IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1997 SESSION

FILED

March 27, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9603-CC-00109**
Appellee,	)	
	)	**BEDFORD COUNTY**
VS.	)	
	)	**HON. CHARLES LEE,**
CASSON MARCEL MCCOY,	)	**JUDGE**
	)	
Appellant.	)	(Sale of under .5 grams of cocaine)

FOR THE APPELLANT:

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(At new trial motion and on appeal)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for the sale of less than .5 grams of cocaine. A jury convicted him of this offense. He subsequently filed a motion for new trial alleging several grounds in support thereof. At the hearing on this motion, however, defense counsel waived all grounds other than ineffective assistance of counsel. After an evidentiary hearing, the trial court denied the motion. The defendant now appeals as of right. We affirm the judgment below.

The defendant was convicted of selling cocaine to a police officer and a confidential informant who were working together on an undercover operation. The officer and informant went to an apartment in Bedford County on May 25, 1993. They were admitted and each bought a fifty dollar ($50) rock of cocaine from the defendant. Although the confidential informant did not testify, the police officer did and positively identified the defendant as the seller.

The defendant's predominant grounds for alleging ineffective assistance of counsel are that his trial counsel did not interview any of the State's witnesses prior to trial and that he asked questions of the State's witnesses on cross-examination that supported the State's case. The defendant also complains that his trial counsel was ineffective because he failed to object to the State's notice of impeachment; waived opening statement; failed to subpoena witnesses; conducted poor cross-examination; failed to develop any evidence requiring the charge of casual exchange, a lesser-included offense; and failed to object to portions of the State's closing argument.

In reviewing a defendant's Sixth Amendment claim of ineffective assistance

of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To prevail on a claim of ineffective counsel, the defendant "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error(s) the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

At the evidentiary hearing the defendant's trial counsel admitted that he had not interviewed any of the State's witnesses, or any other potential witnesses other than the defendant, prior to trial. In fact, trial counsel admitted that he did not even attempt to interview witnesses due to his inability to drive and the defendant's refusal to pay for an investigator. The court below specifically found that "the failure to interview was deficient." However, as also noted by the court below, the defendant failed utterly to show that he was thereby prejudiced. None of the persons whom the defendant alleges should have been interviewed gave testimony at the hearing on the motion for new trial. Therefore, it is impossible to conclude that interviews -- or subpoenas to testify at trial -- would have helped the defendant. This allegation of ineffective assistance is without merit.

We are more troubled by the defendant's allegation that his trial counsel introduced information during cross-examination that worked only to the defendant's detriment. At the trial, the undercover officer admitted during cross-examination that there had been another male and a female in the apartment at the time of the buy. He did not testify -- nor did anyone else -- as to the names of these individuals. The officer

was the only person to positively identify the defendant as the person from whom he and the confidential informant had purchased the cocaine. However, he also admitted on cross-examination that he had never before seen the defendant, had not had a picture of him, and had not seen him since. Thus, defense counsel established some question as to the reliability of the officer's identification. However, following this helpful cross-examination, defense counsel then asked the questions, "This woman, her name was Lisa Rigney, is that not true?" and "[the man's] name was Anton Sales, is that not true?" The defendant now argues that the jury drew the conclusion from these questions that he must have provided these names to his lawyer, therefore he must have been in the apartment at the time of the sale, therefore he made the sale.

The court below found that this aspect of defense counsel's cross-examination "was not a good trial tactic," noting "how else could the identity of the people in the residence on Tate Street be known to counsel for the defense but through his client [thereby] [e]stablishing that perhaps he may have been present during the course of the sale." That is, defense counsel's questions tended to corroborate the State's identification testimony.

While troubled by this "tactic," the court below declined to find prejudice on the grounds that it was bound to presume that the jury followed its instructions. One of the trial court's instructions was that the words and statements of counsel are not evidence in a proceeding. Thus, the court below concluded that, in the absence of evidence to the contrary, the jury did not attribute any weight to defense counsel's use of the individuals' names.

While we agree with the general statement of law that juries are presumed

to follow their instructions, we also think it strains credulity to believe that the jury did not assume that defense counsel knew whereof he spoke. However, even if the jury assumed that the defendant knew who had been in the apartment on that date, we do not think this necessarily led it to the conclusion that the defendant had himself been there at the time of the sale. Therefore, while we agree with the court below that this trial tactic was not a good one, we find that the defendant has not carried his burden of establishing a reasonable probability that, but for this "error," he would have been acquitted.

The defendant also complains about his trial counsel's failure to develop any evidence that the drug sale was a "casual exchange." See T.C.A. § 39-17-418(a). "A casual exchange occurs when the transfer of the controlled substance is made without design." State v. Carey, 914 S.W.2d 93, 96 (Tenn. Crim. App. 1995). The defendant would prefer to have been convicted of casual exchange because it is a Class A misdemeanor. T.C.A. § 39-17-418(c). However, the defendant offered no proof of any evidence that his trial counsel could have presented which would have required a "casual exchange" instruction. The undercover officer testified at trial that he and the confidential informant had chosen their cocaine rocks from a group of ten or eleven which the defendant held out to them, the remainder of which the defendant returned to a "medicine bottle" after the two were removed. The defendant did not testify at the hearing that either the police officer or the confidential informant were friends of his or that the transaction had occurred in the context of a social occasion.

On the other hand, his lawyer testified that the defendant had told him prior to trial that he had "sold dope out of this apartment for three or four months. He could not recollect whether or not he had quit and sent somebody else down in his place in that

particular month or not. But he explained the scheme of how things operated to me. He had no alibi. He could not say whether he was down [there] during that period of time or not. But he had a history of selling dope out of that place." While the defendant denied having told his trial counsel this, the court below made a specific finding as to trial counsel's credibility on this issue, and the defendant's lack thereof. We will not disturb these findings on appeal. See, e.g., Summerlin v. State, 607 S.W.2d 495, 497 (Tenn. Crim. App. 1980). Therefore, given what the defendant had told his trial counsel about his past drug sales from 530 Tate Street, we are not surprised that trial counsel saw no reason to pursue this line of defense. And the defendant has made no showing of any evidence of casual exchange which his lawyer could have developed even if he had been trying to. No prejudice having been shown by defense counsel's failure to pursue this defense, we find this issue to be without merit.

As to the remainder of the defendant's allegations, the court below found that defense counsel's failure to object to the State's notice of impeachment, his waiver of opening statement, his decision to not cross-examine the police officer more closely about his identification of the defendant, and his failure to object to certain portions of the State's closing argument were all valid strategy decisions. We agree with the court below.

The defendant argues for a presumption of prejudice on the grounds that his trial counsel failed to do any investigation prior to trial, was completely unprepared for trial, and offered no defense to the jury. The defendant overstates his case. Both he and his trial counsel testified that they had met and discussed the case several times. Discussions with one's client about the case at hand certainly qualify as investigation and preparation. Moreover, defense counsel requested and received discovery from the

State.[1] According to counsel, the defendant had admitted to him that he had sold cocaine at 530 Tate Street, but he did not know whether he had been there on May 25, 1993. Thus, an alibi defense was out of the question. Defense counsel testified that the only course he felt he had open to him was to test the State's case; that is, argue to the jury that guilt had not been proved beyond a reasonable doubt. While interviewing the State's witnesses prior to trial might have increased defense counsel's ability to attack the State's case more vigorously, the record is devoid of any evidence that it would have. It is, of course, possible that the State's witnesses would have refused to talk to defense counsel. It is also possible that they would not have said anything helpful. A presumption of prejudice is simply not warranted in this case.

The judgment below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

_____
DAVID H. WELLES, Judge

_____
JERRY L. SMITH, Judge

[1]This Court cannot discern what the State's response included. It was designated "Exhibit 2" to the hearing on the motion for new trial, but no "Exhibit 2" has been provided to this Court. It is the appellant's responsibility to create an adequate record on appeal. T.R.A.P 24(b); State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993)