

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1999 SESSION

FILED
January 26, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

TEDDY DALE THOMAS,)	
)	
Appellant,)	No. 03C01-9810-CR-00377
)	
v.)	Bradley County
)	Honorable Carroll L. Ross, Judge
)	
STATE OF TENNESSEE,)	(Post-Conviction)
)	
Appellee.)	

For the Appellant:

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(AT TRIAL)

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(ON APPEAL)

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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

OPINION

The petitioner, Teddy Dale Thomas, appeals as of right from the Bradley County Criminal Court's denial of his petition for post-conviction relief from his 1994 convictions for two counts of aggravated burglary, a Class C felony, and two counts of

theft over one thousand dollars, a Class D felony. He was sentenced as a Range I, standard offender to six years for each aggravated burglary count and to four years for each theft count to be served in the Department of Correction. The aggravated burglary counts are concurrent to each other but consecutive to the theft counts, which are also concurrent to each other, for an effective ten-year sentence. The sentences are consecutive to a previous sentence being served for a parole violation. This court upheld the convictions on direct appeal. State v. Teddy D. Thomas, No. 03C01-9410-CR-00394, Bradley County (Tenn. Crim. App. May 5, 1995), app. denied (Tenn. Sept. 5, 1995). The petitioner contends that he received the ineffective assistance of counsel because his attorney failed to object when a witness for the state referred to the petitioner's prior criminal record and failed to request a mistrial. We affirm the trial court's denial of relief.

This court's opinion in the direct appeal reveals that on November 13, 1992, two homeowners discovered that their homes had been burglarized. The perpetrator(s) stole jewelry from the Ramsey residence and guns and jewelry from the Ingram residence. Detectives encountered the petitioner and his cousin, Jeffrey Hall, at the garbage dumpster in their trailer park about one block from the Ramsey home. Mr. Hall began throwing garbage bags into the dumpster from the bed of his pickup truck. The petitioner got out of the truck and threw a small plastic bag into the dumpster. The detectives recognized the two men and spoke with them. Mr. Hall agreed to let the detectives search his truck and his trailer. The petitioner, who lived with Mr. Hall, agreed to let the detectives search his bedroom. Detective Matthews found guns under the petitioner's mattress. When he called out to the other detective, the petitioner fled the trailer. The detectives also found jewelry in a small plastic bag in the dumpster. The guns and jewelry were identified as those stolen in the burglaries.

At trial, the petitioner testified that he was with his mother until noon on the day of the burglaries. He said he told Detective Matthews that he purchased the guns from two individuals. He testified that after these individuals were arrested, he recanted this statement because he did not want the individuals to be arrested for a crime they did not commit. He said he ran from the trailer because he thought Detective Matthews had found the marijuana that was in his bedroom.

At the post-conviction evidentiary hearing, the petitioner's trial attorney, an assistant public defender, testified that he represented the petitioner at trial and on direct appeal. He said he had represented the petitioner in other matters before this case. He stated that although he had no record of the precise number of meetings with the petitioner, he met with him several times. He said the petitioner was adamant that he was not guilty. He said he believed that the petitioner had to explain why the stolen guns were in his room and why he fled. He stated that it was his strategy to have the petitioner testify at trial. He said that he discussed this with the petitioner before trial and that the petitioner wanted to testify.

The attorney testified that the state gave notice that it intended to impeach the petitioner with his prior criminal record. He said he secured a pretrial ruling that the petitioner could not be cross-examined with his prior burglary convictions because the prejudicial effect outweighed their probative value. However, the trial court ruled that the petitioner's prior convictions for felony escape and theft could be used for impeachment. The attorney said he advised the petitioner that if he testified, his theft conviction would be exposed.

The attorney testified that he objected when Detective Matthews testified that "Teddy was being Teddy, sort of evasive or withdrawn" but that the trial court overruled the objection. He said he did not object when Detective Matthews later testified that the petitioner had a criminal record and was not allowed to possess a gun. He said that not objecting contemporaneously to these statements was a mistake on his part. He said he knew that Detective Matthews suspected the petitioner in a number of residential burglaries. He said he believed that Detective Matthews was attempting to prejudice the petitioner with his prior record. He admitted that Detective Matthews did not testify that the petitioner had been convicted or mention any specific crimes. He said he moved for a mistrial after Detective Matthews' testimony, but the court denied the motion as untimely. He said he raised this issue on appeal, but the appellate court did not reach the merits of the issue, holding that an objection must be made contemporaneously to the statement.

The petitioner testified that he decided to take the stand at trial only because everything had already been disclosed during the state's proof when the

detective testified. He said that whether he testified was his decision but that his attorney advised him that he should testify.

The trial court found that Detective Matthews' statements about the petitioner's criminal record would not have been grounds for a mistrial even if the petitioner's attorney had objected contemporaneously. The trial court found that the detective's testimony that the petitioner was evasive was relevant to show the petitioner's demeanor while being questioned about the crimes. The trial court equated Detective Matthews' testimony that he took possession of the guns because the petitioner was not supposed to have guns with an officer testifying that he stopped someone because he knew that person was driving on a revoked license. Regarding the statement that the petitioner had a criminal record, the court found that the detective never mentioned a specific crime. It said that no information about any crime other than the one that the trial court had ruled admissible ever came into evidence. The court found that in light of the state's evidence, the petitioner had to explain his possession of the recently stolen items. It noted that the petitioner did testify, thereby putting his prior criminal record at issue. It held that the petitioner received the effective assistance of counsel.

The petitioner contends that he received the ineffective assistance of counsel because his attorney failed to object and to request a mistrial contemporaneously with the following testimony by Detective Matthews:

Prosecutor: And how would you describe the defendant's demeanor?

Detective Matthews: Teddy was being Teddy, sort of evasive or withdrawn.

.....

Detective Matthews: [We went] back to the scene and, to the scene of the dumpster, and got the guns, you know we had the guns. We'd taken possession of the guns. I knew that Teddy was not supposed to be in possession of guns and that he was not allowed to be. And so we took possession of the guns. .

....

.....

Defense Counsel: Mr. Matthews, you've been a detective a long time. You're familiar with some of the people that Mr. Hall said stayed [in his trailer]. You're familiar with Mr. Stanley Adams, aren't you?

Detective Matthews: Yes, sir.

Defense Counsel: He's got a prior criminal record.

Detective Matthews: Yes, sir.

Defense Counsel: Rather extensive. Doyle Hall, the brother of Jeffrey Hall, he's got a criminal record, correct?

Detective Matthews: You're, you know, all these people have got prior criminal records. So does Teddy Thomas.

The petitioner argues that he was prejudiced by his attorney's failure to object contemporaneously because it prevented the trial court from granting him a mistrial and this court from reviewing the merits of the issue on direct appeal. The state contends that the petitioner suffered no prejudice because the jury heard evidence of the petitioner's criminal record during the petitioner's testimony.

When a claim of ineffective assistance of counsel is made under the Sixth Amendment, the burden is upon the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial 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. 838, 842-44 (1993). The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n. 2 (Tenn. 1989).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court held 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. Further, the 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). 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; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

We also note that the approach to the issue of the 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 allegations about deficient performance. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The petitioner must show both deficiency and prejudice by clear and convincing evidence. See Tenn. Code Ann. § 40-30-210(f). Our long-standing standard of review on appeal has bound us to the trial court's findings of fact unless we conclude that the evidence preponderated against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). Our traditional standard prevented us from reweighing or reevaluating the evidence, or substituting our own inferences for those drawn by the trial court. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Questions concerning the credibility of witnesses and the weight and value to be given to their testimony were resolved by the trial court, not this court. Id. However, while reaffirming this standard for purely factual issues, our supreme court recently stated that "the issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact" requiring a de novo review by this court. State v. Brenda Anne Burns, W1996-0004-SC-R11-CD, Henry County, slip op. at 12 (Tenn. Nov. 8, 1999) (for publication). Previously, this court held that it would give due deference to the trial court's findings regarding the ineffective assistance of counsel under the well-settled standard set forth in Henley. Richard C. Taylor v. State, No. 01C01-9707-CC-00384, Williamson County, slip op. at 26 (Tenn. Crim. App. July 21, 1999). In any event, we believe that both standards yield the same result in this case.

Initially, we note that the petitioner's attorney did object contemporaneously to Detective Matthew's characterization of the petitioner as evasive. Despite the attorney's recollection otherwise at the evidentiary hearing, the trial transcript reveals that the trial court sustained this objection. Thus, no argument exists that the petitioner's attorney was deficient with regard to this statement.

With regard to the other two references to the petitioner's criminal record, we question whether the trial attorney's request for a mistrial after Detective Matthews concluded his testimony was untimely. In State v. Pilkey, our supreme court held that

the “mere fact that the objection of counsel was made after the witness had testified does not constitute a waiver” unless “counsel also fails to make a timely motion to strike.” 776 S.W.2d 943, 952 (Tenn. 1989). The purpose of a motion to strike is to have the court remove evidence from the jury’s consideration. Id. “It can serve as a late objection or a renewed objection, or it can serve to strike evidence which had previously been conditionally admitted when the condition has not later been met.” Id. at 953. A motion to strike can be made properly at any point before both parties rest their case. Id. at 952. In Pilkey, the defendant objected to a video-taped interview of the victim, which had been played for the jury, because the victim was unsworn. Although not characterized by the defense counsel as a motion to strike, the court held that the objection had the same effect. Id. at 953. “Pilkey . . . [stands] for the proposition that, despite counsel’s failure to make a contemporaneous objection, the court should permit a motion to strike to be made later in the proceedings if the integrity of the trial would not be compromised by the delay.” Neil P. Cohen et al., Tennessee Law of Evidence § 103.3 (3d ed. 1995).

In this case, the court called a recess immediately following Detective Matthews’ testimony. After the jury left the courtroom, the petitioner’s attorney requested a mistrial based upon the detective’s testimony that the petitioner was evasive, was not supposed to possess guns, and had a criminal record. As with a motion to strike, the attorney’s request for a mistrial was based upon the impropriety of evidence that the jury had already heard. The motion was made immediately after the offending witness’s testimony and well before the close of the evidentiary record. Furthermore, the failure to object contemporaneously did not prevent the state from curing any problems with the challenged testimony through further questioning. We believe that the attorney’s request for a mistrial was timely and, therefore, was not deficient performance.

In any event, we also conclude that Detective Matthews’ references to the petitioner’s criminal record did not prejudice the petitioner. The trial court had ruled that the petitioner’s prior conviction for theft was admissible. The petitioner testified and admitted to this conviction during direct examination. On cross-examination, the state introduced a copy of the Georgia felony theft conviction into evidence. We note that the

petitioner had to testify in order to present his defense that he did not know how the stolen guns came to be under his mattress and that he fled the trailer because he thought Detective Matthews had discovered marijuana in his room. We hold that the petitioner was not prejudiced by Detective Matthews' nonspecific references to his criminal record because the jury heard evidence of the petitioner's prior conviction for felony theft during the petitioner's testimony. Thus, the petitioner did not receive the ineffective assistance of counsel.

Based upon the foregoing and the record as a whole, we affirm the trial court's denial of the petition for post-conviction relief.

Joseph M. Tipton, Judge

CONCUR:

Jerry L. Smith, Judge

Thomas T. Woodall, Judge