IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

FILED

February 27, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JIMMY LESLIE SLUDER,	)	**C.C.A. NO. 03C01-9605-CR-00184**
	)	
Appellant,	)	
	)	**KNOX COUNTY**
VS.	)	
	)	**HON. RICHARD R. BAUMGARTNER, JUDGE**
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	**(POST-CONVICTION)**

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF KNOX COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Petitioner appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure from the denial of his petition for post-conviction relief by the Knox County Criminal Court. We affirm the judgment of the trial court.

On June 17, 1987, the Petitioner drifted into the oncoming lane of traffic and swerved to miss hitting an oncoming automobile. Upon swerving, the Petitioner ran off the road, onto the sidewalk, and hit two boys riding their bicycles and the corner of a house before coming to a stop. One of the boys was killed and the other was injured. There were three passengers riding with the Petitioner. When the car came to a stop, the Petitioner fled on foot, but the passengers stayed and answered the questions of the police officers at the scene. The Petitioner was apprehended soon after the accident and had a blood alcohol level of .31.

The Petitioner was indicted for eleven counts in connection with the incident. At the trial, before commencement of proof, but after the jury had been sworn, and in the presence of the jury, the Petitioner's attorney entered pleas of guilty to all counts of the indictment, except the count charging second degree murder, to which trial counsel pled Petitioner not guilty. The trial court sent the jury out and advised the Petitioner of his constitutional rights as required by State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), when a plea of guilty is entered. The Petitioner signed a written plea of guilty to all counts except second degree

murder. The trial court made it clear that the pleas of guilty were not being accepted at that time, but were being held in abeyance pending the outcome of the trial. After the jury returned a verdict of guilty for second degree murder, the trial court dismissed several counts of the indictment with the agreement of the state. The trial court set aside the Petitioner's guilty pleas to the counts dismissed and accepted the guilty pleas to the remaining counts of the indictment.

The final result of the trial was that the Petitioner was convicted by the jury of second degree murder, and pled guilty to one charge of aggravated assault, one charge of driving on a revoked driver's license, and two charges of leaving the scene of an accident, one charge for each victim. He was sentenced to fifty years as a Range II offender on the second degree murder conviction. On the charges to which he pled guilty, he was sentenced to six years as a Range II offender for the aggravated assault run consecutively to the fifty year sentence, two years each for the leaving a scene of an accident charges to run concurrently with the aggravated assault sentence and six months for the driving with a revoked license, also to run concurrently with the aggravated assault charge. He received an effective sentence of fifty-six (56) years.

The Petitioner appealed his convictions unsuccessfully to this court in State v. Jimmy L. Sluder, No. 1236, Knox. County (Tenn. Crim. App., Knoxville, filed March 14, 1990). One of the issues raised on direct appeal was that the Petitioner received ineffective assistance of counsel. However, this court declined to address that issue on direct appeal. The Tennessee Supreme Court denied the Petitioner's application for permission to appeal in June of 1990.

The Petitioner filed a pro se post-conviction petition in February of 1991. The Petitioner was appointed counsel and the post-conviction hearing was held in the trial court on November 16, 1995. The trial court's order was entered January 18, 1996, and a timely notice of appeal was filed.

The Petitioner argues three issues in his petition for post-conviction relief. The first issue is whether the Petitioner was afforded the effective assistance of counsel when his trial counsel's advice to plead guilty to the aggravated assault charge was based on a statute not in effect at the time of the incident. The second issue is whether the Petitioner was afforded the effective assistance of counsel in regard to the second degree murder conviction when trial counsel did not interview two material witnesses. The third issue is whether the Petitioner was afforded the effective assistance of counsel when the trial counsel filed a motion to suppress evidence, but did not bring it to the trial court's attention, resulting in this court deeming the issue waived on direct appeal.

All three of Petitioner's issues deal with the ineffective assistance of counsel. In determining whether counsel provided effective assistance at trial, the court must decide whether 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). To succeed on a claim that his counsel was ineffective at trial, a petitioner bears the burden of showing that his counsel made errors so serious that he was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the petitioner, resulting in a failure to produce a reliable result. Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984); Cooper v. State, 849 S.W.2d

744, 747 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). To satisfy the second prong, the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When reviewing trial counsel's actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time they were made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper, 849 S.W.2d at 746.

This two part standard of measuring ineffective assistance of counsel also applies to claims arising out of the plea process. Hill v. Lockhart, 474 U.S. 52 (1985). The prejudice requirement is modified so that the petitioner "must show that there is a reasonable probability that, but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

I.

The Petitioner's first issue is whether he was denied the effective assistance of counsel when his guilty plea was based on his trial counsel advising him under a statute not in effect at the time of the incident. The Petitioner argues

that entering a plea under such advice renders the plea involuntarily and unknowingly made.

The Petitioner pled guilty to aggravated assault. He argues in this appeal that his attorney advised him under Tennessee Code Annotated section 39-2-101(b)(6) (Supp. 1988), which states that a person is guilty of aggravated assault if he "[c]auses serious bodily injury to another person by the operation of an automobile, airplane, motorboat or other motor vehicle as the proximate result of the driver's intoxication as set forth in § 55-10-401." The Petitioner states that his attorney advised him that because he was intoxicated at the time of the offense he was automatically guilty of aggravated assault and, therefore, should plead guilty to this offense. This statute was not in effect at the time of the incident.

The Petitioner was indicted under Tennessee Code Annotated section 39-2-101(b)(1) (Supp. 1987), which states that a person is guilty of aggravated assault if he "[a]ttempts to cause or causes serious bodily injury to another willfully, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." This was the charge to which the Petitioner pled guilty. At the post-conviction hearing, the Petitioner testified that he believed that he was pleading guilty to aggravated assault by intoxication and did not intend to plead to an aggravated assault charge with an intent element.

At the post-conviction hearing, trial counsel testified concerning this issue. When asked if he remembered advising the Petitioner under the aggravated assault by intoxication statute, trial counsel testified that he did not remember doing that. Trial counsel testified that he went over the indictment and advised

the Petitioner in accordance with the charging documents. He testified that it was his practice to work from the charging documents. Trial counsel's copy of the indictment was included as an exhibit at the post-conviction hearing. The elements of the offense are clearly marked on the indictment.

The Petitioner was represented by different attorneys for his trial and direct appeal. The Petitioner also called as a witness the attorney who represented him on his direct appeal. Appellate counsel testified that when he began looking at the case he was concerned as to whether trial counsel had based the aggravated assault plea on the intoxication provision or the willfully, knowingly, or recklessly provision. He stated that he called the Petitioner's trial counsel to ask, and he could not remember which one he used to advise the Petitioner.

To bolster his argument that trial counsel advised him of the wrong law, the Petitioner relies on an exchange between the prosecutor and himself at trial. At trial, the prosecutor asked the Petitioner if he had pled guilty to aggravated assault. The Petitioner replied that he had. The prosecutor then asked the Petitioner if by pleading guilty the Petitioner was saying that he had intentionally assaulted the victim with his car. The Petitioner replied that he did not intentionally assault the victim. The rest of the exchange is as follows:

> Q. Well, aggravated assault is an intentional crime. Did your lawyer explain that to you, that you're saying that your're [sic] pleading guilty to the aggravated assault? All crimes are intentional.
> A. (No response given)
> Q. Are you telling this jury you didn't intend -- that you didn't intend to kill [the second degree murder victim] but you intended to run over [the assault victim]? Is that what you're telling this jury?
> A. No.

This exchange does not prove that the Petitioner was advised of the incorrect law. Aggravated assault under the 1987 statute did not require that a defendant intentionally perpetrate an act. On the date this offense was committed, the mental state of recklessness was sufficient to convict of aggravated assault.

In addressing this claim in a Memorandum Opinion and Order, the trial court stated:

> Mr. Sluder now complains that [trial counsel] improperly advised him as to the law applicable to aggravated assault prior to his entry of a guilty plea to that count. Mr. Sluder alleges that he was only admitting a reckless act, but that the law applicable at the time actually required a finding of intentional action. Mr. Sluder alleges that [trial counsel] read him the wrong law before the entry of his plea, and that he would not have entered a plea to that charge had he realized he was admitting an intentional act. This Court finds Mr. Sluder's recollection of those events to be convenient to his present claim but unreliable and unconvincing in this writer's opinion.

We agree with the trial court. The only proof presented by the Petitioner to show that his trial counsel advised him of the incorrect law prior to his guilty plea was his own testimony. Trial counsel testified that he would have advised the Petitioner directly from the charging documents, which were based on the correct law. Trial counsel's copy of the indictment contains marks highlighting the elements of aggravated assault. Appellate counsel did not state that trial counsel had advised the Petitioner on the incorrect law. We do not find that trial counsel made an error in regard to this issue.

In addition, pleading the Petitioner guilty to this offense was part of trial counsel's trial strategy of pleading the Petitioner guilty to all charges except second degree murder in the hope that the jury would see that he accepted

responsibility for his actions and would be merciful. Because this is trial strategy, we decline to second guess trial counsel's decisions under the facts in this record. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

The Petitioner also stated in his argument that his plea to aggravated assault was involuntary because he believed that he was pleading guilty to the intoxication provision of aggravated assault. We have found that the Petitioner was advised of the correct law. Therefore, his argument that his plea was involuntary is without merit.

This issue is without merit.

II.

The Petitioner's second issue is whether the Petitioner was afforded the effective assistance of counsel in regard to the second degree murder conviction when trial counsel did not interview two material witnesses. On the day of the incident, the Petitioner was riding around with one of his friends. They passed two men walking to the bus station carrying their suitcases. The Petitioner stopped and offered them a ride to the bus station. The Petitioner continued to drive around, and the incident occurred.

The two men did not flee the scene of the incident and were questioned by the police. They each gave a written statement to the police concerning the incident. The two witnesses resided in Alabama and were not readily available for trial. They were not presented to testify at the hearing on the petition for post-

conviction relief. However, their statements were entered into evidence at the hearing. These statements were not favorable to the Petitioner.

At the hearing, the Petitioner testified that he needed the two witnesses to testify to the fact that he did not intend to hit the children. He believed that their testimony was required to counteract the testimony of another witness who testified at trial that the Petitioner made a statement to the effect that he was going to hit the children.

As stated above, the witnesses were not presented at the post-conviction hearing to testify as to what their testimony would have been at the Petitioner's trial. "When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1990).

Petitioner's trial counsel testified at the post-conviction hearing. He stated that he did not call these witnesses because their written statements were not favorable to the Petitioner. They each stated how the Petitioner was driving very recklessly. Also, trial counsel stated that the district attorney's office was considering pressing attempted robbery charges because the two men told the police that the Petitioner tried to rob them after he had offered them a ride. Trial counsel testified that the district attorney's office was having trouble locating these two witnesses, and he feared that if he was able to locate them that they would contact the district attorney on their own. He believed that these two men

would be more harmful than helpful to the Petitioner, in terms of both their testimony and possible other charges.

Because the Petitioner failed to present the two witnesses at his post-conviction hearing, he has failed to establish the second prong of prejudice. Black, 794 S.W.2d at 758. In addition, we find that trial counsel's decision constitutes trial strategy. As stated above, this court should not use the benefit of hindsight to second guess the decisions of an attorney concerning trial strategy. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

Therefore, this issue is without merit.

III.

The Petitioner's third issue is that he was afforded ineffective assistance of counsel when his counsel filed a motion to suppress, but failed to argue the motion which caused the motion to have been deemed waived on appeal. The object of the motion was a statement the Petitioner made to the police a few hours after his arrest that he was not driving the car when the incident occurred. At trial, the prosecutor referred to the Petitioner's statement to the police when he asked the Petitioner if he had lied to the police.

The Petitioner contends that it was ineffective assistance of counsel for trial counsel to file the motion to suppress and not argue it. The trial court which heard the post-conviction hearing held in its Memorandum Opinion and Order that the record reflected that the motion had been argued, and the trial court had overruled the motion. The trial court's findings in post-conviction hearings are

conclusive on appeal unless the evidence preponderates against those findings. State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983); Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978), cert. denied, 441 U.S. 947 (1979).

At the post-conviction hearing, trial counsel testified that he remembered arguing the motion pre-trial, but that it was possible that it was not argued. This is the sole evidence in the record that the motion was argued. This is not conclusive evidence to prove the motion was argued. In fact, on direct appeal this court stated that the motion to suppress was not argued pre-trial, and therefore, Petitioner's appeal of its admission at trial was waived. Sluder, slip. op. at 11. We believe that we are bound by this court's previous decision. Therefore, the preponderance of the evidence is contrary to the trial court's findings, and we must address this issue.

We agree with the Petitioner that failure to argue a motion to suppress pre-trial, absent a justifiable reason to withdraw the motion, constitutes a serious error in representation. The Petitioner meets the first prong and now must prove that prejudice resulted from this error. Strickland, 466 U.S. at 687. The Petitioner submitted no proof at the post-conviction hearing that a motion to suppress would have been successful. In his brief, he argues that he was too intoxicated to have made a valid consent to making the statement. However, he did not bring in any witnesses to testify to his alcohol level at the time the statement was taken. We have no way of knowing if the motion to suppress was based on adequate grounds and would have been successful.

In addition, the Petitioner argues that the prosecutor showed that the Petitioner was lying by referring to the statement, and this made the jury aware of the Petitioner's bad character. This, the Petitioner says, constitutes prejudice so that the results of the trial are unreliable. We disagree. The evidence against the Petitioner was overwhelming. Witnesses testified that the Petitioner terrorized the neighborhood with his driving. There was also testimony at trial that before the incident, the Petitioner made a remark about hitting the kids, and that he was going to kill somebody that day. We do not find that the introduction of the fact that the Petitioner lied to the police would give the jury a worse picture of the Petitioner than they had from other evidence.

To satisfy the second prong, the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994). The Petitioner does not satisfy this requirement.

Therefore, this issue is without merit.

We affirm the judgment of the trial court.

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THOMAS T. WOODALL, Judge

CONCUR:

_____
DAVID H. WELLES, Judge

_____
DAVID G. HAYES, Judge