

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS  
WESTERN DISTRICT

STATE OF ARKANSAS

VS. NO. CR 93-450 & 450A

DAMIEN ECHOLS

PLAINTIFF

DEFENDANT

**ORDER**

Now on this 17th day of June, 1999, comes on for findings of fact and final order the Rule 37.5 post-conviction petition filed by Damien Wayne Echols, by his attorneys, Edward A. Mallett, Houston, Texas, Alvin Schay, Little Rock, Arkansas, and Barry C. Scheck, Jonathan Oberman and Louise Hochberg, all of New York, New York, and Melissa Martin, Houston, Texas. The Court has considered the numerous and extensive pleadings, briefs and testimony given in support of the petition and makes the following findings and conclusions:

1) Damien Wayne Echols was tried and convicted in Craighead County on 3 counts of capital murder of Michael Moore, Christopher Byers, and Steve Branch. He was sentenced to death in 1994. On December 23, 1996, the sentenced was affirmed, Echols and Baldwin v. State, 936 S.W.2d 509 (Ark. 1996), the mandate issued on January 10, 1997. A petition for writ of certiorari was filed before the U.S. Supreme Court and hearing was denied.

2) The petition for post-conviction relief under Rule 37.2 and 37.5 followed the denial of writ of certiorari before the U.S. Supreme Court alleging among other claims that he was deprived of due process of law and right to effective assistance of counsel at both trial and on appeal.

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3) The petitioner has failed to demonstrate that trial and appeal counsel Val Price and Scott Davidson, both of Jonesboro, Arkansas, were ineffective. Under the test recognized by both State and Petitioner in their briefs, Strickland v. Washington, 466 U.S. 668 (1984) and Wainwright v. State, 307 Ark. 569, 823 S.W.2d 449 (1992), the petitioner has failed to overcome the presumption of competency by production of evidence to demonstrate a reasonable probability that, but for unprofessional error, the results of the trial would have been different. The mere allegation of ineffectiveness is not sufficient to show that counsels' conduct undermined the adversarial process and resulted in actual prejudice to the degree that petitioner was denied a "fair trial."

The petitioner has not established proof of both deficient conduct and actual prejudice and, therefore, his claim of ineffective assistance of counsel must fail.

4) It is well settled that the judge who presided over defendant's criminal trial may also preside over the defendant's post-conviction proceeding. Bryant v. State, 323 Ark. 130, 913 S.W.2d 257 (1996). Recusal is not required because some of the trial judge's rulings are considered in the post-conviction proceeding. A judge's decision not to recuse is discretionary and will only be reversed for abuse of discretion. Beshears v. State, 329 Ark. 469, 947 S.W.2d 789 (1997). Petitioner has failed to show either bias or prejudice by the trial judge and, therefore, fails to carry his burden.

5) Petitioner alleged newly discovered evidence of his actual innocence under the Supreme Court's holding in Herrera v. Collins, 506 U.S. 853 (1993). Claims of newly discovered evidence are not normally cognizable in a Rule 37 proceeding, Cigainero v. State, 321 Ark. 533, 906 S.W.2d 282 (1995). Under this claim, the petitioner attempted to establish a "bite mark" on the face of one of the victims and

argued that failure to recognize and develop evidence was incompetence on the part of petitioner's counsel Price and Davidson. Evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of reasonable diligence, Amrine v. Bowersox, 128 F.3d 1222, 1230 (8th Cir. 1997), cert. denied, 118 S.Ct. 1807 (1998).

The "bite mark" evidence is not "new" because the marks were on the victim's face from the initial discovery of the bodies. Furthermore, the evidence is not reliable. The bulk of the testimony at the evidentiary hearing was that no bite mark could be identified to a reasonable degree of medical certainty.

The testimony of Doctors Peretti, Sturner, and Dugan, and that of Val Price and defendant's investigator, Ron Lax, established that there are not identifiable bite marks on the photographs of the bodies. Dr. Harry Mincer testified that the identification of bite marks is not an exact science. Dr. Mincer, president of the American Board of Forensic Odontology and an expert in the field of forensic odontology also concluded that the mark over the eye brow of Steve Branch was not a bite mark within a degree of reasonable medical certainty.

The petitioner has failed to prove a valid claim of actual innocence or to demonstrate incompetence of counsel. The alleged bite mark can neither be said to constitute new or reliable evidence of innocence or evidence that a rational fact finder would have considered seriously.

6) The petitioner has failed to establish ineffective assistance of counsel for failure to adequately investigate the facts. The facts and testimony presented at the evidentiary hearing indicate that both Price and Davidson spent substantial time in

preparation for and in defending petitioner at trial and that attorney Dan Stidham also provided research on motions and production of witnesses. Ron Lax who was referred to as "the best investigator I have ever worked with" testified that he had worked on 25 capital murder cases prior to petitioner's case. Lax stated that he conducted multiple interviews and developed witnesses and that he had the assistance of additional staff. This court finds that petitioner has failed to establish Price or Davidson failed to adequately investigate the facts of their case.

7) Jurors are presumed unbiased and fit to serve, Goins v. State, 318 Ark. 689, 890 S.W.2d 602 (1995). The petitioner did not exercise all of its preemptory challenges of jurors and, therefore, cannot now raise defects in voir dire. Furthermore, the actual response of those jurors selected to hear the case support Price's contention that the jury selection was fair and impartial.

8) Val Price was not ineffective for failing to preserve a record of voir dire for appeal. The decision of Price, as indicated by his testimony, in the evidentiary hearing, was that he exercised sound principles of strategy in electing not to designate voir dire record for appeal because he had not utilized all preemptory challenges having acquired a jury he believed to be fair and impartial and not wishing to clutter the appeal with weak or insupportable grounds decided not to include voir dire.

9) Price was not ineffective with respect to the HBO video and petitioner has failed to demonstrate any prejudice whatsoever as a result of the making of this video.

10) Price was not ineffective for failing to obtain funding for experts and the outcome of the trial would not have been different had he done otherwise. The witnesses called by petitioner in the evidentiary hearing produced no evidence to establish that Price

was ineffective or that the outcome of the trial would have been different had additional experts been employed.

11) The failure to object to leading questions and hearsay by Price as alleged by petitioner is mere second guessing the trial strategy and does not establish ineffectiveness of counsel.

12) Price was not ineffective by failing to have DNA test performed. As a practical reason no material remained that could be tested a second time and the results at hand were not harmful to petitioner, in fact, were beneficial.

13) The decision not to impeach Michael Carson was a matter of trial strategy.

14) The petitioner's claim that Price was ineffective for failing to move for another change of venue or alternatively a continuance is not supported by law or by facts.

15) The cross-examination of Mark Byers by Val Price at trial was both complete and clearly a matter of trial strategy and Price was not ineffective.

Petitioner has asserted a number of claims at the conclusion of his petition. It is well established that Rule 37 proceedings are not a substitute for direct appeal and cannot be used as a vehicle to challenge mere errors that occurred during trial or to raise claims that could have been raised at trial or on appeal. Coplen v. State, 298 Ark. 272, 766 S.W.2d 612 (1989); Neal v. State, 270 Ark. 442, 605 S.W.2d 421 (1980). Simply put, a Rule 37 proceeding is not designed to take the place of a direct appeal. Robinson v. State, 295 Ark. 693, 751 S.W.2d 335 (1988). Thus, any claims that should have been raised either at trial or on appeal are not cognizable in this proceeding and cannot form the basis for post-conviction relief. Further, post-conviction relief is not warranted based

upon claims already adjudicated in a petitioner's direct appeal. Dunham v. State, 315 Ark. 580, 868 S.W.2d 496 (1994).

CONCLUSION

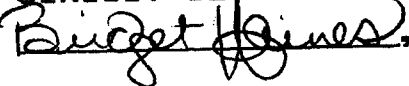
WHEREFORE, for all of the reasons stated herein, petitioner's petition for post-conviction relief is hereby denied.

IT IS SO ORDERED.

  
CIRCUIT JUDGE DAVID BURNETT

Date of Entry:

6/17/99

Criminal Bk 51 Pg 88-93  
DATE :06-18-1999  
TIME :09:20:23 AM  
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