

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**

**AT NASHVILLE**

**JULY 1999 SESSION**

**FILED**

**March 3, 2000**

**Cecil Crowson, Jr.  
Appellate Court Clerk**

**BILLY MERLE MEEKS,**

Appellant,

v.

**STATE OF TENNESSEE,**

Appellee.

\* C.C.A. NO. 01C01-9804-CC-00134  
\* M1998-00791-CCA-R3-PC  
\* GRUNDY COUNTY

\* Hon. J. Curtis Smith, Judge

\* (Post-Conviction)

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OPINION FILED: \_\_\_\_\_

AFFIRMED

NORMA MCGEE OGLE, JUDGE

**OPINION**

The petitioner, Billy Merle Meeks, appeals the dismissal of his petition for post-

conviction relief by the Grundy Circuit Court on February 9, 1998. The petitioner was convicted of aggravated kidnapping, especially aggravated robbery, aggravated burglary, and extortion in the Grundy County Circuit Court in August 1990. The petitioner received an effective sentence of thirty-nine years in the Department of Correction. The petitioner appealed and this court affirmed the petitioner's convictions and sentence in August 1993. See State v. Meeks, 867 S.W.2d 361 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1993). The petitioner filed a timely petition for post-conviction relief on September 8, 1995. The petitioner amended the petition four times to allege additional grounds. After hearing evidence raised by the petition, the post-conviction court filed a memorandum opinion dismissing the petition. On appeal the petitioner presents the following issues for our consideration:

1. Whether the prosecutors withheld evidence in violation of Brady v. Maryland and Jencks v. United States;
2. Whether the post-conviction trial court erred by dismissing the petitioner's claims that he was denied due process through the failure of the government to prove beyond a reasonable doubt the facts necessary to constitute the charged offenses;
3. Whether the trial court erred by imposing a sentence of thirty-nine years;
4. Whether the trial court's failure to instruct the jury on all lesser included offenses deprived the petitioner of a fair trial;
5. Whether the trial court's instruction to the jury on the definition of reasonable doubt deprived the petitioner of a fair trial in violation of the Eighth and Fourteenth Amendments;
6. Whether the petitioner received ineffective assistance of counsel.

Following a thorough review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

#### **A. Brady and Jencks Violations**

The petitioner argues that the prosecution intentionally withheld known exculpatory evidence during the discovery process and during trial in violation of Brady v. Maryland, 373 U.S. 83 (1963) and Jencks v. United States, 353 U.S. 657 (1957). The information alleged to have been withheld involves Larry Davis, a Tennessee Bureau of Investigation officer, who petitioner claims withheld prosecution witnesses' statements.

Under the Post-Conviction Procedure Act, the petitioner bears the burden in post-

conviction proceedings of proving the allegations in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f) (1997). In order to prove a due process violation under Brady v. Maryland, 373 U.S. 83 (1963), the petitioner must show that (1) he requested the allegedly withheld information, (2) the State suppressed the information, (3) the information was favorable to the accused, and (4) the information was material. State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). The petitioner claims that the State failed to deliver prosecution witnesses' statements which would have been favorable to his defense. However, on this issue we find that the petitioner has failed to sustain his burden of proving his factual allegations by clear and convincing evidence. See Seagroves v. State, No. 01C01-9711-CC-00553, 1999 WL 233543, at \*1-3 (Tenn. Crim. App. at Nashville, April 22, 1999).

Additionally, under the Post-Conviction Procedure Act, waiver occurs if "the petitioner personally or through an attorney failed to present [the ground] for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-206(g) (1997). Waiver in a post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney. House v. State, 911 S.W.2d 705, 714 (Tenn. 1996); Strader v. State, No. 03C01-9611-CC-00433, 1998 WL 6932, at \*1 (Tenn. Crim. App. at Knoxville, January 8, 1998), perm. to app. denied (Tenn. 1998). The presumption that a ground not raised has been waived is rebuttable. Tenn. Code Ann. § 40-30-206(g). In order to rebut the presumption, the petition must contain "allegations of fact supporting each claim for relief set forth in the petition and allegations of fact explaining why each ground was not previously presented in any earlier proceeding." Tenn. Code Ann. § 40-30-204(e) (1997).

The petitioner alleges that during the police investigation, Officer Davis took statements from the victim and other witnesses and that portions of the statements were redacted from the copies provided to the petitioner. The portion of the trial transcript submitted with the post-conviction petition reflects that at trial, defense counsel questioned Officer Davis about these statements and asked for copies of the original statements. However, there is no proof that such statements ever existed. Following the trial, the petitioner failed to raise these alleged Brady and Jencks violations on direct appeal. See State v. Meeks, 867 S.W.2d 361. Therefore, this issue is waived. Tenn. Code Ann. § 40-30-206(g).

## B. Sufficiency of the Evidence

The petitioner argues that he was denied due process by the failure of the government to prove beyond a reasonable doubt the facts necessary to constitute the charged offenses. Essentially, the petitioner is attempting to challenge the sufficiency of evidence in a post-conviction petition. In Tennessee, post-conviction proceedings are not available to test the sufficiency of the evidence at the original trial, nor to inquire into the question of guilt or innocence, nor to test the competency or incompetency of original trial witnesses. Shepherd v. State, 533 S.W.2d 335, 338 (Tenn. Crim. App. 1975); see also Brotherton v. State, 477 S.W.2d 522, 524 (Tenn. Crim. App. 1971); Myers v. State, 462 S.W.2d 265, 267 (Tenn. Crim. App. 1970). Therefore, this issue is without merit.

## C. Sentencing

The petitioner argues that the trial court erred by imposing a sentence of thirty-nine years incarceration. First, the petitioner argues that the trial court misapplied two enhancement factors. Additionally, the petitioner argues that the trial court entered an erroneous judgment and sentence in the aggravated kidnapping conviction.

With reference to the petitioner's issues alleging sentencing errors, our law provides that "[t]here is no appellate review of the sentence in a post-conviction . . . proceeding." Tenn. Code Ann. § 40-35-401(a) (1997). The petitioner has failed to challenge that the sentence is void or voidable because of the abridgement of any right guaranteed by the Tennessee or United States Constitutions. Tenn. Code Ann. § 40-30-203 (1997); Terrell v. State, No. 02C01-9806-CC-00190, 1998 WL 726542, at \*2 (Tenn. Crim. App. at Jackson, October 16, 1998). Therefore, post-conviction is unavailable.

Furthermore, we note that the sentencing errors alleged by the petitioner have been previously determined by this court. Tenn. Code Ann. § 40-30-206(h) (1997). See State v. Meeks, 867 S.W.2d 361. In the petitioner's direct appeal, this court addressed the petitioner's sentence, and after careful consideration of all the issues, affirmed the trial court's imposition of a sentence of thirty-nine years incarceration.<sup>1</sup>

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<sup>1</sup>We also note that the petitioner has failed to include the transcript of the sentencing hearing or the judgment forms in his petition for post-conviction relief.

#### **D. Lesser Included Offenses**

The petitioner argues that the trial court's failure to instruct the jury on all lesser included offenses deprived the petitioner of a fair trial. Specifically, the petitioner contends that after the trial court reduced the petitioner's indicted charge of especially aggravated burglary to aggravated burglary, the trial court erred by not instructing the jury on any lesser included offenses to aggravated burglary. We note that the petitioner has failed to include a transcript of the jury instructions in his petition for post-conviction relief. In any event, this issue is not an appropriate issue for post-conviction relief. Tenn. Code Ann. § 40-30-203 (1997); Keaton v. State, No. 01C01-9704-CR-00146, 1998 WL 485559, at \*3 (Tenn. Crim. App. at Nashville, August 18, 1998) (citing Overton v. State, 874 S.W.2d 6, 12 (Tenn. 1994)). Furthermore, even if this issue were proper, this issue is waived because of petitioner's failure to raise it at trial or on direct appeal. Tenn. Code Ann. § 40-30-206(g) and -210(f) (1997); Stampley v. State, No. 02C01-9707-CR-00288, 1998 WL 765711, at \*2 (Tenn. Crim. App. at Jackson, November 4, 1998).

#### **E. Reasonable Doubt Jury Instruction**

The petitioner argues that the trial court's instruction to the jury on the definition of reasonable doubt deprived the petitioner of a fair trial in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Specifically, the petitioner alleges that the trial court erroneously referred to "moral certainty" in the definition of reasonable doubt. Once again, we note that this issue has been waived as a result of petitioner's failure to raise it in his direct appeal. Notwithstanding waiver of this issue, our supreme court has upheld the use of jury instructions including the phrase "moral certainty." Carter v. State, 958 S.W.2d 620 (Tenn. 1997); State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994); see also Gaylor v. State, No. 03C01-9702-CR-00066, 1999 WL 817462, at \*3-4 (Tenn. Crim. App. at Knoxville, September 30, 1999). Therefore, this issue is without merit.

#### **F. Ineffective Assistance of Counsel**

The petitioner argues that he received ineffective assistance of counsel. We initially note that the petitioner bears the burden in post-conviction proceedings of proving the allegations in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f) (1997). In other words, if afforded a post-conviction evidentiary hearing, a petitioner must do more than merely present

evidence tending to show incompetent representation. Billbrey v. State, No. 03C01-9711-CR-00498, 1998 WL 827080, at \*2 (Tenn. Crim. App. at Knoxville, December 1, 1998), perm. to appeal denied, (Tenn. 1999). Additionally, the findings of fact of the post-conviction court are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence in the record preponderates against those findings. Henley v. State, 960 S.W.2d 572, 578-579 (Tenn. 1997), cert. denied, \_\_\_ U.S. \_\_\_, 119 S.Ct. 82 (1998); Bates v. State, 973 S.W.2d 615, 631 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1997), cert. denied, \_\_\_ U.S. \_\_\_, 118 S.Ct. 2067 (1998).

The post-conviction court in this case concluded that the petitioner had received the effective assistance of counsel. Accordingly, this court must determine whether the evidence preponderates against the post-conviction court's findings (1) that counsel's performance was within the range of competence demanded of attorneys in criminal cases, Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), and (2) that any deficient performance did not prejudice the petitioner. Strickland v. Washington, 466 U.S. 668, 687-697, 104 S.Ct. 2052, 2064-2069 (1984). See also Henley, 960 S.W.2d at 579-580; Powers v. State, 942 S.W.2d 551, 557 (Tenn. Code. Ann. 1996). Courts need not address these components in any particular order or even address both if the petitioner fails to meet his burden with respect to one. Henley, 960 S.W.2d at 580.

In evaluating counsel's performance, this court should not examine every allegedly deficient act or omission in isolation, but rather in the context of the case as a whole. State v. Mitchell, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The primary concern of the court should be the fundamental fairness of the proceeding whose result is being challenged. Id. (citation omitted). Therefore, this court should not second-guess tactical and strategic decisions by defense counsel. Henley, 960 S.W.2d at 579. Instead, this court must reconstruct the circumstances of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time. Id. See also Irick v. State, 973 S.W.2d 643, 652 (Tenn. Crim. App.), perm. to appeal denied, (Tenn.), cert. denied, \_\_\_ U.S. \_\_\_, 119 S.Ct. 219 (1998). Moreover, the fact that a strategy or tactic failed or hurt the defense does not alone support the claim of ineffective assistance of counsel. Thompson v. State, 958 S.W.2d 156, 165 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1997); Dickerson v. State, No. 03C01-9710-CR-00472, 1998 WL 619110, at \*1 (Tenn. Crim. App. at Knoxville, September 16, 1998), perm. to appeal denied, (Tenn. 1999).

In sum, a defendant is not entitled to perfect representation, only constitutionally adequate representation. Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). Thus, we have observed:

In order to pass constitutional muster, counsel need not discover every possible item of information before trial, make every possible objection during trial, or use every trial tactic which petitioner would in retrospect, now require ... .

Allen v. State, No. 960, 1991 WL 154520, at \*2 (Tenn. Crim. App. at Knoxville, August 14, 1991).

If the petitioner establishes that counsel's performance was not within the requisite range of competence, his task is not complete. He must also demonstrate a reasonable probability that the result of the proceeding would have been different but for the defective performance of counsel. Henley, 960 S.W.2d at 580.

"A court must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect ... ."

Id. (citations omitted). With these general principles in mind, we address the petitioner's specific allegations of ineffective assistance of counsel.

The petitioner makes numerous allegations of ineffective assistance of counsel. The petitioner argues that trial counsel failed to (1) protect the petitioner's rights during the preliminary stages of the trial, (2) confer with him, (3) properly investigate the case, (4) keep the petitioner informed, (5) pursue new evidence, and (6) properly argue various motions in the trial court. The trial court correctly concluded that these grounds for post-conviction relief are simply unsupported conclusory allegations and subject to dismissal. The Post-Conviction Procedure Act states: "A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition. Tenn. Code Ann. § 40-30-206(d) (1997). See also Cone v. State, 927 S.W.2d 579, 581 (Tenn. Crim. App. 1995). Moreover, other allegations under the guise of ineffective assistance of counsel, prosecutorial misconduct, and judicial misconduct relate to the sufficiency of the indictment and sufficiency of the evidence which cannot be challenged in a post-conviction petition. Shepherd v. State, 533 S.W.2d 335, 338 (Tenn. Crim. App. 1975); see also

Brotherton v. State, 477 S.W.2d 522, 524 (Tenn. Crim. App. 1971); Myers v. State, 462 S.W.2d 265, 267 (Tenn. Crim. App. 1970).

The petitioner also argues that trial counsel failed to challenge juror Michael Perry after the petitioner allegedly informed counsel of Perry's potential prejudice against him. As a result, the petitioner contends that he was denied his constitutional right to a fair trial by a jury of twelve unbiased and impartial men.

The findings of fact of the post-conviction court are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence in the record preponderates against those findings. Henley, 960 S.W.2d at 578-579. After a thorough reading of the record, including the transcript of the voir dire proceedings, we agree with the post-conviction court that the record does not support the petitioner's allegations.

The petitioner argues that during voir dire Perry misrepresented his knowledge of the victim's and the petitioner's background. The record of the voir dire proceedings reflects that Perry admitted that he knew all of the parties on a "casual" basis. Perry also repeatedly stated that he knew nothing about the case, did not have a preconceived opinion of the petitioner's guilt or innocence, and would have an open mind if selected to be a juror. The record also reflects that the petitioner and his family knew Perry and Perry's background. Furthermore, petitioner's trial counsel testified at the post-conviction hearing that he does not recall the petitioner expressing any reservations about Perry before, during, or after trial. Trial counsel's notes indicate that he had discussed Perry as a potential juror with the petitioner and the petitioner's mother and that Perry was acceptable to them. Trial counsel testified that as to Perry, his notes state, "Bill thinks okay." Moreover, notes made by trial counsel's investigator indicated "Keep on jury." Because the evidence presented to the trial court fails to reflect juror misconduct, ineffective assistance of counsel, or resulting prejudice, this ground will not afford the petitioner relief. Strickland, 466 U.S. at 687-688; Rhinerson v. State, No. 02001-9608-CG-00265, 1997 WL 327616, at \*6-9 (Tenn. Crim. App. at Jackson, June 17, 1997).

The petitioner also argues that trial counsel failed to call certain witnesses, thereby suppressing facts and evidence favorable to the guilt and punishment of the petitioner. Specifically,

the petitioner claims that counsel was ineffective for failing to call Charles Anderson, Officer Ron Reeves, and Officer Rodney Banks. However, the petitioner did not present any of these witnesses to testify at his post-conviction hearing. Therefore, except for petitioner's testimony and the testimony of his sisters, which the post-conviction court found not credible, we do not know what the purported witnesses would have said. "It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of . . . what a witness' testimony might have been if introduced by defense counsel." Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). By failing to present these witnesses at the post-conviction hearing, the petitioner failed to prove that he suffered prejudice from trial counsel's failure to subpoena certain witnesses. Strickland, 466 U.S. at 687-688 This issue lacks merit.

Accordingly, the judgment of the trial court is affirmed.

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Norma McGee Ogle, Judge

CONCUR:

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Jerry L. Smith, Judge

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Thomas T. Woodall, Judge