory right to counsel, again (Petitioner represented himself on the motion for new trial and appeal as of right in this cause) represented himself.

Petitioner had an initial motion to disqualify the Office of the District Attorney General, who he blamed for his being housed in New Mexico. This motion was

withdrawn in open court and Petitioner chose to begin his proof by calling, as his first witness, co-defendant Montez Mullins.

Mullins testified that prior to being a part of this case he communicated with a “detective” and with Petitioner’s trial counsel, Claiborne Ferguson. Mullins testified that he told both this detective and Mr. Ferguson that the package sent was “all his”. Mullins maintains that neither Petitioner, nor co-defendant Cole, (the woman to whom the package was sent) knew the contents were methamphetamine. The witness attempted to “take the case” and accept responsibility for the crime while exonerating Petitioner and co-defendant, Cole. Mullins was incarcerated with Petitioner on unrelated charges in the TDOC

After making the statement to the police, a Shelby County grand jury returned a superseding indictment adding Mullins as a co-defendant with the other two.

At the trial, Mullins suggests that he was willing to testify, but that all lawyers advised against it. This was because his statement was going to be admitted in the state’s proof, and he would not be subject to cross-examination if he did not testify. The plan of the defense was to rely on this attempt to exculpate the others and for Mullins to take the blame.

The petitioner next called as a witness, Robert Felkner. Felkner, an assistant public defender since 1993, testified that his office was appointed to represent Petitioner when he was first indicted. Felkner did not remember Petitioner specifically but stated that he usually would have conducted a brief general interview and even possibly would have given Petitioner a copy of the indictment.

When asked, Felkner testified that it was not “typical”, nor was it that unusual for a superseding indictment to be returned with “upgraded” charges.

Counsel was shown the original indictment (Exhibit 1). This document charges Petitioner and co-defendant Cole with the offenses of conspiracy to possess with intent to sell (count 1) and deliver (count 2) methamphetamine, in an amount over 300 grams and within (1000’) one thousand feet of a public elementary school.

Counts 3 and 4 charge Cole with the actual possession with intent to sell and deliver the same.

Petitioner then asked the witness to explain differences in the wording of the capias produced by the clerk's office. (Exhibit 3) The capias shows charges as CONSP-PROMOTE MANUFACTURE METHAMPHETAMINE and cites a number 39-17-433. This is clearly not the offense which is charged in the body of the indictment.

Petitioner repeatedly characterized this as changing the charge. When asked, counsel stated that the charge contained in the indictment was what mattered, not the capias. When showing the transcript of the arraignment, the witness pointed out that the court correctly notified Petitioner of the charge and of the fact that it was an "A" felony. (Exhibit 2 page 4)

This witness, who only represented Petitioner at arraignment (the case was initially assigned to another assistant public defender) agreed that the capias prepared (apparently) by the clerk's office did not have the correct statute number on it, but did not see a problem because the indictment and arraignment were apparently correct.

The petitioner next called as a witness, Claiborne Ferguson, his trial counsel in the matter.

Ferguson, an attorney for 22 years was hired to represent Petitioner in September of 2016. A contract of employment was signed by Petitioner's mother. (Exhibit 5)

In that document, there is a handwritten notation describing the legal matter as:

Criminal Court: Case Number: 16-02794

Counts 01 é 02 – Conspiracy – Promote Manufacture Meth

Mr. Ferguson next testified that he filed seventeen (17) pre-trial motions, many of which were "boiler plate" but that would protect Petitioner's rights and which could be amended if necessary. Counsel explained that most of the requests did not require a hearing because they had been complied with. For example, discovery was provided without the need of a court order.

Petitioner asked counsel why he did not file a motion about "the fact that Detective Gaia planted evidence". Apparently, this is a reference to the fact that during the trial, Detective Gaia used co-defendant Cole's phone to send a text to the person with whom she (Cole) had been texting. State of Tennessee vs. Jason White, No. W2018-00329-CCA-R3-CD (February 11, 2019)

Counsel testified that since this fact only was developed at trial, he could not have litigated it. Instead counsel embraced it and hoped it served to discredit Detective Gaia as a witness.

Upon further questioning counsel explained that he did to have standing to question the search of co-defendant's telephone. Petitioner questioned counsel as to the decision not to have a court hearing on motions and such as the request for impeaching information, a request for written replies and other such form motions. To all of which counsel replied, that there was no need. All of these requests were complied with. Counsel reiterated that he was thoroughly familiar with the state's case against Petitioner.

Petitioner spent a great deal of time at the hearing asking counsel questions concerning his "illegal arrest" and "right to a preliminary hearing" which counsel explained. Counsel did not consider the arrest illegal and, as a result of the indictment, the right to a preliminary hearing was not available.

Counsel and Petitioner were prepared to go to trial and present a defense in the form of Montez Mullins who would testify and "take the case". The superseding indictment charging Mullins, also, did not change the strategy. The only change was that the Mullins statement would come in through the state without being subject to cross-examination.

Counsel again answered repeated questions about objecting to the new indictment by stating that he simply had no legal grounds to do so.

Petitioner questioned counsel about his (Petitioner's) desire to hire a new attorney. Petitioner was told in April of 2017 that he could hire anyone that he liked but that they needed to be ready for trial in July of that year. (Exhibit 6 pages 10-11).

Petitioner next questioned counsel about an incident that occurred on the morning of trial in the lock-up area off the courtroom. Mr. Ferguson stated that Petitioner got mad at him and acted in a threatening way. This was reported to the court who offered to put safety restrictions in place, but whose implementation was not needed. Client and counsel agreed to cooperate through the trial and did so. This matter was discussed extensively on the direct appeal of the conviction. Stat of Tennessee vs. Jason White, (Supra) (at pages 7-11)

Petitioner then questioned counsel about failing to call Mullins as a witness. Counsel explained the co-defendants could not be made to testify, but that in any case, Mullin's statement had been admitted and was heard by the jury.

In conclusion, Mr. Ferguson testified that he felt that he had performed well and did not miss anything. It was a case of presenting a defense, which in this case jury rejected.

On cross-examination counsel testified that he has previously been qualified as an expert witness in criminal defense, that he frequently teaches for the Tennessee Association of Criminal Defense Lawyers (TACDL) and that he has been representing clients in complex cases for over twenty-two (22) years.

He testified that he has handled cases where clients have filed complaints with the Board of Professional Responsibility. Counsel stated that an attorney has a duty the "plow on", even with dealing with unhappy clients. Ferguson stated that after the incident, he and Petitioner put their differences aside and worked well during the trial.

Counsel talked of trying a case with two other lawyers and the goal to present all favorable information without repeating every question three times. At the conclusion of the case, he and Petitioner were communicating well, and felt good that their defense (Mullins did it) had been successfully presented to the jury. That satisfaction of Petitioner lasted only until the verdict.

Petitioner next called Darius Jones of the Shelby County Sheriff's Department. Deputy Jones was filling in as a bailiff in this division of Criminal Court on the first day of Petitioner's trial. He took the report of the incident in lock-up between Petitioner and his trial counsel, Ferguson. Deputy Jones did not witness the incident but stated that other prisoners were apparently present near-by.

Petitioner next called Kimberly White, his mother. Ms. White testified that she hired trial counsel, but was not satisfied with his performance. Ms. White also testified that a phone number described in the trial as hers (901-208-9195) was actually listed in the name of Michael Underwood, her husband.

She wrote complaining letters to the Board of Professional Responsibility because, in her opinion, trial counsel wasn't "taking enough initiative."

On cross-examination Ms. White stated that she hired another attorney in late 2016 or early 2017. This other attorney never enrolled in this case.

Petitioner next testified on his own behalf.

Petitioner recounted being arraigned and having a public defender appointed. Petitioner expressed dismay that Mr. Felkner entered a “not guilty” plea on his behalf without consulting him. He spoke of another public defender (Brent Walker) coming to the jail to see him.

Thereafter, friends and family hired Blake Ballard (sic) – probably meaning Blake Ballin. The petitioner thought that attorney didn’t seem interested so, after communicating with him, Petitioner’s mother hired Claiborne Ferguson.

Mr. Ferguson filed the seventeen pre-trial motions. Early on, the relationship was good. Petitioner credits Mr. Ferguson with helping to get Petitioner sent back to the TDOC (where he had been living for the past many years). This was at Petitioner’s request.

After that, Petitioner testified that communication became more infrequent. Petitioner informed counsel about Mr. Mullins and his desire to take responsibility of the charge.

Mr. Ferguson arranged the transfer of Mr. Mullins, who was also in prison, back to the Shelby County jail. Mullins gave a statement attempting to accept responsibility for the crime.

This statement, given to counsel and then formally to an investigator, Detective Christian, was the cause of the continuance of the trial date. Petitioner faults counsel for not preventing this continuance.

The superseding indictment was returned and Petitioner was arraigned on this new indictment, which added Mullins as a co-defendant. Again, Petitioner feels that this was the fault of trial counsel.

At this point, according to Petitioner, the attorney – client relationship was deteriorating. Petitioner began filing complaints, blaming Mr. Ferguson for “allowing” Mullins to become a co-defendant.

Petitioner further testified that at the trial, people said the package had been “fed-ex’d” when it actually came via UPS.

Petitioner recounted that trial counsel “falsely accused” him of assault. Petitioner admits that he threatened to sue counsel, and that he was frustrated with him but flatly dismiss that he ever touched him.

On cross-examination Petitioner described hiring the Ballin firm but not “seeing eye to eye” with them. He agreed that he was pleased that Mr. Ferguson got him sent back to Riverbend (TDOC).

Petitioner re-iterated that he wanted Mullins to testify for him as a witness, and to try to exculpate him. After Mullins confession the state indicted him. Petitioner blames this on Mr. Ferguson and states that’s where the relationship broke down. Petitioner says that now counsel was working against him.

On cross-examination Petitioner admitted that the Michael Underwood of the phone in question was his mother’s husband and that they were living together at that time.

On re-direct Petitioner re-iterates that Mr. Ferguson should have gotten the case continued and then gotten relieved of representing Petitioner.

The state did not call any witnesses at the hearing.

Petitioner wanted to call certain witnesses. The prosecutor in the case, the district attorney general and Detective Christian. When asked for what purpose Petitioner could not give a legally compelling answer.

Petitioner repeatedly wanted to subpoena Detective Gaia, one of the main investigators. Gaia, who has retired, was not able to be served by Petitioner despite repeated attempts. The court directed the state to subpoena him, which they did, and again the return was NOT TO BE FOUND.

When asked why he wanted Detective Gaia, Petitioner responded, “to show he lied.” It should be noted that Detective Gaia testified in a post-conviction hearing, where the petition was filed by former co-defendant, Christian Cole. Gaia did not recant his testimony or admit any untruthful testimony.

II FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is well settled that Petitioner bears the burden of proving his allegations by “clear and convincing” proof T.C.A. § 40-30-101 et seq. To prevail he must show that his attorney was deficient and that this deficiency then prejudiced his case. Strickland vs. Washington, 466 U.S. 668, (1984)

In this case Petitioner blames his attorney for “allowing” the state to indict the person who came forward and confessed to the charge while attempting to exonerate Petitioner.

The decision to indict co-defendant Mullins was not something that trial counsel could have prevented.

Petitioner remains convinced that the notations on the capias, his employment contract and other papers showing the charge as T.C.A. § 39-17-433 makes his conviction for the offense stated in the indictment (T.C.A. § 39-17-434 and T.C.A. § 39-12-103) invalid. Again, he blames his attorney for this.

Had this been pointed out prior to trial, it would have simply been corrected as a clerical error. The body of the indictment is correct. Petitioner is incorrect in his assertion that clerical errors on un-related documents are jurisdictional.

Petitioner again blames counsel for the admission of the voluminous communications between Petitioner and co-defendant, Cole. These issues were resolved in favor of the state on direct appeal, wherein, Petitioner represented himself. Even if not thoroughly explored, they were then waived.

The petitioner believes counsel was deficient for failing to achieve a severance. This issue was also concluded in the state’s favor as direct appeal. Petitioner offers nothing now, other than his desire for one, to demonstrate a legal ground for a severance.

Petitioner remains insistent that the verdict of the jury was incorrect.

Petitioner now demands that Mullins should have testified for him. He is not satisfied with the statement. Petitioner overlooks the fact that if Mullins had testified, the state could have cross-examined him about many things. His record, the texts believed Petitioner and co-defendant Cole, the appearance of Petitioner’s brother at the home of co-defendant Cole shortly after the package arrived and more.

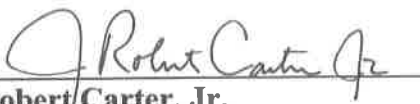
Petitioner has used his post-conviction petition to restate his direct appeal with the addition of the claim that “my attorney should have prevented this.”

The performance of counsel was not perfect. There was a failure to not notice the typographical statute number error. This did not prejudice the case against Petitioner. The indictment clearly states the correct charge. The trial was for the correct charge.

Petitioner offered what he hoped was an affirmative defense. This defense was presented, heard by the Jury and apparently disregarded. Petitioner has failed to carry his burden of proof.

The Petition for Post-Conviction Relief is, hereby, denied.

This is the 15th day of September, 2022.



J. Robert Carter, Jr.
Judge - Division III