

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

APRIL SESSION, 1996

RONNIE BARBER,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. NO. 02C01-9411-CC-00245

DYER COUNTY

HON. CREED MCGINLEY
PRESIDING JUDGE

(Post-Conviction Relief)

FILED

November 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Ronnie Dale Barber appeals the judgment of the Dyer County Circuit Court denying his petition for post-conviction relief. On September 12, 1986, a jury found Appellant guilty of second degree burglary, robbery by use of a deadly weapon, and first degree murder during the perpetration of a larceny. As a Range I standard offender, Appellant received consecutive sentences of eight years for the burglary conviction, twenty years for the robbery conviction, and life imprisonment for the murder conviction. On January 6, 1988, this Court affirmed the convictions and the sentences of the trial court. On February 24, 1989, Appellant filed a petition for post-conviction relief in the Dyer County Circuit Court. Following an evidentiary hearing, the trial court denied the petition. In this appeal of that decision, Appellant alleges that his trial counsel provided constitutionally ineffective assistance. In support of this allegation, Appellant argues that his trial counsel (1) failed to call certain defense witnesses, (2) improperly moved for a change of venue and employed delaying tactics, (3) failed to request that the trial judge recuse himself, and (4) failed to raise certain meritorious issues on direct appeal.

After a review of the record, we affirm the judgment of the trial court.

In a petition for post-conviction relief, the petitioner must establish his or her allegations by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court are conclusive on appeal unless the evidence preponderates against those findings. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). In

reviewing a denial of collateral relief, this Court is bound by the following well-established rules of appellate review:

(1) this court cannot reweigh or reevaluate the evidence or substitute its inferences for those drawn by the trial judge, (2) questions concerning the credibility of witnesses, weight and value to be given their testimony, and factual issues raised by evidence are resolved by the trial judge, and (3) on appeal, the petitioner has the burden of demonstrating why the evidence contained in the record preponderates against the judgment entered by the trial judge.

Taylor v. State, 875 S.W.2d 684, 686 (Tenn. Crim. App. 1993) (citing Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990)).

When a petition for post-conviction relief alleges ineffective assistance of counsel, the petitioner has the burden of establishing (1) deficient representation and (2) prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686 (1984); Barr v. State, 910 S.W.2d 462, 464 (Tenn. Crim. App. 1995). Deficient representation occurs when counsel provides assistance that falls below the range of competence demanded of criminal attorneys. Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim App. 1991). Prejudice is the reasonable likelihood that, but for deficient representation, the outcome of the proceedings would have been different. Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994).

I.

Appellant first argues that his trial counsel was ineffective in failing to call certain defense witnesses, most particularly Appellant's sister Diane Barber. Appellant maintains that his trial counsel was informed of potential witnesses such as Ms. Barber who would have impeached the testimony of

State witness Steve Lybarger and who would have suggested that Lybarger, rather than Appellant, committed the offenses. The trial attorney testified that he fully investigated the case to the best of his ability and that he spoke to every significant State witness and to every person suggested by Appellant. Following the evidentiary hearing, the trial court found that the trial counsel was “extremely thorough” and “zealously pursued all legal and practical avenues open to the defendant.”

The decision to call or not to call a witness is a tactical decision entrusted to the discretion of the trial counsel. State v. Kerley, 820 S.W.2d 753, 756 (Tenn. Crim. App. 1991). Here, the trial counsel testified that, after interviewing Ms. Barber as well as other potential witnesses suggested by Appellant, he concluded that their testimony would actually damage Appellant’s case. As a result, he made the tactical decision not to call them as witnesses. A tactical decision made at trial will not be judged by hindsight unless there is no rational basis for the decision. Id. The fact that the testimony of these potential witnesses was, according to the trial attorney, inculpatory of Appellant qualifies as a rational basis for the decision not to call them. Furthermore, no prejudice is demonstrated where a post-conviction petitioner fails to show that potential defense witnesses, who were not called by trial counsel, would have testified favorably. See Taylor v. State, 875 S.W.2d 684, 687 (Tenn. Crim. App. 1994). Appellant has failed to make such a showing here.

II.

Appellant argues that his trial lawyer rendered ineffective representation by moving for a change of venue from Lake County, where the offenses occurred, to Dyer County. He contends that he did not consent to such a change of venue and that his trial counsel was coerced to do so by the trial court. According to the Tennessee Rules of Criminal Procedure, venue is determined by the location of the offense. Tenn. R. Crim. P. 18(a). However, in criminal prosecutions, venue may be changed if, “due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial could not be had.” Id. 21(a).

Appellant and his brother were both charged with the brutal murder of a “reasonably well-known” Lake City woman. Prior to Appellant’s case coming to trial, a Lake County jury tried, convicted, and sentenced the brother to death. At the outset of Appellant’s trial, the trial court expressed concern over the pretrial publicity surrounding the case and the potential difficulty in impaneling an impartial jury in Lake County. However, it was Appellant’s belief that a Lake County jury would be more familiar with the killing and his brother’s conviction and, as a result, would be more likely to find him not guilty because, as Appellant maintained, “two people can’t kill one person.” Essentially, Appellant believed that the pretrial publicity would help exonerate him. Despite this questionable premise, the trial counsel, in an effort to delay conviction, initially supported Appellant’s wish to remain in Lake County. When it became apparent that an impartial jury could not be impaneled in Lake County, the trial court admonished counsel for the delaying tactics and suggested a change of venue. The trial attorney testified that, at this point, he “encouraged [Appellant] to accept [the change of venue], which is what we

did, and we moved the case.” The trial counsel further testified that he was neither coerced nor intimidated by the trial court to move for a change of venue.

The trial court found that, after full consultation with his attorney, Appellant conceded that the change of venue was proper and the only way to select a fair and impartial jury. Appellant has failed to present evidence that preponderates against this finding. Furthermore, Appellant has failed to show that he was prejudiced in any way by this change of venue.

Appellant also argues that his defense was prejudiced by his lawyer’s delaying tactics. The trial court noted that the length of time from commission of the crime to conviction was less than seven months. The trial court found that this length of time did not reflect an unreasonable delay, and we agree. Furthermore, the record shows that any delay was due to Appellant’s misguided wish to remain in Lake County for trial. Once Appellant agreed to a change of venue, the trial proceeded without further delay. This allegation does not reflect deficient representation on the part of Appellant’s trial counsel, nor is it accompanied by a showing of prejudice.

III.

Appellant next argues that his trial counsel rendered ineffective assistance by failing to request that the trial judge recuse himself. Prior to trial, the trial judge informed Appellant and his trial counsel that he had represented the victim in an uncontested divorce several years before. Appellant testified that his attorney made the decision to not seek recusal of

the trial judge without discussing the matter with him. However, trial counsel testified that, after full consultation, Appellant made the decision to accept the trial judge. The trial attorney further testified that the trial judge was “eminently fair” in presiding over the pre-trial and trial proceedings. Having heard the evidence on this issue, the trial court found that counsel properly discussed the matter with Appellant and that Appellant waived this issue when he made the decision to accept the trial judge. Appellant has presented no evidence that preponderates against this finding. Furthermore, Appellant has demonstrated absolutely no prejudice from the performance of the trial judge.

IV.

Finally, Appellant argues that his trial counsel failed to raise certain meritorious issues on appeal. Appellant maintains that his inculpatory statement regarding the offenses was taken in violation of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel and that his trial counsel was ineffective in failing to raise these issues on appeal. The record reveals that, when Appellant was arrested, he was taken to a holding cell at the Lake County Sheriff’s Department. During his first interview with authorities, Appellant was advised of his Miranda rights and chose to either remain silent or to make a non-inculpatory statement. During his second interview, Appellant was again advised of his rights and, at this point, requested an attorney. Appellant was then returned to his cell. Soon thereafter, he became agitated and requested an opportunity to make a statement. He was again advised of his rights but, in a tape-recorded statement, chose to waive those rights and discuss his involvement in the

crimes. Appellant argues that, because he was held in a cell without light, fresh air, or food, the waiver of his Miranda rights was not made “voluntarily, knowingly, and intelligently.” See State v. Smith, 834 S.W.2d 915, 918 (Tenn. 1992). Appellant further argues that, having requested an attorney, he could not properly waive his rights without first having consulted with an attorney.

According to the Post-Conviction Procedure Act, a claim that has been previously determined must be dismissed. Tenn. Code. Ann. § 40-30-206(f) (Supp. 1995); see Caruthers v. State, 814 S.W.2d 64, 69-70 (Tenn. Crim App. 1991). The Act also provides the following:

A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

Id. § 40-30-206(h). While not specifically argued on direct appeal, this Court addressed the constitutionality of Appellant’s statement in affirming his conviction. This Court found that “[t]he record amply demonstrates that [Appellant] voluntarily reinitiated communication with the police after asking for an attorney . . . [and] that [Appellant] understood his rights and, nevertheless, intelligently and knowingly chose to admit his involvement in the crime.” State v Barber, No. 9, 1988 WL 620, at *2 (Tenn. Crim. App. Jan. 8, 1988) (citations omitted). In its order denying post-conviction relief, the trial court concluded that, in light of this Court’s finding on direct appeal, these constitutional claims were previously determined and therefore subject to dismissal. We agree and therefore decline to re-examine Appellant’s claims regarding his inculpatory statement.

We now turn to Appellant's ineffective assistance allegation that the claims regarding his inculpatory statement should have been argued on direct appeal. The determination of which issues to present on appeal is "a matter which addresses itself to the professional judgment and sound discretion of the appellate counsel." Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993). Here, the trial counsel testified that, in an effort to enhance his credibility with the Court of Criminal Appeals, he only argued his strongest issues on appeal. The trial counsel further testified that he could find no authority to support the proposition that Appellant could not change his mind, uninvoke his rights, and make a statement to authorities. Indeed, once an accused invokes the right to counsel, further interrogation is only proper where the accused initiates the communication, which appears to be the case here. State v. Bates, 804 S.W.2d 868, 874 (Tenn.), cert. denied, 502 U.S. 841 (1991) (citing Edwards v. Arizona, 451 U.S. 477, 484-485 (1981)). Given the lack of any authority supporting Appellant's position and the fact that the issues were "vigorously litigated" at trial, the trial counsel was acting within his discretion in deciding not to argue these issues on appeal. Furthermore, in light of this Court's decision to address the issues on direct appeal, Appellant was not prejudiced in any way.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

PAUL G. SUMMERS, JUDGE