

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1997

FILED

January 13, 1998

Cecil W. Crowson

Appellate Court Clerk

MIKE ALLRED,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. NO. 01C01-9812 CR 00516

OVERTON COUNTY

HON. LEON BURNS, JR.
JUDGE

(Post-Conviction)

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

FOR THE APPELLANT:

KELLY WILLIAMS
P.O. Box 608
Livingston, TN 38570

FOR THE APPELLEE:

JOHN KNOX WALKUP
Attorney General and Reporter

DARYL J. BRAND
Assistant Attorney General
425 5th Avenue North
Nashville, TN 37243

BILL GIBSON
District Attorney General

OWEN G. BURNETT
Assistant District Attorney General
145 South Jefferson Avenue
Cookeville, TN 38501

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner, Terry Michael Allred, appeals pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure the trial court's denial of his petition for post-conviction relief. He argues that (1) trial counsel rendered ineffective assistance, and that (2) he was prejudiced because the State failed to provide an audiotape regarding the offense for which he was charged until three days before his trial. We affirm the judgment of the trial court.

The Petitioner was convicted on September 23, 1993, for the sale of a Schedule II Controlled Substance, cocaine, and was sentenced as a persistent, Range III offender to fifteen years imprisonment. Tenn. Code Ann. §§ 39-17-417(a)(3), 40-35-112(c). He filed a direct appeal to this Court and his conviction was affirmed on October 27, 1994. State v. Terry Michael Allred, C.C.A. No. 01C01-9401-CC-00039, Overton County (Tenn. Crim. App, Nashville, Oct. 27, 1994). Our supreme court denied permission to appeal on April 3, 1995. The Petitioner filed a pro-se petition for post-conviction relief on September 5, 1995. With the assistance of counsel, the Petitioner filed an amended petition and after conducting an evidentiary hearing, the trial court denied relief. It is from the trial court's denial that the Petitioner now appeals.

The facts of the case as summarized by this Court on the direct appeal are as follows:

On January 11, 1990, Trooper Rick Leonard, working as an undercover agent for the Tennessee Highway Patrol, and his confidential informant went to the defendant's residence. When the informant asked the defendant if he had any "smoke," the defendant

displayed a plastic bag containing one-fourth ounce of marijuana and asked \$55.00 in return. The defendant then asked if he wanted any "other stuff" and Trooper Leonard expressed an interest in cocaine. The defendant left the room, returned with one-half gram of cocaine, and offered it to the agent and the informant. When the agent asked the defendant if he would accept \$100.00 for both drugs, the defendant readily agreed. Tests at the crime laboratory confirmed that the white powdery substance contained cocaine. The defendant was not charged with the sale or possession of marijuana.

Allred, C.C.A. No. 01C01-9401-CC-00039, slip op. at 1.

In his first issue, the Petitioner contends that counsel rendered ineffective assistance. The Petitioner was first represented by attorney J.H. Reneau. Mr. Reneau died in an automobile accident during his representation of the Defendant. Bruce Myers took over Reneau's cases, including the representation of the Petitioner before and during his trial.

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.

The Petitioner asserts a number of reasons why he was deprived of a fair trial, most of which revolve around an audiotape made by the State which documented the transaction for which he was charged. The Petitioner first claims that counsel failed to inform him about the exact transaction for which he was charged. The Petitioner asserts that until the Friday before the trial, which was scheduled for the following Monday, he thought he was charged with a different transaction. He claims that his first attorney J.H. Reneau, gave him this impression, which was perpetuated by Mr. Myers. He cites their failure to obtain from the State an audio tape-recording of the transaction in question until a few days before his trial. The Petitioner also testified at the post-conviction hearing that when he heard the tape, he realized that persons involved in the transaction for which he was charged were not the persons he thought were involved. He decided that counsel should speak to two individuals "who will tell what went on because that's not the way it [the tape] sounds." The Petitioner admitted that the State had informed counsel that the tape had been misplaced.

The Petitioner testified that counsel's response to his request to talk to two witnesses was that the Petitioner should find them himself and bring them to talk to counsel. The Petitioner argues that if he had heard the tape earlier, there would have been time to subpoena the witnesses, and that he was denied this opportunity. The Petitioner testified that the witnesses would have reduced the possibility that he would be convicted. The Petitioner also testified that counsel's failure to ask for a continuance of the trial resulted in his lack of preparation to deal with the State's witnesses.

On cross-examination, the Petitioner insisted that Mr. Reneau told him that the cocaine transaction involved two different persons. However, he admitted that he saw a copy of the indictment which stated that Trooper Leonard was involved. He also admitted that the audiotape in question was not introduced at the trial. He asserted that if he had heard the tape earlier, it would have assisted his defense that the sale was merely a casual exchange.

Bruce Myers testified at the hearing that he offered his services to the Petitioner and informed him that his fee was \$7500 because he would be representing the Petitioner on multiple cases. Mr. Myers reviewed Reneau's notes regarding the case. The notes were somewhat sketchy, so counsel enlisted the assistance of the Petitioner to clarify specifics about the case in question. Counsel noted that the State had some problem locating the audiotape. He testified that when he attempted to discuss the case with the Petitioner, the Petitioner would deny that he had any involvement. Counsel stated that he had to forcefully insist that the Petitioner "deal with reality" about the case. After that, counsel had difficulty contacting the Petitioner, who did not

return telephone calls or respond to his letters. The Petitioner was not paying his fee and counsel suspected that he was avoiding his meetings because of this.

As a result, the Petitioner missed opportunities to participate in making decisions because he was not cooperating with counsel. Counsel testified that he did meet with the Petitioner at least six times, but that he spent a lot of time on the case trying to locate the Petitioner. Counsel also testified that, although the audiotape had been lost for a time, he and the Petitioner listened to the tape more than a few days before the trial and not on a Friday as the Petitioner had stated. Counsel also discussed potential witnesses with the Petitioner and determined that their testimony substantiated that the Petitioner "sold dope to someone." Counsel concluded that the potential witnesses would work against the Petitioner if they testified at trial.

The Petitioner also alleges that trial counsel failed to object for a lack of foundation, to a witness' statement at trial that "Mr. Allred is a very careful man when he sells drugs." The State counters that by the time the testimony was introduced, Trooper Leonard had already given detailed testimony about the Petitioner's involvement in the transaction in question.

We note that under the provisions of the Post-Conviction Procedure Act of 1995, a petitioner bears the burden of proving the allegations in the petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f) (Supp. 1996). In reviewing post-conviction proceedings, "the factual findings of the trial court are conclusive unless the evidence preponderates against such findings." Cooper v. State, 849 S.W.2d 744, 746 (Tenn.1993); Butler v. State, 789 S.W.2d

898, 899 (Tenn.1990). The trial court determined that even if the actions of counsel were considered to be ineffective because of a failure to contact witnesses, the Petitioner failed to show any prejudice. The Petitioner alleged that the witnesses would help him, but did not produce any evidence or testimony regarding the content of any witness' statements. Obviously, the trial court accredited the testimony of counsel at the post-conviction hearing. Furthermore, we cannot conclude that counsel's failure to object at trial was such that even if it was error, it was likely to have altered the outcome of the trial. Thus, because the Petitioner has failed to establish prejudice, we cannot conclude that the evidence preponderates against the findings of the trial court. Furthermore, we cannot conclude that counsel's performance was not within the range of competency expected of defense counsel. In fact, the evidence indicates that the Petitioner himself is likely at least partially responsible for the alleged shortcomings of his defense due to his lack of cooperation. Thus, the Petitioner has failed to establish a claim of ineffective assistance and we affirm the judgment of the trial court on this issue.

The Petitioner also contends that his right to a fair trial was violated because the State failed to provide the audiotape of the drug transaction until three days before trial. The Petitioner contends that a violation occurred because the State failed to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The State argues that the Petitioner has waived the issue because he failed to raise it in his direct appeal. See Tenn. Code Ann. §§ 40-30-206(g); 40-30-210(f). These provisions of the Post-Conviction Procedure Act provide, in pertinent part, that "[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it 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). The presumption that a ground not raised has been waived is rebuttable. Tenn. Code Ann. § 40-30-210(f). 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 for relief was not previously presented in any earlier proceeding.” Tenn. Code Ann. § 40-30-204(e). The record is devoid of any factual allegations that indicate why the Petitioner failed to raise this issue in an earlier proceeding. Thus, we agree with the State that the Petitioner has waived consideration of this issue.

Therefore, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOSEPH M. TIPTON, JUDGE