

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
DECEMBER SESSION, 1996

FILED

March 11, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

CHICO LOPEZ CHIGANO,)

Appellant)

vs.)

STATE OF TENNESSEE,)

Appellee)

No. 03C01-9602-CR-00061

KNOX COUNTY

Hon. Ray L. Jenkins, Judge

(Post-Conviction)

For the Appellant:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Chico Lopez Chigano, appeals the Knox County Criminal Court's dismissal of his petition for post-conviction relief. On appeal, the appellant raises only one issue: Whether his trial counsel was ineffective for failure to request an accomplice instruction at trial.

After a review of the record, we conclude that the appellant's contention is without merit. The judgment of the trial court is affirmed.

I. Background

The appellant was convicted of aggravated kidnapping, assault with intent to commit first degree murder of Brelen Stovall, first degree murder of Henry Dodson, and two counts of armed robbery.¹ Throughout most of the crime spree leading to these convictions, the appellant was accompanied by Angela Brodie. At trial, the appellant acknowledged his guilt for the attempted murder of Stovall and the armed robberies. See State v. Chigano, No. 1333 (Tenn. Crim. App. at Knoxville, Sept. 26, 1991), perm. to appeal denied, (Tenn. Mar. 23, 1992). The issue before this court only relates to the events surrounding the murder of Henry Dodson. The appellant's theory at trial was that Angela Brodie, and not he, shot and killed Dodson. Although circumstantial evidence linked the appellant to Dodson's murder, the only direct evidence offered at trial to establish that the appellant killed Dodson was Brodie's testimony. Based on these facts, the jury found the appellant guilty of the first degree murder of Dodson.

¹These offenses occurred in October, 1986. As a result of these convictions, the appellant is serving two consecutive life sentences plus one hundred years.

The appellant filed the present petition for post-conviction relief on July 8, 1993, alleging ineffective assistance of counsel on fifteen grounds. At the post-conviction hearing, James Varner and Robert Simpson, the appellant's trial counsel testified. Varner stated that an accomplice instruction was never considered because the defense strategy was that the appellant was not involved in the murder of Henry Dodson. He explained that "to suggest that he was an accomplice or to request an accomplice instruction, as it related to Angela Brodie, would have been to suggest that he was involved, which would have been contrary to our theory of defense." Simpson confirmed Varner's assertion that the defense strategy was that "Angela Brodie, not [the appellant], . . . killed Mr. Dodson . . . and that her story was her fabrication." He explained that:

. . . [Brodie] was a witness whose testimony we could impeach. . . . So, we felt a strong attack on her testimony coupled with [the appellant's] statement of what did happen that night, warts and all, would be compelling and very possibly we would get a not guilty on the murder. We came in and pled guilty to the shooting of Mr. Stovall and armed robberies. I recall . . . trying to send to the jury the message that, 'What we have done, we will fess up to, and what we haven't we are not going to take laying down.'

The appellant chose not to testify at the post-conviction hearing and relied upon the allegations set forth in his petition. In denying the appellant relief, the trial court accredited the testimony of trial counsel finding that "an accomplice instruction was not involved and was contradictory with the defense strategy."

II. Analysis

The appellant challenges his trial counsel's performance for failing to request a jury instruction regarding accomplice testimony, thus, alleging a constitutional denial of the effective assistance of counsel, as guaranteed by the Sixth Amendment of the United States Constitution. To succeed in such a challenge, the appellant must show, by a preponderance of the evidence, Taylor

v. State, 875 S.W.2d 684, 686 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994), that counsel's representation fell below the range of competence demanded of attorneys in criminal cases, Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), and that, but for these errors, there exists a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984); State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn.), cert. denied, 493 U.S. 874, 110 S.Ct. 211 (1989). In determining whether the appellant received effective assistance of counsel, this court must remain mindful that it is not our function to second guess trial counsel's tactical and strategic choices on matters of defense, unless these choices are made without knowledge of the relevant facts or the law applicable to the issue. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982); State v. Swanson, 680 S.W.2d 487, 490 (Tenn. Crim. App. 1984).

After review of the record before us, we conclude that trial counsel's strategy of not requesting an accomplice charge was a reasonable defense strategy. The appellant's defense was that he did not murder Dodson. Requesting an accomplice charge would have conflicted with this defense. If the jury were told that Brodie's testimony was suspect because of her complicity in the crimes, the necessary implication would be that the appellant participated in the criminal activity of which he claims to be innocent. Thus, trial counsel could not logically argue that the appellant had an accomplice to a crime that the appellant did not commit. The appellant's trial counsel, consequently, chose to forego requesting an accomplice charge. We must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689, 104 Sct. at 2065.

Where it is apparent that the action claimed to constitute ineffectiveness was within the realm of trial tactics or strategy, we will not disturb the judgment

below. See State v. Martin, 627 S.W.2d 139, 142 (Tenn. Crim. App. 1981). Moreover, in order for the appellant to prevail in this collateral attack, the proof must establish that had the questioned accomplice instruction been given to the jury, there is a “reasonable probability” that the appellant would have been acquitted. Strickland, 466 U.S. at 693, 104 S.Ct. at 2068. Thus, it would require this court to conclude that the jury would have found Brodie to be an accomplice and that there was no evidence, either direct or circumstantial, which “legitimately tends to connect the defendant with the commission of the crime charged.” See, e.g., State v. Bigee, 885 S.W.2d 797, 803 (Tenn. 1994) (quoting State v. Gaylor, 862 S.W.2d 546, 552 (Tenn. Crim. App. 1992)). The proof in the record does not support this conclusion.

In consideration of the foregoing and the record as a whole, we conclude that the evidence does not preponderate against the trial court’s findings which resulted in a denial of relief. The judgment of the trial court is affirmed.

DAVID G. HAYES, Judge

CONCUR:

DAVID H. WELLES, Judge

THOMAS T. WOODALL, Judge