

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1999 SESSION

FILED

January 13, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

OTHA BOMAR,

Appellant,

v.

STATE OF TENNESSEE,

Appellee.

C.C.A. No. 01C01-9808-CR-00342
M1998-00661-CCA-R3-PC
Davidson County

Honorable Walter C. Kurtz, Judge
(Post-Conviction)

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AFFIRMED

L. T. LAFFERTY, SENIOR JUDGE

OPINION

The appellant, Otha Bomar, the petitioner hereinafter, appeals the Davidson County Circuit Court's dismissal of his petition for post-conviction relief. In seeking appellate review, the petitioner presents one issue:

Whether the trial court erred in denying the petitioner's post-conviction relief petition alleging ineffective assistance of appellate counsel for failure to challenge the sufficiency of evidence on direct appeal?

After a review of the entire record, briefs of the parties and appropriate law, we AFFIRM the trial court's judgment.

PROCEDURAL HISTORY

On May 9, 1991, the petitioner was convicted of murder second degree, while employing a firearm. The trial court imposed a sentence of twenty (20) years in the Department of Correction. Upon direct appeal, the petitioner's conviction was affirmed. *State v. Bomar*, No. 01C01-9203-CC-00065, 1992 WL 365953 (Tenn. Crim. App. Dec. 10, 1992). On March 6, 1995, the petitioner filed a post-conviction relief petition with the Davidson County Circuit Court. The petitioner alleged twelve grounds, including ineffective assistance of counsel, in seeking to set aside his murder conviction. In addition, the petitioner filed two pro se petitions, and appointed counsel filed an amended petition for post-conviction relief. At the conclusion of an evidentiary hearing, the trial court made specific findings of facts on two of the twelve issues presented and found the other ten issues "without merit" without further elaboration.

Upon direct appeal, this Court in *Bomar v. State*, No. 01C01-9607-CR-00325, 1997 WL 672639 (Tenn. Crim. App. Oct. 30, 1997), *perm. app. denied* (Tenn. 1998), affirmed in part the trial court's ruling, but remanded to the trial court on the sole question of whether appellate counsel was ineffective in failing to challenge the sufficiency of the convicting evidence on direct appeal. Pursuant to the remand order, the trial court reviewed the trial transcript and found that trial counsel was not ineffective for failing to challenge the sufficiency of the convicting evidence on appeal. Further, the trial court held that the evidence at trial was sufficient to support the conviction, and, therefore, counsel could not have been ineffective for failing to raise upon an appeal a sufficiency question.

LEGAL ANALYSIS

The petitioner asserts that the trial court erred in finding that appellate counsel was not ineffective for failing to raise an appellate issue of the sufficiency of the evidence, in that the State failed to prove an essential element of the offense of murder second degree beyond a reasonable doubt. Further, the petitioner contends that appellate counsel was

deficient and that the petitioner was prejudiced by appellate counsel's failure to challenge the convicting evidence upon direct appeal. The State counters that the trial court was correct in its judgment.

On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Black v. State*, 794 S.W.2d 752, 755 (Tenn. Crim. App.), *perm. app. denied*, (Tenn. 1990). In this respect, the petitioner has the burden of illustrating how the evidence preponderates against the trial court's judgment.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is asserted, the burden is upon the petitioner to show: (1) that counsel's performance is deficient; and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial court was unreliable or the proceedings fundamentally unfair. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); See *Lockhart v. Fretwell*, 506 U.S. 364, 368-72, 113 S. Ct. 834, 842-44 (1993). The *Strickland* standard has been applied as well to the right to counsel under Article 1, Section 9, of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn.), *cert. denied*, 493 U.S. 874 (1989).

In addition, our Supreme Court in *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975), stated that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. *Id.* at 936. Further, the Supreme Court stated that the range of competence was to be measured by the duties and criteria set forth in *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974), and *United States v. DeCoster*, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). *Id.* Also, in reviewing counsel's conduct, a "fair assessment of attorney

performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Also, we note that the approach to the issue of ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown, we need not seek to determine the validity of the allegation about deficient performance. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

As in a trial, an accused in a criminal prosecution is entitled to the effective assistance of counsel in the appellate court. *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 838-88, 83 L. Ed. 2d 821 (1985). However, an accused has not been deprived of effective

assistance of counsel by counsel's failure to raise a meritless issue. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 3312-13, 77 L. Ed. 2d 987 (1983).

When reviewing a trial court's judgment, the appellate court will not disturb a verdict of guilty unless the facts in the record and inferences which may be drawn from it are insufficient as a matter of law for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. Tenn. R. App. P. 13 (e); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982); *State v. Brewer*, 932 S.W.2d 1, 19 (Tenn. Crim. App.), *perm. app. denied*, (Tenn. 1996). Initially, a defendant is cloaked with the presumption of innocence. *Tuggle*, 639 S.W.2d at 914. However, a jury conviction removes the presumption of innocence and replaces it with one of guilt, so that a convicted defendant has the burden of demonstrating that the evidence is insufficient on appeal. *Id.* In determining the sufficiency of evidence, this Court does not re-weigh or re-evaluate the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). The State is entitled to the strongest legitimate view of the evidence and all legitimate or reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992), *cert. denied*, 507 U.S. 954 (1993). It is the appellate court's duty to affirm the conviction if the evidence viewed under these standards was sufficient for any rational trier of fact to have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994), *cert. denied*, 513 U.S. 1086 (1995). This rule is applicable to findings of guilt predicated upon the direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

With these principles in mind, we must review the record to ascertain if the trial court's ruling was correct. The petitioner was accused of murdering his live-in girlfriend, Golden Beverly Mederies, on September 19, 1988. The petitioner was indicted for murder first degree, and, at the conclusion of his trial in 1991, the trial court granted the petitioner's Motion for Judgment of Acquittal as to the offense of murder first degree, but the trial court stated that there were substantial grounds for the jury to consider the offense of murder second degree.¹

In order for the petitioner to be found guilty of murder second degree while employing a firearm, the State must prove:

1. That petitioner unlawfully and willfully killed the alleged victim; and

¹We note the record reflects the trial court charged the jury with the offenses of murder second degree, voluntary manslaughter and involuntary manslaughter.

2. That the killing was malicious; and
3. That a firearm was used.

In essence, the petitioner contends that the State failed to meet its burden in establishing that the killing in this case was malicious. The trial record reflects that defense counsel insisted express malice or implied malice had not been proven by the State at the conclusion of the trial. However, the trial court found that a jury charge on implied malice was appropriate under the facts of the case. From our independent review of the trial record, there were sufficient facts to support the jury's conclusion that the petitioner maliciously killed the victim. The petitioner and the victim had some personal problems, as the petitioner testified over the victim's abuse of cocaine. At the time of the killing, the petitioner told next door neighbors that he accidentally killed the victim, but told the first police officer on the scene that the victim shot herself. The petitioner later gave a taped recorded statement to law enforcement officers as to the facts surrounding the shooting of the victim. However, in cross-examination, the petitioner denied many of his recorded statements as being truthful. Since the petitioner was the only witness to this homicide, the petitioner's credibility was a critical consideration in this case. The trial court, in its order, found that the petitioner made totally inconsistent statements as to how the victim died, and these inconsistent statements themselves raise an inference of guilt. The petitioner first said the victim shot herself and then said he accidentally shot her. Furthermore, the petitioner told the investigating officer that he told the victim that he was going to shoot her. Therefore, counsel was not ineffective for failing to raise on appeal an insufficiency of evidence issue. We agree with the trial court, thus there is no merit to this issue.

The trial court's judgment is affirmed.

L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

JOE G. RILEY, JUDGE

THOMAS T. WOODALL, JUDGE